Date: 19980915 Docket: CA 145511

NOVA SCOTIA COURT OF APPEAL
Cite as: Flynn v. Atkinson, 1998 NSCA 162

Chipman, Hart and Cromwell, JJ.A.

BETWEEN:	)	
	)	
ARTHUR A. FLYNN, NEIL MARSHALL and NEIL EDGAR MARSHALL	)	David P.S. Farrar for the Appellants
	)	
Appellants	)	
	)	
	)	
- and -	)	
	)	
PATRICIA ATKINSON	)	Paul B. Miller
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	September 15, 1998
	)	
	)	
	)	Judgment Delivered:
	)	September 15, 1998

THE COURT: Leave to appeal is granted and the appeal is dismissed with costs as per oral reasons for judgment of Chipman, J.A.; Hart and Cromwell, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

CHIPMAN, J.A.:

This is an application for leave and, if granted, an appeal from a decision of Kelly, J. in Chambers striking a jury notice filed by the appellants pursuant to s. 34 of the **Judicature Act**, R.S.N.S. 1989, c. 240.

These consolidated proceedings were brought for damages for injuries allegedly sustained by the respondent in two separate accidents occurring on January 7, 1991 (involving the appellants Marshall) and on January 9, 1991 (involving the appellant Flynn). Liability for the two accidents has been admitted and the issue at trial relates to the respondent's damages only. The respondent was also injured in two other motor vehicle accidents occurring on November 4, 1987 and on March 5, 1994. The respondent suffered, as well, from diabetes and obesity which may have complicated her medical picture.

The application to Kelly, J. to strike the jury notice was on the ground that the evidence relating to the respondent's damages and causation therefor was of such complexity that the matter should not be tried by a jury.

The power of the Chambers judge to strike the jury notice is found in s. 34 of the **Judicature Act** which reads as far as is material:

> 34. Subject to rules of Court, the trials and procedures in all cases, whether of a legal or equitable nature, shall be as nearly as possible the same and the following provisions shall apply:
>
> (a) in civil proceedings, unless the parties in

> person or by their counsel or solicitors consent to a trial of the issues of fact or the assessment or inquiry of damages without a jury, the issues of fact shall be tried with a jury in the following cases:
>
> . . .
>
> (ii) where either of the parties in a proceeding requires the issues of fact to be tried or the damages to be assessed or inquired of with a jury and files with the prothonotary and leaves with the other party or his solicitor a notice to that effect at least sixty days before the first day of the sittings at which the issues are to be tried or the damages assessed or inquired of, except that, upon an application to the Supreme Court or to a judge made before the trial or by the direction of the judge at the trial, such issues may be tried or such damages assessed or inquired of by a judge without a jury, notwithstanding such notice.

Kelly, J. recognized that in exercising the discretionary power so given him, the burden was on the party moving to strike the jury notice to satisfy him that there were cogent reasons for so doing.

After reviewing the authorities and the affidavits before him, Kelly, J. concluded that at least three of the four accidents in which the respondent had been involved over a period of seven years could be relevant in assessing the damages. The exercise was thus relatively complex. It was made more so by the fact that the two accidents directly in issue were separated by only two days in time. Another layer of difficulty was the pre-existing conditions of diabetes and obesity of the respondent.

Evidence from a number of expert witnesses was anticipated. An estimate of nine days has been given to us for the duration of the trial. Kelly, J. concluded:

> The occurrence of three separate and distinct motor vehicle accidents coupled with the plaintiff's pre-existing condition - which already make her prone to the injuries sustained in these accidents - in addition to the inherent ambiguity and intangibility of the conditions from which she now allegedly suffers, makes this case particularly complex. I find that to do justice to all of the parties, a judge sitting alone would best be able to assess all of the evidence and give it the reasoned and thoughtful contemplation that it deserves.

We can only interfere with Kelly, J.'s exercise of this discretion where he has erred in law or his decision has worked a manifest injustice. He carefully reviewed the relevant jurisprudence and the material evidence before him. He concluded that the issues were complex. We see no reason to interfere with his conclusions. An application for fresh evidence was made at the outset of the argument before us and in our opinion this evidence adds nothing material.

Leave to appeal is granted and the appeal is dismissed with costs which we fix at $1,000.00, inclusive of disbursements payable forthwith.

Chipman, J.A.

Concurred in:

Hart, J.A.