NOVA SCOTIA COURT OF APPEAL
Citation: ***Anderson v. Queen Elizabeth II Health Sciences Centre***,
2010 NSCA 7

Date: 20100209
Docket: CA 315843
Registry: Halifax

Between:

Victoria Renata Anderson, Mildred Anderson, and
Victor Anderson

Appellants

v.

The Queen Elizabeth II Health Sciences Centre,
Dr. S.A. Gee and Dr. S. Sharma

Respondents

Judges:	Bateman, Oland and Hamilton, JJ.A.
Appeal Heard:	January 28, 2010, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Oland and Hamilton, JJ.A. concurring.
Counsel:	Raymond F. Wagner and Michael Dull, for the appellants Daniel M. Campbell, Q.C., for the respondents Dr. S.A. Gee and Dr. S. Sharma respondent The Queen Elizabeth II Health Sciences Centre not participating

Reasons for judgment:

[1] This is an appeal from the order of Justice A. David MacAdam of the Supreme Court of Nova Scotia, striking the appellants' (plaintiffs at trial) jury notice in a medical malpractice lawsuit. The written reasons leading to the order on appeal are reported as **Anderson v. QEII Health Sciences Centre**, 2009 NSSC 242.

[2] The defendants' summary of the background of this matter was reproduced in the reasons for judgment, having been agreed by all to be accurate (see para. 4):

> 2. On April 2, 1997 the Plaintiff, Victoria Anderson ("Ms. Anderson"), was admitted to the Victoria General Hospital to be treated by Dr. Jonathan Love, a gastroenterologist, for recurrent inflammatory bowel disease. Dr. Love anticipated that she would require surgery, and prescribed total parenteral nutrition to be administered by a central venous line ("central line") – a catheter inserted into one of several large veins in the core of the body. On April 3rd and 4th, residents from the Department of Surgery attempted to insert a central line for Ms. Anderson via the left and right subclavian veins. They were unsuccessful. On April 4th, Dr. Love left the hospital for the weekend and transferred Ms. Anderson to the care of Dr. Gerald Schep, another gastroenterologist. On April 5th, the Defendant Dr. Sharma was the medical resident responsible for the floor where Ms. Anderson was located. He was asked to establish the central line for Ms. Anderson because Dr. Love's prescribed feeding had not yet been initiated. Dr. Sharma sought the assistance of a senior resident, the Defendant Dr. Gee, and they attempted to insert the central line via the internal jugular vein. They, too, were unsuccessful.
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> 3. In the course of their attempt, the needle used by Dr. Gee entered an artery which she believed was the carotid artery on either one or two occasions.She ..., (withdrew the needle and applied) pressure. The expert reports . . . acknowledge that it is possible that there were arterial entries in the course of the attempts by the surgical residents on April 3 and 4, although they were not explicitly documented....
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> 4. The attempt by Drs. Gee and Sharma took place late on Saturday afternoon. The following morning Ms. Anderson developed neurological symptoms which became progressively more severe, culminating in her present condition of "locked-in syndrome". Subsequent angiograms showed that this was caused by an occlusion of her right vertebral artery and basilar artery, which supply blood to the brain.

> 5. The Plaintiffs filed a Statement of Claim on April 1, 1999, ...
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> 6. The Plaintiffs alleged that the conduct of Dr. Gee and Dr. Sharma was negligent, and that it caused the stroke. The Defendants deny this, and state they treated her in a manner which was competent, careful and in accordance with the appropriate standards for physicians in their respective positions. The condition suffered by Ms. Anderson came about despite this careful and competent care. If the condition Ms. Anderson developed was causally connected to this procedure, which is denied, it was not foreseeable that this might be a result or that there was a risk of such an occurrence.
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> 8. The trial was scheduled for ten weeks, to begin on September 15, 2009 (at a time when the court generally sat 5 days per week). As directed at the Date Assignment Conference, the Defendants filed their expert reports in October 2008. The Defendant Doctors filed reports of Dr. Lawrie Garnett, an anaesthetist and critical care physician, and Dr. Stephen Phillips, a neurologist. Dr. Garnett addressed the standard of care and Dr. Phillips addressed causation. The Defendant Hospital delivered the report of Dr. R.J. Riopelle, a specialist in neurology.
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> 9. In May 2009, the Plaintiff delivered two additional expert reports from specialists in different disciplines – Dr. R.A. Willinsky is a neuroradiologist and Dr. Steven Kravcik is a specialist in general internal medicine. The Defendant Doctors advised the Plaintiffs that they would be seeking consultants to respond to this new evidence, and that any new reports would be available in August.

[3] Upon receiving the two additional expert reports the respondents (defendants at trial), Dr. S.A. Gee and Dr. S. Sharma, successfully moved for an order directing that the jury notice be struck with the issues of fact as well as damages to be determined by a judge without a jury.

[4] The judge granted the motion with brief oral reasons after hearing submissions from counsel. He advised of his intention to file written reasons which are cited above at para. 1.

The Grounds of Appeal

[5] The appellants say that the judge erred in a number of ways:

> ... in concluding that the jury would be constrained in the time necessary to consider and decide the material issues of fact;
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> ... in concluding that the jury could not readily seek the assistance of the court in the course of their deliberations;
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> ... in applying an inappropriate legal test without due regard for the Plaintiffs' substantive right to a jury trial by:
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> a. Balancing the interests of the parties; and
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> b. Deciding on the balance of convenience.

[6] In essence, the appellants challenge the judge's exercise of discretion.

The Standard of Review

[7] The standard of review applied on an appeal from a discretionary, interlocutory order is well settled. Chipman J.A. wrote in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 at p. 145:

> [9] At the outset, it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice will result . . .

[8] Where the exercise of judicial discretion is challenged, as here, an appellate Court will consider whether the discretion has been exercised on proper grounds. If so, the Court is without jurisdiction to intervene (**Zinck v. Allen** (1970), 1 N.S.R. (2d) 654 (C.A.)).

ANALYSIS

[9] The detailed reasons for judgment demonstrate that MacAdam J. was alive to a litigant's right to have the issues in dispute determined by a jury and the considerations to be applied when faced with an application to strike a jury notice. He rejected the respondents' submissions that the practical difficulties such as empanelling a jury, scheduling many experts and drafting appropriate jury questions in a complex trial anticipated to last for two months were sufficient to

warrant striking the jury. Nor was complexity, standing alone, sufficient here. He said:

> [35] Notwithstanding these arguments, I am not persuaded that given sufficient time, and an opportunity revisit areas of uncertainty, a jury of seven is not in as good a position to examine, weigh and determine scientific or any other issues, as a judge sitting alone. On what basis a judge, untrained in the scientific or technical area under review, is better qualified to determine whether a person with education and training related to the particular scientific or technical area in question, has acted properly or improperly, is unclear. Nothing in the submissions of counsel, particularly counsel for the individual defendants, satisfies me that this is either probable, or even a serious possibility.
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> (Emphasis added)

[10] However, he concluded that the inherent time constraints under which jurors preside coupled with the complexity of the issues in this case tipped the scales in favour of striking the jury notice:

> [36] There is, however, one difference in how a jury, as opposed to a judge alone, would be able to conduct a review of the evidence, including particularly the expert evidence, and the weighing of the submissions of counsel. Although it has been stated a jury can take as long as required, practically, they are limited to making an "almost" immediate decision. Whether it be hours, days, or even, in some cases, a couple of weeks, there are effectively time restraints on their reaching a conclusion. The current *Civil Procedure Rules* recognize as much, stipulating at *Rule 52.17(2)* that:
>
> > [a] verdict may be given, and a question may be answered, by five jurors after four hours of deliberations.
>
> . . .
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> [39] In the large majority of cases, including most medical malpractice lawsuits, this distinction is not so significant as to warrant the striking of a party's *prima facie* right to a jury. If jurors can decide murder and other serious criminal cases, often with contradictory complex technical, including scientific, evidence, they can certainly decide civil cases, including when there is contradictory complex technical, including scientific, evidence.
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> [41] What, in the circumstances, is different is the apparent uniqueness or rarity of what happened in early April, 1997 at the Victoria General Hospital, in Halifax. The plaintiff, Ms. Anderson, is now in a "locked-in syndrome." The

> anticipated expert evidence, particularly the recently filed report of Dr. Kravick, suggests a theory as to what occurred rather then a particular factual assertion. The summary of his report reads:
>
> > In summary, there is the appropriate and highly suggestive temporal sequence, timing and pathophysiological basis to strongly support a casual link between inadvertent arterial injury during attempt central venous cannulation and Ms. Anderson's vertebrobasilar. Numerous case reports exist in the medical literature documenting the occurrence of vertebral artery injury during attempted internal jugular or subclavian vein cannulation. There is no good alternative cause, and review of the medical literature does not support a significant association between ulcerative colitis and stroke.
>
> [42] The individual defendants' counsel says they will be filing an expert report, in response.
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> [43] The contradictory expert evidence can then be expected to not only involve weighing and considering what the other experts say happened, and with what effect on Ms. Anderson, but also weighing theoretical scientific opinions. Such weighing cannot, and for the sake of all parties, should not, be conducted hastily, particularly when the person or persons weighing the suggested opinions, is/are not trained in the scientific or technical discipline involved in the question at issue.
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> [44] A judge, unlike a jury, can take extensive time to weigh, analyze and consider the respective theories, and, if need be, can request further assistance of counsel. For this reason, in the particular circumstances of this case, I am persuaded the jury notice should be struck.

[11] Essentially, the appellants say the judge erred in focussing upon the time it would take for a jury to reach a result on the evidence in this case.

[12] It was the respondents' argument that every issue in the case, from standard of care, to causation to damages was based entirely upon expert evidence. The two new reports, which precipitated the motion to strike, introduced theories of causation developed from an analysis of complicated, technical journal articles. For example, in one of the reports the expert doctor's opinion relied upon twelve such articles. The issues in the case would require the trier of fact to take

considerable time to analyze and digest the material that informed the highly theoretical expert opinions.

[13] Counsel for the respondents and the Chambers judge, in his reasons, referred to a number of cases where a jury notice had been struck. In all such instances, the court was concerned about the complexity of the issues in the context of the time needed to render a just decision. In **Leadbetter v. Brand**, [1979] N.S.J. No. 724 (Q.L.)(S.C.), Hallett J., found that the complex medical issues in question would require ". . . a careful and reflective study of the medical opinions" (at para 6). In **Crocker v. MacDonald**, [1992] N.S.J. No. 461 (Q.L.) (S.C.), Saunders J., as the then was, considering a motion to strike in a medical malpractice case, noted that the opinions expressed in the experts' reports were highly complex and, without a background in medicine, the required reading would be painstaking and time consuming (at para 16). In striking the notice he concluded:

> 22 The many varied and important questions that arise in this case are not unlike the inquiries regarding fluid electrolyte balances which faced the court in **Leadbetter, supra**. Here an assessment of the evidence will obviously require the trier of fact to understand and weigh the specialized medical evidence. That will require a careful and reflective study, a luxury not enjoyed by juries. . . .
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> 23 I am satisfied that in order to do justice between the parties the case should not be left with a jury. The matters in issue are of a complex and technical nature and would be better heard by a judge sitting alone who would then be free to reserve decision and take whatever time was necessary to analyze the detailed and complicated medical record.
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> (Emphasis added)

[14] Similarly, in **Corkum v. Sawatsky**, [1992] N.S.J. No. 156 (Q.L.)(S.C.) Grant J., in the context of a claim for damages for personal injury arising from a motor vehicle accident, said:

> I have resisted the temptation to lump classes of cases together in a common persuasive argument. For example, that medical malpractice cases are complex and not appropriate for juries. I believe each application to strike must be considered on the facts of that particular case. This case involves complex expert reports which are very lengthy and detailed. In addition to the reports I presume there will be considerable *viva voce* evidence by the experts. Each will be cross-examined on the contents and conclusions leading to their opinions.

> Although such evidence generally will relate to the weight of the evidence of the experts it probably will add to the complexity of the evidence before the jury.
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> Civil juries in this province consist of seven sequestered persons. They are sequestered until they render their findings. They take the exhibits with them, which in this case will include the various expert reports. They may or may not have taken notes. This is in contrast to a judge who may reserve her/his decision and consider it over whatever period of time is thought convenient and necessary. (Emphasis added)

(see also **Young (Guardian ad litem of) v. Critchley**, [1985] N.S.J. No. 248 (Q.L.) (S.C.) at para. 38)

[15] With respect, to suggest, as have the appellants, that this case stands for the proposition that a judge may strike a jury notice simply because it would be more conveniently tried by a judge sitting alone, is a distortion of the carefully crafted and case specific reasoning in the judgment under appeal.

DISPOSITION

[16] I am not persuaded that MacAdam J. failed to exercise his discretion on proper grounds. Accordingly, I would dismiss the appeal. I would fix costs at $1500 plus disbursements as taxed or agreed, to be in the cause.

Bateman, J.A.

Concurred in:

Oland, J.A.
Hamilton, J.A.