IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Matheson v. Webber, 2005 NSSC 236

Date: 2005 03 03
Docket: S.H. 141753
Registry: Halifax

BETWEEN:

James Matheson

Plaintiff

and

Susan Webber

Defendant

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date Heard: 3 March 2005

Counsel: Robert L. Barnes, QC, Counsel for the plaintiff
C. Patricia Mitchell, Counsel for the defendant

Moir, J. (Orally):

[1] The injustice in terminating the cause must be weighed against the prejudice, indeed, in this case, the presumed prejudice that will be suffered by the defendant on account of the delay. The delay in this case is extreme and I take the presumption most seriously in weighing the two points that I've just referred to.

[2] However, I am not satisfied that there is a significant prejudice arising from the unavailability of witnesses on account of the delay. There will be some serious inconvenience that would go to costs on account of a few physicians having left Nova Scotia. They will have, I believe, the assistance of their notes as aids memoir. And I do not see the delay, especially in respect to the medical witnesses, as impacting significantly on their ability to give evidence in this case.

[3] I take the point that ten years is a long time and that the memories will not be as good now as they would be say two, three, and four years after treatment. However, I do not see that as a significant factor when it is seen in light of the effects of terminating the cause itself.

[4] Nor do I see significant prejudice arising from the loss of some documents on account of the delay. For the most part, these can be reconstructed. To the extent that they cannot be, I do not see the absence as being crucial when compared with the significant prejudice to the plaintiff of having the cause terminated.

[5] An earlier independent medical examination might have been helpful, but I do not assess the loss of that opportunity as seriously prejudicial. I have doubts that there is any prejudice with respect to accident reconstruction going to causation. It seems to me that had the writ been served two years earlier, most likely accident reconstruction would not have been available at that time either. And even if it had been, it is not clear to me that the one issue that does justify the expense of accident reconstruction, of causation, had really come to the forefront at that stage. Based on the evidence that is before me, I cannot conclude that accident reconstruction work would likely have been carried out during the period of delay.

[6] I agree with Mr. Barnes that the limitation period is not a compelling factor going to prejudice.

[7] In my assessment, there is no prejudice serious enough to the defendant, neither apparent nor presumed, that would outbalance the serious consequence to the plaintiff of having his cause terminated. The plaintiff has come forward with an adequate explanation excusing the extremely long delay. And that explanation puts the fault at the doorstep of his counsel. The situation before us results from counsel's failure and not the plaintiff's failure. I take Mr. Matheson's affidavit at its face. He was not cross-examined. I don't see anything in the affidavit that gives me a reason to question the honesty of what he says in regards to his dealings with counsel and with the insurer. I see no fault on his part, and I see no fault on ING's part either.

[8] I am satisfied that this case can be tried fairly, despite the inordinate delay. And I will, therefore, grant Mr. Barnes' motion. I've heard some submissions on costs. If counsel want to supplement those, they can do that, or I am prepared to make a decision on costs right now.

[9] DISCUSSION

[10] **The Court:** As I said, it was a close call. I think that the insurers were right to oppose this and present a position which was more than reasonable. The

application itself is necessary because of the delay and in a sense, the expense is part of the prejudice that is suffered by the defendants and I think I should go beyond ordinary costs, notwithstanding the offer that was made and rejected.

[11] My intention is to award to lump sum that is meant to reflect a substantial contribution, but a partial contribution towards thrown away costs. And I can only ask Ms. Mitchell to review her time entries and send me a letter indicating what that figure is, I don't need all the details. And we'll give Mr. Barnes some time to consider that and I will be awarding a lump sum that will come close to the thrown away solicitor and client costs. By thrown away, I mean to refer to the discussion we had. The fair thing is to back-out whatever value past labour has for the defendant in the future of litigation.

[12] As regards costs in the future, the cost of having to discover or do commission evidence of a person who could have been heard in Halifax, that I am leaving to the trial judge. I am not going to order any costs in that regard at this stage. Does that cover pretty well everything?

[13] **Mr. Barnes**: I does for me My Lord, thank you.

[14] **The Court:** I will look forward to hearing from you, Ms. Mitchell, on your entries and your estimate of how much of that is thrown away.

[15] **Ms. Mitchell:** Yes, thank you.

[16] **The Court:** Mr. Barnes, of course, you will get a copy of that letter and I will wait a day or two at least before, maybe you could drop me a line to let me know if there is something you want to contest.

[17] **Mr. Barnes:** I will.

[18] **The Court:** Good, thank you.

J.