SUPREME COURT OF NOVA SCOTIA

Citation: Murphy v. New Ross Home Hardware Ltd., 2011 NSSC 199

Date: 20110525
Docket: Ken No. 294509
Registry: Kentville

Marty Todd Murphy — Plaintiff

and

New Ross Hardware Limited — Defendant

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date of Hearing: May 10, 2011

Counsel: Sharon L. Cochrane, for plaintiff

Clarence A. Beckett, Q.C., for defendant

Moir, J.:

Introduction

[1] Last January this action was set for trial by jury during eight days next November. The defendant makes a motion under Rule 58.02 to apply Rule 57 - Action for Damages Under $100,000. The effect would be to convert the trial to judge alone.

[2] Rule 58.02(2) provides the criteria for the decision I have to make:

- ability to value the claims in money without significant intangible interests being involved
- valuation of the claims at less than $100,000
- proportionality.

The plaintiff does not take issue with the first two. The plaintiff claims damages for personal injury that resulted from a slip and fall outside a hardware store in

New Ross. There are no intangible interests at stake and the fair estimated value of the claim is under $100,000.

Plaintiff's Position

[3] The proportionality criterion reads:

> the expense of taking the action to its conclusion will be out of proportion to the interests at stake in the action unless provisions of Rule 57 apply, or directions to similar effect are given.

[4] At the late stage of this proceeding, only one significant cost saving provision in Rule 57 applies. Rule 57.12 provides: "For the purpose of Section 34 of the *Judicature Act*, an action under $100,000 must be tried without a jury."

[5] As Ms. Cochrane points out, "The intent of this Motion is to strike out the Plaintiff's Notice of Jury Trial." The action was started before Rules 57 and 58 came into effect, and a jury notice would not have been set aside under the practice that prevailed then.

[6] Ms. Cochrane refers to the long line of authorities in this province that treat the right to a civil jury trial as substantive and make it difficult for one party to deprive another of such a trial. We see in 1961, 1986, and 2009 *MacNeil v. Hill the Mover (Canada) Ltd.*, [1961] N.S.J. 13 (S.C. *in banco*); *A.D. Smith Ltd. v. General Home Systems Ltd.*, [1986] N.S.J. 26 (S.C.), and; *Anderson v. QEII Health Services Centre*, 2009 NSSC 242 affirmed by 2010 NSCA 7. There are many others in between.

[7] Justice MacAdam put it nicely at para. 15 of the *Anderson* decision:

> The right to a jury, as set out in section 34 of the *Judicature Act*, *supra*. is not to be denied because the court, or counsel for that matter, will have more difficulty in conducting the trial or their case.

[8] With the long line of authorities in mind, Ms. Cochrane advocates this approach to the denial of jury trials under Rule 57:

> As a matter of principle it should not be said that trial by jury is inconsistent with the 'just, speedy, and inexpensive determination of every proceeding' rather, under the new Rules our court has determined that for certain types of cases it is appropriate to dispense with the jury trial. Rule 57 was not created to dispense with jury trials. It was formulated to identify those types of cases which, due to the cause of action and monetary claim lend themselves to an expedited procedure. Where those criteria are met, trial by jury will not be permitted.

[9] *Discussion.* I agree that Rules 57 and 58 are "formulated to identify those types of cases which, due to the cause of action and monetary claim lend themselves to an expedited procedure." However, I take issue with "Rule 57 was not created to dispense with jury trials." In my opinion, exclusion of jury trials is one feature of the expedited procedure imposed upon plaintiffs by Rule 57, and which may be imposed by a judge for defendants and other parties under Rule 58.

[10] Two thoughts are predominate for reaching the conclusion that resort may be had to Rules 57 and 58 even when the only significant cost saving is the exclusion of trial by jury. First, the statutory basis for the right to a jury trial was deliberately overridden. Second, the principle of proportionality, and not the interest in a jury trial, is determinative.

[11] As Justice MacAdam said in *Anderson*, s. 34 of the *Judicature Act* is the statutory basis for the substantive right to a jury trial.

[12] Usually rules of court made under the *Judicature Act* are restricted "to the practice and procedure of the Court", to use the phrase found in s. 46(j). However,

it is not true to say that the Rules can never be substantive. Aside from the inherent jurisdiction, s. 47(3A) gives the 2008 Rules the force of law. Also, there are statutory provisions that permit the Rules to override statute.

[13] Section 34 is an example of a statutory provision that permits the Rules to override statute, here s. 34 itself. The statutory basis for the right to a jury trial is "Subject to rules of Court". That is why Rule 57.12 begins with "For the purpose of Section 34 of the *Judicature Act*". Other Rules that use this formulation to show the deliberate use of an override authorized by statute include 7.12(2), 18.16(4), 31.03(2), 36.07(2), 49.03, 52.02(1), 52.19(4), 53.08, 56.09, 85.07(1), 91.09(1), and 94.02(5).

[14] So, the statutory right to a jury trial gives way to the expedited process in Rule 57. Under that Rule, the exclusion is automatic when the plaintiff makes the admissions required by Rule 57.04. Those admissions would have been made, and a jury election would automatically have been precluded, had this case been started after 2008.

[15] The second point is that proportionality, rather than the recognized interest in a jury trial, is determinative. Equating difficulty with expense in Justice MacAdam's nice statement, we could say that Rule 58 denies the right to a jury "because the court, or counsel for that matter, will have more difficulty in conducting the trial, or their case."

[16] The Rules do not enshrine the principle of proportionality as a panacea for all problems of procedural justice. They do maintain in Rule 1 - Purpose the "just, speedy, and inexpensive" formulation drawn from the American Federal Rules, as adopted by the Supreme Court of the United States in 1937. Often, the Rules attempt to achieve proportionality. Sometimes, this is done by explicit reference to the concept, as in Rule 58.02(2)(c).

[17] Jury election is not a trump card on a motion under Rule 58. Because the statutory basis for the right to a jury trial has been overridden and because Rule 58 turns on proportionality in cases that meet the other two criteria, the interest in a jury trial is only a fact to be taken into consideration when deciding whether "the expense of taking the action to its conclusion will be out of proportion to the interests at stake".

[18] *Conclusion*. The right to a jury trial is curtailed by Rules 57 and 58. I have only to decide whether the expense of the jury trial will be out of proportion to the interests served by applying Rule 57.

[19] Mr. Beckett says, and I accept, that this simple slip and fall case can be tried without a jury in far less than the eight days scheduled for the jury trial. The evidence on liability is uncomplicated. The evidence on damages is straight forward. With a little effort, we could try this case in four days or less.

[20] Baring in mind that the Rules now recognize that jury trials are generally disproportionate to the interests at stake in smaller monitory claims, I see this as an appropriate case to apply Rule 57 even though the motion comes a few months before trial.

[21] The motion is granted. Costs will be in the cause.

J.