SUPREME COURT OF NOVA SCOTIA
Citation: Anderson v. Cyr, 2013 NSSC 80

Date: 20130306
Docket: Amh. No. 321812
Registry: Amherst

Between:

Heath Anderson

Plaintiff

-and-

Mary Cyr and Enterprise Rent a Car

Defendants

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: February 15, 2013 at Halifax, Nova Scotia

Written Decision: March 6, 2013

Counsel: Counsel for the Plaintiff - Robert K. Dickson, Q.C.
Counsel for the Defendants - James L. Chipman, Q.C.

Wright, J.

INTRODUCTION

[1] On January 19, 2007 the plaintiff Heath Anderson was involved in a head-on collision with the defendants' vehicle while travelling on North Barrington Street near the MacKay bridge in Halifax, Nova Scotia.

[2] The defendants have admitted fault for the accident but have denied that the serious and lasting medical conditions from which the plaintiff continues to suffer were caused by their negligence. Also in issue is the quantum of damages, including what will undoubtedly be significant claims for recovery of future losses.

[3] The case is now ready to be set down for trial. The defendants seek to have the case tried by jury. The plaintiff, on the other hand, seeks to have the case tried by judge alone. With both parties remaining firm in their respective positions, the plaintiff has brought the present motion for an order striking the jury notice given by the defendants and requiring that this action be tried by a judge alone.

LEGISLATIVE PROVISIONS AND LEGAL PRINCIPLES

[4] A party's *prima facie* right to a jury trial is embodied in s.34 of the *Judicature Act*, R.S.N.S. 1989, c. 240. It reads as follows:

> 34. Subject to rules of Court, the trials and procedure 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:

> (i) where the proceeding is an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment,
>
> (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.* [emphasis mine]

[5] The foregoing provision is expressly made subject to the rules of Court. Civil Procedure Rule 52.02 specifically deals with jury election, the relevant provisions of which read as follows:

> **52.02 (1)** For the purpose of Section 34 of the *Judicature Act*, the provisions in that Section respecting jury trials and procedure are modified by this Rule 52.02.
>
> . . .
>
> **(4)** An action must be tried by a judge without a jury, unless a party elects trial by jury in accordance with this Rule 52.02.
>
> **(5)** An action in which a party elects trial by jury must be tried by a jury, unless another party makes a motion for an order that the action be tried by a judge and satisfies the judge hearing the motion on either of the following:
>
> (a) under a Rule, under legislation, or by operation of other law, the action cannot be tried by a jury;
>
> (b) the action is not for a cause referred to in subclause 34 (a)(i) of the *Judicature Act*, and *justice requires trial by a judge rather than by a jury*. [Emphasis mine]

[6] As this court has consistently recognized in various cases over the years, there is a longstanding, traditional and substantive right of a party to a civil action in this province to a jury trial. That *prima facie* right is not easily displaced. A party who seeks to do so bears the onus of satisfying the court that there are

cogent reasons to justify that outcome (see, for example, **Green v. T&T Inspections & Engineering Ltd.**, [2012] N.S.J. No. 179 and the authorities therein cited).

[7] What constitutes cogent reasons for striking a jury notice has been considered in several cases before this court on previous occasions. As Justice Tidman noted in **MacIntyre v. Nova Scotia Power Corporation** [1995] N.S.J. No. 425 (at para.6):

> A canvass of the case law in which jury notices have been struck indicate some valid reasons for doing so are: where the substantive issue is one of law not fact, where the issues of law and fact are so entwined with one another as to be virtually inseparable, *or where the substantive evidence upon which the case will turn is so highly scientific or technical that it cannot be made reasonably comprehensible to a reasonably informed juror.* [Emphasis mine]

[8] It is the latter situation (as above emphasized) with which we are concerned in the present case. The position of the plaintiff is that the medical evidence to be presented in this case is so complex, both in terms of the conflicting diagnoses, the interrelation between physical and psychiatric disorders, and the causation of the plaintiff's ongoing medical problems, that justice requires a trial by judge alone. It is further argued by the plaintiff that where the medical evidence is of such a highly technical nature, the time constraints inherent in the jury deliberation process would not allow sufficient time for proper consideration of the expert opinions and testimony and the voluminous medical records involved, compared to the position of a judge alone, who can reserve the decision and take whatever time is necessary to analyse and deliberate on the evidence presented.

[9] It is the defendants' position, on the other hand, that while the jury will have to consider expert evidence which is complex in nature, the issues to be determined are not so complex that they cannot be understood by a reasonably informed juror.

COMPLEXITY OF MEDICAL EVIDENCE AND LEGAL ISSUES

[10] In support of this motion, plaintiff's counsel has filed a thick dossier of medical reports and records generated to date, organized under 29 tabs. The authors of these reports consist of seven medical specialists, including medical specialists in the fields of neurology, neuropsychiatry, psychiatry, physical medicine and rehabilitation, orthopaedic surgery, pain management and radiology, as well as multiple experts in psychology, neuropsychology, occupational therapists and physiotherapists. There are more than 50 reports in all, emanating from some 26 different experts or health providers to date.

[11] In addition, plaintiff's counsel has filed an affidavit from neurologist Dr. David King, who has been involved in the care and treatment of the plaintiff since at least 2009. Dr. King deposes that since the accident, the plaintiff continues to experience a symptom complex involving multiple and technically complicated medical conditions and symptoms, which include a myoclonus movement disorder condition, chronic physical pain problems involving his knees, groin, torso, wrists, chest, arms, jaw, elbow, neck and back, headaches, severe fatigue, attention and concentration problems, memory problems, insomnia, personality changes and other residual head injury symptoms.

[12] Dr. King has prepared seven medical expert reports to date which document the complexity of symptoms, progression of symptoms, and difficulty in diagnosis and determination of causation of the plaintiff's condition. Dr. King, in conjunction with other medical opinions, has identified multiple, interrelated and complicated medical, psychiatric and psychology issues involving proper identification and diagnosis of the plaintiff's conditions and in particular, issues of causation of these ongoing medical conditions and their relationship to the accident.

[13] Dr. King goes on to say that those issues include the determination of whether the plaintiff sustained a traumatic brain injury, concussion, physical injuries, chronic pain disorder, myoclonic pain disorder, post traumatic stress disorder and depression/anxiety as a result of the accident, as well as the determination of whether the plaintiff suffered from any pre-existing condition, including a somatoform disorder, personality disorder, depression, anxiety, fragility or attention deficit hyperactivity disorder which cause or have contributed to his current disabled condition.

[14] Dr. King further identifies for determination the issue of whether the plaintiff's current condition might have come about regardless of the 2007 car accident and whether the injuries thereby sustained caused, contributed to or accelerated the deterioration of any pre-existing condition, if such is found to have existed.

[15] Dr. King further deposes in his affidavit that a proper determination of the medical issues that arise in this case will require a proper understanding and comprehension of technical medical terminology, medical conditions and investigative techniques, and will involve analysis of complex and conflicting scientific, medical and psychological theory as to diagnosis and causation of traumatic brain injuries and complex psychiatric conditions.

[16] Dr. King concludes his affidavit by deposing that because of the complicated constellation of medical problems experienced by the plaintiff, gaining an understanding and explanation of his condition, and the determination of the causation of his injuries, is "one of the most complex and difficult cases, involving interrelated medical, psychiatric, psychological and scientific fields I have dealt with in my experience as a Neurological specialist".

[17] It should be noted that Dr. King is a longstanding specialist in the field of neurology and is well known to this court as a prominent medical expert in that field.

[18] In the same vein, Dr. Robert Mahar, from his perspective as an experienced physiatrist, commented in his report dated July 20, 2011 that the plaintiff described "a complicated constellation of behavioural, cognitive, physical and pain complaints".

[19] The defendants have countered the various medical reports filed by the plaintiff with a report from Dr. Gerald Hann dated December 9, 2011 who conducted an independent medical examination in late October. Dr. Hann is a psychologist and will be put forward as an expert in that field, capable of giving opinion evidence on the subject of psychological functioning and neuropsychological performance.

[20] The purpose of Dr. Hann's assessment was to determine if the plaintiff's symptoms can best be accounted for by a diagnosis of post-concussion syndrome and whether they are probably attributable to the accident. In considering this, it was also necessary for Dr. Hann to consider alternate and other plausible explanations for his symptoms.

[21] It is the view of Dr. Hann that the plaintiff's symptoms are better accounted for by other causal considerations, including fragility, somatization, depression and anxiety, as opposed to a traumatic brain injury. Dr. Hann considers that diagnostically, the plaintiff's symptoms are represented by somatic factors and that his high anxiety is largely, if not totally, responsible for his reported symptoms. He therefore concludes that the plaintiff's problems are not directly related to the accident and that they existed long before the accident. Dr. Hann opines that the plaintiff's symptoms are very characteristic of patients with somatoform disorder and fragility.

[22] According to the medical literature, somatization disorder is a long-term chronic condition in which a person has physical symptoms that involve more than one part of the body, but no physical cause can be found.

[23] Plaintiff's counsel has since obtained a further medical report from Dr. King containing a critique of the report of Dr. Hann. In addition, plaintiff's counsel has also stated that he is currently awaiting the receipt of expert medical reports from Dr. Alan Cook, a neuropsychiatrist, as well as updated medical reports from Dr. Eva Wilson, a psychiatrist who is collaborating with Dr. Cook, as well as from Dr. King.

[24] Defence counsel have indicated their intention to also obtain additional medical expert reports from other physicians as the case progresses, who have not yet been identified.

[25] It should be mentioned that in deciding this motion, I do not consider myself restricted to a review of only those medical reports which have been filed to date. In trying to address an obscure medical condition for which there is no ready diagnosis, further medical expert reports will undoubtedly follow. It is evident that the plaintiff's team of medical specialists are still struggling with the proper diagnosis and treatment of the plaintiff's condition.

[26] That situation distinguishes this case from the **Green** decision where the Chambers judge restricted her consideration of the expert opinions to only those reports already filed. The facts of that case involved expert opinions on the causation of a single, static mechanical failure of a piece of heavy equipment, unlike the ongoing medical situation to be addressed in the present case. There will undoubtedly be additional medical expert reports filed on behalf of the plaintiff, particularly in the fields of neurology and psychiatry and their interrelation with the plaintiff's physical condition.

[27] In any event, a reading of the expert reports filed with this motion, including the defendants' IME report, readily illustrates the high degree of complexity of the medical evidence to be contended with. It is little wonder that Dr. King describes this case as one of the most complex and difficult ones he has ever dealt with in his long experience.

LEGAL ANALYSIS AND CONCLUSIONS

[28] I have been referred by counsel to several cases in Nova Scotia dealing with a motion to strike a jury notice, in which some were granted and some were not. It is trite to say that each case must be examined on its own individual facts. A very helpful analysis can nonetheless be found on a similar motion decided in **Crocker v. MacDonald** [1992] N.S.J. No. 461. In that case, as Justice Saunders put it, "The question to be determined in applications of this sort is the degree of complexity in relation to the real issues in dispute".

[29] In **Crocker,** the court was hearing an application to strike a jury notice in a medical malpractice action in which both liability and damages were in dispute. The central issue was the determination of why the plaintiff was vitamin deficient, leading to the onset of a degenerative brain disease, and whether the deficiency or the delay in its detection was due to the negligence of the defendants.

[30] Justice Saunders there observed that the opinions in the expert reports were highly complex and that reading them without a medical background would be painstaking and time consuming. He further observed that there were many complicated medical issues and questions that could not be readily understood and answered by a jury. He therefore concluded that matters of such a complex and technical nature were better heard by a judge sitting alone, who could reserve the decision to take whatever time was necessary to analyse the medical record.

[31] There are a number of similarities between **Crocker** and the present case. Both cases involve an unusual and highly complex medical condition and its causation. Both involve conflicting or contradictory expert opinions on complicated medical diagnoses and causation theories.

[32] As in **Crocker**, there will be a high volume of medical documentation and records in highly technical jargon here that jurors will have no baseline of familiarity with and which would be painstaking and time consuming to read. It would be a tremendous challenge to the average juror to absorb, understand and retain such arcane medical evidence over the several weeks that it will take for this

case to be heard at trial, pertaining to an unusual medical condition they will likely be hearing about for the first time. Even though both parties enjoy the legal representation of senior and experienced trial counsel, the volume and complexity of the medical evidence to be addressed here would, in my view, present a daunting challenge to the average juror.

[33] As in **Crocker**, and tracking the language of Justice Saunders in that case, the complex medical questions here are not questions that can be readily understood and answered by a jury. A determination of causation will require a very careful and reflective study of the medical opinions tendered by the parties, a luxury not enjoyed by juries.

[34] This trial is presently estimated to consume at least four or five weeks. That makes it even more difficult for jurors to retain such complex medical evidence over that length of time so as to be able to properly analyse and weigh it in reaching a proper verdict during their deliberations at the end. By comparison, a trial judge sitting alone has the opportunity to review, reflect, analyse and weigh the competing expert theories of diagnosis and causation in whatever time frame is reasonably needed. A trial judge has the further advantage of being able to relisten to segments of expert testimony on the court recording system as an aid to refreshing memory.

[35] I well recognize that jury notices are not necessarily to be struck by the mere fact, standing alone, that there are a large number of expert witnesses who hold conflicting opinions, or because the case involves scientific and technical evidence, or because the case involves legal issues of causation and complicated damages issues, or because the trial will be a lengthy one. However, in the present case, it is the layering of all of these factors and issues, on top of a very complex and technical medical situation, that leads me to the conclusion that the case would be better heard by a judge sitting alone, who would then be free to reserve decision and take whatever time is necessary to analyse and weigh the detailed and complicated medical record and testimony.

[36] I am therefore satisfied that the plaintiff has met the test of establishing cogent reasons for striking the defendants' jury notice and that indeed, justice requires trial by a judge alone in this case rather than by a jury. The plaintiff's motion is therefore granted with costs in the cause.

J.