SUPREME COURT OF NOVA SCOTIA
Citation: *Boyce v. Waterloo Insurance Company*, 2024 NSSC 54

Date: 20240223
Docket: 457680
Registry: Halifax

Between:

Charles Boyce

Plaintiff

v.

Waterloo Insurance Company (a.k.a. Economical Insurance), VW Credit Inc. and Volkswagen Group Canada Inc.

Defendants

DECISION ON MOTION TO STRIKE JURY

Judge: The Honourable Justice Scott C. Norton

Heard: February 7, 2024, in Halifax, Nova Scotia

Decision: February 23, 2024

Counsel: Charles Boyce, self-represented
Philip M. Chapman, for the Defendant Waterloo Insurance Company
Erin McSorley, for the Defendants VW Credit Inc. and Volkswagen Group Canada Inc., not participating

By the Court:

Introduction

[1] The Defendant, Waterloo Insurance Company (also known as Economical Insurance) ("Economical"), moves for an Order setting aside the selection by Mr. Boyce of a trial by a judge with a jury and requiring the trial to be heard by a judge alone pursuant to the *Judicature Act*, RSNS 1989, c. 240, s.34, and *Civil Procedure Rule* 52. The Defendants, VW Credit Inc. and Volkswagon Group Canada Inc. (the "VW Defendants"), support the motion but did not participate in the motion.

[2] The motion was heard on February 7, 2024, with Mr. Boyce attending from Calgary by MS Teams video conference. In advance of the motion, Economical filed the affidavit and supplementary affidavit of Eliza Richardson, an associate lawyer in the office of legal counsel for Economical. Mr. Boyce did not file any affidavit evidence. No cross-examination was requested on the affidavits. Both Economical and Mr. Boyce filed briefs.

Background

[3] Mr. Boyce claims damages for injuries resulting from smoke and fumes that entered his vehicle's interior as he was driving to work. He alleges that the smoke and fumes were the result of a faulty or improperly installed clutch. He claims that he suffered lung and cognitive injuries that resulted in the termination of his employment. He claims against the Volkswagen Defendants for the injuries. He claims against Economical for breach of contract for failing to pay him Section B accident benefits he alleges are owing to him under his automobile insurance policy.

[4] The Notice of Action and Statement of Claim were filed by counsel for Mr. Boyce on November 18, 2016. On April 20, 2018, Mr. Boyce filed a Notice to Act on One's Own. He has been self-represented since that time.

[5] There was delay in Mr. Boyce producing requested medical information related to his claim. This led to an Appearance Day hearing on February 19, 2021, wherein Justice Coughlan ordered production of documents and set dates for discovery examinations.

[6] The discovery examination of Mr. Boyce commenced on April 15, 2023 as ordered. On the second day of discovery, April 16, 2021, the discovery of Mr. Boyce

was prematurely terminated because Mr. Boyce suffered what appeared to have been an emotional breakdown. A continuance of his discovery was then arranged for April 20, 2021. On April 19, 2021 (the day before the scheduled date), Mr. Boyce advised by email that his mental and physical health had deteriorated because of the discovery process and that he intended to seek a stay of Justice Coughlan's order. The discovery was accordingly postponed by agreement.

[7] On April 27, 2021, and later in May/June of that year, Mr. Boyce was asked when he thought he would be able to continue his discovery. Mr. Boyce responded that his mental and physical health was being affected by the discovery process and that, because of the stress of discovery, he had suffered a flare of colitis and was then under doctor's treatment. He further advised that he had hospital tests scheduled for August 6, 2021, and that he would advise on his condition after that appointment.

[8] Mr. Boyce's discovery was left unfinished until the Prothonotary sent a letter to Mr. Boyce advising him that five years had passed since the action had been commenced and that it had not yet been set down for trial. The Prothonotary further advised that a motion to dismiss the action was being considered due to delay. Mr. Boyce did not respond, so the Protonotary filed an appearance day motion to have the action dismissed.

[9] The Protonotary's motion proceeded on November 4, 2022, before Justice McDougall. Economical supported the position that the action should be dismissed because of inordinate delay, but maintained that if it was not dismissed, the finalization of Mr. Boyce's discovery (as well as any other party discovery) should be ordered. There were also documents that remained to be produced, so Economical also sought an order that they be produced.

[10] By Order issued November 22, 2022, Justice McDougall ordered that discoveries be completed by April 14, 2023, and that certain documentation be produced by Mr. Boyce by March 1, 2023.

[11] In February 2023, Mr. Boyce advised Justice McDougall that he had broken his wrist and felt that he would not be able to meet the deadlines imposed upon him by Justice McDougall's earlier order. The order was accordingly amended by consent to extend the time limit for production of further documents until April 30, 2023, and completion of discoveries by June 23, 2023.

[12] On April 9, 2023, Mr. Boyce wrote to the court to complain about certain comments made by Justice McDougall, as well as about counsel for Economical and

the court process itself. He requested that his complaints be heard by an "independent body". In that letter, Mr. Boyce provided a previous note from a physician that stated:

> "This is to certify that Charles Boyce was seen at this clinic on April 19, 2021. The recent court proceedings have been detrimental to his physical and mental health. Stressors such as this have triggered colitis flare ups, worsened symptoms of confirmed major depressive disorder and aquired [sic] brain injury."

[13] Discovery of Mr. Boyce was ultimately completed in September 2023. Thereafter, a Request for a Date Assignment Conference was filed by Economical. In it, Economical elected trial by judge.

[14] On November 2, 2023, Mr. Boyce filed a Date Assignment Conference Memorandum that identified that he would call one witness at trial (presumably himself) and estimated the time to present his case as half a day. No experts were identified or contemplated in that Memorandum. Mr. Boyce elected a jury trial.

[15] A Date Assignment Conference ("DAC") proceeded before Justice Arnold on January 19, 2024. According to the court's file notes, Mr. Boyce expressed that he was unable to determine which and how many experts he might need until he obtained certain disclosure from the Defendants. He indicated he was going to write to the Defendants on January 22, 2024 to request this disclosure. Justice Arnold instructed Mr. Boyce to file a motion to request the disclosure if he did not get what he wanted. As a result, Justice Arnold determined that it was impossible to estimate the length of trial required and adjourned the DAC without day.

[16] At the hearing of this motion, it was confirmed that no motion had yet been filed for production by the Defendants, although Mr. Boyce advised that there are outstanding requests for information or documents from the Defendants.

[17] Also, at the DAC, Economical expressed its concern that the trial could not be heard before a jury. Justice Arnold scheduled the motion hearing and the filing dates for Economical's motion to set aside the request by Mr. Boyce for a jury trial.

Striking a Jury Notice

[18] Jury trials are governed by s.34 of the *Judicature Act*, RSNS 1989, c. 240 and *Civil Procedure Rule* 52.02. *Rule* 52.02 provides, in part, as follows:

52.02 Jury election

(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.

(2) An application, and an action to which Part 12 - Actions Under $150,000 applies, must be heard or tried by a judge without a jury.

(3) Parties to an action, to which Part 12 does not apply, must elect trial by judge or trial by jury in the request for a date assignment conference or the memorandum for the date assignment conference judge.

(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.

[19] There is a prima facie right to a jury trial, but this right is not absolute and must "sometimes yield to practicality": *Girao v. Cunningham*, 2020 ONCA 260, at para. 170-172, cited in *Panagopoulos v. Ugursal*, 2021 NSSC 122, at para. 15.

[20] If a jury trial is not prohibited by the *Rules*, the burden is on the party seeking a trial by judge alone to satisfy the court that, per *Rule* 52.02(5)(b), "justice requires trial by a judge rather than a jury" and to provide "cogent reasons" for why a court should decline to permit a trial by jury (*Banfield v. RKO Steel Ltd*., 2017 NSSC 232, at para. 17). However, there is no significant difference between "cogent reasons" for and "justice requiring" a trial by judge alone (*Cyr v. Anderson*, 2014 NSCA 51).

[21] *Cyr* is the leading Nova Scotian authority on striking jury notices. In that decision, Justice Farrar, writing for the Court of Appeal, conducted an extensive review of the judicial history on the topic. He identified four non-exhaustive reasons why a jury notice should be struck, at para. 41 of the decision:

i) the substantive issue is one of law not fact,

ii) the issues of law and fact are so entwined with one another as to be virtually inseparable,

iii) where the case involves scientific or technical issues that cannot be conveniently presented to the jury, or

iv) where the evidence is extensive and complex.

[22] Justice Farrar noted that the theme underlying all four considerations is that of complexity (at para. 43). Courts have generally accepted that complexity is a key factor in the analysis, without being able to produce a bright-line rule for when the complexity of a case requires a trial by judge. Justice Farrar said that each case must be assessed on its own facts.

[23] In terms of "complexity", Justice Farrar also considered the question of whether conflicting expert opinion or the requirement for expert reports was a factor to consider. He said that it was generally not a ground to strike a jury notice, because counsel performs much of the "heavy lifting" on evidentiary issues in any event, and that "it is the job of counsel to elicit any necessary opinion evidence from medical experts in a clear and understandable fashion" (at para. 99).

[24] The issue of complexity must be judged in the context of the individual facts of the case. I agree with Economical that those facts include whether a litigant is self-represented and whether he or she has illustrated sufficient capacity to deal with issues such as admissibility of evidence, the complexities of conducting a fair trial, and the overall ability to address the matter at issue.

[25] This is exactly what Chief Justice Smith addressed in *Panagopoulos, supra*,

[26] *Panagopoulos* considered a motion by the Defendant to strike the Plaintiff's request for a jury trial. The action arose from a motor vehicle accident. The Plaintiff was self-represented and suffered from a number of health issues which Chief Justice Smith believed would hinder the Plaintiff's ability to advance her case in an effective manner. The Chief Justice decided to strike the jury notice. In doing so, she provided the following reasons in support of her decision, which can be summarized as:

(a) The Plaintiff would require a "great deal of assistance from the court" which may prejudice the Defendant in the eyes of the jury;

(b) The Plaintiff had difficulty focusing on matters at hand;

(c) The Plaintiff was fixated on the conduct of defence counsel;

(d) The Plaintiff would fixate on past procedural matters; and

(e) The Plaintiff would have substantial difficulty determining what is admissible (para. 19).

[27] While the Chief Justice acknowledged that self-representation alone is generally not grounds for striking a jury notice, she felt the plaintiff would in that case "struggle greatly" should the matter proceed by way of a jury trial, resulting in the Defendant not receiving a fair trial.

[28] While noting Justice Farrar's caution in *Cyr* that decisions from other jurisdictions should be cautiously relied upon when considering this issue (*Cyr, supra*, para. 46), the Chief Justice in *Panagopoulos* cited *Desjardins v. Arcadian Restaurants Ltd*. (2005), 77 O.R. (3d) 27. That matter involved a trip and fall with injuries. The Plaintiff was originally represented, and the defendant was the party who filed for a jury trial. Once the Plaintiff became self-represented, the Defendant applied to have the trial heard by judge alone.

[29] The Judge decided that the jury notice should be struck in the circumstances of the case, because he was not satisfied that the trial could be conducted without prejudicing the Defendant. The Court was most concerned about the degree of assistance the Plaintiff would require from the Court on procedural and evidentiary issues and the possibility that this would lead the jury with the impression that the Court favoured the Plaintiff. He was also concerned that the jury might have to be excused for considerable periods of time while the admissibility of medical evidence was being dealt with. Furthermore, the Plaintiff had made prior inflammatory remarks about the Defendant and its counsel, and the concern was that she might make similar remarks in front of the jury. In summary, the judge struck the jury notice because he felt the Defendant might be disadvantaged if the case was heard by a jury.

[30] The evidence before me on this motion establishes that Mr. Boyce has estimated that it will take one-half day to present his case at trial. What is apparent to the court is that the effective presentation of his case will require:

(a) An expert report establishing the existence of a defective clutch to prove the case as against the VW Defendants;

(b) An expert report(s) proving the link between the incident and his subsequent development of cognitive problems and an "acquired brain injury";

(c) An expert report establishing that these conditions prevent (and prevented) him from working. This by necessity must rule out that other medical factors (anxiety, depression, etc.) as being the reason why he cannot work;

(d) Proof of a breach of policy by Economical;

(e) Proof of bad faith if he wishes to maintain a claim for punitive damages;

(f) Proof of entitlement of general damages (i.e., medical proof of the extent to which he has been affected by accident-related issues); and

(g) As against the VW Defendants, proof of income loss.

[31] Given the unusual symptoms Mr. Boyce maintains he suffers, and the need for medical experts, there is an obvious need to elicit medical opinion to explain in layman's terms what caused the incident, what affliction (if any) the incident caused, and the effect it had on Mr. Boyce and his ability to work. Leaving those issues to a self-represented person who has no experience or expertise doing civil trials (let alone with a jury) is simply unworkable. I believe that Mr. Boyce will need considerable assistance from the court when presenting that evidence.

[32] Mr. Boyce's behaviour thus far in this litigation also points to a concern that he will be challenged in presenting his case to a jury. Specifically:

1. He claims that he suffered cognitive decline from the events giving rise to his claim;

2. He has taken 10 years to advance the case, and it hasn't even been set down for trial. He does not appear to appreciate that he is responsible to advance his claim forward to trial. For example, he has not waived discovery of the defendants but there is an order on file with a deadline to do so that is long past. At the hearing it was disclosed that he recently advised the defendants of an interest in delivering interrogatories to them;

3. He has illustrated a lack of appreciation of what medical evidence he is required to produce and has been slow to respond to production requests, to the point where the court has had to make orders to advance the case;

4. At the hearing it was clear that he does not understand the rules of evidence and the requirements of the rules for admission of opinion evidence;

5. He has accused counsel of what he considers to be abusive behaviour during discovery;

6. He has accused Justice McDougall and the court system for unjustifiable reasons;

7. He has illustrated an inability to focus on answering questions during discovery; and

8. Because of his medical conditions (anxiety, major depression, and colitis) he appears not to have been mentally able to withstand the discovery process. During his submissions at the hearing he was noticeably emotional.

[33] All of these factors cause me concern as to Mr. Boyce's capacity to personally conduct a jury trial. By his own admission, his medical condition is such that he cannot deal with the stress of litigation. And this is supported by his physician. A jury trial cannot be adjourned for lengthy periods of time in the event that Mr. Boyce requires time away from trial for health reasons.

[34] Added to this is, it is apparent to me that Mr. Boyce will require considerable assistance from the court in the conduct of his case. This could cause the jury to think that the court is favouring Mr. Boyce. This could prejudice the jury against the Defendants. It is unpredictable as to how that might otherwise impact their verdict.

[35] I have considered whether this is an appropriate case to take a "wait and see" approach as described in the cases. I have concluded, that based on the circumstances of this case, that would not serve the interests of the parties or the administration of justice. I do not need to wait and see.

[36] I am a strong proponent for the right to a civil trial by jury. Were Mr. Boyce represented by counsel I would not hesitate to allow the matter to proceed with a jury. While some self-represented persons could advance their case before a jury in an efficient and effective manner, I do not believe that Mr. Boyce can. The court must balance his right to a trial by jury with its obligation to see that justice is done.

[37] The motion for an Order setting aside the selection by Mr. Boyce of a trial by a judge with a jury and requiring the trial to be heard by a judge alone is granted.

[38] No costs were sought on the motion. and accordingly no costs are awarded.

[39] Order accordingly.

Norton, J.