CITATION: McKee v. Marroquin, 2021 ONSC 5400
COURT FILE NO.: CV-17-3604-00
DATE: 2021 08 09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DAVID McKEE, Plaintiff

AND

SHANELLE MARROQUIN, EM DATA CONSULTANTS INC. and NISSAN CANADA INC. c.o.b. NISSAN CANADA FINANCE, Defendants

BEFORE: Emery J.

COUNSEL: *Mark Klaiman*, for the Plaintiff

Surina Sud, for the Defendants

HEARD: JULY 29, 2021

REASONS FOR DECISION

[1] The plaintiff brings this motion under Rule 47.02 to strike the jury notice filed by the defendants and dated December 14, 2017.

[2] The defendants oppose this motion on two grounds. They say the plaintiff requires leave to bring the motion under Rule 48.04 as he has already set the action down for trial, and it is not in the interests of justice for the court to grant

leave. Should leave be granted, the defendants submit that the circumstances arising from the current COVID pandemic are not sufficient to deprive the defendants of their right to have the trial of the action heard by a jury.

A Brief history

[3] The following is a brief history of the action:

- The action arises from a motor vehicle accident on June 10, 2016. The plaintiff alleges that this accident was caused by the negligence of one or more of the defendants, and caused him permanent and serious injuries;
- The statement of claim was issued in Brampton on August 21, 2017;
- The defendants served the statement of defence along with the jury notice on or about December 14, 2017;
- Examinations for discovery of all parties were completed by April 13, 2018;
- The plaintiff filed the trial record on April 20, 2018, seven days after he was examined for discovery;
- On May 14, 2018, the defendants objected to the passing of the trial record as they took the position that various undertakings given by the plaintiff remained outstanding;
- A pre-trial conference before Doi J. took place on November 15, 2019. The parties advised Doi J. that they were ready to proceed

to trial, and he set the action on the blitz sittings for May 2020 as a 15 day trial with a jury. Doi J. also granted leave for the defendants to bring a motion for productions, provided the motion was brought no later than February 28, 2020;

- Further to the leave granted at the pre-trial conference, the defendants brought a motion for productions in February, 2020;
- The trial did not proceed in May 2020 because of the suspension of the regular operation of the courts due to the COVID-19 pandemic and related health and safety protocols;
- The parties attended a second pre-trial conference conducted by Shaw J. on June 17, 2020. At that time, all parties advised the court they were ready to proceed to trial;
- The defendants brought another motion in December 2020 to seek records from a third party;
- At a virtual Assignment Court on February 17, 2021, the parties were advised that, although the action was set for trial by jury for the May 2021 sittings, it would be delayed to the end of 2021 or even 2022 because of the COVID-19 pandemic; and
- The trial was subsequently adjourned to the blitz sittings in January 2022 to be heard with a jury.

[4] The defendants maintain their position that the plaintiff has not answered all undertakings he gave on discovery. The defendants also seek numerous medical records from the plaintiff now known to exist. These medical records are now known because counsel for the defendants discovered a decision in which the

plaintiff was an applicant to the Human Rights Tribunal. Counsel wrote to counsel for the plaintiff on April 8, 2021 to seek production of documents relating to that case, and for the plaintiff to correct evidence he had given at discovery.

[5] The defendants have now brought a motion for the further production of documents, and to enforce undertakings. The defendants have included evidence in the affidavit of M. Jennifer Cosentino that they intended to bring that motion at the same time as the plaintiff's motion to strike but could not do so as the plaintiff would not cooperate. The defendants' motion is now scheduled for hearing on August 10, 2021.

[6] Accordingly, the defendants take the position that the action is not ready for trial. The defendants therefore submit that the court should exercise its discretion to dismiss the plaintiff's motion.

Leave under Rule 48.04

[7] The defendants raise the preliminary objection that the court should not hear the motion in the first place. They oppose the plaintiff's ability to bring the motion to strike, as leave is required under Rule 48.04(1) after the plaintiff has set the action down for trial.

[8] The modern test for leave to bring a motion was considered by E. Macdonald J. in *Hill v. Ortho Pharmaceutical (Can.) Ltd.*, 1992 CanLII 351 (Gen. Div.). In *Hill*, E. Macdonald J. held that to obtain leave, the moving party must

show a substantial or unexpected change to the circumstances such that a refusal to grant leave would be manifestly unjust.

[9] The requirements for leave were expanded by Perell J. in *Genkil v. East Asia Minerals Corporations,* 2010 ONSC 905 (SCJ) by adding the phrase “or the interlocutory step must be necessary in the interests of justice” to the test set out in *Hill.* Interestingly, Perell J. adds this feature to the test in his review of the cases from which he extracts the governing principles, and cites the *Hill* case in particular, among others, as authority for the test he articulates.

[10] The plaintiff submits that the reasons in *Genkil* allow an alternate ground for leave. If this is the test, the court must first find there has occurred a substantial or unexpected change in the circumstances that it would be manifestly unjust not to allow the motion. Alternatively, the change must be substantial or unexpected to be necessary in the interests of justice to allow the interlocutory step. In each respect, the power of the court to grant leave is discretionary.

[11] I am also referred the decision in *A.G.C. Mechanical Structural Security Inc. v. Rizzo*, at 2013 ONSC 1316, where Frank J. held that the court should exercise its discretion broadly, if it is in the interests of justice to grant leave.

[12] In *Jetport Inc. v. Global Aerospace Underwriting Managers*, 2013 ONSC 2740, Master Graham reached the conclusion that Perell J. had added the second part of the test relating to the interests of justice as a restatement of what could be

considered the manifestly unjust. Viewed this way, the standard that it would be manifestly unjust if leave was not granted is left as the test for the moving party to meet.

[13] This would seem to be the current state of the law according to the authorities provided by the plaintiff: *Lugen Corporation v. Starbucks Coffee Canada Inc.*, 2014 ONSC 7141, per Master Glustein (as he then was), and the decision of D. Cornell J. in *Denis v. Lalonde*, 2016 ONSC 5960. However, I would remiss if I did not acknowledge the decision in *Kranjec v. Green*, 2020 ONSC 6910, where C. Boswell J. held that a moving party need only establish that leave is necessary in the interests of justice.

[14] In my view, there are three steps to decide whether leave should be granted under Rule 48.04(1). First, the court must determine whether the change to the circumstances is substantial or unexpected. Second, the court goes on to decide whether it would be manifestly unjust if leave was refused, or if it is necessary in the interests of justice to grant leave, as the case may be. Third, the court should then exercise its discretion whether to grant leave having regard to all the circumstances. I agree with the observation of Frank J. in *A.G.C. Mechanical* that the court should exercise the discretion to grant leave broadly.

[15] At the motions court level in *Louis v. Poitras* at 2020 ONSC 5301, Beaudoin J. observed that the global pandemic has caused the court to suspend

jury trials in Ottawa, which he found to be a substantial and unexpected change. Justice Beaudoin found that real and substantial prejudice arises simply by reason of delay, and that delay was determinative in the circumstances of that case, arising as it did in the context of the global pandemic. This conclusion was not disturbed on appeal: *Louis v. Poitras*, 2021 ONCA 49, at para. 33.

[16] In *Johnson v. Bielmayer,* 2021 ONSC 1245, Sanfilippo J. held that the pandemic constitutes a substantial and unexpected change, and that it would be in the interests of justice to permit the plaintiff to bring his motion to strike the jury notice. While Sanfilippo J. does not use the terminology that originates in *Hill* that the court consider whether the refusal to grant leave would be "manifestly unjust", I note that the defendant consented to the leave sought by the plaintiff. I also note that Sanfilippo J. acknowledged that if he had to decide the leave issue, he would have granted leave on the basis that the plaintiff had satisfied both the tests.

[17] In recent decisions on motions to strike jury notices in actions from Central West Region, the views of various judges based on circumstances known to them at the time they released their decisions include the following:

- *Mohan v. Howard*, 2021 ONSC 2064, in which the parties were ready for trial but for the pandemic, Baltman J. noted that the defendant had properly conceded that given these substantial and unexpected circumstances, leave should be given to bring the motion.

- *Sauve v. Steele*, 2021 ONSC 1557, where the defendants opposed the motion for leave. Doi J. granted leave to hear the motion to strike the jury notice in that case by stating that "Without question, the pandemic has caused a substantial and unexpected change in circumstances….I am satisfied that their motion should be heard in the interests of justice."

- *Roszczka v. Tiwari*, 2021 ONSC 2372, where Trimble J. noted that none of the defendants opposed leave, and it was therefore granted.

- *De Dieu v. Taylor*, 2021 ONSC 3654, where Chown J. acknowledged that counsel for the defendants had agreed it was appropriate for the court to grant leave to hear the motion.

[18] I note in passing that C. Boswell J. in *Kranjec* found that COVID-19 was, in any event, a substantial and unexpected change in circumstances, and the impact of the pandemic in particular, and that it was necessary, in the interests of justice, that leave be granted.

[19] I think it is fair to say that a general consensus has now emerged from the case law that the COVID-19 pandemic has been a substantial and unexpected change in circumstances, at least for actions that were set down for trial before March 2020.

[20] In view of the pandemic, I find there has been a substantial and unexpected change in the circumstances of this case since the trial record was passed in April 2018. This change has created the practicality of holding a trial by

judge alone, either virtually, as a hybrid hearing or in person as a viable alternative to trial by jury, if waiting for the availability of a trial with a jury in a particular court location will cause undue delay. Delay in obtaining a date for a trial by jury has been found, by itself, to constitute prejudice and to justify the making of an order to strike a jury notice: *Louis v. Poitras*, at para 22.

[21] I therefore conclude that the plaintiff has met both tests for leave. For greater certainty, I find that it would be manifestly unjust if leave was not granted for the plaintiff to bring this motion.

[22] Leave to bring this motion is therefore granted.

Motion to Strike

[23] The defendants oppose the motion to strike the jury notice because they submit the action is not ready for trial. They say the case is not ready for trial because the plaintiff has not answered all his undertakings or produced what he is required to produce, and the defendants have brought a motion to compel productions. The argument goes that the plaintiff cannot rely on delay if required to wait for a trial when a jury would be available because he is either part of the delay, or the delay has not yet started to run.

[24] The defendants' motion to enforce undertakings and compel productions is scheduled for hearing on August 10, 2021. That motion is not before me.

[25] As I understand the evidence, the defendants have agreed to put this action on a trial list on at least two occasions, either reserving the right to bring a motion, as they did, or without that condition. The motion they have now brought has arisen in the context of the plaintiff's motion. If the motion has been brought to obtain discovery to which the defendants are entitled at law, the requested discovery, if granted, may yield possible evidence that adds to the defendants' case, not the case for the plaintiff.

[26] I do not consider it appropriate in the circumstances to make any findings that could be taken as a pre-determination of the defendants' motion. The materials for that motion were not before me, and I heard no submissions other than the nature of the issues counsel propose to argue on that motion. It would therefore be difficult, if not improper for me to consider the possible outcome of that motion as a factor when deciding the motion before me.

[27] The plaintiff states he is ready for trial. He is concerned that the delay caused by the pandemic, and hindering the trial of the action by jury, is causing undue delay. The prospect of delay, and its effect on having this action tried by a jury in a timely manner, is therefore the pivotal issue.

[28] The bedrock principles behind the right to a jury in a civil case, what is required to displace that right, and the discretion of a judge to strike a jury notice are well settled. Those principles were reviewed by Hourigan J.A. on the appeal

in *Louis v. Poitras*, and by Trimble J. in *Roszczka*. Notably, they include the principle restated by the Court of Appeal in *Cowles v. Balac* 2006), 2006 CanLII 34916 that the right to a civil jury trial is a substantive right that must not be interfered with except for just cause or cogent reasons. The Court in *Girao v. Cunningham*, 2020 ONCA 260 also confirmed that, while the right to a jury trial is fundamental, it is not absolute and must sometimes yield to practicality.

[29] Brown J.A. described the scope of this discretion in *Belton v. Spencer*, 2020 ONCA 623 as a qualified right. The judge hearing the motion has "rather broad discretion" to decide "whether the moving party has shown that justice to the parties will be better served by the discharge of the jury." Brown J.A. went on to emphasize that the paramount objective of the civil justice system is to provide the means for the disputes of parties to be resolved in the manner most just between the parties.

[30] In *Louis v. Poitras*, Hourigan J.A. put a fine point on this discretion by stating that "motion and trial judges have the discretion to respond to local conditions to ensure the timely delivery of justice." This corresponds with the view expressed by Brown J.A. in *Spencer* that the discretion given by the law to the presiding judge is intended to better serve the justice between the parties. The question of whether a jury notice should be struck is case specific, and best answered by the judge hearing the motion and likely most aware of local conditions.

[31] Similarly, the motions judge is most able to answer whether striking the jury notice will better serve the justice of the case between litigants in practical terms.

[32] The issues on a motion to strike a jury notice require the court to resolve the tension between the competing rights of the plaintiff to have the trial of his action without undue delay, and the substantive right of the defendants to a jury trial. In *Roszczka*, Trimble J. adopted a “wait and see” approach, leaving the jury notice filed in two related Milton actions in place if they could be heard by a jury during the sittings commencing October 4, 2021. If the court could not accommodate a jury trial at that time, the jury notice would be struck, and the trial would proceed before a judge alone. The same defaults would apply if the trial could not be accommodated or reached in those sittings.

[33] The motion before Doi J. in *Sauve* was also brought in a Milton action. On that motion, Doi J. struck the jury notice, concluding that the defendants’ right to a jury is not absolute, and may give way to the overriding interests of justice and issues of practicality. He made findings that it was unclear if the court will be able to hold jury trials by October 4, 2021 because of the many unknowns caused by the pandemic, as well as the physical state of the Milton courthouse.

[34] I can only conclude from the decisions in *Roszczka* and *Sauve* that the differing results were a product of the particular facts in each case. Accordingly, I propose to apply the reasoning in the *Mohan* and the *De Dieu* cases that apply the approach approved by the Court of Appeal in *Louis v. Poitras* to take into account local conditions arising in Brampton actions, and that involve Brampton factors.

[35] In paragraph 16 of *De Dieu*, Chown J. writes that it is anticipated the court will be inundated (with trials) once pandemic restrictions are relaxed. He speaks of how criminal trials will take precedence, and once jury trials are possible, the backlog in the system may result in considerable further delay. This builds on the earlier concern expressed by Baltman J. in *Mohan* that, given the vagaries of the virus and the uncertainty of the vaccination process, it is impossible to predict when juries can safely reconvene in Brampton. In contrast, based on local conditions, virtual trials are now available to parties willing to proceed with a judge alone, or hybrid trials where parties may attend in person and witnesses and experts may be permitted to give their evidence by video-conference.

[36] Both decisions concerned jury trials in Brampton and take what Baltman J. described as “the middle ground approach” in *Mohan* when she conditionally struck the jury notice. Baltman J. characterized the order she made in those terms because striking the jury notice conditionally would allow the trial to proceed at the upcoming sittings on a judge alone basis, unless the court could accommodate a

jury trial to avoid further delay. At the same time, this remedy protected the substantive right of the defendant to a trial by jury, if available.

[37] Since the release of those decisions, the court has re-introduced jury trials for criminal matters in Brampton as of July 12, 2021. However, neither party on this motion to strike included evidence about the impact of the pandemic on how the Superior Court can currently accommodate jury trials with proper health and safety protocols, the volume of criminal or civil cases that have backed up in Brampton since the pandemic began, or the number of jury cases that have been set for trial since. No evidence was filed by either party about the resources of the court to hear jury cases, or the time it will likely take to reach this case on a jury or non-jury basis.

[38] It is for this reason the parties should be made aware that the current manner of jury selection and the conduct of criminal jury trials in Brampton, and most likely elsewhere in the province, is more time consuming than it was before the pandemic. A few observations about the circumstances from the recent experience in Brampton surrounding the selection of juries and the conduct of a trial by jury in criminal cases may provide some insight to the time it could take before the court is able to hear civil jury trials.

[39] The greater time required to conduct a jury case since July 12, 2021 is due in large part to the logistics to convene a panel of prospective jurors at the Pearson

Convention Centre, a facility that can accommodate social distancing protocols, and the time it takes to properly vet jurors who request they be excused or deferred for health, family or personal reasons. These arrangements and protocols were put in place for the protection of all participants in the selection of a jury, including the citizens who have been summoned as prospective jurors. The arrangements and protocols are necessary not only for health and safety reasons, but also to maintain public confidence in the judicial process.

[40] The same arrangements, health and safety protocols that can slow the commencement of a criminal jury trial often have the same effect on the conduct of a trial. This might include, but is not limited to, the following: the use of other courtrooms to accommodate the jury as standard jury rooms are not large enough to allow social distancing; the wipe down and cleaning of the witness box after each witness has testified, which adds to the time between witnesses; and the coordinated movement of the jury as a group from one room to another at breaks, sometimes involving the movement of jurors between floors of the courthouse.

[41] These local conditions are in addition to the practical realities in Central West Region, and Brampton in particular, described in the *Sauve*, *Roszczka* and *De Dieu* cases.

[42] The backlog of criminal trials where the accused has elected trial by jury that were not reached prior to March 2020 can now be heard, and those cases

take precedence for constitutional reasons. New cases in both criminal law and civil litigation requiring a jury have been added to each trial list during the pandemic, which have increased the backlog of trials waiting to be heard with a jury. Progress on the hearing of trials has been made, but the ramifications of the pandemic remain.

[43] The backlog of cases requiring jury trials is not unique to Brampton. However, the backlog in Brampton must be considered when the volume of cases requiring trial by jury results in systemic bottlenecks because a jury trial requires additional facilities and takes longer to hear. The combined effect of the backlog of criminal jury trials and the prospect of bottlenecks limiting the number of trials that can take place at any given time make it unlikely that civil trials with a jury will be available on a routine basis for the Brampton sittings in January 2022.

[44] Since the trial list for May 2022 is presently closed, this means the earliest the parties in this action could expect a jury trial would be January 2023. In my view, this delay works a great prejudice on the plaintiff, and justifies a departure from the substantive right of the defendants to have this action heard with a jury.

Order

[45] I therefore order that:

a. The plaintiff is granted leave to bring this motion;

b. The action shall remain on the Brampton trial list for the sittings in January 2022, subject to any order made by the presiding judge at the defendants' motion on August 10, 2021 or at an Assignment Court;

c. If the case is reached during those sittings and the court is not providing a trial by jury at that time, the jury notice is conditionally struck. In that event, the trial of the action shall proceed before a judge alone;

d. If the matter is not reached during those sittings, it shall be set for trial on a date or on the list for the earliest sittings that are appropriate to hold a 15 day trial. The new trial date or sittings will be set by the trial coordinator's office in Brampton, or by an Assignment Court in the normal course of setting trial dates for matters not reached in January 2022;

e. If the court can accommodate the trial of the action on that later date or sittings with a jury, the trial may proceed with a jury;

f. If the court cannot accommodate the trial with a jury on that later date or sittings, the jury notice is deemed struck, and the trial shall proceed before a judge alone; and

g. This order is made without prejudice to the plaintiff's right to bring a further motion at any time to strike the jury notice if the trial does not proceed at any time by judge alone.

[46] If either party seeks costs on this motion, they may contact my judicial assistant by email at melanie.powers@ontario.ca to arrange for the parties to attend by video-conference to make submissions.

Emery J.

DATE: August 9, 2021

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