54 O.R. (3d) 70

Walker v. Delic

Re: Walker v. Delic

Ontario Superior Court of Justice

Ferguson J.

Judgment: April 4, 2001
Docket: 99425-99

Proceedings: additional reasons at (2001), 2001 CarswellOnt 2154 (Ont. S.C.J.)

Counsel: *Michael F. Head*, for Plaintiffs

David Tompkins, for Defendant, Wawanesa

Cases considered by *Ferguson J.*:

Mastrangelo (Litigation Guardian of) v. Kitney, 16 C.P.C. (3d) 262, 1992 CarswellOnt 401 (Ont. Gen. Div.) -- considered

R. v. Rose (1996), 47 C.R. (4th) 323, 106 C.C.C. (3d) 402, 134 D.L.R. (4th) 628, 28 O.R. (3d) 602, 35 C.R.R. (2d) 229, 90 O.A.C. 193 (Ont. C.A.) -- referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 52.07 -- considered

Rules of Practice, R.R.O. 1980, Reg. 540

R. 255 -- referred to

APPLICATION by plaintiff's underinsurer to strike jury notice; APPLICATION by plaintiff's underinsurer to open to jury although not intending to call evidence.

***Ferguson J.*:**

1 These are my reasons on the two preliminary issues on which I ruled yesterday. This is a motor vehicle case which is complicated by a claim in the action against the plaintiffs' underinsurer, Wawanesa.

Should the jury notice be struck?

2 Counsel for Wawanesa relies on three grounds.

3 First, he points out that a jury notice was only served by a party who has now been let out of the action. In view of the settlement terms involving all the parties I do not propose to consider that ground. I shall start with the assumption that because of the history of this action the plaintiff is entitled to rely on the jury notice and that it should not be struck for this reason.

4 Next he argues that his role as counsel for the plaintiffs' own underinsurer will be difficult to explain to the jury and difficult for them to understand. I do not agree and will draft an explanation which I shall review with counsel before I read it to the jury.

5 He advises that he intends to seek a directed verdict on one head of damages. I do not understand how this relates to the issue as this is a matter for the judge alone.

6 He says that only a trial by judge alone is fair to both parties. I take it he is concerned that in determining the amount of damages the jury might be influenced by the fact that the defendant is an insurer. Frankly, I am not sure whether this has the potential to harm the defendant or the plaintiffs. In any event, I am confident that in this era of compulsory automobile insurance every jury knows that there is likely an insurer somewhere in the background who will pay the award. I do not consider this to be a factor warranting striking the jury although it warrants a jury instruction to guard against letting this factor influence the award.

7 He also seemed to imply that the case was too complicated for a jury. I disagree. It is a commonplace issue for a jury.

8 I dismiss the application to strike the jury at this stage. If circumstances change the defendant can bring another application.

Can the defendant open after the plaintiff if the defendant is not going call evidence?

9 Counsel for the underinsurer, Wawanesa, informed the court that he does not intend to call evidence but does wish to open to the jury after the plaintiff's opening. At the time this application was brought this was to be a bifurcated jury trial and the only issue on this first part of the trial was liability.

10 Rule 52.07 is the only rule which deals with jury addresses. It gives the trial judge the discretion to permit a defendant to open after the plaintiff opens. The sequence of steps mentioned in the rule indicates that an opening "shall" be followed by evidence which suggests that a defendant is not entitled to open if he is not going to call evidence.

11 The previous rule was Rule 255.

12 It is less clearly worded than the present rule and refers to the "right" to open but it is not clear that this right arose if the defendant did not intend to call evidence.

13 There is an editor's note under the old Rule 255 in *Watson & McGowan* which states that the usual practice in Ontario was that the defendant could not make an opening after the plaintiff's evidence unless the defendant intended to call evidence.

14 From my enquiries of judges with more experience than I it appears that this is the traditional approach in Ontario.

15 This is the way it is put in Geoffrey Adair's book, *On Trial*, Butterworths, 1992:

> A legion of cases suggest that the only purpose of an opening is to outline the evidence that will follow and, accordingly, it is difficult to perceive the legitimate object of any opening unless the defendant makes it known that he intends to call evidence. Were it otherwise, then at the conclusion of the plaintiff's case the defendant could make submissions to the jury, by way of opening address, which would then immediately be followed by the plaintiff's closing address and that, in turn, would be followed by the defendant's concluding address. It would not seem fair to, in effect, provide the defendant with two opportunities to address the jury upon the conclusion of all of the evidence, whereas the plaintiff should have only one such opportunity.

> In Ontario, at least, there can be little doubt that the defendant who does not intend to call evidence has no right to open to the jury. The above-noted Rule 52.07(1), after referring to the right of the defendant to make an opening address, concludes by indicating that the defendant "shall then adduce evidence". [at p. 288]

16 I note that in this analysis he does not address as a separate issue whether this approach should apply where the defendant asks to open immediately after the plaintiff's opening. Earlier in the book he says:

> The traditional practice was for the defence to open at the start of the defendant's case; however there appears to be a growing tendency for defence counsel to attempt to open immediately following the plaintiff's opening. The defendant's counsel is always in the best position to weigh and consider such factors as whether the theory of the defence ought to be put to the jury before cross-examination of the plaintiff's witnesses, or whether the issues in the case require clarification prior to cross-examination, etc. Accordingly, it is submitted that defence counsel ought to be permitted to open immediately following the plaintiff, if so desired, unless good reason be shown to the contrary. [at p. 285]

17 It would appear that he takes the position that the defendant should not be permitted to open after the plaintiff if the defendant does not undertake to call evidence. This is the position he takes with respect to the right of the defence to open in a criminal case. [at p.286]

18 The only civil case I have found on the issue is *Mastrangelo (Litigation Guardian of) v. Kitney*, [1992] O.J. No. 3919 (Ont. Gen. Div.) which is a decision of Kovacs J.

19 That case dealt with the same scenario as in this case where the underinsurer of the plaintiff wished to open to the jury but did not intend to call evidence. Kovacs J. did not cite any authority. He did note that Rule 52.07 gives the trial judge the discretion to give leave to a defendant to open after the plaintiff's counsel. He said he was going to give leave because it would be about two weeks before the plaintiff's case was finished and in such a lengthy case the defence should have the right to put its position to the jury at the beginning of the trial. He concluded that it is not necessary for the defendant to undertake at the outset whether he would call evidence.

20 I note that in that case there were issues between the plaintiff and the underinsurer on which they were adverse. In this trial the first part of the trial was to be only on liability; the plaintiff and its underinsurer are not adverse on that issue.

21 The scenario in this case changed before I gave my ruling. The issue of liability was settled and the only issue remaining was the assessment of damages. The only counsel to participate will be the plaintiffs' counsel and counsel for the underinsurer. They will be adverse on this issue.

22 In my view the general approach should be not to permit a defendant to open if that defendant does not intend to call evidence and that this approach would apply regardless of when the defendant wants to open. I am inclined to the view that if the defence is going to call evidence then defence counsel should be allowed to open immediately after the plaintiff's opening if defence counsel makes the request to do so.

23 I think there is an inherent jurisdiction in the trial judge to depart from this general approach when the defendant wishes to open immediately after the opening of the plaintiff if the needs of justice require it in a particular case.

24 It appears to me that judges now consider that they have a wide discretion

in this matter. I note, for instance, that in criminal trials the courts have recognized that the procedure should be varied to meet the needs of justice. I also note that a discretion has been recognized to vary the usual rules for final jury addresses in criminal cases. For instance, it has been held that in some cases the trial judge should permit the accused a right to reply to the final address of the Crown: *R. v. Rose* (1996), 28 O.R. (3d) 602 (Ont. C.A.).

25 I think the issue of justice or fairness must be considered from the point of view of both parties. It may be unfair not to allow the defence to open even though the defence does not intend to call evidence. In *Mastrangelo (Litigation Guardian of)* the trial judge considered the lengthy case of the plaintiff warranted an early opportunity for the defendant to address the jury. It might be that the content of the plaintiff's opening may be unfairly prejudicial and that an appropriate remedy is to allow the defence to open. It might be that there will be issues which the plaintiff's counsel does not mention in his opening but which should be disclosed to the jury at the outset.

26 I would note, however, that it is important to consider what the defendant wishes to say. It appears appropriate for the defence opening to identify issues and relate them to the evidence which the plaintiff has already described as forthcoming. However, it is not appropriate for the plaintiff to make what, in effect, is a closing address at the outset and then to allow the defendant to reply in kind. Neither should be permitted.

27 I do not think the present case is unusual or that there is any need to permit the defence to open after the plaintiffs' opening in order to meet the ends of justice. The counsel for Wawanesa did not identify any particular reason why he should be allowed to open except that the jury should understand his role as counsel for an insurer. I think it is more appropriate for me to explain that issue and to tell them that the involvement of an insurer is not a factor relevant to their decisions. The issues will be simple -- the quantum of damages of a number of family claimants. The case of the plaintiff is not expected to be long.

28 I rule that counsel for Wawanesa may not open to the jury.

Applications dismissed.