7 C.P.C. (3d) 197

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Wheater v. Walters

ELIZABETH WHEATER, RICHARD WHEATER, WILLIAM J. WHEATER v. ALPHONSO WALTERS and WAWANESA MUTUAL INSURANCE COMPANY

ELIZABETH WHEATER and WILLIAM J. WHEATER v. ANDY M. LONDON, CECIL ETIENNE and WAWANESA MUTUAL INSURANCE COMPANY

ELIZABETH WHEATER and WILLIAM J. WHEATER v. CHANDER SHARMA and DEEPIKA SHARMA

ELIZABETH WHEATER and WILLIAM J. WHEATER v. HING-MAN CHOW

Ontario Court of Justice (General Division)

Meehan J.

Judgment: February 21, 1992
Docket: Docs. 39334/89; 39336/89; 53088/90; 66040/91Q

Counsel: Leonard H. Kunka, for moving parties (plaintiffs) in all actions.

Margaret Shanahan, for responding party (defendant) Wawanesa Mutual Insurance Co. in action nos. 39334/89 and 39336/89.

John Russell, for responding parties (defendants) Chander Sharma and Deepika Sharma in action no. 53088/90.

Johanna Corkery, for responding party (defendant) Hing-Man Chow in action no. 66040/91Q.

Cases considered:

Campbell v. Singal (1989), 35 C.P.C. (2d) 283 (Ont. H.C.) -- considered

De Boer v. Bosweld (1991), 5 O.R. (3d) 413 (Gen. Div.) -- considered

Rahmaty v. Kentner (1982), 31 C.P.C. 300 (Ont. H.C.) -- applied

Sloane v. Toronto Stock Exchange (1991), 4 C.P.C. (3d) 278, 5 O.R. (3d) 412, 52 O.A.C. 177 (C.A.) -- considered

Rules considered:

Ontario, Rules of Civil Procedure --

r. 47.02(3)

Motion for order that actions be tried together or that they be tried one after the other and that various jury notices be struck out.

Meehan J. **(orally):**

1 This motion comes before me for an order that a series of actions be tried together or one after the other and that various jury notices and various actions be struck.

2 Counsel have agreed that there should be an order to go that these actions be tried together or one after the other in the discretion of the trial judge.

3 The factual situation is somewhat unusual as in this particular series of actions it appears that the plaintiff Elizabeth Wheater suffered injuries in motor vehicle accidents on January 11, 1988, November 23, 1988, April 5, 1990 and May 25, 1990 and statements of claim have been issued on her behalf and on behalf of the appropriate family law claimants.

4 There is medical evidence currently available which seems to indicate that each accident aggravated the injuries received in the previous accidents. At least one of the medical reports indicates this unfortunately has become a very complicated situation. She suffered neck and back injuries of the usual type in the first two accidents, and it is alleged that in the third accident she suffered serious and lasting visual problems.

5 It is suggested that it would be very difficult for a jury to assess the damages with multiple accidents. The record indicates that there is one action where no jury notice has been filed, although counsel for the defendants in that action indicate she is content that the jury notices remain for the purposes of the joint trial.

6 Counsel for those defendants who have filed the jury notices rely on recent Court of Appeal cases and particularly *Sloane v. Toronto Stock Exchange* (1991), 4 C.P.C. (3d) 278, 5 O.R. (3d) 412, 52 O.A.C. 177, wherein the Court of Appeal reiterates that the right to trial by jury is an important substantive right and that right should not be denied prematurely. In that case, the Court of Appeal found that the actions of the trial judge were premature and that he should have heard some evidence before deciding whether the case should be withdrawn from the jury.

7 Cited also is the case of *De Boer v. Bosweld* (1991), 5 O.R. (3d) 413 (Gen. Div.), a decision of Mr. Justice Webber wherein fairly complicated medical evidence was dealt with and he cited with approval *Campbell v. Singal* (1989), 35 C.P.C. (2d) 283 (Ont. H.C.), where Mr. Justice McDermid indicated [at p. 290] that,

> ... it is only when 'the facts, the law or both are such that a jury cannot reasonably be expected to be able to follow the evidence properly or to apply the judge's charge properly' that the jury should be struck. This must be determined on a case by case basis.

He further indicates that the purpose of r.47.02(3) of the *Rules of Civil Procedure* was to indicate that where a motions judge refuses to strike a jury notice it does not affect the discretion of the trial judge to try the action without a jury.

8 Several other cases have been quoted to me although they are single judge cases from the last decade where it was believed that the capacity of jurors to understand evidence was somewhat less than is believed now.

9 There is one matter of concern in the one action, the Wawanesa Mutual Insurance Company (no. 39334/89) filed the jury notice and at the same time indicated that there was a crossclaim, and counsel have advised me today that the issue to be raised and dealt with in that was whether the defendants are indeed insured. It is my view that the complexities of these actions combined with the issue of the crossclaim add serious complications to an already complicated factual situation. There is no doubt that the medical evidence will be complicated. There is no doubt that the issue of damages at different dates will be at issue. There is not doubt that the matter of global assessment will be at issue. I am advised today that Elizabeth Wheater still has not returned to work. There will be as well actuarial evidence which will have to be dealt with. There is as well as I indicated the difficulties of management of such a case with the various counsel and the various issues.

10 An assessment of a similar situation can be found in *Rahmaty v. Kentner* (1982), 31 C.P.C. 300 (Ont. H.C.) an older single judge decision where the jury notice was struck out. In that decision, Mr. Justice Reid said at p. 303:

> What it comes down to, therefore, is weighing the prima facie right of a litigant to a jury trial against the risk that the nature of the particular case makes it inappropriate to be dealt with by a jury.

11 In this case, it is my view that it can all already be demonstrated for the factors that I have already recited, that this case is too difficult to be dealt with by a jury and I, therefore, strike the jury notices in the various actions. I pause to note that I have suggested to counsel that this series of actions would benefit strongly from case management, and it is my view that they should be put under case management so that the various conflicting interests can be reconciled as soon as possible.

12 Costs to the plaintiff in the cause.

Motion granted.