CITATION: Jiang v. Toronto Transit Commission, 2020 ONSC 5727
COURT FILE NO.: CV-14-513192
DATE: 20200923

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ian Jiang, Plaintiff

AND:

Toronto Transit Commission, Defendant

BEFORE: Darla A. Wilson J.

COUNSEL: *Joshua Henderson*, for the Plaintiff

Steve Anderson, for the Defendant

HEARD: September 21, 2020

ENDORSEMENT

[1] A requisition was received by the Court to schedule an urgent motion to strike the jury notice in this action. In accordance with the practice, the proposed motion was sent to me to convene a case conference, which I did with counsel today.

[2] I did not review the proposed motion record. I read the requisition to schedule the urgent motion filed by Mr. Henderson. It stated that an order was requested striking out the jury notice due to the pandemic. The reasons given were: the pandemic closed the courts for a number of months and has created a huge backlog and a trial in person would necessitate a further delay of 1-3 years. It was further stated that if the trial were heard with a jury, the jurors would have to take the TTC to the courthouse. On the form, it was noted that the Defendant opposed the motion to strike the jury.

[3] This action is a claim for damages allegedly sustained by the Plaintiff as a result of a slip and fall on water that occurred more than 7.5 years ago. The Defendant filed a jury notice when it delivered its defence; the action has always proceeded as a jury action. When the trial record was filed, it was set down as a jury trial. The case is fixed for trial to commence at the jury sittings in Toronto on October 5, 2020.

[4] At the case conference, Mr. Henderson submitted that there are two grounds for the motion to strike the jury: prejudice that will result to the Plaintiff because the jurors have to take the TTC to get to the courthouse and will likely blame the Plaintiff for that; and it is a complex action not suitable to trial with a jury. Mr. Henderson advised that the Plaintiff is studying at Harvard and her income loss claim is based on her being unable to pursue her career of choice as a result of her injuries from the slip and fall.

[5] Mr. Anderson submitted that this case was not complex and the Defendant had a right to have it adjudicated by a jury, which fundamental right ought not to be taken away without a compelling reason.

[6] I am well aware that we are in unprecedented times. The Court must be flexible and adaptable to accommodate the needs of the parties and to ensure that cases proceed in a fair and equitable fashion. In Toronto, we are very fortunate that we have courtrooms that have been retrofitted to accommodate the social distancing that is required to conduct jury trials. We also are able to conduct jury selection at an off-site premise which has been created to allow for social distancing; it has been approved by the appropriate authorities to ensure it is safe for choosing juries. Further, counsel can decide what witnesses can give their evidence virtually and what evidence can be filed electronically and what evidence may be necessary to have heard in the courtroom.

[7] I am aware that in other jurisdictions that cannot at the present time offer civil jury trials, my colleagues have granted motions striking juries: see *Higashi v. Chiarot*, 2020 ONSC 5523, *Louis v. Poitras*, 2020 ONSC 5301 and *Belton v. Spencer*, 2020 ONSC 5327. In all these decisions, the prejudice to the Plaintiff as a result of an undetermined delay had to be weighed against the right of the Defendant to have the action tried by a jury. In the case at hand, I do not have to consider these issues as there is no prejudice to the Plaintiff and no access to justice issue to be balanced since civil jury trials are available in Toronto.

[8] Since Toronto is offering civil jury trials, there is no basis for the suggestion of counsel for the Plaintiff that this case will be adjourned and not heard for several years. I do not understand where the assertion that there is a "huge backlog" in the civil and criminal court system" emanates from.

[9] Furthermore, the submission that jurors would be biased against the Plaintiff because of having to take public transit is pure speculation and nothing more. Jurors may or may not take public transit to the courthouse but in any event, there is absolutely no evidence that doing so would result in bias against the Plaintiff.

[10] Turning to the second argument advanced by Mr. Henderson, that of complexity, I am not persuaded there is any merit to this argument. Juries have heard very complex negligence cases for years, including professional negligence actions involving alleged breaches of the standard of care and complicated causation issues, and there is no prohibition against these matters being decided by a jury. The onus on a moving party to persuade the Court that a jury is incapable of adjudicating a personal injury case is high.

[11] A motion to strike a jury based on evidence that is too complex for them to understand ought to be made to the trial judge, after some evidence has been heard. In *Kempf v. Nguyen*, 2015 ONCA 114, the Court stated, "In my view, it would have been preferable for the trial judge to have reserved her decision on the motion until after the evidence had been completed, as Nguyen's counsel urged her to do, or, perhaps, until a discrete problem arose. As the cases emphasize, the "wait and see" approach is generally preferred. I say so for two reasons. From a practical perspective, often the anticipated complexities of a case or other concerns giving rise to the motion to dismiss a jury do not materialize. From a principled perspective, the right to a jury

trial is a fundamental, substantive right that should not be interfered with except for very cogent reasons."

[12] In conclusion, there is no urgency to this motion nor is there merit to the suggestion that a jury trial will somehow prejudice the Plaintiff. There may be other reasons why counsel prefer to have a case decided by a judge alone as opposed to a jury; if that is the case, the reasons must be clearly and cogently set out for the judge to consider. Mere speculation is not sufficient to justify depriving a party of its right to a trial by jury.

[13] I decline to order this motion heard on an urgent basis or prior to the trial. If the solicitor for the Plaintiff wishes to bring a motion to strike the jury on the basis that the case is too complex for a jury to understand, he is to do so to the trial judge.

D. A. Wilson J.

Date: September 23, 2020