

COURT FILE NO.: 03-9189

DATE: 2006/09/14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THOMAS ROGER BENNETT

Plaintiff

- and -

WILLIAM NETHERBY

Defendant

)
)
) Robert J. Hooper and
) Allen Wynperle,
) for the Plaintiff
)
)

)
)
) John Sewell,
) for the Defendant
)
)

) HEARD: September 12, 2006
)

AND BETWEEN

COURT FILE NO.: 06-23382

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THOMAS ROGER BENNETT

Plaintiff

)
)
) Robert J. Hooper and
) Allen Wynperle,
) for the Plaintiff
)
)

- and -)	
)	
)	
PEMBRIDGE INSURANCE COMPANY)	Eric Grossman,
)	for the Defendant
)	
Defendant)	
)	
)	
)	HEARD: September 12, 2006

THE HONOURABLE MADAM JUSTICE L.M. WALTERS

RULING ON A MOTION

OVERVIEW

[1] There are two actions before the court. In the first action (the tort action), the plaintiff claims damages from the defendant Netherby as a result of injuries he sustained on May 11, 2002 while riding his bike, when he was struck by a pick-up truck driven by William Netherby.

[2] In the second action (the accident benefits action), the plaintiff claims statutory accident benefits to the maximum limits from his insurer, Pembridge Insurance Company for expenses that have been incurred or will be incurred for his health care.

[3] Pursuant to the legislative scheme of automobile accident insurance compensation in place at the time of this accident, the plaintiff can only receive damages for health care expenses as set out in s. 267.5(3) of the Act, if he has sustained a catastrophic impairment as defined under the regulation.

[4] The issue of determining whether or not the plaintiff has been catastrophically impaired as a result of the injuries he sustained in the motor vehicle accident is the only issue to be determined in the accident benefits action. The same issue, along with the

issues of liability, causation and quantum of damages need to be determined in the tort action.

[5] The defendant in the tort action has filed a jury notice.

[6] All parties agree that the determination of catastrophic impairment is an issue that must be determined by judge alone.

POSTION OF THE PARTIES

[7] The plaintiff moves to have the jury notice struck and asks that both actions be heard together. The plaintiff argues that this is a complicated case. The plaintiff was riding his bicycle and accordingly this is a reverse onus situation. Liability is seriously in issue. There are competing expert engineer reports with respect to liability. There are issues with respect to causation. There must be a determination as to whether or not the plaintiff has been catastrophically impaired. There are prior work related injuries. Many of the witnesses who will be called to testify on whether or not the plaintiff has been catastrophically impaired would also provide evidence with respect to the plaintiff's damages. Other witnesses have overlapping evidence with respect to the plaintiff's damages and health care costs.

[8] As everyone agrees that the determination of catastrophic impairment must be determined by a judge alone, the only way to proceed is either to have a bifurcated hearing where much of the evidence will have to be given twice by health care providers and expert witnesses, or to strike the jury and have all matter dealt with at one time.

[9] The plaintiff argues that the cost and the necessary delay occasioned by having two separate hearings is of significant prejudice to the plaintiff, who is currently receiving no accident benefits. On the other hand, to subject a jury to the detailed, comprehensive and technical evidence necessary to support the catastrophic designation is unreasonable and unfair and might ultimately result in confusion on the part of the jury. In justice to all the parties, the jury should be struck.

[10] The position of both defendants is that this matter should proceed in two separate hearings. The accident benefits action should be dealt with first without a jury. After the court has made its determination as to whether or not the plaintiff has been catastrophically impaired, the tort action could proceed with a jury. Mr. Sewell on behalf of the defendant Mr. Netherby conceded on the record that his client is prepared to be bound in the tort action by whatever decision the court makes with respect to the catastrophic designation.

[11] The defendant's right to a jury trial is a substantive right which should not be interfered with lightly. The increased cost and potential delay occasioned by having two separate hearings has been overstated by the plaintiff. Firstly, by having two separate hearings each hearing will be reduced from three parties to two parties. Mr. Sewell and the defendant Netherby will play no role in the first trial. Once the issue of catastrophic impairment has been determined, Mr. Grosman will have no further participation in the tort action. This alone will result in less not more time. Further, the determination of the catastrophic impairment issue may have far reaching consequences on the outcome of the tort action itself, including potential settlement. In the event that the court determines that the plaintiff has not met the catastrophic definition, then several of the experts whose testimony dealt only with that designation, would not be necessary at the tort trial. Other witnesses, whose evidence relates to health care costs, would have their testimony severely reduced in length.

ANALYSIS

[12] In the past ten years, counsel advise that there have only been two cases where the determination of both the issues of catastrophic impairment and tort damages in the one action have reached trial.

[13] In *Snushall v. Fulsang*, [2003] O.J. No. 1493, Lax J. proceeded with a jury and at the conclusion of the evidence she heard submissions and made a determination as to whether or not the plaintiff had sustained a catastrophic impairment. Commenting on the process she followed in that case, Lax J. at paragraph 55 stated the following:

"Determining the issue of catastrophic impairment at trial in accordance with the Guides was particularly problematic with a jury. Initially, I permitted the jury to hear the medical evidence on catastrophic impairment, as I was of the view that this evidence could be relevant to the jury's assessment of the plaintiff's non-pecuniary general damages. As the evidence unfolded, it became apparent that almost all of the evidence was concerned with an explanation of the methodology of the Guides, the categories of impairments contained in them and the opinions of the experts on their application to the plaintiff's medical conditions. The evidence was technical and challenging to comprehend, even with the Guides in hand. With the benefit of hindsight, it may be preferable for the trial judge to hear the evidence on catastrophic impairment on a voir dire or by way of a trial of an issue before the jury is selected."

[14] In *Desbiens v. Mordini*, [2004] O.J. No.4736, Spiegel J. struck the jury notice. In reasons which he provided after the trial he stated that:

"At the outset of the trial I was provided with the reports of the various experts on the issue of catastrophic impairment. After perusing these reports, I was of the view that the evidence on this issue was inextricably interwoven with the evidence that the jury would be required to hear in order to properly assess Mr. Desbiens' damages. In my opinion hearing evidence on the catastrophic impairment issue would likely prejudice and confuse the jury and unduly lengthen the trial."

[15] He also opined that if the determination of the catastrophic impairment proceeded by way of a voir dire or a trial of an issue before the jury was selected, that the trial would not have been shortened but in fact would have lengthened.

[16] Spiegel J. went on to say that just because a jury trial takes longer than a non-jury trial that is not necessarily a ground for dispensing with the jury. However, in this particular case, given the defendants previous attempts to get rid of the jury, Spiegel J. found that a further delay would not serve the interests of justice.

[17] The right to trial by jury is a statutory right and one that should not be taken away except for substantial reasons. In *Graham v. Rourke*, [1990] 75 O.R. (2d) 622, (C.A.), p. 625 Doherty J.A. succinctly summarized the law:

"If a litigant is entitled to trial by jury, that right is a substantive one which should not be interfered with without just cause: *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528, 4 D.L.R. (2d) 561, at p. 533 S.C.R. When a trial judge is asked to discharge a jury, she or he must decide whether justice to the parties will be better served by the discharge or retention of the jury. The moving party bears the burden of persuasion and must be able to point to features in the legal or factual issues to be resolved, in the evidence, or the conduct of the trial, which merit the discharge of the jury: *Majcenic v. Natale*, [1968] 1 O.R. 189, 66 D.L.R. (2d) 50 (C.A.), at pp. 201-02 O.R. A trial judge faced with a motion to discharge a jury must exercise a judicial discretion. In many situations that discretion may, with equal propriety, be exercised for or against discharging the jury."

[18] After briefly reviewing numerous medical and other expert reports dealing with the catastrophic designation issue, I am satisfied that it would be unfair and inappropriate for a jury to hear all of this evidence, much of which is very technical and difficult to comprehend and certainly has the potential of confusing a jury. I see only two options available to the court. Either I strike the jury and deal with all matters, or accede to the defendant's request to have this matter determined in two separate hearings.

[19] Balancing the right of the defendant to have a trial by jury in the tort action with the plaintiff's right to have this matter heard as quickly as possible and at the least expense possible, I am not satisfied that justice to the litigants is better served by dismissing the jury.

[20] I am mindful that a two-step hearing necessarily involves some delay in the hearing of the tort action. There will have to be some duplication of expert witnesses at both trials however, depending on how the court rules in the first matter, the number of witnesses, and the length of their testimony may very well be adjusted. I am also mindful of the fact that the determination of the catastrophic impairment may go a long way to either narrowing issues or resolving the tort action. The defendant Netherby has already agreed to be bound by the court's decision in the accident benefits action. Mr. Hopper on behalf of the plaintiff was unable to get instructions one way or the other with respect to whether or not the plaintiff would be bound by the court's decision in the subsequent tort action.

[21] Each trial will now only involve two parties, which may ultimately result in significant timesavings, particularly if the outcome of the first trial impacts on resolution or the narrowing of issues in the tort action.

[22] It is important to note that in both cases provided to me by counsel it is apparent that there was only one action before the court. Here, there are two separate actions before the court. There has been no order to date directing that these two actions be heard together or one after the other. The defendant in the tort action made known his desire for a jury trial from as early as July 2003. The accident benefits action was only issued in March 2006. There has been no undo delay in proceeding with the tort action. The plaintiff for whatever reason did not take advantage of bringing a motion to have this threshold issue determined before trial as provided in s. 267.5 (11) of the *Insurance Act*.

[23] Section 267.5 of the *Act* provides as follows:

(11) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, a judge shall, on motion made before trial with consent of the parties or in accordance with an order of a judge who conducts a pre-trial conference, determine for the purposes of sub-section (4) whether the injured person has sustained a catastrophic impairment arising directly or indirectly from the use or operation of the automobile.

(13) The determination of a judge made under sub-section (11) or (12) is binding on the parties at trial.

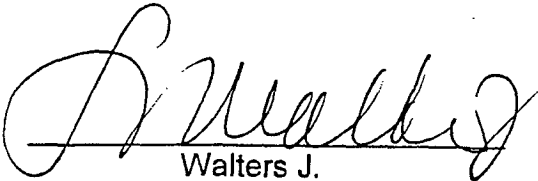
(14) If no motion is made under sub-section (11), the trial judge shall determine for the purposes of sub-section (4) whether the injured person has sustained a catastrophic impairment arising directly or indirectly from the use or operation of the automobile.

[24] Surely the defendant should not be deprived of his right to a jury trial if any delay is now occasioned because this was not done before trial. Without a two-stage process it would appear highly unlikely that one would ever be able to have a jury trial in similar situations. A two-stage process whether it be by way of motion, *voir dire*, trial of an issue, or in this case a separate trial, ensures that the catastrophic impairment will be

determined by a trial judge alone, while at the same time preserving a litigant's right to trial by jury with respect to the tort issues.

ORDER

[25] Accordingly, there will not be an order joining these two actions. Instead, action number 06-23382 between Thomas Roger Bennett and Pembridge Insurance Company shall proceed before me without a jury. The jury panel scheduled to return on today's date will be dismissed. After the court has given its judgment with respect to whether or not the plaintiff has been catastrophically impaired, action number 03-9189 will proceed with a jury on a date to be arranged with the trial coordinator. As these matters are proceeding as two separation actions, I will not be seized of the second trial, although I will be happy to preside over the matter if scheduling permits.


Walters J.

Released: September 14, 2006