Case Name:

Ali v. Malik

Between
Faiz Ul-Haq Ali, plaintiff, and
Sajid Masood Malik, defendant
And Between:
Samina Alam Ali, plaintiff, and
Sajid Masood Malik, defendant

[2004] A.J. No. 642

2004 ABQB 427

48 Alta. L.R. (4th) 304

366 A.R. 173

5 C.P.C. (6th) 391

131 A.C.W.S. (3d) 1056

2004 CarswellAlta 758

Docket Nos. 0203 14768, 0203 14770

Alberta Court of Queen's Bench
Judicial District of Edmonton

Slatter J.

Heard: June 2, 2004.
Judgment: filed June 10, 2004.

(20 paras.)

Civil procedure -- Pleadings -- Amendment of -- Trials -- Juries -- Setting aside jury notice.

Application by the plaintiffs, the Alis, to amend their statements of claim. They were seeking to

reduce the total damages to below $10,000. They also sought an order vacating the previous order directing that the actions be tried by jury. The Alis claimed for damages resulting from minor injuries following a low speed collision. Both Faiz Ali and Samina Ali brought separate claims for the cumulative amount of $180,000 in general damages and $20,000 in special damages. The defendant, Malik, applied to have the actions tried by jury and the Alis consented to the application. Since the Alis sought to reduce their claims to below $10,000, they argued that pursuant to s. 17(1) of the Jury Act, the claims no longer qualified for a jury trial. Malik opposed this application but did not oppose the amendments.

HELD: Applications allowed. Section 17(1) did preclude a jury trial for these claims under $10,000. Despite s. 17(1), the court had discretion pursuant to Rule 234 to order a jury trial. Since Malik agreed with the amendments, there was no reason not to allow the amendments to reflect the true issues between the parties. There was no reason to justify exercising the court's discretion pursuant to Rule 234 to direct a jury trial even though the amount claimed was below the statutory limit. It was important to consider the expense and time consumed by jury trials for minor claims. It was inappropriate to have a jury trial where the costs of the jury would have exceeded the claims themselves. The previous jury order was set aside on the condition that the Alis pay the thrown away costs of the jury applications. The Alis also had to sign undertakings that they would not seek damages in excess of $10,000, and that if more than $10,000 was awarded, that they would not attempt to enforce the surplus over $10,000.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, ss. 132, 234.

Jury Act, R.S.A. 2000, c. J-3, ss. 17(1), 17(1)(b), 17(1.1), 17(2), 17(3).

Jury Act Regulation 68/1983.

Counsel:

Brij Mohan for the Plaintiffs

G. A. Smith, Q.C. for the Defendant

REASONS FOR JUDGMENT

1 SLATTER J.:-- This is an application by the Plaintiffs to amend their Statements of Claim, to reduce the total damages claimed to below $10,000.00. The Plaintiffs also seek an order vacating the previous order directing that the actions be tried by a jury.

Facts

2 The two Plaintiffs were involved in a low speed collision on December 21, 2001. They both sustained minor injuries, and in due course they commenced separate actions claiming general damages of $180,000.00, and special damages of $20,000.00.

3 The Defendant applied to have the actions tried by a jury, and the Plaintiffs consented to that application. On December 12, 2003 Chief Justice Wachowich granted an order for a jury trial.

4 The Plaintiffs have now each filed an affidavit in which they depose that they are advised by their counsel that their claims are worth less than $10,000.00 in total. They accordingly apply to amend their Statements of Claim to reduce the damages claimed to below that amount. Since s. 17(1) of the Jury Act, R.S.A. 2000, c. J-3 and the Jury Act Regulation 68/1983 provide that an action commenced before March 1, 2003 is to be tried by a jury only if the claim is in excess of $10,000.00, the amended claims would no longer qualify for jury trials. Accordingly, the Plaintiffs seek to set aside the previous order calling for a trial by jury.

5 The Defendant opposes this application. He argues that he has a right to a jury trial, and once a jury trial has been ordered, the action should proceed by that mode of trial. The Defendant indicated he would not object to the amendments, as long as the mode of trial (i.e., by jury) was not changed.

Statutory Provisions

6 The relevant statutory provisions are as follows:

> Jury Act
>
> 17(1) Subject to subsections (1.1) and (2), on application by a party to the proceeding, the following shall be tried by a jury:
>
> (a) an action for defamation, false imprisonment, malicious prosecution, seduction or breach of promise for marriage,
> (b) an action founded on any tort or contract in which the amount claimed exceeds an amount prescribed by regulation, or
> (c) an action for the recovery of property the value of which exceeds an amount prescribed by regulation.
>
> (1.1) If, on an application made under subsection (1) or on a subsequent application, a judge considers it appropriate, the judge may direct that the proceeding be tried pursuant to the summary trial procedure set out in the Alberta Rules of Court.

(2) If, on a motion for directions or on a subsequent application, it appears that the trial might involve

(a) a prolonged examination of documents or accounts, or
(b) a scientific or long investigation,

that in the opinion of a judge cannot conveniently be made by a jury, the judge may, notwithstanding that the proceeding has been directed to be tried by a jury, direct that the proceeding be tried without a jury.

(3) In this section, "proceeding" includes a counterclaim.

Under the Jury Act Regulation the prescribed amounts under s. 17(1)(b) are $10,000 for actions commenced before March 1, 2003 and $75,000 for actions commenced thereafter.

Rules of Court

234. Subject to Rule 235, unless a trial is directed to be with a jury, the mode of trial shall be by a judge without a jury.

It has been held that Rule 234 gives the Court a discretion to order a jury trial even when the conditions in s. 17(1) are not met: Luong v. Mawson (2000), 255 A.R. 299 (C.A.).

Amendment of Pleadings

7 Under Rule 132, the Court may "at any stage of the proceedings allow any party to alter or amend his pleadings" for the purpose of "determining the real question in issue between the parties." In addition to providing for amendment of pleadings, this Rule alludes to one of the purposes of pleadings: they are to define and narrow the issues between the parties that need to go to trial. In this case the Plaintiffs originally pleaded that their claims were worth $200,000.00. Now that further information is available, and they have considered the legal advice available to them, they have concluded that the claims are worth less than $10,000.00. The Defendant also believes that the claims are worth less than $10,000.00; in fact it would appear that one of the reasons for the original application for a jury trial was that the Defendant thought that the claims were exaggerated. The Court is therefore faced with a situation where both the Plaintiffs and the Defendant agree that the claims are worth less than $10,000.00. In these circumstances, there is no reason why the pleadings should not be amended to reflect the true issues between the parties.

Trial by Jury

8 Once the pleadings are amended to reduce the claims to less than $10,000.00, the question

arises as to whether the original order for a jury should stay in place. The Defendant argues that it should. Firstly, the Defendant argues that the prior order can only be set aside for the reasons given in s. 17(2) of the Act, and neither of those circumstances apply in this case. Secondly, the Defendant argues that because the Plaintiffs consented to the original jury order, they should not be permitted to now argue that a jury trial is an inappropriate mode of trial. Thirdly, the Defendant argues that the Court should in any event exercise the discretion under Rule 234, and direct a jury trial in this case.

9 With respect to the jurisdiction of the Court, there is authority to suggest that the Court can set aside an order for a jury trial for reasons other than those set out in s. 17(2): Lukic v. Rogers, [2001] A.J. No. 786, 2001 ABQB 508, 11 C.P.C. (5th) 184 at para. 2. I am prepared to rely on that authority, but in any event once the claim is reduced below $10,000.00 the matter would appear to be governed by Rule 234. That Rule clearly grants the Court a general discretion to order or not order a jury trial. The order for a jury trial being procedural in nature, it is one that can be revisited by the Court as circumstances change.

10 The Plaintiffs conceded that they should have considered the true value of their claims before they consented to the jury order last December. It was not suggested that any new information had come to light since that time which caused the Plaintiffs to reevaluate their claim. Obviously parties should not be encouraged to consent to orders, and then apply to set them aside a few months later. However, whatever prejudice may arise from this application can be dealt with by a costs order, and the fact that the Plaintiffs consented to the original order is not a bar to their application.

11 That leaves the general question as to whether the Court should exercise its discretion under Rule 234 and the Jury Act to direct that the trials proceed with a jury. In Bader v. Lapointe, [2001] A.J. No. 1351, 2001 ABQB 862, 306 A.R. 240 the Plaintiff had originally claimed $85,000.00 in damages. In response to the Defendant's application for a jury trial, the Plaintiff reduced her claim to below $10,000.00. The Defendant's application for a jury trial was dismissed, with the Court holding at para. 5:

> Given that the legislature chose to fix a minimum dollar amount for a mandatory civil jury, subject to the discretion set out in s. 16(2) [now s. 17(2)], I conclude that while there remains a discretion to order a civil jury trial if that minimum is not met, the burden shifts to the party seeking a civil jury to show persuasive reasons why it should be granted The reasons given here are inadequate. The mere fact that a jury could do it does not mean that it ought to do it. A civil jury is more costly to the litigants, it occupies more judicial and court personnel time and requires time and commitment from the private citizens chosen. Those costs and resources should not be expended on modest claims - measured in money - unless there are persuasive reasons why a jury would better serve the ends of justice.

This case is distinguishable because no order for a jury trial had ever been made.

12 In Lukic v. Rogers, supra, an order was made for a jury trial. The claim was originally for $100,000.00, but the Defendant consented to an amendment to reduce damages to $10,000.00. On an application to set aside the jury order, the Court noted that there had been no particular change in the nature of the claim since the jury order was granted. However, given the additional cost and length of jury trials, a jury trial was found to be inappropriate, and the jury order was set aside.

13 In Verma v. Chandler (unreported, 9803-15994, April 1, 2003) the Chief Justice considered an application similar to this one. The claim was originally for $60,000.00, and on October 17, 2000, an order for a jury was granted. The plaintiff applied to set aside the jury order, and agreed to file an undertaking with the court to cap the claim at $10,000.00. The Chief Justice granted the order, without written reasons, on the condition that the Statement of Claim be amended to reduce the claim accordingly.

14 In Carbon v. Young, [2004] A.J. No. 122, 2004 ABQB 95, a jury trial had been ordered, and the Plaintiff applied on the eve of trial to reduce the claim below $10,000.00 and to discharge the jury. The Court held that where a claim is for less than $10,000.00 there is no right to a jury trial, and that there are strong reasons for avoiding the length and cost of jury trials for small claims. The order was accordingly granted on terms as to costs.

15 In Duff v. Oshust, [2004] A.J. No. 334, 2004 ABQB 224, a claim for $290,000.00 was filed on February 4, 2003. Effective March 1, 2003 the threshold amount for a jury trial was raised from $10,000.00 to $75,000.00. The plaintiff discontinued the first action, and on September 8, 2003 commenced a second claim for the same cause of action, but now claiming only $75,000.00. The defendant applied for a jury trial under Rule 234, even though the claim was below the new threshold amount. The Chief Justice held that the discontinuance of the first action was a tactic to defeat the defendant's right to a jury trial, and directed that the trial proceed by jury. I note that in this case the plaintiff was attempting to have his cake and eat it too, in the sense that he was attempting to take advantage of the new higher limits for a non-jury trial, while avoiding the jury trial procedure. In the present case the Plaintiffs have not attempted to circumvent the $10,000.00 limit on their claim.

16 In Kabiru v. Deitsch, [2004] A.J. No. 422, 2004 ABQB 249 and Williams-Baker v. Russell, [2004] A.J. No. 434, 2004 ABQB 250 the orders directing a jury trial were set aside when the claims were reduced to below $10,000.00.

17 In this case I can see nothing about the claim or the cause of action that would justify the exercise of the discretion under Rule 234 to direct a jury trial even though the amount claimed is below the statutory limit. I concur with the comments in Bader v. Lapointe, supra, para. 11, on the expense and time consumed by jury trials for minor claims. I note that in these particular claims two jury trials, each of 15 days' duration, are contemplated. In each of the two actions the Defendant has filed a jury deposit of $9,750.00, whereas the proposed Amended Statement of Claim seeks only

$9,500.00 in damages. It is inappropriate to have a trial by jury where the costs of the jury exceed the claim itself, except in the most unusual circumstances. In other cases orders to hold jury trials have been set aside when the claims are reduced; the fact that this is a consent order can be dealt with by costs.

18 In the last few years there have been quite a few cases which discussed the priority between a right to a jury trial, and the right to a summary trial: Hajjar v. Repetowski, [2001] A.J. No. 659, 2001 ABQB 432, 91 Alta. L.R. (3d) 358, 319 A.R. 251; Elliott v. Amante, [2001] A.J. No. 1629, 2001 ABQB 1080, 99 Alta. L.R. (3d) 246, 306 A.R. 82; Forrest v. Ostrovsky, [2002] A.J. No. 1583, 2002 ABQB 1115; Goulbourne v. Buoy, [2003] A.J. No. 641, 2003 ABQB 409, 15 Alta. L.R. (4th) 375; Noland v. Telila, [2003] A.J. No. 642, 2003 ABQB 410, 35 C.P.C. (5th) 86. Some of these decisions held that the Jury Act took priority over the Rules on summary trials, and that if one party had a right to a jury trial, the other party could not apply for a summary trial. That particular debate has been resolved by s. 17(1.1) of the Jury Act, which now provides that where "a judge considers it appropriate" a jury trial can be converted to a summary trial. Those cases are not directly applicable to the present situation, because here the amendments, if allowed, would disqualify these actions from a jury trial. The recent amendment to s. 17 does however reflect a recognition by the Legislature that jury trials can be expensive and lengthy, and they are not justified for minor claims.

Conclusion

19 In summary, in ordinary circumstances the Plaintiffs would clearly be entitled to amend their pleadings to better define the issues between the parties. This is particularly so when both the Plaintiffs and the Defendant agree that the amended pleading would more accurately reflect the true nature of the claim. The present order for a jury trial was granted at a time when the claims were seen as being more substantial, and in the circumstances it is appropriate to set aside the previous jury order. The application to amend the pleadings and set aside the jury order is accordingly granted on the condition that the Plaintiffs must pay the thrown away costs of the jury applications, including the costs of these applications to amend the pleadings, but not including the costs of the examinations on affidavit of May 31, 2004. Those examinations were pointless and resulted in no meaningful evidence being brought before the Court. The Plaintiffs chose to start two actions for damages arising from the same accident, so two sets of costs are payable. The Amended Statements of Claim must be delivered within 30 days.

20 Because the Court is not necessarily limited to the amount of damages claimed in the statement of claim, the Plaintiffs must also file undertakings with the Court that they will not seek damages in excess of $10,000.00, and if such damages are awarded they will make no attempt to enforce the surplus over $10,000.00: see Lukic v. Rogers, supra, at para. 5. There will also be an order directing the Clerk to refund the jury deposits to Dean Duckett Amelio, counsel for the Defendants.

SLATTER J.

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