

Case Name:

Lung v. Burnett

Between

**Kwai Ying Maria Lung, plaintiff, and
Terri Ann Burnett, defendant (Docket: 0103 18932)**

And Between:

**Kwai Ying Maria Lung, plaintiff, and
Robert Denholm, defendant (Docket: 0303 06550)**

[2004] A.J. No. 674

2004 ABQB 442

131 A.C.W.S. (3d) 1055

Docket Nos. 0103 18932, 0303 06550

Alberta Court of Queen's Bench
Judicial District of Edmonton

Wachowich C.J.Q.B.

Heard: May 12, 2004.

Judgment: June 15, 2004.

(17 paras.)

Civil procedure -- Trials -- Juries -- Right to.

Application by the defendant, Burnett, for a civil jury trial. The plaintiff, Lung, cross-applied to consolidate the two actions. Lung was involved in two separate motor vehicle accidents. Lung claimed that the second accident aggravated the injuries from the first.

HELD: Applications allowed. The amount of damages claimed was within the amount prescribed by the regulation, and this was a motor vehicle accident claim; therefore, Burnett had a prima facie right to a jury trial. Also, a jury could have conveniently dealt with the issues that were to be raised at trial. The expert reports were not of such complexity that a jury would have been unable to

conveniently hear the two actions together.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 229.

Jury Act, R.S.A. 2000, c. J-3, as amended by R.S.A. 2000, c. 16 (Supp.), ss. 17, 17(1), 17(2).

Counsel:

Brij Mohan for the Plaintiff

William B. Hembroff for the Defendant Terri Ann Burnett

Brian Wallace for the Defendant Robert Denholm

MEMORANDUM OF DECISION

1 WACHOWICH C.J.Q.B.:-- This is an application by the Defendant, Terri Ann Burnett for a civil jury trial pursuant to s. 17 of the Jury Act, R.S.A. 2000, c. J-3, as amended by R.S.A. 2000, c. 16 (Supp).

2 A cross-application has been filed by the Plaintiff pursuant to Rule 229 of the Alberta Rules of Court for consolidation of two actions, both resulting from motor vehicle accidents involving the same plaintiff.

3 Section 17 of the Jury Act reads:

17(1) Subject to subsection (2), on application by a party to the proceeding, the following shall be tried by a jury:

...

(b) an action founded on any tort or contract in which the amount claimed exceeds an amount prescribed by regulation,

...

(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.

4 The Jury Act gives an applicant a prima facie right to a trial by jury if the action falls within one of the categories in s. 17(1): *Crossley v. Simpson*, [2002] A.J. No. 1032, 2002 ABQB 763. The action which is the subject of the application for a civil jury trial arises from a motor vehicle accident, and the plaintiff's claim well exceeds the amount prescribed by regulation.

5 The burden then falls on the opposing party to establish that one of the factors in s. 17(2) applies so as to render a trial by jury inconvenient.

FACTS

6 The first motor vehicle accident occurred on September 2, 2000 when the Plaintiff was driving a motor vehicle which was struck by a motor vehicle driven by the Defendant, Terri Ann Burnett. As a result of the collision, the Plaintiff alleges injuries including headaches, TMJ, neck, shoulder and back pain.

7 The second motor vehicle accident which involves the same Plaintiff occurred approximately two years later on July 29, 2002 when the Plaintiff was a passenger in a motor vehicle which was struck by a motor vehicle driven by the Defendant, Robert Denholm. As a result of the second collision, the plaintiff alleges that the injuries she sustained in the accident of September 2, 2000 were aggravated.

8 Although there is no application before me for a civil jury trial with respect to the second collision, the Defendant in the second motor vehicle accident has indicated that he favors consolidation of the actions whether the matter proceeds before a jury, or a judge alone.

9 The Defendant in the first motor vehicle accident anticipates that the first action will require seven days or less of trial time. The Defendant deposes in her affidavit that the defence may be calling two expert witnesses including a general practitioner and a dentist.

10 The Plaintiff submits that there is complex expert evidence and that a prolonged examination of documents or accounts will be necessary. The Defendant Burnett states that the trial will not involve complex issues.

ANALYSIS

11 The Defendant Burnett submits that I must first determine whether a civil jury trial should be granted in the first action, before any order for consolidation should be made.

12 The Defendant also submits that so long as he is allowed to exercise the right to a jury trial, he takes the position that there is no objection to such a consolidation. He further submits that if by consolidating the actions the matter is determined to be too complex, or too lengthy for a jury to hear, then he opposes the consolidation application.

13 In the circumstances of this case, I do not find it necessary to make a determination as to whether I accept the Defendant Burnett's submission that I must first determine whether a civil jury trial should be granted before I turn to the question of consolidation of the actions. Whether or not I decide whether the first action could be conveniently dealt with by a jury or not, I find that in this case, even if the two actions were consolidated, the issues to be raised could be conveniently dealt with by a jury.

14 In order to determine whether a matter can conveniently be tried by a jury, I must consider whether a jury will be able to "comprehend, recollect and analyze the scientific evidence presented to them": *Sinclair v. Stehr*, [2002] A.J. No. 489, 2002 ABQB 374.

15 The reports mentioned by the Plaintiff are not of such complexity that a jury could not conveniently hear either the first action, or both actions together.

16 With respect to the first action, and in consideration of the factors in s. 17(2) of the Jury Act, I find that the issues to be raised at trial can be conveniently dealt with by a jury. The Plaintiff has not discharged its burden of proof.

17 The application of the Defendant, Terri Ann Burnett, for a civil jury trial is granted, and the Plaintiff's application for consolidation of actions 0103 18932 and 0303 06550 is granted.

WACHOWICH C.J.Q.B.

cp/e/nc/qw/qlmmm