

SUPREME COURT OF NOVA SCOTIA
Citation: Quinn Estate v. Bitar Deli Ltd., 2009 NSSC 412

Date: 20091102
Docket: Hfx No. 279593
Registry: Halifax

Between:

Mike Quinn, as executor of The Estate of Joan Quinn

Plaintiff

v.

Bitar Deli Limited, a body corporate

Defendant

LIBRARY HEADING

Judge: The Honourable Justice C. Richard Coughlan
Heard: October 29, 2009 (in Chambers), in Halifax, Nova Scotia
Decision: November 2, 2009 (Orally)
**Written Release
of Decision:** February 3, 2010
Subject: Practice - Motion to Strike Jury Notice

Summary: Bitar Deli applied for summary judgment of the plaintiff's claim. The parties agreed that rather than proceeding with the summary judgment application, the issues of liability and damages would be severed and a trial held on the issue of liability, after which, if necessary, the parties would attempt to agree on the amount of damages.

In the plaintiff's request for a date assignment conference, he elected trial by jury. The defendant moved to remove the trial from the jury.

Issue: Should the election for trial by judge and jury be set aside?

Result: The motion was granted and the election for trial by jury was set aside, and the trial as to whether Bitar Deli has any fault is to be tried by judge alone.

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Counsel: Sean F. Layden, for the Plaintiff
C. Patricia Mitchell, for the Defendant

Coughlan, J.: (Orally)

[1] Bitar Deli Limited (Bitar Deli) moves for an order the trial on the issue of whether there is any fault on its part be tried by a judge alone, and the election by the plaintiff that the issue be tried by a jury be struck.

[2] On July 3, 2006, the late Joan Quinn fell at premises owned by Bitar Deli and died as a result of the fall. The executor of the Estate of Joan Quinn commenced action against Bitar Deli pursuant to the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163 for damages, and pleaded the *Occupiers' Liability Act*, S.N.S. 1996, c. 27.

[3] Bitar Deli applied for summary judgment of the plaintiff's claim. The parties agreed that rather than proceeding with the summary judgment application, the issues of liability and damages would be severed and a trial held on the issue of liability, after which, if necessary, the parties would attempt to agree on the amount of damages. Eventually, an order severing the issue of the Bitar Deli's liability was issued, which provided, in part:

1. **IT IS HEREBY ORDERED** that the issue of whether there is any fault on the part of the Defendant in these proceedings (the "Separated Issue") shall be severed, separated and determined separately from all other issues in the within proceedings;
2. **AND IT IS FURTHER ORDERED** that the determination of the Separated Issue shall occur before the determination of any other issues in this proceeding, subject to any further Order of this Honourable Court.

[4] In the plaintiff's request for a date assignment conference, he elected trial by jury. Bitar Deli moves to remove the trial from the jury.

[5] Section 34(a)(ii) of the *Judicature Act*, R.S.N.S. 1989, c. 240 provides:

Trials and procedure

34 Subject to rules of Court, the trials and procedure in all cases, whether of a legal or equitable nature, shall be as nearly as possible the same and the following provisions shall apply:

(a) in civil proceedings, unless the parties in person or by their counsel or solicitors consent to a trial of the issues of fact or the assessment or inquiry of damages without a jury, the issues of fact shall be tried with a jury in the following cases:

....

(ii) where either of the parties in a proceeding requires the issues of fact to be tried or the damages to be assessed or inquired of with a jury and files with the prothonotary and leaves with the other party or his solicitor a notice to that effect at least sixty days before the first day of the sittings at which the issues are to be tried or the damages assessed or inquired of, except that, upon an application to the Supreme Court or to a judge made before the trial or by the direction of the judge at the trial, such issues may be tried or such damages assessed or inquired of by a judge without a jury, notwithstanding such notice;

[6] Civil Procedure Rule 52.02(1), (3) and (5) provides:

Jury election

52.02 (1) For the purpose of Section 34 of the *Judicature Act*, the provisions in that Section respecting jury trials and procedure are modified by this Rule 52.02.

....

(3) Parties to an action, to which Part 12 does not apply, must elect trial by judge or trial by jury in the request for a date assignment conference or the memorandum for the date assignment conference judge..

....

(5) An action in which a party elects trial by jury must be tried by a jury, unless another party makes a motion for an order that the action be tried by a judge and satisfies the judge hearing the motion on either of the following:

(a) under a Rule, under legislation, or by operation of other law, the action cannot be tried by a jury;

- (b) the action is not for a cause referred to in subclause 34(a)(i) of the *Judicature Act*, and justice requires trial by a judge rather than by a jury.

[7] The plaintiff, having given a jury notice, has a *prima facie* right to a jury. In giving the majority opinion in *MacNeil v. Hill The Mover (Canada) Ltd. and Cannon* (1961), 27 D.L.R. (2d) 734, Ilesley, C.J.N.S., in giving the majority opinion, stated at p. 737:

The plaintiff, having given a jury notice, had a *prima facie* right to a jury: *Starratt v. Dom. Atlantic R. Co.* (1912), 5 D.L.R. 641 at p. 644, 46 N.S.R. 272 at p. 276, *Butler v. Charlottetown et al. (No. 1)*, [1944] 3 D.L.R. 343, 17 M.P.R. 193.

See also *Burton v. Harding & Marks*, [1952] 3 D.L.R. 302 at p. 306, O.W.N. 126 at p. 128, *per* Mackay, J.A.:

Subsection (3) of s. 57 [the counterpart of the proviso of our s. 42(1)(b)] by its very nature presupposes the intervention of some outside circumstances or occurrences making it just and desirable, because of such intervention, that the action should be tried without a jury.

King v. Colonial Homes Ltd., 4 D.L.R. (2d) 561 at p. 566, [1956] S.C.R. 528 at p. 533 *per* Cartwright, J.: “This Court has more than once affirmed that the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except from cogent reasons.”

and *Neelands & Neelands v. Haig*, 9 D.L.R. (2d) 165 at p. 167, [1957] O.W.N. 337 at p. 339, *per* Laidlaw, J.A.:

The right of a party to a trial with a jury is a substantive one. The defendant in this case gave notice of trial by jury, and he is not lightly to be deprived of his right to have the trial proceed in that way. A trial Judge has a wide, and indeed one might say an absolute, discretion as to the mode of trial, but his power to decide whether a case should be tried with a jury or without a jury is one that cannot be exercised arbitrarily or capriciously. It must be exercised in a judicial manner and there must be sufficient reason to deprive a party of the substantive right to trial in the manner chosen by him.

[8] In *Wall v. 679927 Ontario Ltd. et al.* (2006), 242 N.S.R. (2d) 300 (C.A.), Oland, J.A., in giving the Court’s judgment, stated at p. 305:

A party to litigation is not to be deprived of the prima facie right to a jury trial except for cogent reasons...

[9] In appropriate cases, a judge can for cogent reasons require the trial proceed before a judge rather than a jury despite an election for trial by jury. Examples of such reasons include: where the case involves issues of law rather than fact, or where the issues of fact are negligible or so closely interwoven with issues of law to be inseparable, where the case involves scientific or technical issues that cannot be conveniently presented to the jury, or where the evidence is extensive and complex.

[10] Bitar Deli submits there are no relevant questions of pure fact derived through lay witness evidence for jury determination on the severed issues of fault. Rather, the critical issues bearing on the element of fault are ones of pure law, or mixed law and fact, with any factual components turning on deciphering expert evidence on applicable National Building Code provisions and construction, all of which are properly issues to be decided by a judge where the combination of such issues are all which will be involved in a given determination, that the questions to be determined are predominately legal questions as opposed to basic questions of fact.

[11] The plaintiff submits there are questions of fact to be dealt with in the trial, including questions of contributory negligence, credibility including credibility of the various expert witnesses. He also submits the question of liability with respect to the death of Joan Quinn is a question of mixed law and fact which can be separated by the trial judge. The plaintiff submits, for example, where Joan Quinn was located after she fell is a factual issue to be determined by the jury and the lighting present at the time of the incident needs a factual determination.

[12] This is an Occupiers' Liability case, such cases are often tried before a jury. It is not complex. The issue to be determined by the trial is narrow, whether Bitar Deli has any fault in this proceeding. The issue of any contributory negligence of the late Joan Quinn is not in issue. The number of facts in question are minuscule. There is agreement, for example, that no hand rail was present.

[13] The issues to be determined when dealing with the limited question to be tried really deal with the interpretation of the National Building Code. These

issues are mainly issues of law or, if fact, so interwoven with the issues of law as to be inseparable. Considering the circumstances of this proceeding, including the narrow issue to be tried, agreement as to many of the facts surrounding the unfortunate incident, and that the matters to be decided are issues of law, or mixed law and fact as set out above, I grant the motion and set aside the election by jury and the trial as to whether Bitar Deli has any fault is to be tried by judge alone.

[14] I award the defendant costs in the amount of \$750.00 in the cause.

Coughlan, J.