Demeter v. Occidental Life Insurance Company of California and two other actions

[1979] O.J. No. 4042

23 O.R. (2d) 31

94 D.L.R. (3d) 465

9 C.P.C. 322

[1979] 1 A.C.W.S. 151

Ontario
High Court of Justice

Labrosse, J.

January 30, 1979.

Richard J. **Sommers,** for plaintiff.

John A. Campbell, Q.C., for Occidental Life Insurance Company of California and Dominion Life Assurance Company.

Wilson E. McLean, Q.C., for British Pacific Life Insurance Company and Dominion Life Assurance Company.

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1 **LABROSSE, J.**:-- This is an application by the defendants to strike out the jury notice served by the plaintiff in the above three actions which have been ordered to be tried together.

2 The application is based on three grounds:

1. Publicity. 2. Complexity of the facts and legal issues. 3. The provisions of s. 62(4) of the Judicature Act, R.S.O. 1970, c. 228.

3 The plaintiff has been involved in criminal proceedings which received extensive coverage through newspapers, television and radio. Subsequent to the criminal trial, the incident was referred to on television programmes, in a book and in a movie.

4 The second ground of the application deals with the complexity of the facts and the legal issues. The plaintiff claims the proceeds of insurance policies. In their statement of defence, the defendants have pleaded misrepresentation, failure to disclose, that the plaintiff was criminally responsible for the death of the named insured and that he failed to comply with the provisions of the Insurance Act, R.S.O. 1970, c. 224. They have counterclaimed for a declaratory judgment that no moneys are payable to the plaintiff. Although the pleadings are not in themselves complicated, the duration of the trial is estimated at four to six months. There are approximately 125 witnesses who may be called and a substantial number of exhibits that may be filed. Numerous questions may have to be submitted to the jury. It is argued that the jury would have difficulty remembering the evidence. The complexity of the facts and of the legal issues flowing from the various defences require that these actions be tried by a Judge alone.

5 The third ground is based on s. 62(4) of the Judicature Act. Having omitted s-ss. (2) and (3) which do not apply on this application, s. 62 provides as follows:

> 62(1) Subject to the rules, if a party desires that the issues of fact be tried or the damages be assessed by a jury, he may, at any stage of the proceedings, but not later than the fourth day after the close of the pleadings, or, if notice of trial or assessment is served before that time, within two days after service of such notice or within such other time as is allowed by a judge, file and serve on the opposite party a notice in writing requiring that the issues be tried or the damages be assessed by a jury, and if such notice is given, subject to subsection 3, they shall be tried or assessed accordingly.
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> (4) Subsection 1 does not apply to causes, matters or issues over the subject of which the Court of Chancery had exclusive jurisdiction before the commencement of The Administration of Justice Act of 1873.

6 The granting of a declaratory judgment, as requested in the counterclaims, and the allegations of innocent misrepresentation were matters within the exclusive jurisdiction of the Court of Chancery. Consequently, the jury notice should be struck out.

7 The plaintiff has a prima facie right to a jury trial and has given notice that he wishes to exercise that important right:

> Such v. Dominion Stores Ltd., [1961] O.R. 190, 26 D.L.R. (2d) 696. The Supreme Court of Canada 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 for cogent reasons: King v. Colonial Homes Ltd. et al., [1956] S.C.R. 528 at p. 533, 4 D.L.R. (2d) 561 at p. 566.

8 In Such v. Dominion Stores Ltd., the Court of Appeal commented on certain factors which should be considered before a Judge in Chambers (now a Motions Court Judge) strikes out a jury notice. There is a burden upon the defendants to convince the Motions Court Judge that the action should be tried without a jury. Under Rule 400, a Judge exercises a judicial discretion which should only be exercised when it is clear that the action is one which ought to be tried without a jury.

9 There is no doubt that there has been a good deal of publicity as a result of the plaintiff's trial. However, the material before me does not indicate that the defendants will be prejudiced by such publicity. It seems to indicate that it is the jurors who will somehow be prejudiced. In this day and age there is instant and extensive coverage of any event that the media deems worthy of news, but publicity does not automatically warrant a conclusion that a jury cannot be found that will arrive at a fair appreciation of the evidence.

10 In Martin v. Deutch et al., [1943] O.R. 683 at p. 692, [1943] 4 D.L.R. 600 at pp. 602-3, Robertson, C.J.O., said:

> It does not appear to me that the circumstance of the former trial, with a very large award of damages, and the public notice that the exceptionally large verdict was given, would afford sufficient ground for refusing the plaintiff a jury on a new assessment. I think it is right to assume that a jury will try to observe its oath and to give a verdict according to the evidence before it. Neither does it appear to me that it is probable that a jury will render an unjust verdict because it has become known generally that a large amount of insurance was carried by the defendants.

And at pp. 694-5 O.R., pp. 604-5 D.L.R., Fisher, J.A., in a dissenting judgment, said:

> I am at a loss to understand the right of a judge sitting in chambers, in the exercise of his discretion, to prejudge the minds of the jury--and especially the minds of a special jury --on supposition or conjecture only. Who knows now whether any one or all of a jury empanelled had ever read a word about the verdict or the insurance in the newspapers, and if they did that they would remember a year and a half afterwards anything about it, and even if one of more had read about it, who knows now, notwithstanding the oaths they had taken, that they would be unduly or wrongly influenced? The view I take is that a jury, being a judicial fact-finding tribunal and the sole judge of the facts, is entitled to the same respect as a presiding judge whose function is to instruct the jury as to the law, and that an order made by a judge in chambers in the exercise of his discretion, based, as I have stated, on supposition or conjecture only, which has

> the effect of taking from a plaintiff his common law right to have his case tried by a jury, which the plaintiff has in this case, is clearly wrong.

11 I agree with both quotations. I cannot accept that because of the publicity referred to in the material, a majority of jurors would already have formed definite and practically unalterable opinions. Although I recognized that the right to a jury in a civil case is not the same as in certain criminal trials, some recent criminal trials were widely publicized before trial and the jurors have discharged their duties in accordance with their oaths.

12 In any event, as stated by my brother Zuber in Bellitti v. Canadian Broadcasting Corp. (1973), 2 O.R. (2d) 232 at p. 236, 44 D.L.R. (3d) 407 at p. 410, 15 C.C.C. (2d) 300: "The problem is simply met and sorted out in the jury selection process."

13 It cannot be disputed that the facts and issues of law will be complicated but there is nothing strange or exceptional about that. Jurors often try very long and complicated murder or conspiracy trials. A jury is presently on a very long trial involving some nine accused persons together with 11 companies charged with serious and complicated offences.

14 In the present actions, the defences are substantially identical. Numerous issues referred to in the material relate to the admissibility of evidence. They will be decided by the trial Judge and not by a jury. I fail to see how the issues could be any more difficult than at the criminal trial of the plaintiff and they were decided by a jury. If they do become so complex, the trial Judge can exercise his discretion.

15 The examinations for discovery have not been completed. By the time the actions come to trial, the issues may be narrowed by discoveries and admissions and some of the complexities may have disappeared. On this ground, the trial Judge will be in a much better position to make a decision which he may delay until substantial evidence has been heard.

16 With respect to the argument that the jury notice should be struck out because of s. 62(4) of the Judicature Act, I agree with counsel for the plaintiff that if the statement of claim raises legal issues, a defendant who raises equitable issues does not prevent himself or the plaintiff from having the action tried by a jury: see Ontario Bank v. Stewart (1903), 2 O.W.R. 811; McMahon et al. v. Lavery (1887), 12 P.R. (Ont.) 62; Sawyer et al. v. Robertson (1900), 19 P.R. (Ont.) 172, and Temperance Colonization Society v. Evans et al. (1887), 12 P.R. (Ont.) 48. The argument of the defendants is further weakened by the provisions of Rule 258, which states:

> 258. Where both legal and equitable issues are raised and notice for a jury has been given, the action shall be entered for trial at the jury sittings, and such issues shall be tried at the same time, unless the trial judge otherwise directs.

It would appear that the Rule is mandatory and that the issue of a jury is exclusively within the discretion of the trial Judge and not within the discretion of a Motions Court Judge.

17 Finally, it was argued that if the jury notice was struck out at this time, the trial Judge could nevertheless direct a trial by jury. In Such v. Dominion Stores Ltd., supra, Morden, J.A., stated at p. 194 O.R., p. 700 D.L.R.:

> But if the jury notice is struck out in Chambers and the action comes on for trial in a non-jury list, the power of the presiding Judge to order a trial before a jury is almost illusory ... In practice, an order made in Chambers striking out a jury notice amounts in most cases to a final determination of the mode of trial while on the other hand a refusal of such an order leaves the ultimate decision to the trial Judge.

At that time Rule 398(2) [now Rule 400(2)] read as follows:

> 398(2) The refusal of such an order by the Judge in Chambers shall not interfere with the right of the Judge presiding at the trial to try the action without a jury. Nor shall an order made in Chambers striking out a jury notice interfere with the right of the Judge presiding at the trial to direct a trial by jury.

The second sentence of subrule (2) has since been removed. If the power of the trial Judge was illusory then, it has to be practically nonexistent today.

18 I realize that the question as to whether the action should be tried by a jury should be determined as quickly as possible. However, I am not convinced at this stage of the proceedings that the action is one which ought to be tried without a jury. The defendants have failed to satisfy me in my function as a Motions Court Judge that the action should be tried without one. I have referred to a number of reasons which confirm the very practical approach in proper cases to leave the ultimate decision to the trial Judge. This is such a case.

19 The application is dismissed with costs.

Application dismissed.