

# Court of Queen's Bench of Alberta

**Citation: Junuzovic v. Kostenuk, 2008 ABQB 347**

**Date:** 20080610  
**Docket:** 0303 01045  
**Registry:** Edmonton

Between:

**Ifeta Junuzovic**

Plaintiff

- and -

**Gordon Kostenuk**

Defendant

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**Memorandum of Decision  
of the  
Honourable Chief Justice  
A.H.J Wachowich**

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## **I - Introduction**

[1] The Defendant applies for a civil jury trial pursuant to s. 17 of the *Jury Act*, R.S.A. 2000, c. J-3. The Plaintiff opposes the application.

## **II - Relevant Statutory Authority**

[2] Section 17 of the *Jury Act* reads as follows:

Subject to subsections (1.1) and (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 the amount prescribed by regulation, or

...

- (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 can-not 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.

[3] The *Jury Act* Regulation, Alta. Reg. 68/83, sets out the limits contemplated by s. 17(1)(b):

- 4.1 The amount that is prescribed for the purposes of section 17(1)(b) and (c) of the Act is:
  - (a) \$10 000 if the action was commenced in the Court before March 1, 2003, and
  - (b) \$75 000 if the action was commenced in the Court on or after March 1, 2003.

### III - Facts

[4] This civil jury application arises from a motor vehicle accident ("MVA") which occurred in the City of Edmonton on January 20 or 21, 2001. Although both parties acknowledge that a collision took place, there is some dispute over the circumstances in which the collision occurred. The Plaintiff, Ifeta Junuzovic, alleges that her vehicle was rear-ended by the Defendant, Gordon Kostenuk's, vehicle while stopped at a yield sign on the offramp of the Yellowhead Trail at Fort Road / Wayne Gretzky Drive. The Defendant claims that the Plaintiff slammed on her brakes after travelling a short distance across Wayne Gretzky Drive, at which point the collision occurred.

[5] The Plaintiff submits that she has suffered the following injuries: chronic pain, fibromyalgia, injuries of the neck, back and shoulders with associated soft tissue damage, tenderness and reduced range of motion, pain at back of the head, upper and lower back pain and tenderness, headaches, dizziness, jaw pain and tenderness and temporomandibular joint injury, muscle spasms, memory impairment, shock, emotional upset and distress, anxiety/nervousness, depression, fatigue, sleep deprivation/disturbance, insomnia, on-going pain and suffering and loss of capacity to perform her usual employment, recreational, household and other activities. There is no evidence of any previous medical conditions.

[6] The Plaintiff has claimed general damages, including future loss of income (\$175,000), loss of housekeeping (\$30,000), special damages (\$75,000), and damages for cost of future care (\$15,000).

[7] The Defendant's notice of motion suggests that a jury trial will not involve a prolonged examination of documents or accounts or a scientific or long investigation. An affidavit filed by the Defendant estimates that a jury trial will take less than two weeks to complete.

[8] The Plaintiff argues that there will be complex information presented on issues of liability as well as a number of issues around the medical history of the Plaintiff since the MVA. The fact that the Plaintiff intends to call 12 expert witnesses and will require a Bosnian interpreter suggests that the evidence will be difficult to record, remember, comprehend and collect and that findings of fact cannot be conveniently made by a jury. The Plaintiff also suggests that the trial would require a minimum of approximately three weeks.

#### IV - Analysis

[9] This tort action was commenced before March 1, 2003. The amount of the claim exceeds \$10 000. Pursuant to s. 17(1)(b) of the *Jury Act*, the parties have a *prima facie* right to have this matter tried with a jury (**Ralph v. Robertson** (1995), 173 A.R. 146 (Q.B.)).

[10] As the party opposing the jury application, the Plaintiff bears the onus of demonstrating that this matter cannot be conveniently heard by a jury (**Govias v. Tempo School**, 1999 ABQB 571, 248 A.R. 189). The right to be tried by jury is not to be removed lightly (**Couillard v. Smoky River (Municipal District No. 30)**, [1980] A.J. No. 163 (C.A.)).

[11] The factors to be considered in determining convenience under s. 17(2) were consolidated by Rooke J. In **Shaw v. Standard Life Assurance Co.**, 2006 ABQB 156, 398 A.R. 181 ("**Shaw**") at para. 11:

- (a) prolonged examination of documents;
- (b) prolonged examination of accounts;
- (c) scientific or technical investigation;
- (d) long investigation; and
- (e) complexity, which requires a consideration of the following:

- (i) the number of issues;
- (ii) the number of experts;
- (iii) the need for an interpreter;
- (iv) the legal issues to be put to the jury;
- (v) conflicts of expert opinions;
- (vi) causation; and
- (vii) other factors.

[12] While it is possible that a jury application can be dismissed on the basis of a single factor, generally a combination of these factors must be present before a civil jury application will be denied (*Shaw*; *Al-Sheemary v. Dhaliwal*, 2007 ABQB 514, [2007] A.J. No. 911).

[13] These factor have been applied in a number of cases (see, for example, *Nieman v. Kennedy Estate*, 2006 ABQB 894, [2006] A.J. No. 1587; *Redshaw v. Fairfield*, 2007 ABQB 163, [2007] A.J. No. 529 (“*Redshaw*”); *Willox v. Betz*, 2006 ABQB 944, [2006] A.J. No. 1698; *Wiedman v. Chajowski*, 2007 ABQB 152, [2007] A.J. No. 265, *Stuparyk v. Schultz*, 2007 ABQB 639, [2007] A.J. No. 1164 (“*Stuparyk*”)) and will be followed in the case at hand.

#### **(a) Prolonged examination of documents**

[14] The number of documents, in and of itself, is not important. Rather the amount of time the jury will require to study the documents is important (*Redshaw*).

[15] The Defendant has provided two expert reports totalling 18 pages. The Plaintiff has provided medical reports from eight individuals totalling 48 pages. While these deal with medical analysis and will require attention from the jury, they can be presented in a manner understandable to the average individual. All of the reports are clearly written and they do not use an excessive amount of technical language. As a result, a prolonged examination of the documents should not be required.

#### **(b) Prolonged examination of accounts**

[16] The Plaintiff’s claims include loss of future income and loss of housekeeping. While the value of the claim is set out in the Statement of Claim, there has been no evidence presented on this application as to the complexity of the economic or accounting issues, nor as to whether expert evidence will be called.

#### **(c) Scientific or technical investigation**

[17] Rooke J. noted in *Shaw* at para. 20 that “although some medical reports use specialized terminology and discuss concepts which may be foreign to a jury, if these reports are properly explained by counsel and by the live evidence of their authors, a jury will be able to understand and assess them”.

[18] The injuries to the Plaintiff are not unique or complex and the expert medical reports that have been provided are clearly written, relatively brief and capable of being understood by a jury.

[19] The Plaintiff alleges that the Defendant will call a bio-mechanics engineer in order to dispute liability. The Plaintiff further claims that she will be required to call a similar expert in rebuttal. It was noted by Rooke J. in *Shaw* at para. 21 that “complex and conflicting engineering and collision reconstruction evidence can be sufficient in itself to deny a jury”. However, such reports have not been presented on this application, precluding any determination of their complexity or degree of conflict.

**(d) Long investigation**

[20] A long investigation is an important consideration on a civil jury application. Long investigations can be caused by any number of factors including the number of witnesses and the complexity of the evidence (*Shaw* at para.. 24). In *Saythavy v. Elshahib*, 2006 ABQB 613, [2006] A.J. No. 1032 (“*Saythavy*”) a civil jury application was granted with an estimated trial time of 15 days, while in *Alberta Laser Alignment Services Ltd. V. Scandinavian Grinding Mills Systems Inc.*, 1998 ABQB 257, 222 A.R. 108 a trial of three to four weeks, combined with other complexities, was held to be too long for a jury.

[21] The Defendant has indicated that the trial will take less than two weeks to complete, while the Plaintiff expects the trial time to be greater than three weeks. Given my conclusions on complexity, below, a trial time of three weeks does not render this case inappropriate for a civil jury.

**(e) Complexity**

[22] Rooke J. noted in *Shaw* at para. 27 that “to ‘meet’ the onus, the respondent must establish evidence of ‘actual complexity’ and not merely the anticipation of complex evidence”. The Plaintiff’s anticipation of complex, and possibly conflicting, bio-mechanical reports will therefore not be considered in analysing the complexity of the evidence to be presented to the jury.

*(i) Number of issues*

[23] The issues in this case will be causation, credibility and damages. The number of issues is not significant enough to justify denying a civil jury.

*(ii) Number of experts*

[24] The number of experts, alone, is not a determining factor in assessing the convenience of a jury trial, rather the complexity of the expected evidence should be the focus of the inquiry (*Shaw* at para 34). For example, in *Murdoch v. Balfour*, 2002 ABQB 494, [2002] A.J. No. 777 (“*Murdoch*”) the complexity was low, so a civil jury application was granted despite the fact that 24 experts were expected to be called to give evidence at trial. However, in *Teichgraber v. Gallant*, 2001 ABQB 265, 290 A.R. 338 a civil jury application was denied where only 12 experts were anticipated, as the evidence was complex.

[25] In the present application, the Plaintiff expects to call 12 experts, while the Defendant expects to call 2 experts to testify. I find that the complexity is not unduly increased by the number of experts.

*(iii) Need for an interpreter*

[26] The Plaintiff will require a Bosnian interpreter. Although the need for an interpreter, in and of itself, is not fatal to a jury application, it is a factor that can combine with other issues to justify denial of a civil jury application (*Shaw* at para. 38; *Chan v. Smith*, 2005 ABQB 263; *Singh v. Malhi*, 1999 ABQB 87 (“*Singh*”). The Plaintiff is the only party requiring translation in this action. While the need for an interpreter may increase somewhat the complexity of the trial, it is not fatal to the civil jury application.

*(iv) Legal issues to be put to the jury*

[27] Certain legal issues may be difficult to put to a jury, including subrogation, professional negligence and insurability (*Shaw* at paras. 41-3). The case at hand is a tort resulting from a MVA, the legal tests for which are not beyond the comprehension of the average juror. Civil juries have been deemed appropriate in these situations many times before (*Stuparyk; Saythavy; Murdoch; Singh*).

*(v) Conflicts of expert opinion*

[28] As Rooke J. noted in *Shaw* at para. 45, it is expected that expert opinions will conflict somewhat in litigation. This fact alone is not a reason for denying a jury application. Only where the jury will have trouble understanding the nature of the issues in conflict does a conflict of expert opinion become fatal.

[29] In the present case the conflicts between experts are minor and can be resolved by a reasonable jury using common sense.

*(vi) Causation*

[30] As I noted in *Stuparyk* at para. 40, issues of causation are made more complicated when dealing with multiple accidents, or pre-existing or subsequent injuries. Rooke J. held in *Shaw* at para. 48 that juries can sort through issues of causation in low-impact and rear-end collisions.

[31] Further, no evidence of any pre-existing condition has been presented and many of the medical reports note that the Plaintiff had no medical conditions prior to the MVA. The lack of a pre-existing condition is a significant factor in assessing the complexity of this case.

*(vii) Other factors*

[32] Rooke J. stated in *Shaw* at paras. 51-2 that the list of factors to be considered is not finite and includes: counterclaims, third party proceedings, difficulty in recording, remembering, comprehending and collating the evidence, and whether justice is better served without a jury.

[33] The Plaintiff claims that the laboriousness and difficulty in recording, remembering, comprehending and collecting evidence will be onerous for a jury. Given the clear language of the reports and the limited number of issues, it is difficult to see how the evidence would be too complex for a jury.

**V - Conclusion**

[34] Certain factors discussed above, such as the need for an interpreter and the length of the trial, will affect the complexity of the trial in this case. However, having weighed all of the relevant factors, including the nature of the documents and the investigation, and the overall complexity of the case, I find that the Plaintiff has not established that this matter cannot be conveniently heard by a jury.

[35] Accordingly, the application is granted and I direct that this matter be tried with a jury.

Heard on the 28<sup>th</sup> day of March, 2008.

**Dated** at the City of Edmonton, Alberta this 10<sup>th</sup> day of June, 2008.

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**A.H.J Wachowich**  
**C.J.C.Q.B.A.**

**Appearances:**

Senia Tarrabain  
Tarrabain & Company  
for the Plaintiff

Jonathan Hillson  
Fraser Milner Casgrain LLP  
for the Defendant