Case Name:

Cipparone v. Royal and Sunalliance Insurance Co. of Canada

RE: Robert Cipparone, Plaintiff, and
Royal and Sunalliance Insurance Company of Canada, Defendant

[2010] O.J. No. 3482

2010 ONSC 4528

88 C.C.L.I. (4th) 133

2010 CarswellOnt 5949

Court File No. 04-15448

Ontario Superior Court of Justice

J.A. Ramsay J.

Heard: August 17, 2010.
Judgment: August 18, 2010.

(13 paras.)

Civil litigation -- Civil procedure -- Trials -- Jury trials -- Jury notice -- Motion by the defendant insurance company for leave to file a jury notice out of time allowed -- The plaintiff insured was suing the defendant for accident benefits and damages -- The defendant's previous counsel had inadvertently omitted to file a jury notice -- The new defence counsel promptly moved to correct the omission as soon as it was noticed -- The delay was not intentional or tactical and was thus not unconscionable -- Furthermore, the plaintiff was not prejudiced as there was still time to adjust his case and the jury notice would not cause a delay.

Insurance law -- Actions -- By insured against insurer -- Practice and procedure -- Motion by the defendant insurance company for leave to file a jury notice out of time allowed -- The plaintiff insured was suing the defendant for accident benefits and damages -- The defendant's previous counsel had inadvertently omitted to file a jury notice -- The new defence counsel promptly moved to correct the omission as soon as it was noticed -- The delay was not intentional or tactical and was thus not unconscionable -- Furthermore, the plaintiff was not prejudiced as there was still time to adjust his case and the jury notice would not cause a delay.

Counsel:

Mr D. Nicassio for the plaintiff, responding.

Mr S. Coons, for the defendant, moving party.

ENDORSEMENT

1 **J.A. RAMSAY J.**:-- The plaintiff is suing his own insurance company for accident benefits said to arise from a car accident. He is also claiming damages for mental distress, and aggravated and punitive damages for the wrongful administration of the claim. Discoveries have taken place. The matter was set down for trial in May 2010. The trial has been scheduled for the September 2010 sittings. The defendant, having been given leave to bring this motion after the matter was set down for trial, moves for leave to file a jury notice out of time.

2 The defendant's trial lawyer deposes that he was retained in June 2010, at which point he noticed that the previous lawyer had omitted to file a jury notice. I accept the lawyer's conclusion that this was done inadvertently. In car accident cases, insurance company defendants almost invariably request a jury. There is no reason to think that this case is any different in that regard from the many other similar cases outstanding in this jurisdiction.

3 The principles that apply to a motion of this sort have been stated recently by the Divisional Court in *Nikore v. Proper* 2010 ONSC 2307. There are two key factors to be taken into account: (1) the circumstances of the delay; and (2) whether there is prejudice to the other side. The length and reasons for the delay are both relevant to whether the delay is unconscionable. As to prejudice, there are no presumptions, but logical inferences may be drawn in appropriate cases. The closer the case is to trial, the more likely it will be that prejudice is inferred. The court in *Nikore* gave as an example the case in which the motion was made the week before trial, and noted that by that time, counsel will likely have prepared witnesses and exhibits based on presentation to a judge alone. Similarly, if the effect of the jury notice is to delay the trial, prejudice to the other party can be inferred. The fact that discoveries have taken place does not give rise to a presumption of prejudice.

4 In the case at bar, pleadings were closed in June 2005. Some five years elapsed before the present motion was brought. The explanation for the delay is that new counsel was appointed in June 2010. The new counsel noticed the omission of the jury notice and promptly moved to correct it. The delay was not intentional or tactical. Particularly in view of the allegations of bad faith and the claim for damages for administration of the claim, credibility questions will arise which make the case eminently suitable for a jury. I see no oblique motive in requesting a jury or in the timing of the request. In these circumstances I do not find the delay to be unconscionable. To my mind, in the circumstances the motion turns on whether prejudice would be occasioned to the plaintiff.

5 Mr Lou Ferro, who will be trial counsel for the plaintiff, has deposed that a jury notice filed at this stage will occasion prejudice to his client for a number of reasons.

6 He says that "some lay witnesses may find the lack of comfort of a judge alone hearing their evidence disconcerting." I find that hard to believe. Unless they have unusual sensitivities, I doubt

that testifying before six ordinary fellow citizens hearing the evidence would be more disconcerting than testifying before a judge alone.

7 Mr Ferro says that if the matter becomes a jury trial, he will need an expert opinion on the issue of bad faith, "as a jury may not understand the test under *Fidler v. Sunlife*, [2006] 2 S.C.R. 3, on aggravated damages, bad faith and mental distress." Counsel who argued the motion was unable to tell me what sort of expertise would qualify a witness to testify as proposed. These issues seem to me to involve the application of the law to facts that are within the realm of the layman to understand. Expert evidence would not be admissible.

8 Mr Ferro says that if the case goes as a jury trial, he will need an actuarial report on the present value of the income replacement benefit. He would need one anyway. Judges are not actuaries. If the plaintiff had an actuarial report, the defendant would likely agree on the present value of the benefit, jury or no.

9 Mr Ferro deposes that if he had known it would be a jury trial he would have anticipated different presentation techniques at trial including demonstrative evidence of various body parts as an aid to understanding the dynamics of the impairment in question. With a month at least before the commencement of the trial, I do not think that it is too late for Mr Ferro to make the necessary adjustments. They are essentially adjustments. He does not need to re-think his whole case.

10 Mr Ferro says that the trial would likely take 10 days without a jury and possibly 17 days with a jury, in part because he would have to bring pre-trial motions to exclude inadmissible evidence. The few days increase in the length of the trial does not constitute prejudice. Nor does the prospect of pre-trial motions to exclude evidence, although I note in passing that I would have thought that motions to exclude inadmissible evidence would be brought whether the case is tried with or without a jury.

11 The jury notice would not cause the trial to be delayed. The action can be tried at the September 13 sittings either way. As a jury trial, it would be decided sooner, since there would be no chance of a reserved Judgment.

12 I conclude that filing a jury notice would not cause prejudice to the plaintiff.

13 The motion is granted. The parties may make brief written submissions to costs. The defendant's submissions must be filed by August 24, 2010 at 4 pm, and the plaintiff's by August 31.

J.A. RAMSAY J.

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