Case Name:

Walker v. John Doe

Between
Jason Walker, Plaintiff, and
John Doe and Insurance Corporation of British Columbia,
Defendants

[2012] B.C.J. No. 1565

2012 BCSC 1112

Docket: M085239

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

P.G. Voith J.

Heard: April 10-13, 16-20 and 23-27, 2012.
Oral judgment: April 26, 2012.

(37 paras.)

Civil litigation -- Civil procedure -- Trials -- Jury trials -- Charge to jury -- Removal of issue from jury -- Determination of whether questions should go to jury and plaintiff's counsel using charts in closing submissions -- Plaintiff claimed he was struck by tire from unknown motorist's vehicle -- Parties agreed judge would deal with s. 24 deductions from jury award -- Questions asked about period of future total disability and whether there was additional period plaintiff would be unable to work -- Permanent and total disability had precise definitions and without contract available, jury could not be properly instructed -- Plaintiff's use of graphs to show wage loss and future care claim modest and helpful to jury, so permitted.

Damages -- Assessment of damages -- Measure of damages -- Deductions -- Determination of whether questions should go to jury and plaintiff's counsel using charts in closing submissions -- Plaintiff claimed he was struck by tire from unknown motorist's vehicle -- Parties agreed judge would deal with s. 24 deductions from jury award -- Questions asked about period of future total

disability and whether there was additional period plaintiff would be unable to work -- Permanent and total disability had precise definitions and without contract available, jury could not be properly instructed -- Plaintiff's use of graphs to show wage loss and future care claim modest and helpful to jury, so permitted.

Insurance law -- Automobile insurance -- Accident benefits -- Total disability -- Compulsory government schemes -- Claims against parties unknown -- Determination of whether questions should go to jury and plaintiff's counsel using charts in closing submissions -- Plaintiff claimed he was struck by tire from unknown motorist's vehicle -- Parties agreed judge would deal with s. 24 deductions from jury award -- Questions asked about period of future total disability and whether there was additional period plaintiff would be unable to work -- Permanent and total disability had precise definitions and without contract available, jury could not be properly instructed -- Plaintiff's use of graphs to show wage loss and future care claim modest and helpful to jury, so permitted.

Determination of whether draft questions eight and nine should go to the jury and the propriety of the plaintiff's counsel using diagrams and charts in his closing submissions. The plaintiff claimed he was struck by a tire from an unknown motorist's vehicle while riding his motorcycle. The parties had now agreed the judge would deal with s. 24 deductions from the jury award. The central deduction would relate to the plaintiff's long-term disability payments he had been receiving since the accident. Question eight asked what the plaintiff's period of future total disability would be. Question nine asked whether there would be a period beyond that where he would be unable to work. The plaintiff's counsel wanted to develop bar graphs and charts to show wage loss and future care costs claim. The defendant argued visual aids were inappropriate in closing arguments.

HELD: Questions would not go to jury. Visual aids permitted with conditions. Permanent and total disability had precise definitions and, without access to the contract in question, the jury could not be properly instructed. As such, the matter would be determined by the judge when the parties returned. There was no case law supporting the defendant's claim visual aids were absolutely prohibited. Trial judges had wide discretion to determine what aids to a jury were helpful and appropriate. The plaintiff's intended use was modest and finite and would help the jury understand the issues. The instructions to the jury would caution that the aids were not evidence, and the plaintiff was to provide them to the defendant in advance.

Statutes, Regulations and Rules Cited:

Insurance (Vehicle) Act, RSBC 1996, CHAPTER 231, s. 24, s. 106

Counsel:

Counsel for the Plaintiff: T.P. Harding.

Counsel for the Defendants: I.D. Aikenhead, Q.C., A. Jones.

Oral Ruling

1 P.G. VOITH J. (orally):-- The two issues addressed in these reasons arose late yesterday afternoon while counsel and I were reviewing both my draft charge to the jury and the draft questions that they had prepared.

2 The first issue relates to whether two of the draft questions, questions 8 and 9, should properly go to the jury. The second relates to the propriety of counsel for the plaintiff using diagrams or charts of a future wage loss and future care calculation, as well as certain other bar graphs that deal with time lines, in his closing submissions to the jury later today.

Question One: Should Draft Questions 8 and 9 be put to the Jury?

3 The backdrop to this issue is important. The plaintiff in this case says that he was struck by a tire from the vehicle of an unknown motorist while riding his motorcycle. Thus, s. 24 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 is engaged. It is common ground that s. 24 establishes a series of specific requirements that a plaintiff must satisfy before he or she can succeed against ICBC as a nominal defendant. These requirements are reflected in several of the questions that are going to the jury and in respect of which there is no dispute.

4 It is also common ground that s. 24 requires various types of deductions, including, for example, that "insured claims" be deducted from the sums the plaintiff would otherwise receive. From the outset there has been disagreement between the parties about what moneys, which the plaintiff has received from different sources, should properly be deducted from any sum the plaintiff might receive at this trial.

5 There has also been disagreement about whether I or the jury, after it has been properly instructed, should make these deductions. There are still further issues about, for example, whether the jury should be instructed about the upper limits on recovery that are established by s. 24. None of these issues, I am advised, are expressly addressed by the relevant case law. To the credit of both counsel, they have been able to prepare a written agreement on many of these issues. That agreement is Exhibit 51 at trial. Paragraphs 1-4 of Exhibit 51 provide:

1. The parties agree that the Learned Trial Judge, as opposed to the jury, will deal with the s. 24 (and s. 106 Regulations) deductions to be made, if any, from any award that the jury may make concerning this matter.
2. The procedure to be used will be that the evidence that the parties determine is

needed for the judge will be presented to the court, either in voir dire or normal evidence, that exhibits will be marked, and either be put in the hands of the jury or not, on the reference of the Learned Trial Judge, and the Judge will determine the deductions to be made based on that evidence.

3. Concerning Manulife, although some evidence has been submitted as an exhibit to the trial concerning the Manulife contract, Manulife has not provided a full copy of the relevant contract to date. A representative of Manulife is to attend the trial on Tuesday, April 24, but has advised counsel that he does not yet have a copy of the full contract, but can obtain one in due course.
4. The parties agree that the Manulife representative can give his evidence in a voir dire and provide his evidence to the court, such as is determined to be admissible, and that evidence, together with any contract that can be provided to the court in due course, will be used by the Learned Trial Judge in determining s. 24 (and s. 106) deductions. The parties will not object to one or the other parties introducing the Manulife contract after the jury has been discharged, subject to the usual objections as to authenticity.

6 The central deduction that has been at issue relates to the long-term disability payments that the plaintiff has received from Manulife since shortly after the accident.

7 By virtue of the foregoing agreement, the parties called Mr. Lize, a senior claims consultant with Manulife, in a *voir dire*. Mr. Lize was called to give evidence about how Manulife deals with various issues that arise from Manulife's long-term disability policies. Mr. Lize was not familiar with the particular disability contract or policy at issue. Importantly, that contract was not produced during the trial, nor do I have it at this point, though counsel for the plaintiff has endeavoured to obtain it for some time.

8 Mr. Lize confirmed that he would provide a copy of the particular contract in issue to the parties, and further confirmed that he would address a series of questions and issues that would be sent to him by counsel, which he was not able to respond to directly during his evidence. All of this information was then to be made available to me so that I could, at some point in the near future, address the issues raised in Exhibit 51.

9 The present concern derives, as I have said, from draft questions 8 and 9, which counsel for ICBC argues should be put to the jury at this time. Those two questions respectively provide:

8. What is the period of time in the future, if any, is it a real possibility that the plaintiff will be totally disabled from working at any job for which he is reasonably qualified by training, education or experience, from today until the end of his working life?

Answer: Period of future total disability _____

9. If you answered Question 8 with a number larger than NIL, but not a number that takes him to the end of his working life, to what degree or extent, if any, is it a real possibility that the plaintiff will be totally disabled from working at any job for which he is reasonably qualified by training, education or experience, from beyond the period stated in Question 8, until the end of his working life?

Answer: Period of time: _____

Percentage: _____%

10 Counsel for ICBC further argues that I can instruct the jury on what constitutes a "permanent disability" or a "total disability" on the basis of the language contained in an information booklet that is provided to employees who are covered by the Manulife disability policy in question. That information booklet, under the heading "Total Disability", states:

> You are considered totally disabled, during the first 24 months in which you receive benefits, if you are unable to perform any and every duty of your occupation. After this period you are considered totally disabled if you are unable to perform any and every duty of any occupation for which you are reasonably qualified by training, education or experience.
>
> In order to determine eligibility for benefits during the first 24 months, you may be required to be examined by a medical doctor chosen by the Plan or the insurance company. In order for benefits to continue beyond the first 24-month period, you may again be required to be examined by a medical doctor chosen by the Plan or the insurance company.
>
> To remain qualified for benefits, you must be under the regular care and personal attendance of a licensed doctor of medicine. Statements of continuing disability signed by your attending physician will be required on a regular basis.

11 The fact that I had understood from my review of those portions of Exhibit 51 that I have referred to, that I, rather than the jury, was to deal with the substance of draft questions 8 and 9 is not the issue. Nor, at this point, is the issue whether as a matter of law the substance of draft questions 8 and 9 would normally go to the jury.

12 The central question at this point is whether I could, in concept, properly instruct the jury with the information I presently have at hand. I do not consider that I can.

13 Both counsel agree that what constitutes a "permanent or total disability" will be determined by the terms of the contract in question. The term "permanent or total disability" will have a precise definition. I do not have the contract in question and do not believe that an information booklet constitutes an adequate substitute.

14 In Kim Lewison, *The Interpretation of Contracts*, 4th ed. (London: Sweet & Maxwell Limited, 2007) at 119, the author states:

> The division between what is a question of law and what is a question of fact is extremely difficult to draw. However, it has been said on many occasions that the proper interpretation of a contract is a question of law. Thus it is for the judge to interpret the contract even when he is assisted by a jury and the jury is bound to accept the judge's direction upon the construction of the contract. Indeed, it is largely because trials were heard by juries that the construction of a contract is classified as a question of law at all. ...

15 Thereafter, at 120, he states:

> Since the proper construction of a written contract is a question of law, the court is not bound by concessions about its meaning made by counsel in the course of argument. ...

16 Still further, at 121-125, he confirms that the process of construction is a two-step process and, at 121, states:

> The process of construction, therefore, consists of at least two elements, one element of which is factual, and the other legal. The two stage process was summarized by Lindley L.J. in *Chatenay v. Brazilian Submarine Telegraph Co Limited*, [1891] 1 Q.B. 79, as follows:
>
> > "The expression 'construction', as applied to a document, at all events as used by English lawyers, includes two things: first the meaning of the words; and secondly their legal effect, or the effect to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law.
>
> Thus in a criminal trial it is the function of the jury to rule on the construction of

> a contract, rather than the function of a jury to decide what it means as a question of fact. However, in a libel action although the question whether words are *capable* of bearing a defamatory meaning is a question of law of the judge, whether they *do* bear such a meaning is a question of fact for the jury.
>
> [emphasis in original]

17 In this case, absent access to the contract in question, I am unable to properly perform the functions that fall to me. I am unable, assuming without deciding that the substance of questions 8 and 9 does fall to the jury, to properly instruct the jury at this time. I believe that only with the contract in question in hand will I be able to address questions 8 and 9, and I will do so when counsel and I return to address the further matters that are raised in Exhibit 51.

18 While this resolution of the defendant's present objection may not be optimal, it is much preferable to providing an instruction to the jury that is inaccurate or does not have an adequate basis.

Question Two: Visual Aids

19 Counsel for the plaintiff proposes, in his closing submissions, to: (a) develop a bar graph or time line that explains the period of time that each of past wage loss, future wage loss, and the other heads of damage being claimed cover; and (b) visually depict how a future wage loss claim or future care claim should be calculated from the relevant tables that are found in the Civil Jury Instructions.

20 Counsel for the defendant argues that the use of such visual aids or summaries is not permissible in a closing submission. This position was advanced in absolute terms and would be unchanged even if, for example, counsel for the plaintiff provided the particular graph or calculation to counsel for the defendant in advance of its use. I was not provided with any case law on this point by either party.

21 I do not, in the main, accept the submission of counsel for the defendant. I have been unable, in the time available to me, to find any civil cases that deal with the matter. In the criminal context, the leading case is *R. v. Bengert* (1980), 53 C.C.C. (2d) 481, 15 C.R. (3d) 114 (B.C.C.A.). The relevant passages are found at 517-521.

22 In *Bengert*, as part of its closing address, the Crown sought to give the jury a chronological chart that it had prepared. The chart was approximately 30 pages in length. The decision indicates that the chart was marked as an exhibit at trial, but it appears that this must have been done just before the closing, as the chart is described as having been inspired by a similar chart used by counsel for one of the accused after the Crown had completed its evidence.

23 The defence objected to the Crown's request that the jury be permitted to take the chart into the jury room. The trial judge rejected this argument, emphasizing its illogic -- given that the jury could simply transcribe the chronology in their own notes and bring that summary into the jury room -- and the fact that such aids would be helpful given the length and complexity of the trial.

24 The trial judge also pointed out that defence counsel had the right to introduce their own chronologies to the jury. So long as the jury was properly cautioned that the chronology was not itself evidence, the trial judge had no difficulty with its introduction.

25 The Court of Appeal upheld the trial judge's decision and concluded, at para. 160:

> ... In a long and complex trial of this nature, the members of the jury were entitled to anything that would assist them in dealing with the evidence reasonably, intelligently and expeditiously.

26 Subsequent to *Bengert*, the Court of Appeal decided *R. v. Fimognairi*, [1983] B.C.J. No. 576 (C.A.). The relevant passages are found at paras. 48-60. Before the Crown's closing address to the jury, a written summary of the evidence, which had been prepared over the course of the trial by the Crown, was furnished to each juror, as well to defence counsel. The decision does not state whether the summary was made an exhibit. The jurors were permitted to take the summary with them into the jury room.

27 On appeal, defence counsel argued that the Crown summary went far beyond what was permitted in *Bengert*, as it contained commentary from the Crown on the evidence. Nevertheless, the Court of Appeal upheld the trial judge's decision. Hinkson J.A., for the court, felt that the jury had been appropriately cautioned on the use to be made of the summary and said, at para. 54:

> [54] I remain of the view expressed in *Bengert*. In a long and complex conspiracy trial, it is a matter for the exercise of discretion by the trial judge as to what form of summary may be permitted, to assist the jury in dealing with the evidence. In the present case I am not persuaded that the trial judge erred in permitting the use of the Crown evidence summary.

28 The court also rejected the argument of defence counsel that inaccuracies in the summary that had been raised and corrected should have been corrected in the jurors' written summaries before they were taken into the jury room. Further, they stated that while it is desirable that defence counsel see any summary before it is handed to the jury, this too is within the trial judge's discretion.

29 More recently, in *R. v. Basi*, 2010 BCSC 713, MacKenzie A.C.J.S.C., as she then was, confirmed the continued application of *Bengert* and *Fimognairi*. The case concerned the distribution of a chart and a binder to each juror by the Crown before its opening address. Thus, the issue arose in a somewhat different context than in the other cases. Madam Justice MacKenzie emphasized both

that the chart was not evidence and the importance of an appropriate instruction to the jury. At para. 9, she said:

> [9] Particularly in long or complex cases, the trial judge has discretion to permit summaries or aids to be given to juries to assist them in dealing with the evidence reasonably, intelligently and expeditiously: *R. v. Bengert* (1980), 53 C.C.C. (2d) 481 (B.C.C.A.); *R. v. Fimognairi*, [1983] B.C.J. No. 576 (C.A.). I observe, as well, that the Canadian Judicial Council's model jury instructions and *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Carswell, 2005) contemplate that charts and summaries may be given to juries, as both have model instructions on that topic.

30 Some of the limits of the principles expressed in *Bengert* can be seen in the recent decision of *R. v. Steele*, 2010 BCCA 125. That case dealt with enlarged photos that the defence sought to put before the jury. The trial judge instead acceded to the Crown's argument that the photos could not go before the jury as a "visual aid", as they had not been referred to in evidence.

31 Agreeing with the trial judge, the Court of Appeal, at para. 22, said:

> [22] It seems doubtful that the enlargements could have been marked as exhibits since they were not adverted to by any witness, a usual pre-condition to admissibility of this sort of evidence. See *R. v. Creemer*, [1968] 1 C.C.C. 14 (N.S.C.A.). The photographs seem to me to be in a different category from the chronology of dates and events prepared by the Crown and referred to in argument which were allowed to be taken into the jury room in the case of *R. v. Bengert* (1980), 53 C.C.C. (2d) 481, 15 C.R. (3d) 114 (B.C.C.A.). The judge ruled in that case that such a chronology was akin to notes the jurors could have made themselves and there was no vice in allowing the jury to have this to help them assess the evidence in this very lengthy trial. This Court found no error in this ruling of the judge. In my view, photographic images are not analogous to what was being considered in *Bengert*. There must be some verification in evidence of the source and accuracy of such items before they can be allowed to form part of the record of the case before the jury. The judge did not err when he ruled these items should not be permitted to be placed before the jury.

32 In line with MacKenzie A.C.J.S.C.'s reasons in *Basi*, I have reviewed both *Watt's Manual of Criminal Jury Instructions* and the CJC's model jury instructions. Both seem to confirm that charts or summaries can be used during a closing to help illustrate or explain the evidence, even if they are not made exhibits at trial.

33 The purport of the decisions in *Bengert*, *Fimognairi* and *Basi*, moreover, is that trial judges have a wide discretion to permit what aids to the jury they consider are helpful or appropriate.

34 Support for this wider discretion is also found in Jones A. Olah, *The Art and Science of Advocacy*, loose leaf, (Toronto: Carswell, 1990). At 18.8, he writes, unfortunately with no citation other than to another secondary source that I was unable to access:

> The use of demonstrative aids that are not part of the trial record, such as blackboards, charts, models, and summaries, is in the trial judge's discretion. If the evidence provides reasonable foundation for these summaries or charts, then their use should be permitted.

35 In this case, subject to the comments I am about to make, I am satisfied that counsel for the plaintiff can proceed as he wishes. The intended use of the "demonstrative aids" that he has described is modest, finite, and would assist the jury in understanding the issues that are before them. This is also consistent with the guidance provided in each of *Bengert*, *Fimognairi* and *Basi*. Still further, my instructions will contain a caution confirming that neither the time line nor the calculations constitute "evidence" before the jury.

36 I have two further comments. First, I am directing that counsel for the plaintiff prepare a sheet of paper that depicts each of his time lines and model calculations. Counsel for the defendant is to be provided these documents in advance. This will limit the prospect that the depictions stray beyond their intended purpose and raise still further objections.

37 Second, the materials prepared by counsel can be marked, albeit not as exhibits in the trial, so that they will be available in the future, should that be necessary.

P.G. VOITH J.

cp/e/qlrds/qllmr/qlced