SUPREME COURT OF NOVA SCOTIA
Citation: Nelson v. Queripel, 2011 NSSC 478

Date: 20111222
Docket: Ken No. 189394
Registry: Kentville

Between:

Jennifer Kathleen Nelson

Plaintiff

v.

Gregory Queripel

Defendant

Decision

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	December 6, 2011
Written Reasons:	December 22, 2011
Counsel:	Sharon L. Cochrane, for the plaintiff Robert G. Belliveau, Q.C., for the defendant

Moir J.:

[1] Thirteen years ago, Ms. Nelson was injured in a single car crash. Nine years ago, Ms. Nelson sued the driver. Five years ago, a defence was filed. The defendant made several motions for disclosure between 2008 and this year. On October 7, 2011 the defendant requested trial dates. The plaintiff responded to the request a month later as follows:

> Further to the Request for Date Assignment Conference which was filed by the Defendant in this matter, the Plaintiff objects to this matter being set down for trial. The witnesses are not in this area and we will be filing a Motion for a change of venue. This should be done prior to having a Date Assignment Conference so that the matter can be dealt with in the proper jurisdiction.

[2] I heard the plaintiff's motions to refuse the request for a date assignment conference and to change the place of trial. As suggested by Rule 47.04(3), the hearing was by teleconference. It was held on December 6, 2011. Under the Rules, the motion to refuse the request ought to have been made and heard sooner than it was.

[3] The defendant opposed both motions. I announced at the teleconference that the motions were dismissed, with reasons to follow. Counsel were then able to

give me enough information to set dates for trial. I set the dates and now provide the reasons for dismissing the motions.

[4] The plaintiff filed the documents that started her action with the prothonotary at Kentville, and she nominated Kentville as the place of trial.

[5] The main point in favour of moving the trial to Halifax is that no party, witness, or counsel lives in Kentville. Plaintiff's counsel has his office nearby in Wolfville and, otherwise, everyone resides in Colchester, Hants, and Halifax counties.

[6] Halifax has no great advantage over Kentville for the parties and witnesses who live in Colchester or Hants. The defendant's counsel and the defendant's only expert witness live in Halifax, but they are content to travel to Kentville, which is only an hour from Halifax. That leaves just a few medical witnesses for the plaintiff who live in Halifax.

[7] There is no evidence that the few witnesses who are to be called by the plaintiff and who live in Halifax would be much inconvenienced by having to travel to Kentville to give evidence.

[8] The main advantage of Kentville over Halifax is that the case can be tried sooner in Kentville. According to the affidavit of Michael Blades, the Prothonotary at Kentville had time available for a two week trial in the fall of 2012 but, when Mr. Blades called, the scheduling office in Halifax could only offer dates in the fall of 2013.

[9] Plaintiff's counsel referred to *Shortliffe's Grocery Ltd. v. Irving Oil Co.*, [1973] N.S.J. 151 (S.C.) in which Justice Dubinsky set the tone for changes of trial venue. The tone sounded through the decades: Justice Burchell in *Lintaman v. Goodman,* [1983] N.S.J. 37 (S.C.); Justice Hall in *MacDonnell v. Wilton*, [1985] N.S.J. 342 (S.C.); Justice Haliburton in *Nova Scotia (Attorney General) v. Annapolis*, [1996] N.S.J. 322 (S.C.); Justice Oland, now of the Court of Appeal, in *Bowater Mersey Paper Co. v. Queens (Municipality)*, [1999] N.S.J. 361 (S.C.); and the Court of Appeal in *Ruiz v. Colby Physioclinic Ltd.*, 2002 NSCA 113.

[10] The 1972 Rules provided for the plaintiff to select the place of trial. Rule 28.02(2)(b) allowed a defendant to obtain an order changing the place of trial by satisfying the court on two points, including that "it is just". Justice Dubinsky concluded, at para. 29 of *Shortliffe*:

> [T]he plaintiff in an action has the right to control the course of litigation and to select the forum and this right is not to be interfered with unless it can be shown by strong evidence that the great preponderance of convenience warrants the change - in short, that it is just for the change to be ordered.

I emphasize the close connection Justice Dubinsky made between plaintiff control of an action and a plaintiff's procedural right to select the place of trial. The concept of plaintiff control led to a narrowing of the phrase in the Rule, "it is just", to "the great preponderance of convenience warrants".

[11] The plaintiff's motion raises an important issue: Whether the great preponderance of convenience principle still applies?

[12] The question of the applicability of the principle under the present Rules was not raised, or decided, in *Zomar Investments Ltd.*, 2011 NSSC 104. Although Justice Rosinski referred to Justice Oland's decision in *Bowater*, he did so only in discussing "What are the consequences of adopting Matheson's proposed

interpretation of LAVA?" and his references are to the extension of the principle to the old applications brought by originating notice and, from there, to present motions, the former application brought by interlocutory notice.

[13] Rule 28.02(1) provided that "the place of trial … shall be the place of trial named in the statement of claim". Rule 28.02(2) put restrictions on a defendant's ability to obtain a change of trial venue. It read:

> Upon satisfying the court that he has a good defence, and
>
> (a) all the plaintiff's reside out of the jurisdiction, or
>
> (b) it is just
>
> a defendant may obtain an order changing the place of trial to any place within the Province.

[14] Rule 28.02(2) was original to the 1972 Rules, except the paragraphing into (a) and (b) was created by a 1992 amendment to correct the classic *A and B or C* ambiguity noted in *Weldon v. Kavanagh*, [1989] N.S.J. 397 (C.A.).

[15] Rule 28.02(3) preserved the court's overriding discretion to require that an action be tried "at any time or at any place within the Province". To some extent, Rule 30.03 and the opening words of Rule 28.02(1) overlapped Rule 28.02(3).

[16] Justice Dubinsky said that the effect of Rule 28.02(1) was "to enable a plaintiff to apply for an order changing the place of trial": *Shortliffe's Grocery* at para. 7. (He can only have meant that the opening words of the Rule had such an effect.) He saw the defendant as being in a more restricted position:

> Insofar as a defendant is concerned, he must come within the provisions of Rule 28.02(2) to obtain such an order. In other words, a defendant seeking a change of venue must show (a) that he has a good defence and (b) that either all the plaintiffs reside out of the jurisdiction or, if the plaintiff resides in the jurisdiction, that "it is just" that such an order be granted to him.

Rule 28.02(2) derived from Order XXXIV, rule 1(2) of the pre-1972 Rules, which also restricted the circumstances in which a defendant could obtain an order changing the venue for trial.

[17] Failures to prove a good defence thwarted the defendant's attempt to have the venue changed in *Cody's Ltd. v. Chester Branch of The Canadian Legion of The British Empire Service League* (1962), 47 M.P.R. 203 (S.C. *in banco*) per Patterson, J., *Shortliffe's Grocery* at para. 12, and *Weldon v. Kavanagh*.

[18] Although the proof of a good defence was insufficient in *Shortliffe's Grocery*, Justice Dubinsky decided to provide some guidance on what "it is just" meant in the circumstances confronting him: para. 15. After making reference to several nineteenth century English and Nova Scotia judgments requiring proof that the "preponderance of convenience" favours a move, he turned to *McDonald v. Dawson* (1904), 8 O.L.R. 72 (S.C.), see para. 22 of *Shortliffe's Grocery*. That decision recognized there must be "a great, or very great, or an overwhelming preponderance of convenience shewn by the defendant", that the last adjectival phrase now controlled the practice in Ontario, and that the restriction resulted from the principle that "The plaintiff, as *dominus litis*, has the right to control the course of litigation."

[19] After reviewing some more recent decisions, Justice Dubinsky reached the conclusions to which I referred in the beginning: "the plaintiff in an action has the right to control the course of litigation" and the plaintiff, therefore, has the right to control the forum "unless it can be shown by strong evidence that the great preponderance of convenience warrants the change".

[20] The notions that the plaintiff is the dominant litigant and that the plaintiff has a right to control the course of the litigation had become much weakened by 1972. The expanded obligations for disclosure and production were out of the plaintiff's hands. The expanded rights to discovery were equally rights of the plaintiff, of the defendant, and of other kinds of parties. Any party could file a notice of trial.

[21] In light of that background and in the light of modern principles of statutory interpretation, it might have been argued that "it is just" in the 1972 Rules could not be turned into a requirement for proof of a "great preponderance of convenience". However, the *Shortliffe's Grocery* principle was followed so consistently that a repetition of Rule 28.02 in the 2008 Rules would have to be taken as a continuation of the requirement for proof of a great preponderance of convenience.

[22] The 2008 Rules did not replace the wording of old Rule 28.02 with anything similar. Both the text and the context of Rule 47.04(1) differ substantially from that of the old Rule. Let us start with the text, then we shall set it in context.

[23] Rule 47.04 reads:

> 47.04 (1) A party may make a motion to change the place of trial or hearing.
>
> (2) The judge presiding at a trial or hearing may direct that the trial or hearing, or part of it, be held at any place and in any suitable building.
>
> (3) Rule 25 - Motion by Appointment, provides for a motion that may be made by teleconference.

[24] Rule 47.04(1) says simply, "A party may make a motion to change the place of trial or hearing." Gone is any distinction between plaintiffs and defendants. Gone is any requirement to prove a good defence. Gone is any reference to residency.

[25] Read literally, that is to say read without context, these words provide the motions judge with a discretion to choose the place that is the more just. (See also, Rule 94.06.) No literal interpretation could insinuate a requirement for proof by strong evidence of a great balance of convenience.

[26] Context accommodates the simple meaning of Rule 47.04, such that grafting into it some requirement for proof of a great preponderance of convenience would cause disharmony, if not do violence to the words.

[27] The scope provisions are often a good place to start getting the context of a Rule. Rule 47.01 treats as equals selection of the place of trial and requesting a change in the selected place.

[28] Rule 47.03 deals with selection and it treats trials, hearings of applications, and hearings of motions the same way: place is selected by the party who starts an action, the party who starts an application, and the party who makes a motion.

[29] In the broader picture, we see a set of Rules in which the notions of the plaintiff as dominant litigant and of a plaintiff's right to control the course of litigation have ceased to be meaningful. There is one change, in addition to those made in 1972 to which I referred, that deserves emphasis on this point.

[30] Control of an action is largely in the hands of the parties, rather than one of them. They have resort to judges in the numerous ways painstakingly catalogued in Part 6 - Motions, but, up to a point, uninvited interference by the court has been reduced under the new Rules. The point at which the court becomes somewhat controlling is when a party calls for trial dates.

[31] We now allow parties to request trial dates before they are ready for trial. Often this happens long before trial readiness. This creates risks, risks in which the public has an interest. Judges are required to assess the risks when assigning dates. In various ways, protections can be built in by the assigning judge. And, some Rules are designed for the court to be alerted to unforseen risks after trial dates are assigned.

[32] All of which is only to say that the plaintiff can no longer be said to have a right to control the course of litigation until trial. The principle underlying the requirement for proof of a great preponderance of convenience is no longer with us.

[33] Something also has to be said about another change in the broader context of litigation. The relative importance of time and place has changed.

[34] A longer wait for trial was a factor to be taken into consideration in motions under the old Rule for a change of trial venue, but "it can only be in an exceptional

case that its influence will be decisive": Justice Gale, later Chief Justice, as quoted at para. 25 of *Shortliffe's Grocery*.

[35] The present Rules allow for witnesses to testify by teleconference. They allow for trials to be moved about. On the other hand, they set short deadlines for filings before a date assignment conference and they impose restrictions on adjournments.

[36] "Speedy" remains part of the trilogy in Rule 1 - Purpose. Time should not take a backseat to place when one assesses the justice of changing the venue of a civil trial.

[37] In conclusion, Rule 47.04(2) does not incorporate the principle in *Shortliffe's Grocery*. Rather, on a motion for a change of venue the motions judge must consider all relevant circumstances and exercise the discretion in the way that the judge determines will best do justice. There is no preference for the place selected by the plaintiff.

Application to the Facts of this Case

[38] I do not have sufficient evidence from which to find that the witnesses living in Halifax will be much inconvenienced by having to travel to Kentville. Although no witness lives near Kentville, none except the ones in Halifax could be expected to care much which of the two places they have to travel to.

[39] The counsel who lives near Kentville proposes Halifax, and the counsel who lives in Halifax argues in favour of Kentville.

[40] While the evidence suggests some advantage for Halifax as the more convenient place for travel, the advantage is weak.

[41] The claim has been outstanding, and the case has been in litigation, for a very long time. The cost of even a few months if the case is shifted to Halifax is too high when the delay in bringing the case to trial is considered. I fault no one for that delay, but it heightens the advantage of Kentville over Halifax because the delay is ended sooner in Kentville.

[42] Therefore, justice favours keeping the trial in Kentville.

J.