IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Batiste v. WestJet Airlines Ltd. (d.b.a. Swoop Inc.),* 2025 BCSC 663

Date: 20250409
Docket: S135285
Registry: Kelowna

Between:

Jodean Batiste and Andre Henry

Plaintiffs

And

WestJet Airlines Ltd. (d.b.a. Swoop Inc.) and Jane Doe aka Hannah and John Doe aka Roberts

Defendants

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Plaintiffs:	M.A. Patterson
Counsel for the Defendants:	K.S. Chaudhary
Place and Date of Trial/Hearing:	Kelowna, B.C. April 3, 2025
Place and Date of Judgment:	Kelowna, B.C. April 9, 2025

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[1] At issue before the court is whether the plaintiffs should be permitted to proceed with a trial by jury despite having failed to file and serve a jury notice in accordance with the *Supreme Court Civil Rules* [*Rules*].

[2] Specifically, in the notice of application filed by the plaintiffs, Jodean Batiste and Andre Henry, on January 13, 2024 (the "Application"), the plaintiffs seek the following relief:

a) An order that the jury notice filed and served on the defendants on November 26, 2024 (the "Jury Notice"), is valid;

b) In the alternative to the order sought in paragraph (a), the plaintiffs have leave for an extension to file and serve the Jury Notice; and

c) Costs.

Overview of the Claim

[3] The plaintiffs filed the notice of civil claim on October 7, 2022, and the amended notice of civil claim on February 21, 2024 (the "ANOCC").

[4] The ANOCC pleads three causes of action: defamation, breach of contract and intentional infliction of mental suffering. The plaintiffs seek general damages, aggravated and punitive damages, loss of wages, costs, including special costs, and pre-judgement and post-judgment interest.

[5] Part 1 of the ANOCC, which is lengthy, pleads material facts relating to events that primarily took place on August 10, 2024. Specifically, it is alleged that the plaintiffs were rightful holders of airline tickets on a flight from Toronto, Ontario, to Kelowna, British Columbia, operated by the Defendant, WestJet Airlines Ltd. (d.b.a. Swoop Inc.) ("Swoop").

[6] After the commencement of boarding of the aircraft but prior to take off, an issue arose regarding the plaintiffs' seating (the "Incident"). The primary individuals involved in the Incident were the plaintiff, Jodean Batiste ("Batiste"), and the defendant, Hanan

Darvesh (“Darvesh”), a Swoop flight attendant. After preparations for take off were completed, the aircraft returned to the gate and the plaintiffs were asked to leave the aircraft voluntarily or police would be called. Police were called and the plaintiffs were both escorted off the aircraft and through Toronto’s Pearson International Airport.

[7] Both during and following the Incident, it is alleged that Darvesh made false allegations, wilfully and intentionally failed to correct false information and intentionally and recklessly repeated false allegations. Darvesh is alleged to have committed these acts negligently, oppressively, and maliciously with racial indifference towards the plaintiffs and with the unlawful intention of injuring the plaintiffs.

[8] It is further alleged that following the Incident, the defendant, Jeffrey Roberts, a pilot of the Swoop plane during the Incident, and an unidentified Swoop representative made false statements on social media and through mainstream media that were defamatory of the plaintiffs.

[9] The plaintiffs’ claims in the ANOCC are denied entirely by the defendants in the amended response to civil claim filed March 20, 2024. I note specifically that it is plead that WestJet Airlines Ltd. and Swoop Inc. are separate legal entities and that WestJet Airlines Ltd. is not a proper party to this action. That issue is not before me, and I have simply relied upon the style of cause as pled in the ANOCC.

Procedural History

[10] After the plaintiffs filed the NOCC in October 2022 and the defendants filed the original response to civil claim in November 2022, the litigation was effectively dormant until September 2023 when the plaintiffs scheduled a case planning conference for October 4, 2023.

[11] In anticipation of the case planning conference, and as required by the *Rules*, the plaintiffs and the defendants each filed and served case plan proposals. The case plan proposal form includes a box for “proposed mode of trial”. The plaintiffs’ case plan proposal rather unhelpfully says “supreme court”, thus not providing any indication as to an intention to proceed to a judge alone or jury trial. The defendants’ case plan proposal

indicates “judge alone” in the proposed mode of trial box. No orders were made at the case planning conference.

[12] After the exchange of the amended pleadings referred to above in early 2024, examinations for discoveries were conducted of the plaintiffs, Darvesh, Roberts and a Swoop investigator in June 2024.

[13] By letter dated June 20, 2024, plaintiffs’ primary counsel, Monique Patterson, sent a letter to counsel for the defendants (“AHBL”) providing an amended list of documents containing the response to a request made at Batiste’s examination for discovery. The letter further stated as follows under the heading “**TRIAL**”:

> Given the Examinations for Discovery in this matter have been concluded we seek to secure dates for a 7-day jury trial.
>
> Please provide your available dates for a 7-day jury trial in 2025.

[14] On June 28, 2024, Ms. Patterson’s paralegal sent an email to AHBL following up on the June 20, 2024 letter “requesting availability for a 7-day Jury Trial in 2025.”

[15] Some discussions appear to have occurred offline between support staff at each firm and on September 13, 2024, Katelyn Chaudhary, an associate at AHBL, sent an email to Ms. Patterson regarding document disclosure, discovery requests and trial dates. With respect to the issue of trial dates, Ms. Chaudhary’s email states:

> We confirm our availability for the 7-day Jury trial to be set for the assize of September 15, 2025. These dates are held as discussed between our assistants.

[16] On that same date, Ms. Patterson’s paralegal emailed Ms. Chaudhary advising that the assize of September 15, 2025, was now a four-day assize and asked if counsel was available “for the 7-day jury trial to be scheduled for the 9-day assize of September 22, 2025.”

[17] The very prompt response from AHBL was an email stating, “we confirm we are available on September 22, 2025, for the 7-day jury trial.”

[18] Accordingly, the plaintiffs filed a notice of trial on September 13, 2024, setting the matter down for a seven-day trial on the assize in Kelowna commencing the week of September 22, 2025 (the “Notice of Trial”).

[19] The plaintiffs served the Notice of Trial on AHBL on September 17, 2024. In accordance with R. 12-6(3)(a), where a party seeks have a trial of an action heard by a jury, a jury notice must be filed and served within 21 days of the Notice of Trial. In this case, the deadline for doing so was October 8, 2024.

[20] The plaintiffs failed to file the Jury Notice by October 8, 2024. Of note, the deadline for the payment of jury fees to the sheriff is at least 45 days before trial. So, all that was required of the plaintiffs by October 8, 2024 was filing and serving the Jury Notice.

[21] The parties took no further steps in the litigation until they attended a mediation on November 12, 2024. It was not successful.

[22] On November 14, 2024, the plaintiffs filed the Jury Notice.

[23] The plaintiffs did not serve the Jury Notice on AHBL until November 26, 2024.

[24] By letter dated December 3, 2024, AHBL objected to the late filing of the Jury Notice and confirmed their position that it was a nullity.

[25] The plaintiffs promptly canvassed dates with the defendants and filed the Application, as noted, on January 13, 2025.

Applicable Law

[26] A jury notice that is not filed and served within twenty-one days of the delivery of the notice of trial as required by R. 12-6(3)(a) is a nullity and not a mere irregularity.

[27] In order to file a jury notice beyond the time permitted to do so under R. 12-6(3)(a), leave of the court must be obtained pursuant to R. 22-4(2) which allows the court to extend any period of time provided for in the *Rules* even though the application for the extension is made after the period of time has expired.

[28] It is an exercise of judicial discretion whether to grant leave: see *Gill v. Mijatovic*, 2016 BCSC 239 at para. 44.

[29] In exercising that discretion, the court must also, *inter alia*, keep focus on the object of the *Rules* as set out in R. 1-3(1): securing the just, speedy and inexpensive determination of every proceeding on its merits.

[30] Further, given the extension of time for filing a jury notice is a matter of considerable significance it should be done so on the basis of the "clearest and best evidence": see *Litt v. Grewal*, 2011 BCSC 1071 at para. 22.

[31] The specific law governing late filing of jury notices was summarized by (then) Master Nitikman in *Joshi v. Vien*, 2003 BCSC 1772 at para. 13 as follows:

a) Did the applicant have a clear intention or desire to have the action tried by a jury during the time allowed for filing a Jury Notice?

b) Was the failure to file and deliver the notice in time due to inadvertence or neglect on the part of the applicant or the solicitor?

c) Has the character of the action changed so materially that a jury trial is now clearly appropriate when it was not appropriate during the time allowed for filing a jury notice?

d) Have the parties consented to late filing?

e) Has the application been brought in a timely manner?

[32] The test was articulated almost identically by Master Brine (as he then was) in *Coulson v. Sra*, 2001 BCSC 914 at para. 18.

[33] Regarding the supporting evidence, generally speaking the evidence required is that of the solicitor and the client. However, in some circumstances the evidence of the solicitor alone may be sufficient: see *Narang v. Bhatthal,* 2006 BCSC 513 at para. 28. Evidence comprised of the affidavit of a paralegal alone or of double hearsay will generally not suffice: see *Ngai v. Cho*, 2001 BCSC 333 at paras. 24-25 and 31.

[34] Lastly, and perhaps most importantly here given the need to ensure trial fairness, is the question of whether the party opposing the extension of time to file and serve the jury notice can point to any prejudice that would arise if an extension of time is allowed: see *Moll v. Parmar*, 2012 BCSC 1373 at paras. 35 and 37.

Legal Analysis

[35] Considering the above law, I have concluded that is appropriate to exercise my discretion under R. 24-4(2) to extend the time to file and serve the Jury Notice.

[36] My reasons for doing so are as follows:

a) Prior to June 20, 2024, there had apparently been no meaningful discussion about the mode of trial beyond the defendants' case plan proposal in September 2023 indicating their proposed mode of trial being by judge alone;

b) The plaintiffs' intention to proceed with a jury trial was clearly articulated in the June 20, 2024 correspondence which sought to secure mutually agreeable dates for a seven-day jury trial in 2025. In the subsequent communications on the issue of trial scheduling, of which there are four, the word "jury" appears in every one;

c) In the emails exchanged on September 13, 2024, the very day that the plaintiffs' filed the Notice of Trial reference is made to it being a "jury trial". This amounts to, in my view, an intention articulated during the time allowed for filing a jury notice notwithstanding the fact that the time did not technically start running under the *Rules* until service of the Notice of Trial on September 17, 2025;

d) I accept the evidence of Ms. Patterson, primary counsel for the plaintiffs, that the failure to file the Jury Notice was due to mere inadvertence. There is no evidence that contradicts this, and it is consistent with the correspondence between the respective offices during the months of June through September 2024 which, as I have highlighted, all contemplated a jury trial. In this regard, I

do not consider it a situation where affidavit evidence of either plaintiff was necessary in order to determine whether to exercise my discretion;

e) The character of the action has not changed, so that factor is not relevant;

f) The defendants, as indicated, do not consent;

g) Once notified of the defendants' position regarding the Jury Notice, plaintiffs' counsel promptly addressed the issue, sought hearing dates and filed the Application; and

h) The evidence in opposition of the Application is provided through the affidavit of Ciarah Machado, a legal administrative assistant at AHBL. Ms. Machado's affidavit very properly provides no substantive evidence relating to any prejudice alleged to flow from the late filing and service of the Jury Notice. Counsel for the defendant further confirmed in submissions that they are not asserting any prejudice. Specifically, counsel confirmed that the defendants are not taking the position that the seven days presently reserved for trial will be insufficient or that the matter is unsuitable for a jury trial. Further, I note that examinations for discovery were completed in advance of trial dates being canvassed in June 2024 such that counsel were in a well-informed position to consider these matters. Nothing had changed by October 8, 2024, but for the failure by plaintiffs' counsel to file and serve the Jury Notice in accordance with the *Rules*.

[37] I shall thus grant the relief sought in paragraph 2 of the Application and order that the plaintiffs shall have leave, pursuant to R. 22-4(2), to file and serve a jury notice in this action by no later than 4:00 p.m. on Tuesday, April 15, 2025.

Costs

[38] Costs are awardable at the discretion of the hearing judge.

[39] The general principle is that costs are awarded to the successful party, but at the discretion of the presiding justice: R. 14-1(9).

[40] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal stated the law regarding costs as follows:

> [71] Rule 14-1(9) . . . grants unqualified discretion to depart from the *prima facie* rule that the successful litigant should be awarded its costs.
>
> [72] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention by this court: *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, the discretion is very broad.

[41] In this case, the plaintiffs successfully obtained the relief sought. Further, whilst the need for the Application lies solely at the feet of plaintiffs and not due to any conduct by the defendants, it was open to the defendants to consent to the late filing and service of the Jury Notice given the lack of any identifiable prejudice. The defendants instead chose to oppose the Application.

[42] In the circumstances, I am satisfied that the appropriate exercise of my discretion is to award the plaintiffs' costs of the Application as costs in the cause to be assessed under Appendix B as "Scale A" costs as being a matter of less than ordinary difficulty.

"Hardwick J."