CITATION: Robson v. LSO, 2024 ONSC 4728
COURT FILE NO.: CV-15-00535850-0000
DATE: 20240826

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
PAUL ALEXANDER ROBSON	)	Self-represented litigant
	)	
Plaintiff	)	
	)	
– and –	)	
	)	Sean Dewart, for the Defendants
THE LAW SOCIETY OF UPPER CANADA, ZEYNEP ONEN, MARK PUJOLAS, LISA FREEMAN and JAN PARNEGA-WELCH	)	
	)	
Defendants	)	
	)	
	)	**HEARD:** August 15, 2024

PAPAGEORGIOU J.

Overview

[1] The defendants move to strike the jury notice in this action. I released the decision on August 20, 2024, dismissing the motion with reasons to follow.

[2] These are the reasons.

[3] The plaintiff is a former lawyer called to the bar in Ontario in 1983.

[4] The respondents are the Law Society of Ontario ("LSO"), an investigation counsel, and a discipline counsel.

[5] The plaintiff claims that the defendants have been on a mission to disbar him since 2002 and brought proceedings against to achieve that end.

[6] He pleads the tort of malicious prosecution. The trial is scheduled to commence in September for a ten-day period.

Decision

[7] For the reasons that follow, I am dismissing the motion at this time, without prejudice to the trial judge striking the jury notice at some point during the trial if he or she determines, in the exercise of his or her discretion, that it is no longer in the interests of justice that this matter be heard by a jury. This is the "wait and see" approach that the Court of Appeal for Ontario references in some of the case law discussed below.

Issues

[8] As set out in the defendants' factum, the only issue on this motion is whether the jury notice should be struck.

The Applicable Legal Principles

[9] The tort of malicious prosecution involves the following elements:

i) The proceeding must be instituted by a defendant.

ii) The proceeding must be terminated in favour of a defendant.

iii) The proceeding must have been instituted in the absence of reasonable grounds which is an issue of mixed fact and law.

iv) The proceeding must be actuated by malice which does not mean ill will or spite but for an improper purpose: *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at pp. 192-193.

[10] The right to a trial by jury in civil actions is set out in s. 108 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43:

> 108(1) In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.

[11] See also s. 108(10) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 with respect to malicious prosecution in particular where it states that in an action for malicious prosecution, the trier of fact shall determine whether there was reasonable and probable cause for instituting the prosecution.

[12] In *Kempf v. Nguyen*, 2015 ONCA 114, 124 O.R. (3d) 241, at para. 43, the Court confirmed that the right to a trial by a jury in a civil case is a substantive right and should not be interfered with lightly. The LSO argues that the principal cited in *Kemp v. Nguyen* cannot be reconciled with its recent decision in *Louis v. Poitras*, 2021 ONCA 49, 456 D.L.R. (4th) 164, at para. 17, where it indicated that the state of the administration of justice and the civil backlog was an appropriate consideration. However, as pointed out by the plaintiff, in its recent decision in *Penate v. Martoglio*, 2024 ONCA 166, at para. 18, the Court reiterated that the statutory right to a trial by jury is a substantive and important right that judges should not lightly interfere with.

[13] Section 108(3) of the *Courts of Justice Act* provides that the court may, on a motion, order that the issues of fact be tried or the damages assessed, or both, without a jury.

[14] The Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, also permit a party to bring a motion before a judge to strike a jury notice:

> Rule 47.02(2) A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge.

[15] The test for discharging a jury in a civil proceeding was articulated by the Court of Appeal for Ontario in *Graham v. Rourke* (1990), 75 O.R. (2d) 622, at p. 625 as follows:

> When a trial judge is asked to discharge a jury, she or he must decide whether justice to the parties will be better served by the discharge or retention of the jury. The moving party bears the burden of persuasion and must be able to point to features in the legal or factual issues to be resolved, in the evidence, or the conduct of the trial, which merit the discharge of the jury.

[16] In *Cowles v. Balac* (2006), 83 O.R. (3d) 660 (Ont. C.A.), at paras. 58, 72, and 91, O'Connor A.C.J.O. held that the complexity of the facts and the legal principles that apply to a given case are proper considerations, and indeed the main considerations in determining whether justice will be better served by the discharge of a jury. This includes factual complexity, as well as legal complexity: paras 48-50. While complexity is a proper consideration, drawing a line between what is too complex for a jury is "far from an exact science": *Cowles v. Balac*, at para. 48.

[17] The LSO's main argument is that this matter is too complex because of the facts and legal principles, which they argue are intertwined with multiple proceedings and overlapping decisions since 2002 when the plaintiff went bankrupt. They say that as a practical matter, there will be so many disputes as to what evidence is admissible, that the jury will end up "wearing a path into the floor" as they traverse it over and over as these issues arise and need to be disposed of.

[18] The following is a description of the pleadings, as well as the overall chronology of facts which the defendants say are too complicated for a jury.

Background

The Pleadings

[19] The plaintiff issued his claim in 2015. He delivered his jury notice in 2015, but did not file it until 2019, together with his reply. At that time, pleadings closed.

Prior Court Proceedings

[20] The plaintiff was general counsel for an anti-aging group of companies. On July 9, 1992, the plaintiff filed an assignment in bankruptcy. He was conditionally discharged in January 1996 and absolutely discharged in May 1996.

[21] After his discharge, the trustee learned that the plaintiff may have acquired shares in an anti-aging group of companies or the right to own them while bankrupt. The trustee brought a claim against the plaintiff. Lax J. conducted the trial and concluded that the plaintiff was indeed the beneficial owner of shares of two such corporations while he was an undischarged bankrupt, and that he had instructed his law clerk to alter corporate records in aid of his position in the case. On October 12, 2004, the Court of Appeal for Ontario dismissed the plaintiff's appeal.

[22] The trustee brought a motion to annul the plaintiff's discharge from bankruptcy by pleading fraudulent activity. On September 5, 2005, the court dismissed the trustee's motion, finding that Lax J.'s findings were capable of a conclusion short of fraud. The Court of Appeal dismissed the trustee's appeal, holding that while Lax J. made a finding that the plaintiff acted fraudulently, fraud had not been in issue in the trial. Thus, there was no issue estoppel to establish fraud.

[23] On January 23, 2009, the plaintiff brought a motion to set aside Lax J.'s decisions pursuant to r. 59.06. Pattillo J. struck the plaintiff's motion on the basis that it was an attempt to relitigate issues already litigated. The Court of Appeal dismissed the plaintiff's appeal.

The Law Society Proceedings

[24] The LSO began an investigation of the plaintiff based upon Lax J.'s decision in 2002, on the basis that it gave rise to a reasonable suspicion that the plaintiff may have engaged in professional misconduct. Most of the allegations the LSO investigated tracked Lax J.'s findings.

[25] The LSO requested written representations from the plaintiff about the complaint and he responded that it would be inappropriate for him to respond at that time because the matter was under appeal.

[26] The LSO obtained documents relating to the court proceedings, and interviewed individuals who might have had knowledge. The investigation report was concluded on August 17, 2005. The LSO then followed up with the plaintiff who provided a sworn affidavit advising he would act in person.

[27] In 2007, after reviewing Lax J.'s decision and the results of its own investigation, the LSO says that it determined that there was a reasonable prospect of a finding of professional misconduct.

The LSO then proceeded to bring an application for a determination by a hearing panel as to whether the plaintiff contravened the *Law Society Act*, R.S.O. 1990, c. L.8, by engaging in conduct unbecoming of a member of the LSO.

The *CUPE* motion

[28] The defendants say that in 2007, they brought a motion (the "*CUPE* motion") in accordance with a decision in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, for a determination that the plaintiff could not relitigate findings made by Lax J., as this would be an abuse of process. The motion was heard on November 14 and 16, 2011, and the hearing panel granted the motion. As a result, the plaintiff could not call evidence to dispute Lax J.'s findings.

The hearing panel's decision

[29] On March 21, 2013, the hearing panel found that the plaintiff engaged in conduct unbecoming of a barrister by not disclosing assets while an undischarged bankrupt, counselling his law clerk to alter corporate records, and collaborating with the former document management specialist of the anti-aging companies in a scheme to conceal the undisclosed assets. The penalty was a revocation of the plaintiff's licence and payment of $90,000 in costs.

[30] On January 13, 2015, the appeal panel allowed the appeal and held that the hearing panel had erred by preventing him from relitigating the fraud issue on the basis that the Court of Appeal's reasons were binding on the hearing panel. It set aside both the finding and penalty and ordered that the matter proceed before another panel.

[31] The appeal panel awarded the plaintiff no costs, reasoning that although the LSO's conduct was incorrect, it was not unreasonable, in bad faith, or for a collateral purpose. The LSO chose not to pursue the prosecution further.

Analysis

Arguments concerning complexity

[32] The defendants say that the matter is too complex for a jury because it involves technical legal issues surrounding the trial before Lax J, the appeal, the motion before Campbell J. to annul the bankruptcy, the Court of Appeal's decision that issue estoppel did not apply, the investigation of the plaintiff's activities, the hearing panel's determination that it would be an abuse of process for the plaintiff to relitigate adverse findings by Lax J., and the appeal panel's reasoning that it disagreed. It will involve determinations of whether or not the LSO's actions were actuated by an improper purpose as well as the consideration of whether or not the LSO had reasonable and probable cause based on its investigation.

[33] The defendants say it will also involve the defendants' argument that the plaintiff's claim is a collateral attack on the appeal panel's determination that the disciplinary proceeding was not tainted by malice or bad faith.

[34] The defendants say that these issues are far too complicated for a jury to grapple with.

[35] However, in some respects, the prior proceedings and findings made by other courts simplify this matter. Lax J.'s decision established that the plaintiff was liable for something. The Court of Appeal's decision determined that she did not make a finding of fraud. The LSO appeal panel decided that the comments made by Lax J. related to fraud did not result in any issue estoppel that the hearing panel was permitted to rely upon.

[36] The concepts of causation and reasonable and probable grounds are regularly put before juries. The concepts of issue estoppel, res judicata, and abuse of process are not overly complicated concepts to explain to a lay person. These doctrines essentially mean that one cannot bring the same claim twice and that once a court makes a decision, it cannot be relitigated. Even the concept of malice is one which a lay person can understand with explanation from a judge. As set out in *Kempf v. Nguyen*, at para. 43, citing *Cowles v. Balac*, "trial judges are presumed to know the law and be able to explain it to a jury."

[37] Additionally, even though the defendants reference the concepts of res judicata, issue estoppel, abuse of process, and others in this motion, they do not plead these issues. What they plead is that the plaintiff's claim is a collateral attack on the cost decision of the LSO, which found that the LSO's conduct was not unreasonable, in bad faith, or for a collateral purpose.

[38] The main contested facts before this court will be whether the LSO pursued this matter for an improper purpose, and whether it suppressed evidence, issues that a jury should be able to consider. The jury will have to sift through evidence, make findings of fact, and apply law to the facts. "This is what juries do every day": *Kempf v. Nguyen*, at para. 59.

[39] The cases the defendants cite are not apposite.

[40] For example, *Moore v. Wienecke*, 2008 ONCA 162, 90 O.R. (3d) 463, involved a trial judge's decision to strike a jury on the basis of complexity which arose from the plaintiff having suffered many injuries from different sources over a 20-year period, as well as a brain injury that would make it difficult to assess credibility. In *Placzek v. Green*, 2012 ONCA 45, 287 O.A.C. 38, the complexity arose from the effect of the plaintiff's pre-existing medical condition on the post-accident medical condition and competing expert reports.

[41] The closest case is *Thibault v. The Empire Life Insurance Company*, 2012 ONSC 1723, 8 C.C.L.I. (5th) 272. The defendants argued that the reason why the jury notice was struck in *Thibault*, was that the case involved the consideration of "a host of complex legal issues including civil fraud, breach of contract, breach of fiduciary duty, an insurer's obligation to deal with an insured in good faith and the meaning of such obligation, an insured's obligation to bargain in good

faith, and the interpretation of complex insurance policies" in addition to several questions of fact: at paras. 69-74.

[42] However, the court's reasons for discharging the jury in that case was broader. The court discussed the fact that the jury would have to assess two actuarial reports and the forensic accounting report involving entries in a general ledger account over a 16-year period. Hundreds of pages of exhibits and over three weeks of testimony would have had to be reviewed.

[43] As well, the main claim was declaratory in nature. Justice Thorburn (as she then was) noted that s. 108(3) of the *Courts of Justice Act* provides that issues of fact and the assessment of damages in a claim for declaratory relief shall be tried without jury: at para. 56. Thorburn J. also held that it was not in the interests of justice to sever these claims from the claim for declaratory relief: at para. 65.

[44] Thus, Thorburn J. relied upon a more complex record and also relied upon the requirement in s. 108 that declaratory relief and issues of fact and damages must be heard by a judge alone.

[45] As I addressed, the facts here are not the same. In the case before the court, there are no complex expert reports. The matter does not involve declaratory relief, and in my view, based upon the submissions and materials presented to me, the issues of fact and law are issues that a jury can understand, subject to the way in which the trial ultimately develops. The defendants did not even elect to conduct any discovery of the plaintiff, which also supports the argument that this matter is not overly complex.

Arguments concerning the administration of justice

[46] The defendants also argue that the interests of the civil backlog should be taken into account in the exercise of the court's discretion and that in this case, this tips the balance in favour of striking the jury notice: *Louis v. Poitras*, at paras. 2, 3; *Fazari v. Lawley*, 2023 ONSC 6409, at para. 54.

[47] The defendants say that the plaintiff is self-represented, and proposes calling irrelevant witnesses, in particular, previous LSO counsel who acted against him in a previous matter. Thus, he will stray into irrelevant matters. In fact, the defendants say that most of the plaintiff's proposed evidence does not relate to the matters at issue and contains a significant amount of inadmissible evidence.

[48] As noted above, the defendants argue that there will be so many disputes over the admissibility of evidence that the jury will continually have to be excused from the trial when these issues are argued.

[49] However, this is a summary trial where the parties have agreed that the main evidence in chief will be by way of affidavit with some brief *viva voce* evidence in chief.

[50] The defendants point out a few paragraphs of the plaintiff's affidavit evidence which they argue contains inadmissible opinion evidence. They argue that the plaintiff's affidavit evidence is filled with these types of issues and that the task of picking through the evidence in only this one affidavit, considering what is admissible or inadmissible, would take an entire day.

[51] However, the fact that this is a summary trial arguably makes the issue of dealing with alleged inadmissible evidence much simpler. To the extent that the defendants consider any paragraphs of the proposed affidavits inadmissible, they will be able to address these issues once before the trial judge at the outset of that witness' evidence in the absence of the jury. There will be no need for the jury to be excused continually. In fact, the trial judge could consider all of these objections to all of the affidavit material at the outset of the trial, subject of course to the trial judge's exercise of his or her discretion.

[52] When I raised this option with the defendants' counsel, they argued that the exercise I proposed was only theoretically possible and in practice too monumental of a task for the trial judge to do at the outset. Rather, if this is a trial by judge alone, the trial judge will just be able to account for whatever is relevant and admissible without the defendants having to raise all the issues with the affidavit material at all. Counsel for the defendants said that he did not propose to argue admissibility paragraph by paragraph. Instead, in closing argument he would make arguments as to what is admissible.

[53] I leave it to the trial judge to determine the most efficient manner of dealing with the defendants' objections, but in my view, the defendants will have to raise their objections one way or another, at the outset or in their closing submissions whether this is a trial by judge and jury or by judge alone.

[54] Additionally, the defendants only referred me to a few paragraphs that they suggested contained inadmissible evidence. I am not prepared to read all the affidavits on my own to examine whether they are replete with such objectionable materials as alleged. It was the defendants' motion, and they should have referred me to all such objectionable evidence, or at least provided me with a list of such references, if they wanted me to take additional objectionable material into account.

[55] Additionally, although the defendants now say that the trial cannot be completed in ten days, when they carefully set the length of this trial, which was accepted by the court and the parties, at no point did the defendants raise the arguments they now put forward in support of complexity. Over the last nine years, the defendants have never taken the position that this matter is too complicated for a jury, except at the latest pretrial when this motion was scheduled.

[56] As well, the LSO's own witness list shows that it will call no more than seven hours of testimony. The plaintiff's estimated time for his witnesses is 21.2 hours. There are ten days scheduled for this trial.

[57] The defendants have not persuaded me that this matter is too complex for a jury or that this matter will not be completed in ten days. They have not persuaded me that having this matter heard by a jury over ten days will have a significant impact on the broader issues of the administration of justice. It is possible, perhaps even likely, that many of the issues raised will never materialize since they have never even been specifically pleaded.

[58] As noted in *Kempf v. Nguyen*, citing *Cowles v. Balac*, sometimes it is preferable to take a "wait and see" approach before deciding whether to discharge the jury, because experience shows that in many cases "the anticipated complexities of a case or other concerns do not materialize or at least not to the extent originally asserted": at para. 43. Waiting and seeing allows courts to "better […] protect the substantive right of the party who wants a jury trial and to only dismiss the jury when it becomes necessary": at para. 43.

[59] In that regard, the plaintiff argues that the vast majority of the previous court decisions will not be tabled. He says he is bound by his trial estimates and that he will adhere to them.

[60] Given the Court of Appeal's decision in *Kempf v. Nguyen*, Dow J. observed in *Ma v. RBC Life Insurance Company*, 2016 ONSC 6417, at para. 13:

> It will be the rarest of situations and only in the clearest of cases where a party can successfully argue a jury notice should be struck in advance of the trial.

Disposition

[61] In all the circumstances, I dismiss the motion at this time, without prejudice to the trial judge's discretion to strike the jury notice if it appears at the outset or during the trial that the matter is too complex for a jury and/or that the interests of justice favour this.

[62] I defer the issue of the costs of this motion to the trial judge.

Papageorgiou J.

Released: August 26, 2024

CITATION: Robson v. LSO, 2024 ONSC 4728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PAUL ALEXANDER ROBSON

Plaintiff

– and –

THE LAW SOCIETY OF UPPER CANADA, ZEYNEP ONEN, MARK PUJOLAS, LISA FREEMAN and JAN PARNEGA-WELCH

Defendants

REASONS FOR JUDGMENT

Papageorgiou J.

Released: August 26, 2024