


MEDICAL MALPRACTICE

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INTRODUCTION

Rule 9-7(15) of the BC Supreme Court Civil Rules permits a party to an action to apply to the Court for judgment on summary trial, either on a single issue or generally. There are a number of factors to consider in determining whether a matter is suitable for summary trial, but where the court is able to find the necessary facts to decide the issues and it is not "otherwise unjust to decide the matter summarily, the court should give judgment."[1]

In medical malpractice actions, summary trial applications are almost exclusively brought by the defence for a dismissal of the action. Plaintiffs' counsel all too often have a knee-jerk reaction to oppose a summary trial application when, in fact, the application can benefit their client as well. In this article, we will discuss summary trial applications in the context of a medical malpractice action, review a number of cases where summary trial applications have succeeded and where they have not, and examine the impact of the recent Supreme Court of Canada decision of *Hryniak v. Mauldin*.[2]

SUITABILITY FOR SUMMARY TRIAL

In determining the suitability of an action for summary trial, the BC Supreme Court has set out a number of factors to be considered, including:

a. The amount involved;
b. The complexity of the matter;
c. Its urgency;
d. Any prejudice likely to arise by reasons of delay;
e. The cost of taking the case forward to a conventional trial in relation to the amount involved;
f. The course of the proceedings;
g. The cost of the litigation and the time of the summary trial;
h. Whether credibility is a critical factor in the determination of the dispute;
i. Whether the summary trial may create unnecessary complexity in the resolution of the dispute; and
j. Whether the application would result in litigating in slices.[3]

SUCCESSFUL SUMMARY TRIAL APPLICATIONS

Although complexity of the matter is a factor the court may consider in determining suitability for summary trial, it is not itself determinative. In *Parragh v. Eagle Ridge Hospital*[4], the plaintiffs contracted necrotizing fasciitis after undergoing surgery, and brought allegations of negligence against the hospital and nurses involved in their care. The defendants brought an application for dismissal of the action by summary trial which the plaintiffs opposed on several grounds, one being the complexity of the matter. The court agreed that the matter was complicated and involved voluminous materials, but held that complexity did not make it unsuitable for summary trial:

> Rather, what is necessary is an examination of the issues and evidence relating to them, followed by a determination of whether it would be unjust to resolve them in this context.[5]

The plaintiffs in *Parragh* further opposed the summary trial application on the grounds that they sought to conduct further discovery and, due to issues of apportionment between the hospital and nurses, it was not appropriate to only deal with one defendant summarily. The court held that a desire to conduct further discovery may be a basis for adjournment, but it is not a basis for declining to deal with a matter summarily. The court agreed that when overlapping issues existed between two or more defendants, it is often desirable to deal with those issues together, but found the plaintiffs had adduced no evidence proving a breach of the standard of care. As all of the issues between the parties were before the court, Barrow J. found that multiple parties and overlapping issues were not a bar to resolving the matter summarily.

A summary trial application was successful recently in *McLellan v. Shirley*,[6] where the plaintiff sought damages for bodily injury sustained during a negligently performed laparoscopic cholecystectomy. In addition to the doctor who performed the surgery, the plaintiff also named the surgical assistant as a defendant in the matter, but the assistant successfully applied for a summary trial dismissal of the action against her. In his reasons, Brown J. noted that the case did not involve conflicting expert reports

which would necessitate cross-examination to parse out and weigh conflicting testimony. He found there was sufficient evidence to make the necessary findings, and citing *The Bank of Nova Scotia v. Robertson*,[7] stated that a summary trial judge is entitled to weigh evidence and accept or reject it. He went on to state that separating and determining issues of causation or standard of care from other trial issues is within the chamber judge's discretion; if only some issues can be dealt with summarily and some must proceed to a full trial, that is no reason for the chambers judge not to do so, if it will effectively determine the issue and promote orderly use of the court's time.[8]

UNSUCCESSFUL SUMMARY TRIAL APPLICATIONS

In *Andrews v. Hay*, [9] the plaintiff brought a negligence claim against her former doctor, and the defendant sought dismissal by way of summary trial due to expiration of the limitation period. The plaintiff opposed the application, arguing that due to her mental capacity, the limitation date was postponed. She submitted that the determination of the limitation issue required both *viva voce* evidence and expert evidence on the plaintiff's mental capacity at the relevant time, and, as a result, was not suitable for summary trial.

Although Duncan J. noted that, generally, limitation issues are amenable to judgment by way of summary trial, she ultimately dismissed the defendant's summary trial application, as the "subtleties and temporal uncertainties of the postponement issue" were not well developed in the materials before her, and in the absence of expert evidence and *viva voce* evidence of the plaintiff subject to cross-examination, it would be unjust to decide the issue of postponement summarily.[10]

In *Moore v. Castlegar and District Hospital*[11], the BC Court of Appeal upheld the chamber judge's dismissal of the defendant doctor's application for summary trial on the issue of causation. The defendants relied on the fact that all medical experts consulted shared the same basic opinion: that the plaintiff's injury had likely been caused by the motor vehicle accident he was involved in, not his subsequent hospital stay. The court found that the weight to be given to the expert opinions depended to a large extent on the accuracy of the facts relied upon, a number of which were disputed by the plaintiff. Although the court noted that conflicting affidavits alone are insufficient to refuse summary judgment, because of the complexity, range, and importance of the underlying facts, they could only be adequately considered through a conventional trial.

Where credibility is at issue, an application for summary trial is unlikely to succeed. In *C.P.M. et al. v. Dr. Thomas Reynolds Martin et al.*[12] the plaintiff claimed her doctor breached the standard of care by failing to advise her of a herpes diagnosis, which she passed on to her baby during delivery. The defendant, Dr. Martin, applied for dismissal by way of summary trial, as he had an expert opinion which stated that he had acted in accordance with the standard of a reasonably competent obstetrician/gynecologist in his treatment of the plaintiff. The crux of the expert's opinion, as well as the defence position, was that Dr. Martin did not observe signs consistent with the herpes virus. The court dismissed the summary trial application, stating that at trial, the judge or jury may find that, contrary to the defendant's assertions, he did observe signs consistent with herpes, and therefore the defence expert's opinion relied on assumptions not yet proven.

THE EFFECT OF *HRYNIAK*

Traditionally, in medical malpractice claims, summary trial applications have been used exclusively by defendants. For plaintiffs, these applications have provided nothing more than another obstacle to overcome. In light of the evolution of summary trial procedures in Canada, this does not have to, and should not, remain the case.

In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada stressed the need for a culture shift in order to create an environment promoting timely and affordable access to the civil justice system. [13] Such a culture shift is necessary to address access to justice concerns:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted. [14]

Part of this culture shift entails simplifying pretrial procedures and moving the emphasis away from conventional trials.[15] To that end, the SCC concluded that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. [16] The Court was clear that our civil justice system is premised upon the value that the process of adjudication must be fair and just; that cannot be compromised. [17] However, the process must also be accessible – proportionate, timely and affordable – and the best forum for resolving a dispute is not always that with the most painstaking procedure. [18]

Admittedly, *Hryniak* came out of Ontario and parts of the judgment are restricted to the wording of the Ontario Rules. However, its broad principles are likely applicable in British Columbia. The decision in *Hryniak* is consistent with the objects of the BC Civil Rules to secure the just, speedy and inexpensive determination of every proceeding on its merits, in ways that are proportionate to the amount involved, the complexity of the proceeding and the importance of the issues (Rule 3-1). It is also consistent with the caselaw from BC requiring judges to be "careful but courageous in assisting the parties to resolve an action without a conventional trial if it can be done without injustice."[19] Moreover, the Supreme Court of Canada acknowledged that Ontario's summary trial rules are different from those in other provinces but expressly stated that the values and prin-

ciples underlying its interpretation are of general application.[20]

If there is minimal overlap between the evidence required for the liability and damages aspects of the case, plaintiffs may seek to bring a summary trial application on liability. The fact that the summary trial will not end the litigation, does not prevent the application or prevent the chambers judge from determining some matters summarily, if it will promote the orderly use of court time and effectively determine an issue.[21] There is nothing barring medical malpractice claims from summary trial procedures, even if evidence is needed on all elements of liability. Some cases will not be suitable for summary judgment, particularly where there are overlapping issues such that granting summary judgment may run the risk of duplicative proceedings or inconsistent findings. However, as previously mentioned, complexity does not automatically render a case unsuitable for summary disposition.[22] Nor does the existence of some conflict in the evidence in and of itself preclude a court from proceeding by summary trial, if that conflict can be resolved on the evidence.[23] Whether a full trial is required becomes a question of whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.[24]

Although based on the Ontario rules, the decision in *Legendre v. Crittendon Hospital Medical Center*,[25] provides food for thought. The defendant physician brought a motion to have the action dismissed on the causation issue. The plaintiff, in response, provided two expert reports. The defendant did not provide any expert reports and relied solely on his own affidavit. The court commented that it would be premature to reach any firm conclusions regarding a possible finding of liability against the physician but that, based on the evidence of the expert testimony proffered, there was some evidence to support the conclusion that the treatment provided by the physician was deficient and that these deficiencies caused the loss. The court felt it reasonable to anticipate that the defendant physician would now wish to provide expert evidence to counter the plaintiff's claim and therefore declined to utilize the enhanced fact-finding powers granted under the Ontario summary judgment rule. However, the analysis in this case highlights how summary judgment processes can be used to the plaintiff's advantage, particularly since the law in British Columbia would allow a summary trial judge to find for the plaintiff in these circumstances. The BC Court of Appeal has stated that:

> [a]ll parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner.[26]

In *Hryniak*, the Supreme Court of Canada pointed out that a summary judgment motion is an important tool for access to justice because it can provide a cheaper, faster alternative to a full trial.[27] This is important for plaintiffs to keep in mind. Almost all medical malpractice claims require expert evidence and often multiple experts are required. The costs of running a medical malpractice claim can run into the hundreds of thousands of dollars. Usually, the defendants in medical malpractice cases are protected by insurers with deep pockets who litigate claims on their behalf. In these circumstances, the problems with access to justice in Canada impose a disproportionately heavy burden on plaintiffs. As expressed by Myers J. in *Baghbanbashi v. Hassle Free Clinic et al,*

> it is no more in the plaintiffs' interests than it is in the defendants' interests to endure the cost, delay and distress of a full trial, if it turns out that the case could have been resolved years earlier and hundreds of thousands of dollars cheaper on a single issue.[28]

Even if the plaintiff loses at a summary trial, surely that is preferable to losing on the same issue at trial and being on the hook for the extensive costs associated with running a full trial (including counsel fees, expert fees and other disbursements).

Plaintiffs should be proactive in using summary trial procedures themselves, either by bringing summary trial applications or by responding to dismissal applications in ways that allow the chambers judge to find in their favour on some or all issues, thus restricting what they need to prove at trial. Not only can plaintiffs use these procedures to their advantage, they can discourage defendants from pursuing applications of questionable merit to allow themselves a second chance at success (the application and the trial if the application fails). V

1 *McVeigh v. Boeriu*, 2011 BCSC 400, at 43.
2 *Hryniak v. Mauldin*, 2014 SCC 7 [*Hryniak*].
3 *Ahlwat v. Green*, 2014 BCSC 1865.
4 *Parragh v. Eagle Ridge Hospital & Health Care Centre*, 2008 BCSC 1299 [*Parragh*].
5 *Parragh*, supra note 4 at 24.
6 *McLellan v. Shirley*, 2015 BCSC 1930 [*McLellan*].
7 *The Bank of Nova Scotia v. Roberson*, 2001 BCCA 580, at 11.
8 *McLellan*, supra note 6 at 45.
9 *Andrews v. Hay*, 2015 BCSC 1618 [*Andrews*].
10 *Andrews*, supra note 9 at 34.
11 *Moore v. Castlegar and District Hospital*, [1995] BCJ No. 2790 (CA).
12 *C.P.M. et al. v. Dr. Thomas Reynolds Martin et al.*, 2003 BCSC 1686.
13 *Hryniak*, supra note 2 at 2.
14 *Hryniak*, supra note 2 at 1.
15 *Hryniak*, supra note 2 at 2.
16 *Hryniak*, supra note 2 at 5.
17 *Hryniak*, supra note 2 at 23.
18 *Hryniak*, supra note 2 at 28.
19 *Tripp v. Ur*, 2013 BCSC 785, at 24; *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 1989 CanLII 229 (BC CA).
20 *Hryniak*, supra note 2 at 35.
21 *McLellan*, supra note 6 at 45.
22 *Parragh*, supra note 4 at 24.
23 *Fidler v. Forensic Psychiatric Hospital Institute*, 2015 BCSC 1241 at 45.
24 *Hryniak*, supra note 2 at 33.
25 *Legendre v. Crittendon Hospital Medical Center*, 2014 ONSC 6556.
26 *Gichuru v. Pallai*, 2013 BCCA 60 at 32.
27 *Hryniak*, supra note 2 at 34.
28 *Baghbanbashi v. Hassle Free Clinic et al*, 2014 ONSC 5934, at 20.