

CITATION: McLeish v. Daines, 2017 ONSC 903
COURT FILE NO.: 14-61793
DATE: 2017/02/07

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Krystal McLeish)
)
Plaintiff) Alan J. Clausi and Ian Mair, for the Plaintiff
)
– and –)
)
Erin Daines and Paul Penney)
) Kevin P. Nearing and Michelle Doody, for
) the Defendant
Defendants)
)
) **HEARD:** January 8 to February 1, 2017

2017 ONSC 903 (CanLII)

REASONS ON PLAINTIFF’S MOTION TO STRIKE THE JURY

R. SMITH J.

[1] The plaintiff has brought a motion to strike the jury and to proceed as a judge alone trial because of an inflammatory statement made by defendant counsel in his closing address. Defence counsel ended his closing submissions by telling the jury that the plaintiff’s case was just a “cash grab”.

[2] The plaintiff submits that this submission was not directed towards evidence and rationality but was an inflammatory comment which was prejudicial to the plaintiff which implied dishonesty on her part. The plaintiff submits that his comment cannot be cured by a correcting instruction so the jury should be discharged and I should proceed and decide the case.

[3] The defendant opposes discharging the jury but does not really dispute that the submission was inflammatory. She argues that the plaintiff also made emotional appeals to the jury in his closing address by comparing the plaintiff’s chronic pain, as being like “Chinese water torture” and using an analogy of a broken cash machine in the garage.

[4] The plaintiff used an analogy and compared the plaintiff's loss of future income by saying "If you had a machine in your garage which produced \$60,000 per year, assuming it was legal, and someone broke into your garage and smashed the machine with a baseball bat, and the machine could not be repaired, you would lose the income that the machine would have generated.

[5] The defendant submits that this analogy implies that it was certain that the plaintiff would receive \$60,000 per year when she had never been employed as a police officer and her employment as a police officer was uncertain.

[6] I decline to refer to this analogy and to give a further instruction to the jury to tell them that it was not certain that the plaintiff would have become a police officer and earned \$60,000 a year for the following reasons:

- (a) The plaintiff's analogy started with the words "if the plaintiff had a machine that could produce \$60,000 per year, did not imply a certainty that this was the case for the plaintiff;
- (b) It was not necessary to instruct the jury again that the plaintiff was not certain to become a police officer because they were well aware of this fact and this was the very issue that they had to decide to determine her future loss of income;
- (c) The fact that the plaintiff had never worked as a police officer was uncontested. The jury had already been instructed that they had to determine the percentage probability that the plaintiff would have become a police or military police in the future in order to assess her loss of future income.
- (d) The plaintiff submitted in closing, that the plaintiff had an 80% probability of becoming a police officer but for the injuries she suffered in the accident and the defendants submitted that she would never have become a police officer. Neither party ever suggested that it was certain that the plaintiff would have become a police officer

Chronic pain compared to Chinese Water Torture

[7] I also decline to give a correcting instruction about the plaintiff’s analogy comparing Chronic pain to Chinese water torture because the pain was always present, wouldn’t stop, and you didn’t know when the next painful event would occur because:

- (a) It was an analogy which is different from implying that a party was being dishonest or was acting in bad faith; and
- (b) Both the plaintiff and the defendant’s experts agreed that pain was subjective and different people have different pain thresholds and some feel pain more intensely than others and have a low pain threshold.

Correcting Instructions on “Cash Grab” Submission

[8] The submission that the plaintiff’s case was just a “cash grab” can be understood as implying that the plaintiff has been dishonest about her injuries in order to obtain money. The defendant’s expert, Dr. Shanks, was asked if he was calling the plaintiff a liar, and he answered that he was not calling her a liar, and agreed that she suffered from chronic pain. Given the evidence, I find that the submission was prejudicial to the plaintiff and a correcting instruction is required to ensure a fair trial.

[9] I am satisfied that a correcting instruction will be sufficient to allow the jury to disregard this comment and to decide the case on the evidence before it and that this will remove any prejudice to the plaintiff. The remedy of declaring a mistrial is not required in the circumstances.

Correcting Instructions to the Jury

[10] The correcting instructions to the jury are as follows:

1. In his closing submissions, counsel for the defendants submitted to you that the plaintiff’s claim was just a “cash grab”. To the extent that this comment was intended to imply dishonesty or bad faith by the plaintiff in her claim, the comment should be ignored.
2. You should disregard this comment and base your findings, on the evidence you heard at trial.

Disposition

[11] The plaintiff’s motion to discharge the jury and proceed on a judge alone basis or for a mistrial is denied. A correcting instruction will be given to the jury with regard to the “cash grab” submission which I am satisfied will cure any prejudice to the plaintiff. Further instructions to the jury on the analogies used by the plaintiff are not necessary to ensure trial fairness and the plaintiff’s analogies did not prejudice the defendants.

Justice Robert Smith

Released: February 7, 2017

CITATION: McLeish v. Daines, 2017 ONSC 903
COURT FILE NO.: 14-61793
DATE: 2017/02/07

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Krystal McLeish

Plaintiff

– and –

Erin Daines and Paul Penney

Defendants

**REASONS ON PLAINTIFF'S MOTION TO
STRIKE THE JURY**

R. Smith J.

Released: February 7, 2017