Case Name:

Laudon v. Roberts

Between
Rick Laudon, Plaintiff, and
Will Roberts and Keith Sullivan, Defendants

[2007] O.J. No. 1703

46 C.P.C. (6th) 180

157 A.C.W.S. (3d) 279

157 A.C.W.S. (3d) 341

2007 CarswellOnt 2740

Barrie Court File No. 02-B5188

Ontario Superior Court of Justice

G.P. DiTomaso J.

Heard: April 24, 2007.
Judgment: April 26, 2007.

(34 paras.)

Civil procedure -- Trials -- Juries -- Discharge of jury -- Motion by the plaintiff to strike the jury notice and discharge the jury from trial of the action dismissed -- During cross-examination of the plaintiff's mother, it was put to her that the plaintiff was involved in a robbery -- The judge immediately instructed the jury to disregard the exchange -- The plaintiff submitted that serious prejudice resulted -- The court found that no substantial wrong or miscarriage of justice occurred such that it was unfair to continue with the jury -- The judge's equivocal instructions remedied any prejudice and left no uncertainty regarding the jury's task.

Counsel:

J. Ralston and B. Keating, for the plaintiff.

E. Chatterton, for the defendant, Roberts.

M. Forget & L. Matthews for the defendant Sullivan.

RULING
MOTION TO STRIKE THE JURY

G.P. DiTOMASO J.:--

THE MOTION

1 The plaintiff brings this motion to strike the jury notice, discharge the jury from the trial of this action, and for an order that the trial continue by judge alone. The trial of this action commenced on April 10, 2007.

2 The motion arises from questions put to Alda Laudon in cross-examination, and the impact of those questions on the jury.

OVERVIEW

3 The issue arose from an exchange between defence counsel and Mrs. Laudon wherein she was asked if she knew her son was involved in a robbery. She replied that he was not involved in a robbery, at which time the plaintiff's counsel rose to object. No submissions were required and the jury was instructed immediately to ignore what they had just heard. There was no relevancy in respect of the last question and the jury was to ignore the question and answer.

4 Plaintiff's counsel added that the robbery posed in the question by defence counsel could not be proven because it was not going to be true. Again, the court repeated the ruling that the jury was to ignore the last question.

5 We were left with the witness learning from the Bradford Police that her son had experienced legal problems in British Columbia. She was asked by defence counsel what those legal problems were and she responded that Mr. Laudon was accused of being involved in an armed robbery.

6 Again, the court immediately interceded and advised the witness that she did not need to go there. The witness responded that she did not mind giving the answer because that is what defence counsel wanted to hear.

7 Once again, the court ruled that the last exchange could be ignored by the jury as well. It was another way of getting at what the court had previously ruled the jury did not need to know and hear.

8 The full transcript of the exchange is set out at pages 9 through to 11, reproduced below:

> Q. You mention that - that Rick - Rick couldn't be at the funeral ...
> A. Yeah.
> Q. ... of his father? Rick also had some legal problems when he was out West, did you know about those?
> A. I learned about them from the Bradford Police.
> Q. Okay. Did you know that he was involved in a robbery?
> A. He was not involved in a robbery.

MR. RALSTON: Your Honour!

THE COURT: Just a minute. Just a minute. Have a seat, Mr. Ralston.

MR. RALSTON: Thank you.

THE COURT: That does not have anything to do with anything, and the jury is to ignore what you just heard. I think it is sufficient if the witness has answered that she was aware that Mr. Laudon had his legal problems out West, that is good enough. I do not see any relevancy in respect of the last question that you just put to the witness, and the jury is to ignore that.

MR. RALSTON: And with all respect, Your Honour, that is a fact that can't be proven because it's not going to be true.

THE COURT: Do not worry about it, Mr. Ralston. I have made a ruling. I have made the ruling the jury is to ignore that last question and Mr. Forget, you may move on.

MR. FORGET: Ummm ...

THE COURT: And what we are left with is the witness learned from the Bradford Police that Mr. Laudon had experienced legal problems in British Columbia. Move on, please.

MR. FORGET: Those legal problems, can you tell us - tell us what those legal problems were?

A. He was accused of being involved in an armed robbery.

THE COURT: No, we do not need to go there.

ALDA LAUDON: Well, that's what he wants. I don't mind ...

THE COURT: That is all right. We do not need to go there, Mr. Forget. It is just another way of getting at what I said I did not want to hear and what the jury does not need to know. And, you can ignore that last part too, members of the jury. Mr. Forget?

9 The plaintiff submits that these references to robbery and armed robbery are so prejudicial to the plaintiff that the jury is left with the impression that Mr. Laudon is an armed robber and has no credibility. Notwithstanding the instructions from the trial judge, the serious prejudice caused to the plaintiff cannot be cured and, therefore, the jury should be struck and the trial proceed by way of judge alone.

10 The defence submits that the comments were appropriately dealt with by the trial judge by way of a prompt and clear instruction, which the jury was capable of understanding. If there was any prejudice caused as the result of the exchange, any such prejudice was cured by the judge's instruction and, in any event, there was no miscarriage of justice so as to strike the jury.

ISSUE

11 As the result of the reference to the plaintiff's involvement in a robbery or accused of being involved in an armed robbery, has the plaintiff suffered prejudice which cannot be corrected by an instruction to the jury by the trial judge, with the result that the jury ought to be struck?

ANALYSIS

12 A close reading of the relevant portions of the transcript shows that defence counsel asked Mrs. Laudon is she knew that her son was involved in a robbery. She denied that he was involved in a robbery, at which time Mr. Ralston immediately rose to his feet.

13 It was not necessary for Mr. Ralston to make any submissions as the jury was promptly and sharply instructed by me as the trial judge that they were to ignore what they had just heard. While the jury heard that Mr. Laudon had his legal problems out West, there was no relevance in respect of the last question put to the witness, and the jury was instructed to ignore what they had just heard.

14 At that point, Mr. Ralston added in the presence of the jury, that the fact of Mr. Laudon's involvement in a robbery could not be proven because it was not true.

15 Again, I reinforced my ruling that the jury was to ignore the last question. Defence counsel was told to move on, and he asked Mrs. Laudon to tell us if she could, what her son's legal problems were. Mrs. Laudon's response was that her son was accused of being involved in an armed robbery. I immediately told the witness that was not an area in which she was to go. Her response was that she did not mind answering the question, as that was what defence counsel wanted.

16 Once again, there was a sharp, clear and prompt instruction to the jury that this was not an area in which defence counsel was to question and again, the jury was to ignore this exchange.

17 Although defence counsel suggested the plaintiff's involvement in a robbery to begin with, this is denied by Mrs. Laudon in cross-examination. At that point, in my view, a sufficient instruction was put to the jury immediately and in the strongest of terms to ignore what they had just heard as it was not relevant. This was reinforced by Mr. Ralston, stating in the presence of the jury that Mr. Laudon's involvement in a robbery could not be proven because it was not going to be true. Once again, I repeated my ruling that the jury was to ignore the last question. The jury was not presented with an opportunity to consider the exchange for any interval of time outside the courtroom. The "robbery" question was dealt with immediately and unequivocally by me as the trial judge, so that the jury was capable of understanding that any reference regarding the robbery question ought to be ignored.

18 The next question was an open-ended question which defence counsel admits might have been ill-advised. So it proved to be. He returned to an area that was problematic, and was met with Mrs. Laudon's answer that her son was accused of being involved in an armed robbery. Her answer is consistent with her previous answer, which was a denial that her son was involved in a robbery. On this occasion, she clarifies her answer by testifying that her son was accused of being involved in an armed robbery. Mrs. Laudon is the person who utters the words "armed robbery", which evokes a

further immediate, sharp and unequivocal instruction to the jury that this information is not for the jury to know or hear, and that the jury can ignore the last exchange.

19 Defence counsel submits that in considering what prejudice to the plaintiff arises from the entire exchange on cross-examination, it is important to look at the context of the entire case. The jury heard in the opening statement of Mr. Laudon's pre-accident history. They heard of Mr. Laudon's cocaine addiction, his problems with alcohol and smoking marijuana. They heard about his checking into a rehabilitation centre. They learned of his addiction to painkillers in the late 1990's, and his not being truthful with his doctors. They also heard about Mr. Laudon's attempt to reopen a 1987 Workers' Compensation claim, and that he did not take an honest position with the Board. Mr. Laudon was presented to the jury by his counsel "warts and all" in the opening jury address. His untruthfulness was a matter that had been put squarely before the jury from the very outset of trial. Against this backdrop, the jury heard the evidence of Dr. Zajc and other evidence in respect of his receiving treatment through the prescription of powerful narcotic medications. The issue of Mr. Laudon's credibility had already been put in play before the jury well before any reference regarding a robbery or armed robbery was made.

20 In this context, the defence submits that the robbery and armed robbery references create little prejudice. Further, the trial judge's instructions to the jury have left little doubt in the jury's mind that they are to completely disregard the robbery and armed robbery references which, ultimately, do not affect any assessment of Mr. Laudon's credibility by the jury.

21 On behalf of the plaintiff, it is submitted that the seed had been planted in the mind of the jurors that Mr. Laudon was an untrustworthy witness and a person of bad character as the result of the prejudicial references to his possible involvement in a robbery or armed robbery. I agree with the defence position that if any seed was planted in the mind of the jury in respect of Mr. Laudon's character and credibility, it was not planted by these references. Rather, it was planted at the outset of trial by Mr. Laudon himself through his own counsel when Mr. Laudon's pre-accident life experience was put to the jury "warts and all".

22 In so far as the law is concerned, it is clear that the right to a jury trial is both a statutory and a substantial right, which should not be interfered with absent just cause. The onus is on the party moving to discharge a jury, and that onus is substantial. *Hunt v. Sutton Group Incentive Realty Inc.*, [2002] O.J. No. 3109 (C.A.), *Russett v. Bujold*, [2003] O.J. No. 5531 (S.C.J.).

23 In particular, the moving party 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, and provide cogent and substantial reasons warranting discharge of the jury. *Hunt v. Sutton Group Incentive Realty Inc., supra; Russett v. Bujold, supra.*

24 The courts have held that discharging the jury is a matter of last resort where a prejudicial remark has been made before the jury, as a party's right to a jury trial is not to be taken away lightly. *Hunt, supra; Hamstra v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092 (S.C.C.).

25 In *Hamstra v. British Columbia Rugby Union*, the Supreme Court held that a jury may only be discharged where the remark caused such substantial wrong or miscarriage of justice that it would be impossible to ensure a fair trial continuing with the jury. Noting that in most instances, a charge to the jury is sufficient to remedy prejudicial remarks, the Supreme Court stated:

> If the reference is prejudicial, the trial judge has the ability to deal with it. If the trial judge concludes that the prejudice is so severe that specific instructions or like means cannot dispel the prejudice, the trial judge may discharge the jury. It is apparent that in most cases, the trial judge could fashion a remedy to remove the prejudice short of discharging the jury.
>
> *Hamstra, supra*, at para. 17.

26 In *Russett v. Bujold*, Justice Power reviews the applicable authorities including *Hunt* and *Hamstra* at page 9 of his decision.

27 The decision whether to discharge the jury should be a matter within the discretion of the trial judge. In exercising this discretion, the trial judge should consider whether in the circumstances, the references caused a substantial wrong or miscarriage of justice so that it would be unfair to continue with the present jury. *Russet* at para. 66, *Hamstra* at para. 20. Justice Power found that there was no substantial wrong or miscarriage of justice that had occurred in *Russett v. Bujold.*

28 At para. 68, Justice Power cited with approval the Supreme Court of Canada decision in *Canadian Broadcasting and National Film Board v. Dagenais*, [1994] 3 S.C.R. 835, where it was held:

> Commons sense dictates that in some cases jurors may be adversely affected. Assuming this, I nevertheless believe that jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of the criminal proceedings.

29 I concur with Justice Power that the capability of jurors to follow instructions from trial judges applies equally to civil matters.

30 In *Brochu v. Pond*, [2002] O.J. No. 4882 (C.A.), paras. 26 and 27, the plaintiff alleged the defence made inflammatory remarks in his opening address. The trial judge cautioned the jury that the offending comments were irrelevant and instructed the jurors to base their decisions strictly on the evidence adduced in the case and not on comments made by either counsel. On appeal, the plaintiff argued that the jury ought to have been struck. In dismissing the appeal, the Court of Appeal found that the trial judge's charge sufficiently remedied any prejudice on the plaintiff as it:

* was thorough and unequivocal;
* addressed the material errors of the inflammatory remarks;
* was made promptly, while the remarks were still fresh in the minds of the jurors; and
* left no uncertainty as to the proper way in which the jurors were to approach their task.

31 In the case at bar, my intervention as trial judge was immediate and did not await the trial judge's charge. The jury was instructed promptly, while the remarks were still fresh in the minds of the jurors. The instructions were clear, unequivocal, and addressed the issue in such a way that left no uncertainty as to the proper way in which the jurors were to approach their task.

32 The plaintiff relied upon the decision in *Cowie v. Colwell*, [1995] O.J. No. 4720. In *Cowie*, a question was put to the plaintiff on cross-examination, "Have you ever been convicted of a criminal offence?" The witness answered in the affirmative, without more. The plaintiff's move to strike the

jury and Justice Hockin did so. The question and answer in *Cowie* planted in the mind of the jurors that the plaintiff was an untrustworthy witness because she was of bad character and no instruction could reasonably be expected to blunt or deflect the prejudice so caused. *Cowie* is distinguishable in that the conviction of a criminal offence was put to the witness without context. In *Cowie* there was an admission to a conviction without objection, and without any corresponding instructions to the jury from the trial judge. In our case, there was a denial of the plaintiff being involved in a robbery and a further denial from counsel. In *Cowie,* the trial judge was disadvantaged, as he could not explain to the jury an admitted conviction on the record, which was highly prejudicial. The decision in *R. v. Dixon*, [1984] B.C.J. No. 2010 was also distinguished as the problem in that case was not the nature of the question, but rather the fact that the trial judge failed to give any warning instruction to the jury. The same argument is made by the defence in respect of the decision relied upon by the plaintiff in *R. v. D.W.* [1983] B.C.J. No. 1588. Again, the trial judge should have directed the jury to completely disabuse their minds of suggestions made by Crown counsel. By contrast, in the case at bar, sharp, clear, prompt and unequivocal instructions were given to the jury, capable of the jury understanding that the disputed references to the plaintiff's involvement in robbery or armed robbery were irrelevant and ought to be completely ignored.

33 I find that the plaintiff has not satisfied the substantial onus as the moving party to discharge the jury in this case. The right to trial by jury is a substantial right and one which is not to be taken away lightly.

34 I have considered whether the disputed references have caused a substantial wrong or miscarriage of justice so that it would be unfair to continue with the present jury. I am not persuaded either on the facts or in law that there is such a substantial wrong or miscarriage of justice that has occurred in this trial. The plaintiff has failed to meet the test set out in *Hunt* and *Hamstra* by failing to establish that the references so severely prejudiced him that a fair trial would be impossible with a jury. I agree with the defence submission that any prejudice arising from the disputed references has been sufficiently remedied, and, in any event, falls short of warranting the discharge of this jury.

G.P. DiTOMASO J.

cp/e/qlgxc/qljjn