Newfoundland and Labrador Supreme Court
Trial Division

Citation: S.T. v. Oblates of Mary Immaculate, St Peter's Province et al., 2005 NLTD 14
Date: 2005-01-17
Docket: 1998 St. J. No. 1762)

Between:
B.P. (Plaintiff)
and
James Roche (First Defendant) and the Oblates of Mary Immaculate - St. Peter's Province (Second Defendant) and the Oblates of Mary Immaculate (Third Defendant) (Deleted) and the Roman Catholic Episcopal Corporation of Labrador (Diocese of Labrador City -Schefferville) (Fourth Defendant) and the Roman Catholic Church (Fifth Defendant) (Deleted)

Barry, J.

Counsel:
John W. Lavers, for the plaintiff;
Bernard Coffey, Q.C., for the individual first defendants;
Gregory Kirby, for the Oblates of Mary Immaculate, St. Peter's Province;
Edward Hearn, Q.C., for the Roman Catholic Episcopal Corp. of Labrador (Diocese of Labrador City - Schefferville).

[1] Barry, J.: The second defendant has applied for civil juries in the above three cases. Trials have been set to commence on March 1,2005 in Happy Valley-Goose Bay. The plaintiffs allege sexual assaults by Roman Catholic priests and, in the case of Baynham, a religious brother employed by the second and fourth defendants (the third and fifth defendants are no longer parties). The alleged incidents date back as far as 1979 in the case against Paradis and to the 1980's in the other two cases.

[2] The defendant propose that another four trials involving different plaintiffs but the same corporate defendants (and in some cases the same individual defendants) proceed by judge alone. In all, 29 similar cases have been commenced against various individuals involved with the second and

fourth defendants. These cases have been case managed by Orsborn, J., since April 17, 2003.

[3] The defendants have denied the occurrence of the alleged sexual assaults and have raised other defences, including laches and expiration of limitation periods.

THE ISSUE

[4] The only issue on the present applications is whether, in the circumstances of these matters, I should exercise the discretion provided by s. 36 of the *Jury Act,* 1991[1], so as to permit the trials to proceed before a judge and civil jury.

BACKGROUND FACTS

[5] S.T. is a resident of Davis Inlet. B.P. is a resident of Sheshatshiu. These are Innu communities in the Labrador part of our Province.

[6] At the relevant times, Baynham was a religious brother and Paradis and Roche were ordained priests of the Roman Catholic Church. They allegedly were Oblates and employed by and under the control and direction of the second and fourth defendants.

[7] The Oblates of Mary Immaculate is a worldwide religious order of the Roman Catholic Church. The second defendant is a branch member of the Oblates.

[8] The fourth defendant is the Roman Catholic diocese responsible for ministering to the Innu of Labrador and for carrying out the religious, charitable and educational objectives of the Roman Catholic church within the diocese, which allegedly included the appointment, control and direction of its parish priests and religious brothers.

[9] S.T. states that when he was approximately 15 years old, between September 1984 and June 1985, Baynham conducted church services and

[1] Stats. NL 1991, c. 16, as amended by Stats. NL 1999, c. 13.

engaged in other religious and social activities on the Mission premises of the fourth defendants, including hunting trips into the country. S.T. alleges he was sexually assaulted by Baynham during this period on numerous occasions, through acts of fondling, attempted masturbation, initiation of sexual touching and attempted anal intercourse.

[10] S.T. claims that the second and fourth defendants knew or ought reasonably to have known about the sexual activities and sexual propensity of Baynham and failed to adequately supervise him, thereby creating a risk of harm and danger to S.T.

[11] B.P. alleges that Leonard Paradis, while a priest in Sheshatshiu, from about 1979 to 1984, sexually assaulted B.P. by acts of fondling and attempted masturbation, commencing when B.P. was approximately nine years old, during religious and social activities on the Mission premises of the fourth defendant and while accompanying B.P. on hunting and sporting trips into the country.

[12] B.P. also alleges that James Roche, while a priest at Sheshatshiu during 1986 and 1987, sexually assaulted him by acts of fondling and kissing and acts of fellatio, during church-sponsored religious and social activities on the Mission premises of the fourth defendant and while accompanying B.P. on hunting and sporting trips into the country.

[13] B.P. claims the second and fourth defendants were in breach of their fiduciary duty to protect him from injury and also alleges negligence by the second and fourth defendants in their supervision of Paradis and Roche and in their failure to warn B.P. about their alleged propensities.

[14] Both plaintiffs seek exemplary and punitive damages as well as general and special damages.

RELEVANT LEGISLATIVE PROVISIONS

[15] The following provision of the *Judicature Act,* R.S.N. 1990, c. J-4, has particular relevance:

> "24. Except where otherwise expressly provided by an Act, a

proceeding in the Trial Division and all proceedings arising from that proceeding shall, where practical and convenient, be heard, determined and disposed of before a single judge."

[16] Relevant provision of the *Jury Act* include:

"32(1) In actions of defamation, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage, the plaintiff and defendant may indicate in a certificate of readiness filed under the *Rules of the Supreme Court,* 1986 that he or she wishes the issues of fact tried by a judge with a jury.

"(2) Upon a request made under subsection (1) a court shall order that the issues of fact shall be tried by a judge with a jury.

"(3) A judge may make an order for a trial with a jury in another cause or matter where a party makes a request in a certificate of readiness filed under the *Rules of the Supreme Court,* 1986, or in a manner and at those times as the court may allow,[2]

"36. Where it appears to a judge in chambers or a judge presiding at a trial that an issue of fact should be tried or damages assessed without a jury, the judge may, in his or her discretion or upon application by a party, direct that the issue be tried or damages assessed without a jury."

[17] The history of the law in this province concerning civil jury trials was summarized by Orsborn, J., in *Brushett v. Peninsulas Health Care Corp. et al.* (1999), 176 Nfld. & P.E.I.R. 329; 540 A.P.R. 329 (Nfld. T.D.), (where he found there was no automatic right to a jury trial) and by Green, C.J., in *Clarke v. Manufacturers Life Insurance Co.* (2003), 223 Nfld. & P.E.I.R. 280; 666 A.P.R. 280 (N.L.T.D.), (where he concluded, in paragraph 33, that the "no jury presumption" enunciated in *Brushett* has been weakened by the 1999 amendment of s. 36 of the *Jury Act,* which came into effect six days

[2] Subsections 32(1) and (3) were enacted by the *Attorney General Statutes Amendment Act, 2001,* Stats. NL 2001, c. 42, s. 25. The original enactment in 1991 required a notice of a wish for a jury trial, in the case of subsection 32(1), and an application for a jury trial, in the case of subsection 32(3), certificates of readiness not then being employed.

after *Brushett* had been heard) and by the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co. et al.* (2002), 283 N.R. 1; 156 O.A.C. 201. In the opinion of Green, C.J., at para. 21, these developments in the law after *Brushett* "would no longer make it the 'exceptional case' where trial by jury would be indicated".

THE CASE LAW AND ANALYSIS

(a) Whether exceptional circumstances are needed for a civil jury trial

[18] In determining the factors to be considered by a Chambers judge in determining whether there should be a civil jury, I must note the decision of our Court of Appeal in *Wells v. Sanitary Products Ltd.* (1995), 135 Nfld. & P.E.I.R. 318; 420 A.P.R. 318 (Nfld. C.A.), a wrongful dismissal action, where Mahoney, J.A., overturned the trial judge's order for a hearing before a jury, finding the trial judge had erred in concluding the issues were not complex. Mahoney, J.A., noted at para. 9:

> "In our view, the bases of the claim and the damages sought do not support that conclusion. The pleadi ngs in this case disclose that substantial legal questions are involved together with issues where legal questions and questions of fact are interwoven. It is apparent that complex questions of law and mixed fact and law will arise in the area of contract, wrongful dismissal and tort (negligence) law."

[19] Mahoney, J.A., at para. 10, continued:

> "The separate functions of a jury and a judge are clearly defined. Issues of fact including inferences from these facts and damages may properly be determined by a jury. Issues of law are left to the trial judge. A civiljury is inappropriate where the issues of fact are clearly interwoven with the issues of law or where the primary issues are issues of law, which is clearly the situation in this case. (See: *Earle v. Christian Brothers of Ireland and Canada et al.* (1994), 124 Nfld. & P.E.I.R. 254 per Mercer, J.)"

[20] The *Earle* case, like the present matters, arose out of incidents of sexual assault and alleged negligent supervision by the Christian Brothers of

those to whom the care of orphans had been entrusted. Applying the test of whether justice to the litigants would be better served by granting or refusing the application for a jury, Mercer, J., noted consideration had to be given to whether the nature, length and complexity of the trial would mean that the action was one that could be conveniently be tried with a jury. Noting that in one of the actions the plaintiff intended to call 30 witnesses and present 30 documents in 30 days of trial, Mercer, J., concluded, at para. 13:

> "I accept that members of the public would be able to understand many of the matters and issues which will arise at the trial. I have serious concerns however, based upon Earle's pre-trial filing and the Court's experience with prior Mount Cashel cases, that the proceedings may be extremely lengthy. I observe that s. 35 of the *Jury Act,* 1991 entitles seven jurors in a civil cause to return a verdict if the full jury of nine cannot agree upon a unanimous verdict after three hours deliberation. It would undoubtedly be challenging the individual members of the jury to analyze the evidence at the end of the trial on the allegations of physical and sexual abuse brought against each defendant. A jury would have to make numerous factual findings respecting the assault charges and respecting the impact of the assaults upon Earle. Finally it would have to assess the resultant damages claimed under many headings. In my view the case requires unhurried and thoughtful consideration without the time pressures imposed by the practicalities of the jury process and in particular s. 35 of the *Jury Act,* 1991."

[21] In *Clarke,* Green, C.J., considered the factors to be weighed by a judge in deciding when and how to exercise the discretion to order a civil jury. He noted two different approaches had arisen in this province. One line of cases, in which *Earle* would be included, approached the exercise of discretion without applying any presumption for or against the granting of a jury trial. The overriding question, approached neutrally, would be whether "justice to the litigants in a particular case... [will] ...be better served by retention or discharge ofthe jury", as decided by Hickman, C.J., in *Harding v. Peddle et al.* (1993), 108 Nfld. & P.E.I.R. 266; 339 A.P.R. 266 (Nfld. T.D.). The second approach, which would include *Brushett,* started from a presumption against trial by jury, which could be overcome by the applicant convincing the Court that the special characteristics of trial by jury were particularly appropriate to the determination of the issues at stake. A

significant factor here would be whether the case could better be decided "by a consensus of ordinary lay opinion than by a single judge".

[22] Green, C.J., noted the conclusion of Orsborn, J., in *Brushett* that the "no presumption approach" relied on decisions from provinces whose statutory regimes differed from Newfoundland and Labrador. Orsborn, J., relied upon the jurisprudence of Manitoba and England, whose legislative provisions he concluded were more similar to this Province's, in deciding that civil jury trials should be available only in exceptional cases. He saw this as involving analysis of whether, in the circumstances of a particular case, it would be desirable to have a "consensus of ordinary lay opinion" from the law community, rather than the opinion of the judge alone.

[23] Green, C. J., pointed out that Orsborn, J., had treated the phrase "before a single judge" as equivalent to phrases such as "by a judge without a jury unless..." found in the legislation of other jurisdiction where case law had enunciated a similar bias against trial by civil jury. Green, C. J., noted that s. 24 does not expressly say the Court should sit "without a jury" but merely "before a single judge". He suggested s. 24, enacted at the time our Supreme Court was divided into the Trial Division and the Court of Appeal, was intended merely to require that matters be tried before a single judge rather than a panel of judges and may not have been intended to deal at all with whether or not there should be a jury.

[24] On the amendment to s. 36 of the *Jury Act,* Green, C.J., stated at para. 27:

> "By eliminating complexity and the impact of expert or technical scientific evidence as specific factors that could justify trial without a jury, the legislature was apparently signalling that these matters should no longer have the controlling influence in denying trials by jury that they once had in the analysis that was undertaken even under the 'no presumption' approach. Instead, the new s. 36 reiterated a general discretion to decide, on a case-by-case basis, that a specific issue of fact or an assessment of damages could be tried without a jury even in a case that was otherwise considered appropriate in principle for trial by jury. If anything, therefore, the new provision seems to assume that trial by jury would not be an extraordinary occurrence but that by way of exception the court should still order trial by judge alone."

[25] With respect, I believe this approach of Green, C. J., ignores the effect of s. 32 of the *Jury Act.* By s. 32(1) a plaintiff is provided with a right to a civil jury in certain specified types of cases. Subsection 32(3) requires a party to make a request for a jury trial in other types of cases and provides a discretion for the judge hearing the request. From s. 32 I conclude it is appropriate to draw two inferences: First, the legislature has established that trial by judge alone is the norm in civil matters and a party applying for a civil action has a burden to overcome in persuading a trial or Chambers judge that there should be trial by jury; and, second, in exercising his or her discretion, a judge must, as in other cases, proceed in a reasoned and not an arbitrary fashion, evaluating and balancing appropriate factors before arriving at a conclusion as to whether there should be a civil jury.

[26] Also with respect, I do not believe it is necessary to conclude, as did Orsborn, J., in *Brushett,* that the factors involved should establish an "exceptional case" if it is intended by this to mean that only rarely would a judge exercise discretion to order a civil jury. The scarcity of civil jury trials in this jurisdiction in the past was probably due more to lack of requests than to the wording of our *Jury Act.* I believe s. 36 means nothing other than that the party applying must establish on a preponderance of evidence that the relevant factors weigh in favour of a jury trial rather than the normal trial by judge alone. There is nothing in the Legislative history of the 1999 amendment of s. 36 to indicate any intention by the legislature to significantly modify the way in which judges should exercise their discretion. The applicant still has to persuade the judge that a civil jury is appropriate. By removing specific reference to matters "requiring prolonged examination of documents or accounts, or scientific or local investigation", I believe the Legislature merely removed examples of types of cases where jurors could be at a disadvantage. These matters, in my opinion, had been merely set out for greater certainty and did not limit the judge's previous discretion to determine whether a civil jury was better to promote justice for all parties. I do not read s. 32 as permitting the conclusion that a Chambers or trial judge should begin from a "neutral" position with no preference for or against a civil jury or that trial by judge alone should be "by way of exception", as stated by Green, C.J., in *Clarke.* Indeed Green, C.J., appeared, at para. 33, to recognize that the applicant does not begin from a position of neutrality, when he notes that "the person seeking trial by jury as the applicant has the job of persuading the Court that a jury trial is appropriate". I agree with

Green, C.J., that the court "should engage in a structured analysis, utilizing a multi-factor approach, to determine whether, on balance, trial by jury is appropriate".

[27] In the final result I believe there would probably be little difference whether one applies the approach of Green, C.J., or Orsborn, J. Each would probably consider similar factors in arriving at the final decision as to whether there should be a civil jury. Perhaps Orsborn, J., would commence with an examination of trial management factors rather than with the typological or functional factors noted by Green, C.J. But Orsborn, J., made it clear, in para. 120 of *Brushett,* that his analysis would be directed toward whether, in the circumstances of the particular case, it would be desirable to have a "consensus of ordinary lay opinion" in the community rather than the opinion of the judge alone. That is also the point at which Green, C.J., indicates in *Clarke* he would begin his analysis. I do not understand how the Chief Justice's approach would be "with less rigidity and strictness than mandated by *Brushett"* (see para. 35 of *Clarke***).** I believe that in determining whether there should be a civil jury, a judge should, as in judicial review cases, proceed on a functional and pragmatic basis, considering all relevant factors and giving them appropriate weight in determining whether the balance tilts in favour of a civil jury. I further believe that this analysis should proceed under the umbrella of the overriding principle in *Harding v. Peddle,* relied upon by Mercer, J., at para. 9 of *Earle,* and implicitly adopted by our Court of Appeal in *Wells,* that the basic question on each application is "whether justice to the litigants would be better served by granting or refusing the application for a jury".

(b) Factors to be considered

[28] In analyzing the factors weighing for and against a civil jury in the present actions, I shall employ the classification adopted by Green, C. J., in *Clarke* and consider (i) typological factors, (ii) functional factors, and (iii) trial management or convenience factors.

(i) Typological factors

[29] This is not a case where it is immediately obvious there will be a benefit to having a consensus or a cross-section of lay opinion from the community on the issues to be decided. As Green, C.J., noted, at para. 36 in

*Clarke, "*such cases might include ones where standards of community morality or reasonableness are involved or where condemnation of improper conduct is asked for". Clearly, if sexual assaults on young children are proven, this will amount to misconduct by the first defendants representing "a marked departure from ordinary standards of decent behaviour". No input from a civil jury is necessary to establish this. I do accept the corporate defendants' submission that, as Green, C.J., noted concerning *Whiten***,** a civil jury may assist in determining whether any action or inaction or abuse of authority by these defendants was no reprehensible as to warrant punitive damages. I conclude, however, that considering the guidance available from the Supreme Court of Canada in various cases relating to the duty of parties in positions such as the corporate defendants to properly supervise their employees and representatives and to adequately protect children in their care, the advantage to be gained by a civil jury in the present actions is slight and easily outweighed by the functional and trial management factors which I shall now address.

[30] Assuming it would be appropriate to obtain an indication of lay opinion in the present actions, functional factors (concerning the nature of the issues involved and how the division of functions between judge and jury will impact on those issues) weigh in favour of a trial by judge alone in the present case.

[31] As Mahoney, J.A., indicated in *Wells,* and as noted by Green, C. J., in *Clark,* at paras. 43-44, jurors may become confused as to the limits of their roles, where the separate functions of judge and jury become blurred because issues of fact are interwoven with issues of law. In the present case there are several issues of mixed law and fact. For example, the legal liability of the corporate defendants will depend upon how findings of fact concerning supervision, warnings and protective measures relate to the legal responsibilities of those in a position of trust or authority and to vicarious liability. Also, the legal quantification of damages will depend upon factual findings.

[32] In the present case the functional factors, by themselves, might not outweigh the benefit of having a civil jury provide a consensus of lay opinion from the community. However, when combined with the following trial management considerations, the situation changes.

(iii) Trial Management or Convenience Factors

[33] The most significant trial management or convenience factor in the present case relates to the risk of logistical difficulties arising because of the projected length of the trials and the number of potential witnesses. Counsel for B.P. estimates that in the action involving Paradis he will call 32 witnesses and direct examination will take approximately 112 hours. Counsel have estimated 20 days for this trial. In my opinion the projected direct examination alone will take more than that. The B.P.-Roche matter will involve 19 witnesses with at least 76 hours of direct examination. The S.T.-Baynham matter will involve 18 witnesses with 78 hours of direct examination. In *Bonnell v. Durnford* (1997), 158 Nfld. & P.E.I.R. 118; 490 A.P.R. 118 (Nfld. T.D.), Adams, J., concluded an estimated trial length of 12 to 15 days militated against a trial by judge and jury. In *Earle,* Mercer, J., refused a civil jury in a sexual assault case where the estimate was for 30 witnesses and 30 documents within an estimated 30 days.

[34] The greater the number of witnesses in a trial, the greater the probability of delays arising because of travel difficulties, personal problems, or other logistical matters. Continuations may be arranged more easily with a judge alone than with a civil jury where the aim must be to proceed without significant interruption.

[35] Counsel for the plaintiffs also points to the voluminous documents filed by the parties, including the plaintiffs' health and counselling records, employment records, criminal transcripts and investigation files, any correction records, Social Services files, expert impact assessment reports, documents relating to the structure and organization of various parts of the Catholic church, correspondence between the individual defendants and the Diocese or Oblate Order and counselling documents relating to the individual defendants. In my experience the introduction of documents, even where these are being admitted by consent, greatly increases the time necessary for oral testimony of witnesses, when these witnesses must have these documents presented to them and be given the opportunity to comprehend or explain them.

[36] The trials will also include the testimony of experts in the field of childhood sexual assault and an expert on the structure and operation of the Oblates. The probable complexity of the expert evidence weighs in favour of

trial by judge alone.

[37] The plaintiffs also intend to call similar fact evidence, which is an area of law requiring very careful instruction to jurors to avoid prejudice to the defendants and to ensure a proper line of reasoning from such evidence by jurors. The complex law in this area will probably be more easily understood by judges than by jurors without legal training.

[38] Another significant consideration is, as noted in *Earle,* the need for "unhurried and thoughtful consideration" of the issues without the time pressures imposed by the need for a jury decision shortly after testimony finishes.

[39] In my opinion, if the trials are by judge alone, it will greatly facilitate case management aimed at having trials heard together or other steps taken to avoid duplication of testimony (for example, testimony relating to the structure of the Oblates Order and the Order's relationship with individual defendants). This becomes more complicated, if not impossible, where trials proceed with a jury.

[40] On the issue of case management I should note that the present matters have been under a case management order since April 17,2003. The defendants did not request a jury trial in the certificate of readiness (indeed they refused to complete the certificate of readiness proposed by the plaintiffs, who then obtained an order that the execution of a certificate of readiness be dispensed with before placing the matter on the pretrial list). Their present applications were filed December 20,2004. Orsborn, J., has taken certam decisions relating to case management without having any indication the defendants would be requesting civil juries. For example, in June, 2004, in a written decision, he stated:

> "Where it can be achieved without injustice, a multiplicity of proceedings should be avoided; the potential for inconsistent findings in different proceedings should also be minimized. These factors can be addressed, at least to some extent, but not by ordering at this time a formal consolidation and joint trial of these cases or of those involving the same alleged tortfeasor.
>
> "These cases are subject to the case management process, and

through vigorous case management and perhaps a single pre-trial conference, a trial structure may be developed that would minimize the potential for duplication but which would not unduly complicate the management of any single trial and would not leave any perception of fairness."

[41] If it were necessary, I believe the defendants' delay in requesting civil juries in these matters could be taken as a factor weighing heavily against their request. In the present circumstances, however, my decision is not based upon this delay, since I have determined that the other trial management factors, when combined with the functional factors noted, greatly outweigh any benefit from having the input of a civil jury and strongly indicate that justice to the litigants in the present cases will be better served by trials without a jury.

[42] Because of the conclusions set out above, I need not deal with the plaintiffs' arguments concerning the inadequate representation of Innu on the jurors list or the possibility of racial or religious bias.

SUMMARY AND DISPOSITION

[43] In summary, the trial management problems alone greatly outweigh any benefit to be obtained by having input from a civil jury. When combined with the potential for jury confusion arising from the nature of the issues, with interwoven issues of fact and law blurring the separate functions of judge and jury, I find the defendants have not persuaded me in the present cases that justice would best be served for all parties by having civil juries. Indeed, I should note in case I am mistaken as to where the onus lies, that the plaintiffs have established on a balance of probabilities that, in the particular circumstance of these matters, there is very little doubt justice requires trial by judge alone. The second defendants' applications are dismissed with costs to the plaintiffs. Application dismissed.