Citation: ICBC v. Phung, et al
2003 BCSC 4

Date: 20030110
Docket: S004631
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA

PLAINTIFF

AND:

VAN LUONG PHUNG, VAN HIEN PHUNG, TONG VAN VU, SOI THI LE, PAUL HUNG DOAN, VINH VAN LE, HUONG THI VU, HUNG MANH NGUYEN, LIEN THI LE, THANH SON LE, VAN TAM PHAM, THANH PHU TRINH, TUYEN VAN DO, VAN KHAI TANG, TUAN DUC BUI, THI HA TRUONG, VAN HONG NGUYEN, QUOC NAM TRAN, VAN DAO NGUYEN, QUANG DUNG TRAN, THI PHUONG PHAM, VAN LONG DO, LOAN THI NGUYEN, and LIN NGUYEN

DEFENDANTS

REASONS FOR JUDGMENT

OF

MASTER DOOLAN
(IN CHAMBERS)

Counsel for the Plaintiff: F.G. Potts

Counsel for the Defendant, Van Luong Phung: R. McQuillan appearing as agent for D. Komori

Counsel for the Defendants, Van Hong Nguyen, Quoc Nam Tran and Van Dao Nguyen: L. Spencer

Date and Place of Hearing: November 26, 2002
Vancouver, BC

[1] By notice of motion filed September 20, 2002, defendant Van Luong Phung, makes application for an order that the jury be struck at the trial of this matter. The trial is set to commence February 24, 2003, for 20 days.

[2] On this application, and for the trial, each of the 24 defendants has been assigned a number coinciding with the order of their appearance in the style of cause. The defendants by number and name are as follows:

List of Defendants in Order and as shown in Statement of Claim:

#1	Van Luong Phung Involved in MVA #1,#2,#3 & #4	#13	Tuyen Van Do Involved in MVA #4
#2	Van Hien Phung Involved in MVA #1, #2 & #4	#14	Van Khai Tang Involved in MVA #4
#3	Tong Van Vu Involved in MVA #1 & #5	#15	Tuan Duc Bui Involved in MVA #4
#4	Soi Thi Le Involved in MVA #2	#16	Thi Ha Truong Involved in MVA #5

#5	Paul Hung Doan Involved in MVA #2	#17	Van Hong Nguyen Involved in MVA #5
#6	Vinh Van Le Involved in MVA #2	#18	Quoc Nam Tran Involved in MVA #5
#7	Huong Thi Vu Involved in MVA #2	#19	Van Dao Nguyen Involved in MVA #5
#8	Hung Manh Nguyen Involved in MVA #2	#20	Quang Dung Tran Involved in MVA #5
#9	Lien Thi Le Involved in MVA #2	#21	Thi Phuong Pham Involved in MVA #5
#10	Thanh Son Le Involved in MVA #3	#22	Van Long Do Involved in MVA #5
#11	Van Tam Pham Involved in MVA #3	#23	Loan Thi Nguyen Involved in MVA #5
#12	Thanh Phu Trinh Involved in MVA #3	#24	Lin Nguyen – Court Certified Translator

[3] The plaintiff caused a writ of summons and a 32-page, 49 paragraph, statement of claim to be filed August 28, 2000. The statement of claim is replete with words such as “conspired”, “deceitfully conspired”, “fraudulent”, “misrepresented”, “cheat”, “defame”, and “connived”. In paragraph after paragraph the plaintiff alleges who did what with whom and to whom, all as part of a conspiracy to hoodwink the plaintiff into paying false and spurious damage claims.

[4] Each defendant is alleged to have been involved in one or more motor vehicle accidents which occurred between 1993 and 1996. The accidents, referred to by plaintiff’s counsel as “Incidents”, and the interrelationship between the defendants, with respect to one or more of the accidents, are shown as follows:

Interrelationship between Defendants

		Total number of defendants alleged to have interacted with each other in the motor vehicle accidents referred to on the left
Incident #1	MVA May 11, 1993 Defendants alleged to be involved: #1,#2 & #3	3
Incident #2	MVA August 12, 1993 Defendants alleged to be involved: #1, #2, #4 to #9	8
Incident #3	MVA July 24, 1995 Defendants alleged to be involved: #1, #10, #11 & #12	4
Incident #4	MVA September 6, 1995 Defendants alleged to be involved: #1, #2, #3, #14 & #15	5
Incident #5	MVA May 26, 1996 Defendants alleged to be involved: #3, #16 to #23	9

[5] The plaintiff submits that while there were four “Incidents” (motor vehicle accidents), there are 14 separate events of fraud, conspiracy, etc. which must be considered.

[6] On January 3, 2002, the plaintiff delivered a notice of trial and a notice requiring trial by jury. I was told that the plaintiff’s list of 453 documents was delivered to the defendants in or about mid-January of 2002.

[7] As stated, on September 20, 2002, defendant #1, Van Luong Phung, filed his notice of motion to strike the jury. He relies upon R. 39(27)(a)(i) and (ii).

[8] Mr. Potts, on behalf of the plaintiff, raises a preliminary objection. He submits that the notice of motion was filed some eight months after expiry of the seven-day period set out in R. 39(27)(a), and as such, the application should be dismissed.

[9] The applicant relies upon the decision of Esson, J. in ***Sadowick v. Doobay***, (Vancouver Registry C793714), issued March 30, 1982. In that case, the learned judge was dealing with an application to strike a jury on the ground that the facts were of an intricate and complex character within the meaning of R. 39. As here, it was argued that the application was out of time. The comments of the court commencing at p. 7 are as follows:

> The question remains as to whether the court should exercise its discretion against the plaintiff. On this point, Mr. Griffiths places great emphasis upon the late stage at which the application was brought on for hearing. It was launched in September, 1980, and adjourned generally by agreement. It finally came on for hearing a few days before trial. The result, as Mr. Griffiths puts it, is that, if the application is allowed, the plaintiff will have to choose between her right to appeal this order and her right to proceed to trial on the presently scheduled trial date. That is a regrettable result.
>
> On the other hand, it must be recognized that there are many cases in which it is impractical to bring on an application such as this within the time contemplated by R. 39(20). At that stage, the issues as they relate to the conduct of the trial simply are not well enough defined. Counsel for the plaintiff concedes that to be so but says that the matter can and should be dealt with soon after discoveries are held. There are, however, cases where the real issues cannot be defined until the defendant knows what the plaintiff's expert evidence will be and knows what his experts are prepared to say in response. This is such a case.
>
> In requiring the application to be launched within days of the giving of notice of trial, R. 39(20) follows the former M.R. 429 and 430, rules which were enacted at a time when trials were generally less complex and, I think it is fair to say, were not set down at such an early stage of the action as has now become the practice. Read alone, R. 39(20) would seem to contemplate a final decision as to mode of trial being made at the time notice of trial is given. That cannot, however, be the intended policy under the present rules because R. 35(4) provides that, after a pre-trial conference, the court may direct that the trial be heard by the court without a jury. That rule has been employed on the court's own motion as in ***Robitaille v. Vancouver Hockey Club Limited***, (1979) 6 W.W.R. 41 (B.C.C.A.) aff'g (1979) 12 B.C.L.R. 335. Such orders have also been made where the defendant applied at the pre-trial conference. ***Henry v. Knickerbocker*** (unreported, Vic. Reg. No. C800709, McEachern C.J.)
>
> The rules recognize the need, in order to ensure a fair trial, of an opportunity to review the mode of trial at a late stage. If the inconvenience which would be created by a jury trial was merely inconvenience in the sense of additional expense and delay in the conduct of trial, it would be right to refuse the defendant's application because of the tardiness in bringing it on for hearing. But the concern here is about something more serious, i.e., the importance of being able to ensure a fair trial. That must over-ride the inconvenience to the plaintiff of being deprived of a jury trial at a late stage.

[10] In this case, the applicant points out that the plaintiff's list of 453 documents was delivered to them after the expiration of the seven-day period set out in Rule 39(27)(a). Further, that at that time there had not been an opportunity to complete discoveries, or in fact to marshall his documents. It is the position of the applicant that he was not in a position to appreciate the complexity of the many intertwined issues that will be raised at this trial.

[11] It is submitted that the factual matrix is complex, and that the interinvolvement of any single defendant with any number of other defendants involved in up to five accidents makes this case extremely complicated, both with respect to the basic facts of the accidents, the interrelationship, and in fact blood ties of many of the defendants, and, of course, the separate and sometimes distinct damages claimed by each defendant. A number of damage claims were subsequently paid on what are now alleged to be fraudulent claims.

[12] The applicant submits that no prejudice has been advanced by the plaintiff, other than the fact that they want this trial to be by judge and jury. In any event, the applicant submits I should exercise my discretion under R. 3(2) and extend the time for the hearing of this application so it can be heard on its merits.

[13] I am satisfied that while the Rules of Court were created as a code of conduct for legal proceedings, they should seldom be so rigidly applied so as to deny the hearing of an important application on its merits.

[14] It is to be noted as well that under R. 2(1):

> Unless the court otherwise orders, a failure to comply with these rules shall be

> treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding.

[15] On all the facts, I am satisfied that the applicant's failure to comply with time constraints set out in R. 39(27)(a) should not frustrate the hearing of this application.

[16] I note as well that there would appear to be some inconsistency in the rules. A trial set to be heard by judge and jury for 20 days falls within the practice directive of Williams, C.J.S.C. dated November 20, 1998, and is subject to mandatory case management. Minimally, there must be a pre-trial conference before a judge or master of the court in advance of the trial. Under the usual practice, unless requested earlier by counsel, court staff will contact counsel in order to set up a pre-trial conference usually four to five weeks prior to the trial. The pre-trial conference will not only touch on those matters set out in R. 35(4) but provide a convenient conduit to a judge or master when circumstances require directions from the court to resolve an impasse between the parties or their counsel.

[17] Rule 35 has, in my opinion, been too long unappreciated. A careful reading of the rule reveals that a judge or master has expansive jurisdiction under subrule (4), "whether or not on the application of a party . . ." to make such orders as are necessary to facilitate the litigation, including the setting down of schedules and time limits for the completion of pre-trial procedures. Rule 35(4)(a) has particular reference to this application:

> 35(4) At a pre-trial conference, the judge or master may, whether or not on the application of a party, order that
>
> > (a) the trial, or part of it, be heard by the court without a jury, on any of the grounds set out in Rule 39(27),

[18] It is clear from the statement of claim that while some defendants are alleged to have been involved in a conspiracy with respect to only one accident, defendant #1 is alleged to be involved in four of the accidents, while defendant #2 is alleged to be involved in three of the accidents.

[19] Defendants #1, #2 and #23 are alleged to be the "KING PINS" in what is alleged to be an elaborate "scheme to defraud and injure the plaintiff."

[20] The plaintiff alleges in its 32-page, 49-paragraph, statement of claim, that the 24 defendants acted in concert to cheat and defraud the plaintiff. Paragraphs 26 and 27 of the statement of claim are as follows:

> 26. Between the period May 11, 1993 through and to the present date, the Defendants and each of them, wrongfully and maliciously conspired together and continue to conspire together to defraud and injure the Plaintiff, and/or the Plaintiff's insureds by combining in various combinations and at different times and in different combinations for the purpose of assisting and encouraging each other in making fraudulent insurance claims as against the Plaintiff and/or the Plaintiff's insureds in respect of non-existent and/or exaggerated personal injury claims and in respect of non-existent or exaggerated damage to or loss of property claims and in respect of non-existent or exaggerated claims for benefits pursuant to the ***Insurance (Motor Vehicle) Act*** R.S.B.C. 1979 and amendments thereto and the ***Insurance (Motor Vehicle) Act*** R.S.B.C. 1996 and amendments thereto.
>
> 27. Further, the Plaintiff says that the Defendants and each of them, fraudulently and deceitfully conspired and agreed together to cheat and defraud the Plaintiff and to hoodwink and deceive the Plaintiff and the Plaintiff's employees and agents and to obtain and/or attempt to obtain payments and benefits from the Plaintiff which were not properly owing by the Plaintiff or the Plaintiff's insureds to the Defendants or any of them.

[21] At paragraph 30 the plaintiff describes what it says it knows of the scheme of these defendants:

> 30. The Plaintiff says that the general particulars of the Scheme, as presently known to it, were that:
>
> > (a) the Defendants would, in various combinations, agree between themselves to cause a collision to occur between two automobiles for the purpose of advancing fraudulent material damage and personal injury claims in respect of Incidents #2, #3 and #5 and to cause a collision with an innocent third party in respect of Incidents #1 and #4;
> >
> > (b) the Defendants, with respect to Incidents #2, #3 and #5, would agree to ensure that the circumstances of the fraudulent collision would be such that if a legitimate accident had occurred in identical circumstances, there would be no legal issue as to which of the two vehicles involved in the fraudulent incident was, in law, the "at fault" vehicle;

(c) the Defendants would, in respect of each fraudulent incident, except Incident #1, ensure that the registered owner of the "at fault" vehicle would have previously obtained insurance coverage from I.C.B.C., and, in particular, would have obtained collision coverage from I.C.B.C. regardless of the value, age, or condition of the "at fault" vehicle, and would insure that the fraudulent incident occurred within the first or last six weeks of the insurance policy coverage period;

(d) the Defendants would, in furtherance of the Scheme, ensure that, in fact, the occupants of each automobile involved in such fraudulent incident were related to or known of, or by, the occupants of the other vehicle, but that all such occupants would either deny such relationship and/or omit to inform the Plaintiff of such relationship except Incidents #1 and #4;

(e) the Defendants would further insure that no witnesses, other than participants in the Scheme, would see such fraudulent incident or, alternately, would ensure that I.C.B.C. was not informed of the names of any independent witness to such fraudulent incidents;

(f) the Defendants would ensure that the driver of the "at fault" vehicle in each such fraudulent incident would admit liability for the fraudulent incident except Incidents #1 and #4 and in respect of Incidents #1 and #4 both incidents were intentionally caused by either #1 VAN LUONG PHUNG or #2 VAN HIEN PHUNG;

(g) the Defendants would, in furtherance of the Scheme, insure that each vehicle involved in such fraudulent incident would have multiple occupants and, in respect of Incidents #2 and #4, arranged to have the registered owner of one of the vehicles present as a passenger in his own vehicle whilst such vehicle was being operated by another of the Defendants;

(h) subsequent to each such fraudulent incident, the Defendants, or some of them, would advance fraudulent personal injury claims in respect of personal injuries, which personal injuries were incapable of objective verification and which such injuries were wholly dependent upon the individual Defendant's description of pain and suffering for proper medical diagnosis and treatment; and the Plaintiff says that the description of the injuries alleged to have been suffered by each of the Defendants, as described to their treating physicians and care givers, was virtually identical with respect to each and every claim for bodily injuries advanced by the individual Defendants herein;

[22] The issue is whether there arises in this case a "prolonged examination of documents or accounts . . . or local investigation which cannot be made conveniently with a jury, or" that "the issues are of an intricate or complex character." (R. 39(27)).

[23] In ***Falez (Guardian ad litem of) v. Boothroyd***, [1980] B.C.J. No. 1359 (B.C.S.C.), Bouck, J. had this to say at paras. 13 and 14:

> 13. Under this Rule, the plaintiff had to apply for an order that the trial be heard with a jury. Otherwise, it was held before a Judge sitting alone. While it was the plaintiff's application, the onus shifted to the defendant at the time of the motion to show why an order for trial by a jury should not be made. This was because every party has a common law right to have his case heard before a Judge and jury. ***McDonald v. Inland Natural Gas Co.*** (1966), 57 W.W.R. 87; ***Holland v. Hallonquist*** (1968), 63 W.W.R. 207.
>
> 14. Applying the new Rules, a party may by notice to the other side request trial with a jury (R. 39(19)). Unless the opposite party then applies to the Court for an order the jury be dispensed with, the jury notice stands (R. 39(20)). At a hearing before a Chambers judge using R. 39(20), the onus is upon the party opposing the jury in the same way as it was in the pre-1976 Rules.

[24] At para. 18, Bouck, J. comments as follows:

> 18. I think it is safe to say this kind of motion is a particularly good example of the rule that cases stand for the proposition founded upon their own facts. What one must look at is the nature of the cause of action, the number of parties involved which may complicate the issues, and the kind of evidence which will likely be heard at the trial. After examining these three items, it is a matter of discretion to be exercised judicially as to whether or not the defendant has met the burden imposed upon him by R. 39(20).

[25] The thrust of Mr. Potts' submission is that this is not a case which cannot be investigated conveniently by a jury. While 24 defendants are named, he notes the plaintiff has discontinued against one defendant and intends to make application to discontinue against another defendant.

[26] Mr. Potts asks me to consider that the plaintiff has taken default judgment against 11 defendants and that only 11 defendants are continuing to defend this action. Of these, eight are represented by counsel and three are self-represented defendants.

[27] Mr. Spencer advised he will not continue to act for the three defendants he represents on this application. As a result there will be six defendants not represented by counsel at trial. Further, it is not clear that taking default judgment against 11 defendants eliminates the necessity of presenting evidence against one or more or all of them concerning their involvement with one or more of the remaining defendants in order to present the plaintiff's case on the conspiracy issue.

[28] A decision often referred to on applications under R. 39(27) is that of McEachern, C.J.S.C. (as he then was) in ***Wipfli (Guardian ad litem of) v. Britten***, [1981] B.C.J. No. 1706 (B.C.S.C.). At para. 18 he deals with the question of onus as follows:

> 18. First, I must consider the question of onus. The plaintiff is prima facie entitled to have a trial with a jury unless the defendants can bring themselves within one or more of the exceptions contained in R. 39(20). I have also specifically instructed myself in accordance with the helpful analysis of this two-staged process described by Lambert J.A. in ***Nichols v. Gray*** (1978), 9 B.C.L.R. 5; and in ***Cook v. Ring***, B.C.C.A., November 23, 1978 (unreported).

[29] At para. 26, McEachern, C.J.S.C. considers the question of "convenience":

> 26. Convenience, in the sense in which that word is used in the Rule does not depend solely upon whether or not the jury can be made to understand the evidence. I accept the evidence of Drs. Riddell and Henniger whose useful evidence on their cross-examinations satisfies me that they can probably make an understandable description of the actual surgical procedures and they can explain the present condition of the infant plaintiff. But that is not the point. What is required before it is convenient to have a scientific investigation made with a jury, is the ability to have a proper trial, which includes not just an understanding of the evidence as it is being given, but also an ability to retain this understanding throughout a long trial in a form which permits an analysis of the evidence in relation to the difficult questions which must be decided at the end of the case.

And again at paras. 30 through 34:

> 30. As I said in ***Mewhort***:
>
> > . . ."convenience" in the context of this Rule does not refer to physical or personal convenience.
> > Rather, it relates to the proper conduct of the trial including an understanding of the issues and evidence, the submissions of counsel, and the Judge's charge.
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> 31. I will subscribe to what I said there, except that I now realize that this passage may be thought completely to exclude physical or personal convenience as relevant factors on this question. I do not think such matters must be disregarded. In a long case such as this one the personal convenience of all parties must be considered if it may affect the proper trial of the case, particularly if the volume of evidence may become difficult to manage or if the decisional process may adversely be affected by the personal or physical discomfort of the jury. Having said that for the purpose of expanding upon what I said earlier, I am still of the view that "convenience" in this Rule relates to the proper conduct and management of the entire trial including, of course, the decisional process.
> 32. I do not believe that it will be convenient to make this scientific investigation with a jury. If the trial proceeds with a jury, and if it should last 25 days or thereabouts, the members of the jury whose note-taking ability is at least questionable will listen, usually in silence, to many days of scientific evidence about the matters mentioned above. They will then hear submissions pro and con which will compress this case the way counsel choose to compress it but not, perhaps, the way the jury would like to have it discussed. The jury will have practically no opportunity (except possibly for a few hesitant questions), to take part in the trial and the jury will have no verbal interaction or opportunity to discuss this case with the witnesses or with counsel as a Judge has. The jury will then hear the Judge's best efforts to analyze and simplify the case, but it is doubtful if the case can properly be explained in a protracted monologue, keeping in mind that I have only mentioned some of the issues in the case.
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> 33. After that, the jury will be instructed to retire and decide the case, and they will be separated from mankind, except for meals or when exhaustion arrives, until they reach a unanimous verdict. If, after three hours, they have not reached a verdict, they may be told that a majority verdict of 3/4 of their number will be accepted.
>
> 34. I do not believe that the time-honoured process of jury trials, which may be eminently sensible for some cases, can be described as convenient is this case either

> in the sense that I have described or in any other sense of that word. This case cries out for unhurried and thoughtful consideration. There must be a weighing of alternatives, and an opportunity to reflect upon these alternatives. The first decision the jurors reach may well be the right one, but all these parties, including the various defendants as between themselves, are entitled to have the case considered and reconsidered before a final decision is irrevocably announced. In this connection I respectfully adopt what Branca J.A. said in ***McDonald v. Inland Natural Gas Co.***, supra, at pp. 95 and 96. With deference, I also refer to what I said in ***Henry v. Knickerbocker***, unreported, May 8, 1981 (Victoria Registry):
>
> > A Judge deciding this case without a jury would, after hearing the evidence and reviewing his notes or a transcript, assess and consider all the evidence including the many medical reports and the submissions of counsel. He would probably draft and redraft a judgment several times, and he would make countless calculations to test and verify the reasonableness of his conclusions. Like any conscientious jury, he would agonize over his conclusions, but he would so at a leisurely pace and he would not be under pressure of time or the personal comfort of himself or others in making the kind of calculations which should be made to test the reasonableness of his conclusions.

[30] While the applicant concedes that, unlike the facts in ***Wipfli***, this case will not require "a scientific . . . investigation which cannot be made conveniently with a jury . . .", he submits that the comments of McEachern, C.J.S.C. apply equally to the circumstances of this case. He submits that in this case it is alleged there is a complicated web of wrongful conduct on behalf of the defendants, and that because of the number of and names of these defendants, it will be difficult for a jury to conveniently keep them separate and isolate the evidence concerning their individual involvement in one or more of the 14 separate events that must be reviewed. It is submitted that all of this will be further complicated by the fact that six defendants are unrepresented, and that most, if not all, will require interpreters at trial. To all of this will be added the difficulty faced by a jury who will be required to distinguish between proven facts and other events or circumstances from which they are to infer that facts have been proven, as the plaintiff intends to raise and argue the "similar fact" rule.

[31] Mr. Potts attacks the sufficiency of the applicant's evidence on this application, noting that while the court has a discretion, there must be evidence and not bald assertions in support of the relief sought.

[32] Mr. Potts submits that the facts in this case are not complicated and do not require "a scientific or local investigation which cannot be made conveniently with a jury . . ." He notes that in this case there are no medical or engineering reports. It is his submission this is not a case that cries out for "unhurried or thoughtful consideration" – the issue he says is one of "credibility", and that allegations of fraud ought to be heard by juries (***King v. Colonial Homes Ltd.*** [1956] S.C.R. 528 (S.C.C.)).

[33] Mr. Potts responds to the applicant's submission that the jury will become confused by the non-Anglo-Saxon names of the defendants and that their evidence will be given through interpreters. He submits that the fact the defendants are Vietnamese or that their evidence will be given through interpreters should not be considered and that if I do so I am "going down a slippery slope".

[34] He submits that the assignment of numbers to each defendant was done for the purpose of avoiding confusion and that a jury will have no difficulty in understanding and considering evidence as it relates to defendants #1 to #24.

[35] That submission raises the question as to whether a jury, not familiar with the non-Anglo-Saxon names of the defendants, will become confused and will be less able to fulfil the duties imposed upon them "conveniently".

[36] Drawing upon that concern, one must consider the time constraints imposed upon a jury and the danger of their becoming so confused and frustrated that they might opt for a compromise settlement.

[37] The question I pose is: Does the allocation of numbers to each defendant provide some protection against confusion on the part of members of the jury?

[38] The answer is: Possibly – providing they are not led astray by carelessly drafted pleadings and/or documents.

[39] With great reluctance, I point out that after a number of hours of review, and predicated upon the assumption that the style of cause in the statement of claim, at tab 4 of the chambers record, is correct, I found 34 errors in documents contained in the chambers record as follows:

Inconsistencies between defendants' names in the style of cause and other documents filed on

application.

[40] 1. The style of cause in applicant's chambers record index identifies defendant #11 as Van Tan Pham, whereas he is shown as Van Tam Pham in the statement of claim.

2. The style of cause in applicant's chambers record index identifies defendant #19 as Van Do Nguyen, whereas he is shown as Van Dao Nguyen in the statement of claim.

3. Same error as number 1 above appears in applicant's outline.

4. Same error as number 2 above appears in applicant's outline.

5. Same error as number 1 above appears in para. 8 of applicant's outline.

6. At para. 11 of applicant's outline defendant #14, Van Khai Tang is shown as Van Kai Tang.

7. The applicant's notice of motion refers to defendant #14, Van Khai Tang as Van Kai Tang.

8. The plaintiff's outline omits to show defendant #11, Van Tam Pham in proper sequence and incorrectly adds him at the end of the style of cause as Van Tan Pham.

9. The plaintiff's outline refers to defendant #16, Thi Ha Truong as Hi Ha Truong.

10. The response of the plaintiff refers to defendant #11, Van Tam Pham as Van Tan Pham.

11. The affidavit of James Gopaulsingh filed by the plaintiff makes the same error as number 10 above.

12./13. The response of Quoc Nam Tran repeats the same errors as numbers 8 and 9 above.

14./15. The response of Van Dao Nguyen repeats the same errors as numbers 8 and 9 above.

16./17. The response of Van Hong Nguyen repeats the same errors as numbers 8 and 9 above.

[41] As shown, defendants' documents contain a number of errors, the majority of errors, however, are to be found in the plaintiff's documents.

Errors noted in the statement of claim.

[42] 1. Para. 3: refers to defendant #4, Soi Thi Le as Thi Soi Le.

2. Para. 7: refers to defendant #7, Huong Thi Vu as Huong Vu Thi.

3. Para. 9: refers to defendant #8, Hung Manh Nguyen as husband of #9, Wendy Le, whereas defendant #9 is Lien Thi Le and not Wendy Le. It is unlikely Hung Manh Nguyen is married to Wendy Le who is not a defendant but who was an infant passenger in a vehicle involved in Incident #2, which occurred on August 15, 1993. Para. 10 would seem to confirm the error in para. 9, as it now has defendant #9, Lien Thi Le married to defendant #8, Hung Manh Nguyen.

4. Para. 21: refers to defendant Loan Thi Nguyen as defendant #24 when she is defendant #23.

5. Para. 24: refers to defendant Loan Thi Nguyen again as defendant #24 when she is defendant #23.

6. Para. 25: refers to defendant Lin Nguyen as defendant #23 when she is defendant #24.

7. Para. 28: same errors as in para. 25.

8. Para. 29: same errors as in paras. 25 and 28.

9. Para. 31: same errors as in paras. 25, 28 and 29.

10. Para. 38(a)(i): refers to defendant Vinh Van Le as defendant #36 when he is defendant #6.

11. Para. 38(b): refers to defendant Lin Nguyen as defendant #23 when she is defendant #24.

12. Para. 38(c): same errors as in para. 38(b).

13. Para. 41(d): twice refers to defendant Loan Thi Nguyen as defendant #24 when she is defendant #23.

14. Para. 41(e): same error as in para. 41(d).

15. Para. 41(f): same error as in paras. 41(d) and 41(e).

16. Para. 41(g)(iii)(g): same error as in paras. 41(d), 41(e) and 41(f).

17. Para. 4(h)(i): same errors as in paras. 41(d), 41(e), 41(f) and 41(g)(iii)(g).

[43] I concede that some of the errors that appear on documents produced by the same law firm presumably derive from one original error now in their computers, and which, unless corrected will be repeated *ad nauseam*. These errors in documents created by careful law firms without time constraints may well add to those difficulties a jury will undoubtedly face in this trial.

[44] I am taken by Mr. Spencer's argument that the number of defendants, and the spelling of their names, may cause difficulty to some jurors in keeping allegations against each defendant separate and apart one from the other. Mr. Potts' adamant response that a jury would not, particularly by assigning numbers to each defendant, become confused when dealing with the evidence against each defendant is arguable. The very scheme designed to simplify the case for jurors may magnify rather than reduce their difficulties.

Summary

[45] 1. The 24 defendants are each alleged to have been involved in at least one or more of five separate motor vehicle accidents (referred to in the statement of claim as "Incidents").

Incident #1	May 11,1993
Incident #2	August 12, 1993
Incident #3	July 24, 1995
Incident #4	September 6, 1995
Incident #5	May 26, 1996

2. That the above five incidents give rise to 14 combinations of events.

3. Default judgment has been taken against 11 defendants – however, as conspiracy is alleged against all, their involvement or lack thereof is still at issue.

4. Plaintiff has discontinued proceedings against one defendant and may discontinue against one other.

5. At the time of the hearing, it was known that three defendants were unrepresented. Mr. Spencer, who appeared for #17, Van Hong Nguyen; #18, Quoc Nam Tran; and #19, Van Dao Nguyen, advised he will not be representing these three defendants at trial, therefore six defendants will be unrepresented.

6. Many defendants will require Vietnamese interpreters.

7. The plaintiff intends to rely upon the "similar fact" rule:

> Under the similar fact rule the prosecution or a party may adduce evidence of the disposition or propensity of the accused or opposite party to show the person did or did not do the act as charged. The relevancy of bad character evidence is that the propensity of a person to do an act is relevant to indicate the probability of her or him doing or not doing the act in question. The Supreme Court has held that in *exceptional circumstances*, similar fact evidence is admissible if it is relevant to an issue in the case (other than a relevance that derives from showing only that the accused or opposite party is merely a bad person) *and* its probative value outweighs the prejudice to the accused or opposite party that may arise from the admission of such evidence. [The Law of Evidence in Canada; John Sopinka, Sidney N. Lederman, Alan W. Bryant; Second Edition, Butterworths, ch. 11, p. 523, §11.3]

8. The trial is currently set for 20 days and is <u>not</u> under case management.

9. The difficulties faced by a judge drafting a charge to this jury will be considerable.

[46] On this application, counsel have, with liberal time for drafting and correction, relied upon documents in which there are multiple errors. In my view, these errors would likely exacerbate and complicate a jury's already formidable task. In all the circumstances, I have grave doubts with respect to a jury's ability to hear, understand and weigh all the evidence heard over a 20-day trial and conveniently come to a just determination on all the evidence.

[47] Whether or not the presiding judge will invoke the three-hour rule is of no moment. This case demands unhurried and thoughtful consideration and not a rush to justice which may be tainted by compromise if the jury are harried.

[48] The motion is allowed with costs to the applicant in any event of the cause.

(Disclaimer: While I have made a time-consuming investigation in my quest to identify errors in the chambers record, I cannot guarantee that I have uncovered all errors, nor can I guarantee that in attempting to identify these errors, I have not also made errors.)

"Master K. Doolan"