COURT FILE NO.: 97-CU-135410
DATE: 20041104

ONTARIO

SUPERIOR COURT OF JUSTICE

2004 CanLII 35084 (ON S.C.)

B E T W E E N:	)	
	)	
JENNIFER-ANNE COWLES, JESSE COWLES, a minor by his Litigation Guardian, Jennifer-Anne Cowles, QUINTON COWLES, a minor by his Litigation Guardian, Jennifer-Anne Cowles and ANNE KELLY	)	*L. Craig Brown*, for the Cowles Family Members as Plaintiffs
Plaintiffs	)	
- and -	)	
DAVID BALAC, RANKO BALAC and THE AFRICAN LION SAFARI & GAME FARM LTD.	)	*J.A. Soule*, for David Balac and Ranko Balac, as Defendants
	)	*Douglas Wright* and *Martin Smith*, for The African Lion Safari & Game Farm Ltd.
Defendants	)	

COURT FILE NO.: 98-CV-139448

BETWEEN:	)	
	)	
DAVID BALAC, RANKO BALAC, SLAVA BALAC and SANDRA BALAC	)	*B. Haines, Esq., Q.C.*, *D. Christie* and *O. Jasen*, for the Balac Family Members as Plaintiffs
Plaintiffs	)	
- and -	)	
AFRICAN LION SAFARI & GAME FARM LTD. and LIBERTY MUTUAL INSURANCE COMPANY	)	
Defendants	)	

COURT FILE NO.: 98-CV-139448A

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BETWEEN:	)	
	)	
DAVID BALAC, RANKO BALAC, SLAVA BALAC and SANDRA BALAC	)	
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
AFRICAN LION SAFARI & GAME FARM LTD. and LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Defendants	)	
	)	
- and -	)	*D. Rollo*, for Jennifer-Anne Cowles as Defendant-by-Counterclaim and Third Party
JENNIFER-ANNE COWLES	)	
	)	
Third Party	)	
	)	**HEARD:** November 1, 2004

MacFarland J.

RULING

[1] The two main and one third party actions are scheduled to proceed to trial before me on Monday, November 8th, 2004. There are a number of pre-trial motions which the parties required be heard before the commencement of trial by the trial judge.

[2] These actions arise as the result of an unfortunate incident which occurred at premises owned and occupied by The African Lion Safari & Game Farm Ltd. (hereafter "ALS") on April 19, 1996. At that time Jennifer-Anne Cowles (hereafter "Cowles") was the front seat passenger in a car owned by the defendant Ranko Balac and operated at the time by the defendant David Balac (hereafter "Balac").

[3] It is pleaded that on the occasion in question Cowles and Balac attended at the ALS premises, a wild game reserve and theme park, where they paid a fee to enter. They were traveling through the animal reserves when a tiger suddenly attempt to enter the car through the

right side window and proceeded to attack Cowles and Balac. As might be expected, they suffered serious injuries as the result and both bring actions to recover damages.

[4] In the Cowles action, Cowles seeks damages on her own behalf for the injuries she suffered and as litigation guardian on behalf of her two children for *Family Law Act* (FLA) claims. In addition, Anne Kelly, the mother of Cowles seeks damages for her derivative FLA claim. In that action David and Ranko Balac and ALS are named as defendants. The Plaintiffs' claims are against the defendants for negligence, breach of contract and breach of the *Occupiers Liability Act* and alternatively for strict liability based on the inherent danger of the premises by reason of the presence thereon of uncaged tigers.

[5] In their Statement of Defence and Cross Claim the Balac defendants plead negligence on the part of Cowles and alternatively in negligence against ALS. Balac has also filed a separate counterclaim against Cowles in this action. ALS in its defence has pleaded negligence on the part of the plaintiff Cowles and cross-claimed in negligence against the Balac defendants.

[6] In the second action before me, David Balac and members of his family bring action against ALS and Liberty Mutual Insurance Company. His claim is based on strict liability primarily and in negligence in the alternative as against ALS. In addition, he has claimed against Liberty Mutual which insured the vehicle he was operating at the time of the incident for statutory accident benefits.

[7] In their Statement of Defence ALS pleads contributory negligence on the part of the Balacs and Cowles. ALS has taken Third Party proceedings against Cowles for contribution and indemnity in respect of the claims of the Balacs.

[8] The action against Liberty Mutual has settled and it is no longer a party to these proceedings. In paragraph 22 of his affidavit sworn October 21, 2004, Douglas Christie states that ALS intends to raise as an issue that David Balac made an improvident settlement with Liberty Mutual thereby affecting the amount he can claim against ALS.

[9] In addition, in paragraph 20 of that same affidavit Mr. Christie attests to the issues in relation to the deductibility of statutory accident benefits and the distinction between protected and non-protected defendants. There is a further issue as to whether, in the event ALS were found to be "strictly liable", there would be any entitlement whatever in relation to the deductibility of accident benefits either paid or to which there may have been entitlement.

The Cowles Action

[10] Ms. Cowles in her capacity as plaintiff is represented by Mr. Brown who also acts for the other FLA plaintiffs in the Cowles action.

[11] Mr. Haines on behalf of David Balac has brought a counterclaim against Cowles in this action.

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[12] In her capacity as defendant by counterclaim (to Balac's counterclaim) Ms. Cowles is represented by Mr. Rollo. Mr. Soule acts for Balac as defendant and Mr. Wright and Mr. Smith for ALS.

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The Balac Action

[13] The Balac family plaintiffs are represented by Mr. Haines, Mr. Christie and Ms. Jasen. ALS is represented by Mr. Wright and Mr. Smith and has taken Third Party proceedings against Ms. Cowles. Mr. Rollo acts for Ms. Cowles in her defence of that Third Party proceeding.

[14] Both Mr. Soule and Mr. Rollo are appointed by Liberty Mutual, the automobile liability insurer.

[15] The causes of action pleaded and relied on by the plaintiffs in both actions raise a number of legal issues.

[16] Firstly, the plaintiffs plead that the defendant ALS is strictly liable and there is no available defence of contributory negligence. They say the *Negligence Act* does not apply. In relation to this defence there is the related issue of whether statutory accident benefits are deductible in the event the plaintiffs prevail in this cause of action.

[17] Alternatively, the plaintiffs plead negligence and evidence of contributory negligence will be led.

[18] The plaintiffs have both suffered serious personal injuries as the result of the incident and I am told there will be between 18 and 20 medical experts called.

[19] In addition to their physical injuries the primary plaintiffs have suffered psychologically as well. Mr. Balac in particular is said to have been diagnosed with severe post-traumatic stress disorder from which he still suffers.

[20] At the time of the incident he was still engaged in post-secondary educational pursuits and accordingly both his past loss of income claim and his future loss claim are necessarily complex. Different scenarios will be required and the actuarial evidence will be more difficult as the result.

[21] In addition to the medical experts there are liability experts in relation to the standard of care to be expected of those who keep wild animals to be called by the plaintiffs and by ALS. In addition, both sides have retained expert engineers to give evidence in relation to the ability of the tigers to have accessed the vehicle in the absence of the occupants of the vehicle having put the windows down.

[22] Both actions were ordered tried together as the trial judge may direct and obviously there must be only one tribunal to adjudicate these overlapping claims.

[23] In the Cowles action ALS filed a jury notice as did David and Ranko Balac in their capacity as defendants in that action.

[24] In the Balac action, the defendant Liberty Mutual delivered a jury notice, ALS did not. In the Third Party proceeding neither ALS nor Cowles filed a jury notice.

[25] Mr. Haines takes the position that there is no jury notice in the Balac action. He submits that when the action was dismissed against Liberty Mutual – the only party to serve a jury notice – the jury notice ceased to have any effect. He relies in this respect, on a case which appears at page 894 of the 2004 Watson and McGowan *Ontario Civil Practice*: *Taylor* v. *Santos*, (Doc. SC 2308/90, Milton (Ont. Gen. Div.). The note there reads:

> Where the only party who has served a jury notice is let out of the lawsuit before trial, the trial will proceed without a jury.

[26] The full copy of the case could not be located. The case is referenced in a later case which also came from Milton, *Laqua* v. *Paulos*, [1996] O.J. No. 1281, a decision of Morrison J. made March 4, 1996. In that case the judge stated that counsel before him referenced the *Taylor* v. *Santos* case then noted in the 1996 version of Watson and McGowan. Counsel reported in that case, that they had contacted the publisher to try to find the full version of the case but without success. It appears that Morrison J. too was unsuccessful in his effort to locate the *Taylor* case.

[27] Morrison J. came to a different result and concluded that once a jury notice was filed, it protected the right to a jury by all other parties, even though the action against the party who filed it was discontinued. I agree with and accept the comment of Morrison J. where he said in paragraph 9:

> I must agree with the argument put forth by the defence that there is no need in the law for multiple jury notices to be filed, and the practice appears to have been, over the years, that one jury notice files (*sic*) by one party is sufficient.

[28] In my view it is of no moment that the action was discontinued against Liberty Mutual. ALS was entitled to rely on the jury notice filed by Liberty Mutual and was not required to file its own notice separately. Once the jury notice was filed the action became a jury action.

[29] I move then to consider whether the jury notices should be struck out. The law is succinctly and accurately set out in the judgment of Doherty J.A. in *Graham* v. *Rourke*, [1990] 75 O.R. (2d) 622 at 625:

> If a litigant is entitled to trial by jury, that right is a substantive one which should not be interfered with without just cause: *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528, 4 D.L.R. (2d) 561, at p. 533 S.C.R. When a trial judge is asked to discharge a jury, she or he must decide whether justice to the parties will be better served by the discharge or retention of the jury. The moving party bears the

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> burden of persuasion and 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, which merit the discharge of the jury. *Majcenic v. Natale*, [1968] 1 O.R. 189, 66 D.L.R. (2d) 50 (C.A.), at pp. 201-02 O.R. A trial judge faced with a motion to discharge a jury must exercise a judicial discretion.

[30] In my view the complexities which arise in these cases and which I have detailed above cause me to conclude that justice to the parties will be better served if the jury notice is struck out and these matters proceed before me alone.

[31] The legal liability arguments are complex, whether the doctrine of strict liability applies on the facts of this case is at best a question of mixed fact and law. Further there is disagreement about whether strict liability admits of any defence. The alternative ground of negligence advanced here clearly admits the defence of contributory negligence. It may be difficult for a lay jury to keep the concepts separate. There is disputed expert evidence on the liability aspects outlined earlier in these reasons and the medical evidence will be detailed, lengthy and complex and may even be disputed in some respects, I am told that ALS has delivered two defence medical reports – but even absent any dispute – the evidence remains detailed and complex. The actuarial evidence, which is never easy, is even more difficult where a plaintiff is at a stage in life where he/she has not moved yet into a permanent vocation where there is some reliable indicator of income potential. Of necessity streams of income from a number of scenarios are usually considered when these sorts of claims are made.

[32] These and the other complexities outlined cause me to believe that justice requires these matters be tried without a jury. While each of the factors I have outlined may – alone – not be sufficient, when considered cumulatively together with the fact that counsel conservatively estimate that the trial will take six weeks there really in my view is little choice.

[33] Mr. Wright suggests we take a wait and see attitude. He says that perhaps as the evidence unfolds the issues may become less complex. I must respectfully disagree with his submission. All of the evidentiary complexities I have outlined to this point in time are the reality now. They are not merely possibilities which <u>may</u> arise in the future; they arise by reason of the very nature of the actions themselves. While I appreciate there are times where it is preferable to take a wait and see approach in my view, this is not one of those cases.

[34] In addition to these complexities, when I consider the number of counsel involved on behalf of the primary plaintiffs in their various capacities and the difficulty of explaining that to a jury let alone having them comprehend it, I am more convinced that it is appropriate here to strike the jury notices and I so order.

<u>Motion for Production of Investigation Reports</u>

[35] I move to consider the second motion before me which relates to the investigation reports relating to the surveillance of and dialogues with the Plaintiff Jennifer Cowles.

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[36] The affidavit of Anne Filice sworn October 26, 2004 sets out the content of the letter Ms. Cowles' solicitors received October 22, 2004 from the solicitors for ALS. The letter summarizes the surveillance of Ms. Cowles on various dates between September 3, 1996 and August 11, 2000 and outlines conversations between an investigator and Ms. Cowles. At the time, Ms. Cowles was represented by counsel who had no knowledge of his client being contacted in this way until the pretrial held in October, 2004.

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[37] Mr. Wright tells me that he instructed his investigator only to go out and see if she (the plaintiff Ms. Cowles) is working at Hanrahan's and how often. He says the evidence from the investigator actually confirms what Ms. Cowles told him at discovery. He minimizes it and suggests that it's not clear from the investigator's report who approached who and suggests perhaps it was Ms. Cowles who approached the investigator. He suggests waiting for the investigator to be cross-examined to clarify these issues. Further he argues it doesn't matter how the evidence was obtained, its relevant and therefore admissible and in this respect he relies on *Ferenczy* v. *MCI Medical Clinics et al.* (2004), 70 O.R. (3d) 277. In my view *Ferenczy* is concerned with quite a different matter and concerned only with the observations made of a plaintiff not conversations.

[38] Here the complaint is quite different. Here there were conversations by an investigator who was retained by the solicitor for ALS. I am of the view that it doesn't matter who approached who. If Ms. Cowles did first approach the investigator, he had an obligation to disclose who he was and his purpose and should not have engaged her in any conversation whatsoever.

[39] The *Rules of Professional Conduct* provide:

> 4.03(2) A lawyer shall not approach or deal with a person who is represented by another lawyer, save through or with the consent of that party's lawyer.

[40] Whether the approach is by the lawyer him or himself or an investigator retained by the lawyer it is equally improper and the lawyer bears the responsibility for those to whom he delegates tasks.

[41] It is the lawyer's responsibility to insure that those to whom tasks are delegated are aware of the rules and to educate them when they are not.

[42] The approach was improper. Any evidence obtained by the investigator and any other evidence obtained as the result or consequence of such information will be excluded from the trial proceeding.

[43] In order that the plaintiff Cowles may know with some certainty that such evidence will not be used an Order will be granted in terms of paragraph one of the Notice of Motion filed in relation to this matter. It is only by complete production of the investigation file including all reports, notes and/or correspondence – whether written or electronic – relating to the surveillance and/or conversations whether in the possession of the investigator, Signum Corporate Services Inc., the defendant ALS, its insurer or its solicitors – that the plaintiff can be assured the improperly obtained evidence cannot and will not be used. Production is to be made by no later than 4:00 p.m. on Friday, November 5th, 2004.

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[44] Other outstanding matters relating to outstanding undertakings, refusals and production of log books were to be the subject of discussion among counsel and I presume have been resolved because they were not raised again at the second day of argument on the pretrial motions. Such discussions were to include the delivery of a further detailed Affidavit of Documents.

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MacFarland J.

Released: November 4, 2004

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