Docket.CA160670
Date: 20000412

NOVA SCOTIA COURT OF APPEAL

[Cite as: *Rajkhowa v. Watson*, 2000 NSCA 50]

Glube, C.J.N.S., Pugsley and Cromwell, JJ.A.

BETWEEN:

DR. SUDHIR RAJKHOWA	)	
	)	Craig M. Garson, Q.C.
Appellant	)	for the appellant
	)	
	)	John P. Merrick, Q.C.
- and -	)	and Tammy Manning
	)	for the respondents
	)	
DR. ANDREW C. WATSON and MARITIME MEDICAL CARE INCORPORATED	)	
	)	
	)	
	)	
Respondents	)	
	)	Appeal Heard:
	)	April 12, 2000
	)	
	)	Judgment Delivered:
	)	April 12, 2000
	)	
	)	

THE COURT: Leave to appeal is granted, the appeal is allowed with costs, and the decision of the Chambers judge is set aside, per reasons for judgment given orally by Pugsley, J.A.; Glube, C.J.N.S. and Cromwell, J.A., concurring.

Pugsley, J.A.:

[1] The appellant, Dr. Sudhir Rajkhowa, applies for leave to appeal, and if successful, appeals from the interlocutory judgment of Justice Hood, of the Supreme Court, sitting in Chambers, on December 6, 1999, granting an application brought on behalf of Dr. Andrew Watson, and Maritime Medical Care Incorporated, (the respondents) confirmed by order of January 13, 2000, that the appellant's claim for damages against the respondents "be severed from the issue of liability, and be tried, if necessary, subsequent to a determination of liability".

[2] This matter raises unique issues as s. 34 of the **Judicature Act** (R.S.N.S., 1989 c.240) stipulates that in an action for libel or slander the issues of fact should be tried with a jury unless waived by the parties. The appellant has not agreed to waive his right to a jury trial.

Background

[3] On September 9, 1996, the appellant, a psychiatrist then practising in Sydney, Nova Scotia, commenced action claiming general and special damages, as well as punitive, aggravated, and exemplary damages, arising from alleged defamatory statements made by the respondents. The alleged statements were made to the RCMP resulting in an investigation of the appellant's billing practices, which included interviews by employees of the respondents with the appellant's patients. The appellant also claimed damages arising from abuse of process, interference with the appellant's economic and professional relationships, breach of privacy, as well as an infringement

of the appellant's s. 8 and s. 11 rights under the **Canadian Charter of Rights and Freedoms**.

[4] Although Justice Hood had ruled on earlier interlocutory applications in this matter, she had not been requested to supervise the action for the purposes of case management (**CPR 68**).

The Affidavit Evidence

[5] In support of the present application, counsel for the respondents tendered his own affidavit, deposing in part as follows:

> 5. Since the commencement of this proceeding, discovery examinations have been conducted of the plaintiff, an individual employed by the plaintiff in his office, three witnesses representing the defendants, and an RCMP officer involved in the investigation. The scope of the discovery examinations to date has been primarily directed to the issue relating to liability.
>
> 6. Pre-trial production of documents and discovery of witnesses relating to the issue of liability have basically been concluded. On the part of the defendants, further discovery examinations of the RCMP officer may be required and an expert's report dealing with the appropriateness of the plaintiff's billing practices may yet be filed. Subject to that, the matter is ready for trial on the issue of liability.
>
> 7. Subsequent to the commencement of this proceeding, the plaintiff filed experts' reports consisting of two psychiatric assessments and one accounting valuation in support of a claim for general and punitive damages. Included in the claim are allegations that the investigation caused stress to the plaintiff and that stress has impacted on the plaintiff's ability to continue to carry out his practice. That portion of the plaintiff's claim alone is asserted at approximately 1.5 million dollars.
>
> 8. In order to respond to the plaintiff's allegations and claim, it will be necessary to conduct discovery examinations of the plaintiff's experts. They will involve discovery of the two psychiatric experts, who reside in Ontario, and one accounting witness. One of the psychiatric experts has advised he will require a fee of $2,800.00 per day, or any portion thereof, plus preparation time of four to eight hours at $350.00 per hour. . . . In addition to the claim for fees, the two experts require all travel and accommodation expenses to be paid. It is likely that discovery of each of the experts may exceed a full day.
>
> 9. In order to prepare for such discovery examinations, the defendants will be required to retain and instruct appropriate experts on their own behalf, including

psychiatric experts and accountants. Discovery examinations of the plaintiff's experts will be time consuming and expensive.

10. In order to respond to the plaintiff's allegation that his ability to carry out his practice has been impaired, it will be necessary to conduct an evaluation of the plaintiff's professional practice and activity to determine if there is, in fact, any such impact. It is likely the defendants will be required to conduct their own psychiatric evaluations of the plaintiff's condition and capacity and subsequently to prepare and produce their own medical reports.

11. Furthermore, it will be necessary for the defendants to have expert opinion provided relating to the accounting and calculation of the plaintiff's claim.

12. The preparation and production of the defendant's reports on damages will take considerable time and will be expensive.

13. The plaintiff's claim for damages include allegations that he has suffered damage in his ability to cope, not only with his professional practice but with other aspects of his personal life, including his relationship with other members of his family. In order to properly assess and respond to such a claim, it will be necessary for the defendants to conduct discovery examination of other members of the plaintiff's family, including his wife. . . .

14. The issue of liability is relatively straight forward and is essentially ready for trial. The issue of damages will be complex and involve a variety of issues. The work necessary to prepare to deal with the issue of quantum has not as yet been performed.

15. In my opinion, the evidence relating to the claim for damages will take at least as long in any trial proceeding as the evidence relating to the issue of liability.

16. In my opinion and belief, the issues of liability and quantum are separate and distinct. Evidence relating to the issue of liability will be generally different from and independent of evidence that would be called in relation to the claim for quantum. This Honourable Court will be able to deal with the issue of liability without hearing evidence relevant to the issue of quantum.

17. In the event this court should determine that the defendants have no liability to the plaintiff, there will be no necessity to incur the significant expense and additional time of preparing and presenting evidence relating to the claim for damages.

[6] Counsel on behalf of the appellant filed his affidavit in response. It provided, in part:

5. That with respect to paragraph 5. of [counsel's] affidavit, examinations for discovery had been arranged for the psychiatrists in this matter. . . the arrangements for the psychiatrists to attend discovery were being made for June of 1998. However, [counsel for the defendants] advised me that he did not wish to proceed with discovery of these experts at that time .

. . .

> 8. That the two psychiatrists in this appeal are located in Ontario and the other expert is located in Halifax. We could arrange for the discovery of the three experts in Halifax and set aside one week for the same, which would complete the discoveries. In order to reduce costs to the defendants we could arrange to have discoveries in Ontario for the two experts located in that province.
>
> 9. That in my opinion the issue of damages is not particularly complex.
>
> 10. That I respectfully disagree with [counsel's] assertion that damages are easily severable from liability in this matter.
>
> . . .
>
> 12. That the plaintiff was discovered on the issue of damages.
>
> 13. That expert reports have been filed on behalf of the plaintiff. The reports have been prepared and provided to the defendants in 1997 from [the two doctors] regarding the plaintiff's condition.
>
> 14. That an expert's report from [accounting firm] was provided in 1997 to the defendants and no discovery has been requested by the defendants or the authors of this report in this matter.
>
> . . .
>
> 16. That it is the intention of the plaintiff to proceed by way of a jury trial in this matter.

[7] Neither party requested an opportunity to cross-examine the deponents of the affidavits at the Chambers hearing. Indeed, if such a request had been made, one could envisage significant problems for both counsel as well as their clients. This case illustrates the undesirability of counsel using their own affidavits as the sole basis on which Chambers applications are founded or disputed.

[8] At the conclusion of the application on December 6, 1999, the Chambers judge gave an oral decision granting the respondents' application to sever the issues of liability and damages.

Decision of Chambers Judge

[9] The Chambers judge recognized that the general rule was to try all cases together and that the onus rested on the respondents to establish that it was "just and convenient to sever", viewed from the perspective of both parties.

[10] She considered the factors to be considered for severance included those elicited in **Schemenauer v. Smith** [1997] B.C.J. No. 1068, as adopted by Gruchy, J., in **Fraser et al v. Westminer Canada Ltd.** (1998), 168 N.S.R. (2d) 84 (S.C.)::

(a) in an extraordinary and exceptional case;

(b) when the issue to be tried is simple;

(c) when the issue to be tried separately is not interwoven with other issues in the action;

(d) when there is some evidence which makes it at least probable that the trial of the separate issue will put an end to the action.

[11] To these criteria, the Chambers judge added the additional factor of the danger of introducing a substantial delay as considered by Goodfellow, J., in **Piercey v. Board of Education of Lunenburg County District et al** (1993), 128 N.S.R. (2d) 232 (S.C.) at p. 235.

[12] With respect to the first factor, the Chambers judge said:

> Much in this application centres around whether this is an extraordinary and exceptional case. However, I am not satisfied that it is only in such cases that the severance can be granted. However, I am satisfied that

> this case is unusual in that there is a very broad claim for damages, damages which normally are not claimed in actions for defamation. That, in my view, takes this case out of the ordinary. In itself, however, that is not sufficient to be the reason for the granting of the severance.

[13] With respect to the second factor, she commented:

> The issue for the jury in the defamation action is a relatively simple one. The issue on damages, particularly for post-traumatic stress disorder, is less simple.

[14] Respecting the third factor, she determined:

> I am also satisfied that the liability and damage issues are not interwoven. The actions and words which will be the focus of the liability claim have little to do with the damage claim. The unusual part of the damage claim is the alleged effect of those words and actions on the plaintiff's state of mental health and his ability to work. These two things have two almost completely separate sets of witnesses.

[15] Respecting the fourth factor, she was not satisfied that it was one to which she should give much consideration as both counsel put forward differing positions, and it was not her:

> ...role at this time to make any specific determination about the merits.

[16] In determining that it was just and convenient to have the liability issue dealt with first, the Chambers judge concluded that the liability issue could be set for trial "perhaps as quickly as within six to eight months".

[17] Based on the respondents' submissions, she considered that discoveries would be required with respect to expert witnesses, and "presumably will be extensive" and if

both issues go to trial there will be "a substantial delay in getting the matter to trial", which delay was not in the interest of either party.

[18] She found:

> The only prejudice I can foresee to the [appellant] is the possibility of a delay in the event of an appeal. However, I conclude that the risk is not sufficient to satisfy me that the severance should not be granted.
>
> The plaintiff intends to proceed by way of jury trial, as is his right pursuant to the *Judicature Act*. It provides that: "the issues of fact shall be tried by a jury". In this case, the factual issues with respect to defamation can be determined by a jury and the damages dealt with thereafter.

[19] The Chambers judge did not explain how, or the manner in which, the damages could be determined.

Standard of Review

[20] It is settled law that this court will not intervene unless the Chambers judge applied wrong principles of law or the result of her order is a patent injustice. (**Fraser v. Westminer Canada Limited** (1998), 171 N.S.R. (2d) 123 (N.S.C.A.), **Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. et al.** (1999), 173 N.S.R. (2d) 159 (N.S.C.A.).

Analysis

[21] The respondents' application was brought pursuant to **C.P.R. 25.01(1)(d)**, **25.01(1)(f)** and **C.P.R. 28.04.**

[22] **Civil Procedure Rule 25.01(1)(d)** and **(f)** provide:

> The court may, on the application of any party or on its own motion, at any time prior to a trial or a hearing,
>
> . . .
>
> (d) give directions as to the procedure to govern the future course of any proceeding, which directions, shall govern the proceeding notwithstanding the provision of any Rule to the contrary;
>
> . . .
>
> (f) order different questions or issues to be tried by different modes and at different places or times.

[23] **Civil Procedure Rule 28.04** provides:

> The court may order any question or issue, whether of fact or law, or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial, and may give directions as to the manner in which the question or issue shall be stated.

[24] The Chambers judge did not state the particular Rule or Rules which prompted her decision.

[25] Without determining the issue of whether **CPR 25** may only be invoked when counsel have agreed on facts to be placed before the Chambers judge, we are, respectfully, of the view that a patent injustice will result unless the order of the Chambers judge is set aside.

[26] The Chambers judge stated:

> The general rule is to try all issues together.

[27] We would add that it is a basic right of a litigant to have all issues in dispute resolved in one trial, unless it is just and convenient considering the interests of all parties and the proper administration of justice to do otherwise.

[28] Here the appellant is entitled to have the issues of fact and the damages assessed by a jury.

[29] The Chambers judge found that the liability issue is:

> Almost ready for trial but that because of the nature of the psychiatric and accounting evidence, especially the psychiatric evidence, the damage issue will not be ready for trial for some time.

[30] This conclusion was based on the material contained in the respondents' affidavit filed in support of the application to sever.

[31] In that affidavit, counsel deposed:

> 17. In the event this Court should determine that the Defendants have no liability to the Plaintiff, there will be no necessity to incur the significant expense and additional time of preparing and presenting evidence relating to the claim for damages.

[32] We infer that counsel proposes delaying all his pre-trial preparation respecting the damage issue until after the liability issue would be determined.

[33] If liability were severed, and if the jury's response to the questions posed to them were to result in a dismissal of the appellant's action, then obviously, substantial time and expense for both parties would be saved.

[34] No consideration, however, seems to have been given to the prospect that the jury may find in favour of the appellant on the liability issue.

[35] In that event, the respondents would, in light of counsel's affidavit, object to the assessment of damages proceeding immediately before the same jury, and would request a lengthy adjournment in order to properly prepare for the assessment issue.

[36] The appellant would still be entitled to have his damages assessed by a jury.

[37] No authority has been cited to us, nor are we aware of any, where it is possible to recall a jury, whether discharged or not, at some later date in order to assess damages.

[38] Our examinations of the pleadings disclose that the appellant will obviously be a key witness. His credibility is a significant issue to be resolved in the determination of liability, as well as in the assessment of damages. The two issues are "interwoven". The appellant has the right to have both issues determined by the same jury, unless it is just and convenient to do otherwise. It is neither just nor convenient to require the appellant

to establish his credibility before two separate juries. That could be the effect of the Chambers judge's order.

[39] If a new jury were to be impaneled for the purpose of assessing damages, such a procedure would result in unfairness to the appellant, amounting to an injustice, and adversely reflect on the administration of justice.

[40] The Chambers judge was correct when she expressed the test in these words:

> In my view, the test is whether it is just and convenient to sever the issues of liability and damages.

[41] She erred, with respect, in failing to consider the difficulties inherent in severing the issues in a case where one of the parties is entitled to a jury trial, and in failing to give proper consideration to the interests of the appellant.

[42] The test was expressed by Lord Denning in **Coenen v. Payne** [1974] 2 All E.R. 1109, at p. 1112:

> In future, the court should be more ready to grant separate trials than they used to do. The normal practice should still be that liability and damages should be tried together, but the court should be ready to order separate trials whenever it is just and convenient to do so.

[43] We would adopt the comments of Tidman, J. in **McManus v. Nova Scotia (Attorney General) et al.** (1993), 119 N.S.R. (2d) (N.S.S.C.) 137, at 140, that in order to determine what is just and convenient on the severance issue, the court must:

> consider the effect of such a decision on all of the parties as well as its effect on the court system, . . .

[44] The Chambers judge considered the four factors referred to by Justice Gruchy in **Fraser v. Westminer Canada Ltd.**, a case where an application was made to sever certain issues including matters of estoppel.

[45] The list of factors considered by Justice Gruchy are of course only guidelines, and the list may expand, depending on the nature and circumstances of the case. Justice Tobias, of the Ontario Court of Justice (General Division) for example, considered fourteen "helpful" queries to be considered in an application for severance of the issues of liability and damages in a case involving injuries arising out of a motor vehicle accident. (**Bourne v. Saunby** (1994), 23 C.P.C.(3d) 333, at 342).

[46] In Ontario, the Divisional Court (General Division) has concluded that the discretion of a Chambers judge to sever the issues of liability and damages may not be exercised where one of the parties has served a jury notice which is outstanding at the time of application (**Duffy v. Gillespie** (1997), 36 O.R. (3d) 443).

[47] Comments of the Ontario Court of Appeal in **Shepley v. Libby McNeil** (1979) 23 O.R. (2d) 354, at 355, and in **Elcano Acceptance Ltd. v. Richmond** (1986), 55 O.R. (2d) 56, would appear to support this conclusion. The Ontario position may be distinguishable from the Nova Scotia position in that the jurisdiction of the court in

Ontario does not arise from the **Rules of Civil Procedure**, but rather from the inherent jurisdiction of the court. In Nova Scotia we have adopted the "just and convenient" test mandated by Lord Denning in **Coenen**, whereas the Ontario position was expressed by Morden, J.A., on behalf of the court in **Elcano** at p. 59 in these words:

> The power should be exercised, in the interest of justice, only in the clearest cases.

[48] In British Columbia, **Rule 39(29)** of the **Rules of Court** is substantially similar to our **CPR 28.04.**

[49] In **Smiley v. Wolch** (1997), B.C.J., No. 2377, Justice Leggatt, of the Supreme Court, concluded, at para. 17

> It is not possible to recall a jury, whether discharged or not, at some later time in order for them to make a determination on damages. (*Beddow v. Megyesi* (1992), 62 B.C.L.R. (2d) 158 (S.C.)). Severance of this trial would require the issue of damages to be heard by a different jury and perhaps in front of a different judge. Such an order would be both illogical and unjust. . .
>
> It is in only the rarest and most unique of situations that severance of the jury trial could be allowed.

[50] While the legality of recalling a jury has not been argued in this case, we agree that it is not practical to have the same jury consider damages many months or perhaps years after the trial of the liability issue. We do agree that in this case impaneling a new jury to determine the damage issue would be illogical, and unjust.

Conclusion

[51] The test to be followed, in a non-jury trial, for severance, should be that expressed by Lord Denning in **Coenen:**

> The normal practice should still be that liability and damages should be tried together, that the court should be ready to order separate trials whenever it is just and convenient to do so.

[52] The guidelines suggested in **Fraser v. Westminer Canada Ltd.** and **Piercey v. Board of Education of Lunenburg County District et al.**, are guidelines only and the list may expand depending on the nature and circumstances of the case.

[53] In order to determine what is just and convenient, the court must consider the effect of such a decision on all of the parties, as well as its effect on the court system.

[54] When one of the parties is entitled to have a jury determine the issues of liability and the assessment of damages, unique and perhaps unworkable problems are raised. In the circumstances of this case, unless the order of the Chambers judge were to be set aside, the procedure could result in unfairness to the appellant amounting to an injustice, and could adversely reflect on the administration of justice.

[55] We would grant leave to appeal, allow the appeal, and set aside the judgment and order of the Chambers judge.

[56] The appellant is entitled to his costs on the appeal, and in the court below, which we would fix at an aggregate of Two Thousand Five Hundred Dollars ($2,500.00), together with disbursements.

Pugsley, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.