SUPREME COURT OF NOVA SCOTIA
Citation: Best v. Pontius, 2008 NSSC 404

Date: 20081017
Docket: Hfx No. 243282
Registry: Halifax

Between:

Gail Best

Plaintiff/Applicant

v.

Barry Pontius and Helen Pontius

Defendants/Respondents

- and -

Docket: Hfx No. 287292
Registry: Halifax

Between:

Gail Best

Plaintiff/Applicant

v.

David MacCallum

Defendant/Respondent

Judge:	The Honourable Chief Justice Joseph P. Kennedy
Heard:	October 14, 2008 in Halifax, Nova Scotia (Special Time Chambers)
Oral Decision:	October 17, 2008
Written Decision:	January 15, 2009
Counsel:	Sean Layden for the Plaintiff/Applicant
	Joey Palov for the Defendants/Respondents Pontius
	Ian Dunbar for the Defendant/Respondent MacCallum

By the Court:

[1] As indicated, I'm going to do it by way of oral decision. Oral decisions have some advantages, some disadvantages. One of the provisos that I'll state is this, that should it become necessary, I may want to clean this up a little bit. By that I don't mean in any way subtract from. That would mean maybe organize a little better and perhaps add to but not subtract from.

[2] This is an oral decision. It arises out of Chambers application that came before me on Tuesday, October 14, 2008.

[3] The Plaintiff seeks an order pursuant to *Rule 39.02*, wants these two actions, Best and Pontius and Best and MacCallum, wants these two actions consolidated and tried as one, tried together. That *Civil Procedure Rule 39.02* in fact gives this Court the discretion to make such an order, an order that two actions be combined to more actions when it is desirable to do so, desirable to do so.

[4] In this instance the Plaintiff claims to have been injured in two successive but unrelated motor vehicle accidents. The actions involved obviously different Defendants. The Plaintiff claims to have suffered overlapping injuries. The accidents

are, in fact, separated by four years. The Pontius accident that involves the Defendant Pontius happened on November 18, 2002 and the second accident that involved the Defendant MacCallum happened on October 25, 2006. Both accidents were so-called rear-end collisions.

[5] The Plaintiff's second motor vehicle collision, the MacCallum matter, is potentially governed by the motor vehicle insurance regime that became effective November 1, 2003. Among other things, the minor injury cap legislation and regulations imposes a $2,500 cap on general damages for pain and suffering when a person suffers a minor injury in an incident involving a motor vehicle. Now I say it's potentially applicable because I don't know whether - what is determined will constitute a minor injury. However, that new legislation is in play in relation to the second accident but not the first.

[6] The Plaintiff's first accident happened pre-November 1, 2003, pre the motor vehicle insurance regime which is now in place and the situation back then was that full recovery for damages for pain and suffering was possible whether minor injury or otherwise.

[7] In the Pontius matter, the first accident, the 2002 accident, the Plaintiff claims injuries to her head, neck, shoulder, and arm - injuries that she says did not completely resolve and had not resolved at the time of the second accident. Thus the claim of overlapping injuries.

[8] In that MacCallum accident in 2006, the Plaintiff claims aggravated the injuries suffered in the first accident. With respect to the Pontius action, the first collision, the Statement of Claim was filed March 16, 2005 and discovery examination of the Plaintiff has been accomplished. That took place back in January of 2007. With respect to the second accident, the 2006 accident, the MacCallum accident, a Statement of Claim was filed October 25, 2007.

[9] If these two actions were to proceed to trial, the Plaintiff tells the Court that she would intend to call the same experts in both matters; one of them being the Plaintiff's family physician who examined the Plaintiff after and proximate to both collisions. Also, it's suggested that further medical evidence, evidence that relates to the Plaintiff's medical treatment providers arising out of both matters may result in witnesses being called in both matters. So there would be, says the Plaintiff, a

duplication of witnesses, particularly, specifically those who have medical evidence to provide.

[10] The Defendants in both of these matters, Mr. Pontius and Mr. MacCallum, do not want consolidation. They resist this application. If you will bear with me let me speak to the Rule for the record purposes at least. *Civil Procedure Rule 39.02* reads as follows:

> **39.02.** Where two or more proceedings are pending in the court and it appears to the court that,
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> (a) some common question of law or fact arises in both or all of them;
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> (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions;
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> (c) for some other reason it is desirable to make an order under this rule;
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> the court may order the proceedings to be consolidated on such terms as it thinks just, or may order them to be tried at the same time, or one immediately after the other, or may order any of them to be stayed until the determination of any other of them.

Lots of discretion.

[11] Section 41(g) of the *Judicature Act* reads as follows:

> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
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> ...
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> (g) the Court, in exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided;

[12] Section 41 of the *Judicature Act* gives the general direction to the courts to avoid multiplicity of legal proceedings if that is possible, if that is reasonable, if that is desirable.

[13] When exercising its discretion and to order consolidation of proceedings, this Court has adopted the six factors set out by Justice Saunders who was once of this Court, now in the Nova Scotia Court of Appeal. He set those factors out and they've been adopted by many judges of this Court since this decision. He set them out in *Stone v. Raniere* and that was way back in 1992 (cited as *Stone v. Confederation Life*

Insurance Co. (1993), 117 N.S.R. (2d) 194). I won't get involved in quotes, counsel. If it gets typed up - the citations rather will be - I won't get involved in citations. They'll be added when it's typed up. Justice Saunders in that *Stone* case adopted the decision of the P.E.I. Court in *Re: Hillcrest Housing Limited et al.* (1986), 56 Nfld. & P.E.I.R. 237 - a case of the Prince Edward Island Supreme Court. In that case the Court, in considering whether an order should be made for consolidation, referred to six factors relevant to this determination. The factors are stated in Page 247 of the P.E.I. decision and are summarized - this is Justice Saunders speaking, summarized as follows:

1. the general convenience and expense;

2. whether a jury notice is involved;

3. how far the actions have progressed;

4. Whether the plaintiffs have separate solicitors;

5. actions should not be consolidated where matters relevant in one action have arisen subsequent to the commencement of the other, and the actions have proceeded to a considerable extent; and

6. where consolidation is otherwise proper, the fact that on discovery questions would be unobjectionable in one action which might be privileged in the other action is not a sufficient reason for refusing an order for consolidation of actions.

[14] Item 6 doesn't seem to be particularly relevant to our situation. Also in *Stone* Justice Saunders says, and this is a quote:

> [9] While on its face, there may be some attraction to the argument that judicial economy would invite a combination of cases where some of the medical experts may be the same persons, there is much more to an application for consolidation than that. I must consider all of the circumstances, all of the issues that have been raised by the parties and their respective litigation and determine whether or not it would be just and appropriate to combine those two cases. Having done so, I am convinced there are cogent reasons for refusing consolidation.

[15] Now that's Justice Saunders speaking, "just and appropriate." How does "just and appropriate" compare to "desirable"?

[16] What the Plaintiff/Applicant, what Ms. Best argues more specifically in support of consolidation is this. While these actions did involve independent incidents and different Defendants, they are linked by the Plaintiff, by Ms. Best, who suffered again - her claim - overlapping injuries. These overlapping injuries creates the common question of fact in both actions, common question of fact. The apportionment of liability for damages or causation of damages will be common issues in both actions. Also, the apportionment of causation of liability of damages will have implications as to whether the Plaintiff's injuries exceeded the $2,500 minor cap injury with respect to the second action, the MacCallum action.

[17] So whether it's a minor injury or not will depend, says the Plaintiff, on how the injuries are apportioned in relation to the two matters. If these two actions are to be tried separately there will be the possibility of different findings of fact regarding the Plaintiff's injuries and apportionment of liability for damages among the Defendants.

[18] A consolidation would allow a single trier of fact to determine whether it is appropriate to apply, and this is a quote, "the global assessment approach" determination of damages which was adopted in the Ontario Court of Appeal case of *Gorman*. So the global assessment approach, says the Plaintiff, is a possibility that it would be much better where one trier of fact be able to look at these matters to determine whether that approach is applicable. So says the Plaintiff. The Plaintiff further says - referenced back to the *Stone* case and the factors in the *Stone* case - says those factors in this specific support consolidation. Consolidation would result in "decreased expense for the Plaintiff and the Court as well as increased convenience." Well I don't think expense to the Court is a factor but at any rate, expense for the parties certainly is. Increased convenience for the Plaintiff, certainly, the Court and the Plaintiff's experts otherwise given the, again, claim of overlapping nature of the injuries, the Plaintiff will have to call duplicative evidence for both proceedings. These actions are to be tried separately. The Plaintiff will have to call her experts both times whereas in a single trial those experts only come the once, minimizing and

reducing the costs of trial. As well, the Plaintiff has retained the same lawyer in both actions, this factor - this is another factor in Stone and it's applicable to this situation.

[19] Reaction from the Respondent, the Respondents, the respective Defendants say as follows. The Defendants reply that the consolidation of actions would significantly prejudice - they bring the question of prejudice into the mix - prejudice both Mr. Pontius and Mr. MacCallum. Counsel for the Defendant MacCallum, for instance, says that the actions are substantially separate and should be assessed separately. Simply because the Plaintiff sustained similar injuries in two motor vehicle accidents does not make them therefore overlapping and indistinguishable requiring that global assessment process and the apportionment of losses. The accidents are different, different in severity, separated by a period of four years. Evidence on liability does not overlap, says MacCallum, nor does the medical expert evidence. The only common witness that was identified by the Plaintiff was the family doctor, though certainly I would say the Plaintiff alludes to other medical - people within the medical community - who might be involved in testimony about matters. The MacCallum accident was minor, says MacCallum, minor. The Plaintiff's claim against MacCallum, according to MacCallum, the Plaintiff’s claim almost certainly will be captured by that minor injury cap, almost certainly. This factor would likely encourage the parties to resolve the MacCallum action expeditiously, expediently and

on reasonable terms - optimistic, reasonable terms without trial if that cap is applicable. And even if the parties were unable to come to terms, any trial of the matter would likely be short and inexpensive. “That”, says MacCallum, “will not be the case if we're forced into a consolidation with the Pontius matter." This Court would, therefore, unnecessarily prejudice both MacCallum and in fact, Pontius by consolidating their actions. The combined trial would be considerably longer than the two would cost and the two would require were they to be tried separately. The cost of attendance and preparation for both parties would increase because of the longer time. This would also affect their negotiating positions as both parties must then consider the higher economic costs of proceeding with a consolidated trial.

[20] So MacCallum says the opposite. This is not cheaper and more expeditious. This is longer and more expensive were it to be consolidated. MacCallum notes that the proceedings are substantially different in terms of readiness for trial. This is a prime argument on the part of the Defendants. The Pontius matter, that accident, as I've said a number of occasions, was six years ago. The Defendant has filed a Notice of Trial in that proceeding. The Plaintiff was discovered in that action back in January of 2007. That was before she filed her action against MacCallum. Discoveries have not yet begun in the MacCallum case. There is a contrast. Consolidating the proceedings would also delay the Pontius matter, say the Defendants. They cite as a

guideline to me the *Kirby and Strickland* case that I'm familiar with, saying it's relevant on the issues. That was a case that dealt with severance, but in fact I agree that it has some relevance.

[21] In that case, the Plaintiff claimed against the Defendant in negligence for her injuries and against her insurer for punitive and exemplary damages arising from bad faith when the insurer applied to sever the claims and that application was granted. The Plaintiff's appeal was dismissed. It went to the Court of Appeal and the Court of Appeal said, this is Justice Saunders:

> 23 All of these important considerations were addressed by Kennedy, C.J.S.C. on the application. He acknowledged that there was some limited commonality between Ms. Kirby's two claims, as the same doctors may have to give evidence regarding her treatment in both matters. The operative parts of the decision are not lengthy ...
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> ...
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> **Kirby v. Strickland**, for whatever reasons ... is seven years old. It's a slow boat to China. Mr. Chapman doesn't want to get on that boat. Frankly I don't blame him ... the addition of the Section B insurer in this specific will only add to the weight carried by that slow boat ...

By the way, the Court of Appeal seemed to think there was some mistake there. I don't know what it was. Sounds to me like it was. However, that's between me and the Court of Appeal.

> I'm not saying that there is not some commonality between the two matters. There is. It's not significant, but there is some commonality. It is quite possible that the same doctors will give evidence that goes to both of the issues ... that's possible, and that's something that I have to consider, and I do consider that.
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> On the other hand I have to consider the limited commonality that exists in relation to those two Defendants, and how we can best get through both of these matters to the benefit of all parties, including Ms. Kirby ...
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> I am, on the basis of the totality of the information before me, finding that the addition of the Section B insurer to the original action, **Kirby versus Strickland**, will delay that process, will delay that trial. Certainly it's not going to make it proceed any quicker.

[22] Anyway, when I had considered all of the various factors, when I weighed the commonality and the fact that medical experts may have to testify twice in this matter, the *Strickland* matter, and yet considered all the other factors that determined that severance was the best way to go and eventually was upheld by Justice Saunders.

[23] Counsel for the Defendant , Pontius, joins in the concern about delay, joins in the issue that was before this Court in *Kirby and Strickland* and counsel for Pontius goes back and cites *Stone* as being on point.

[24] Counsel for Pontius points out that after some preliminary settlement discussions, the Respondents Pontius have consistently pushed the litigation

surrounding the Best first action forward - that they have worked at trying to move that matter forward. Pleadings have been completed. Documents have been exchanged and as indicated, the discovery of the Plaintiff has been carried out. The parties have agreed, have reached an agreement as of August of 2008 that Ms. Best has accepted that all pre-trial steps are completed, aside obviously from this application and that Pontius' only remaining pre-trial step is the possible supplementary discovery of the Plaintiff arising from the production of her second supplementary list of documents. This will be a straightforward procedure which does not impact on the matter of trial readiness. In short, and this is his point, "Pontius is ready for trial now, ready to go and has been for many months," says counsel for that Defendant.

[25] Further in the topic of time and expense, Pontius also raises the factor that is again that factor that is associated with the current state of the law in this jurisdiction. The possibility is that the other action, the MacCallum action, will involve the minor injury cap. The Plaintiff noted in her pre-trial submission that she had not filed a Notice of Constitutional Challenge to that minor injury cap legislation. However, she did not undertake not to do so. This is Pontius' counsel speaking: "The Plaintiff could file a challenge once the matters are consolidated." It's possible that that could happen. If the Plaintiff did so, the consolidated matter would then be stayed pending

the final determination of the constitutionality of the minor injury cap and Pontius would get caught up in that stay even though his case has nothing to do with that legislation. Any involvement with that legislation in a consolidated proceeding would be an aspect of the consolidated trial that Mr. Pontius had no interest in that would not be relevant to his situation.

[26] Furthermore, even if no challenge is filed, it's likely that a good portion of the MacCallum action would concern the applicability of the cap to the facts. They would be arguing over whether or not the injuries that could be associated with the second accident would be minor or not within the definition under the minor injury cap. All of that is alien to, is superfluous to, the Pontius trial and Pontius' counsel is concerned about getting tied up in that irrelevancy in a consolidated action. The defence sums up their situation. The Respondents sum up their situations.

[27] Thusly, Mr. Pontius generally submits that a consolidation of these actions will result in significant delay, expense and prejudice to them. There will be no economy of proceedings to the Defendants by virtue of one trial to deal with the issues of liability and damages arising out of these two motor vehicle accidents. It is not an appropriate case for consolidation. The consolidation will complicate the minor MacCallum action, cause unjust delay in the advancement of the Pontius matter which involves more significant claims, raise costs for both Defendants.

[28] The MacCallum action also involves, as indicated, that minor injury cap. Pontius doesn't want to go there. Although there are some common issues to both actions, the overlap is not sufficient to outweigh the disadvantage of the consolidated action. When you do the balance, the claims are not so interwoven as to make separate trials at different times undesirable - not so interwoven as to make separate actions, separate trials undesirable, so they say. That's not me speaking. That's the Defendants.

[29] I'm speaking now. It is the Applicant's burden, the Plaintiff's burden, to convince me that it is desirable to make an order consolidating these actions that it is the better way to proceed when one considers all of the various factors. The Plaintiff

has shown to my satisfaction that there is some possible benefit to be had if the matters were combined.

[30] Particularly, I speak of the advantage of time and cost of being able to examine medical witnesses at the one time rather than having them repeat the testimony. No doubt that some judicial economy could be had, some money saved, if that were possible.

[31] Also, manifestly it would be some advantage to have one trier of fact determine both of these matters. Whether the global approach is used or otherwise, there would be some benefit to having one trial or trier of fact deal with both.

[32] On the other hand, the Defendants, the Respondents, have succeeded in causing me to conclude that in this matter, the balance favours the Defendants, the Respondents.

[33] The significant time between these accidents results in one action - the MacCallum action - being, to use a quote from the Defendants, “in its infancy” while the other, the Pontius matter is described as being “virtually trial-ready”.

[34] Benefits put forward by the Plaintiff would seem to me to be overridden by what I consider to be the real possibility of delay to both of the matters that a consolidation would cause. In other words, rather than be expeditious, a consolidation might very possibly be the opposite. The reality that the second action - the MacCallum action - is possibly, possibly subject to that minor injury cap, would further complicate the process of one combined trial and it does ring true to me that it would be unfair to hold Pontius hostage to argument and evidence and discussion relating to that minor injury cap when in fact it's got nothing to do with him.

[35] The claims result from events years apart and I ultimately agree with the Respondents' submission that they are not so interwoven as to dictate one proceeding.

[36] In totality, on balance, it is not made clear to me that consolidation of these actions is the better way to proceed - that consolidation is desirable. It is not shown that it will make the process quicker and less expensive, but rather I'm satisfied - contradiction - rather, the opposite is not only possible but I think likely, that in fact, it may complicate the process.

[37] I re-adopt my general reasoning from *Kirby and Strickland* and find after consideration of all of the various factors, that consolidation is not the better process in this specific and therefore we'll not be consolidating these actions.

[38] Thanks to counsel for their excellent presentations.

[39] In trying to keep all the various factors in mind I find that each of the Defendants will be entitled on this special time chambers application to $800 costs to be payable at the end of the respective trials. Each Defendant entitled to - each Respondent entitled to $800 costs to be paid at the end of the respective trials. Thank you, counsel.

Chief Justice Joseph P. Kennedy