

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation: Ocean v. Economical Mutual Insurance Company,
2010 NSSC 314**

**Date: 20100803
Docket: Hfx No. 190673
Registry: Halifax**

Between

MAY OCEAN, of White's Lake, in the Province of Nova Scotia

Plaintiff

-and-

THE ECONOMICAL MUTUAL INSURANCE COMPANY, a
body corporate, registered to carry on business in the Province
of Nova Scotia and **RAYMOND PATRICK SULLIVAN** of Lantz,
in the Province of Nova Scotia.

Defendants

Judge: Deborah K. Smith, Associate Chief Justice

Heard: July 30, 2010 in Halifax, Nova Scotia

Oral Decision: July 30, 2010

Written Decision: August 3rd, 2010

Counsel: May Ocean for the Plaintiff (Self-represented)

**C. Patricia Mitchell, Robert G. Belliveau, Q.C. & Tricia
Barry for the Defendant, Economical Mutual Insurance
Company**

**Megan M. Roberts for the Defendant, Raymond Patrick
Sullivan**

By the Court:

[1] This is the matter of May Ocean v. the Economical Mutual Insurance Company and Raymond Patrick Sullivan.

[2] On December 13th, 2000, the Plaintiff, May Ocean, was involved in a motor vehicle accident with the Defendant, Raymond Patrick Sullivan. It is acknowledged by Mr. Sullivan and Economical that Mr. Sullivan was an uninsured motorist at the time of the collision. It is also acknowledged by Economical that Ms. Ocean was insured under a standard Nova Scotia automobile insurance policy issued by them at the time of the collision.

[3] On December 5th, 2002, Ms. Ocean commenced an action in the Supreme Court of Nova Scotia against Economical and Mr. Sullivan. The action against Economical was for what is commonly known as a Section D claim.

[4] The action was originally scheduled to be heard over 10 days commencing on September 22nd, 2008. Shortly before the trial, Ms. Ocean applied to amend her Statement of Claim to include a negligence and bad faith action against Economical. Economical opposed that application and filed an application to bifurcate the

proceeding in the event that Ms. Ocean's application to amend her pleadings was granted.

[5] On July 31st, 2008, I allowed Ms. Ocean's application to amend her pleadings. On that same date, I granted Economical's application to bifurcate the issues raised in Ms. Ocean's original Statement of Claim from those that arose as a result of her amended pleadings. In the oral decision that I gave that day, I referred, *inter alia*, to the fact that the parties were ready to proceed to trial on the issues raised in the original Statement of Claim but that they were not ready to proceed on the issues raised in the amended Statement of Claim. I noted that additional documentary and oral discovery would be required in relation to the amended pleadings. I accepted Ms. Mitchell's suggestion that the allegations raised in Ms. Ocean's amended Statement of Claim would necessitate the retainer of new counsel by Economical to defend the amended Statement of Claim. I also noted that there was a very real possibility that documents that would otherwise be considered to be privileged [and not disclosable in the first proceeding] may have to be disclosed in relation to the second proceeding. I recognized that in bifurcating the claims there would, by necessity, be some overlap in the evidence between the two proceedings and I reserved the right to give directions as to the procedure that would govern the future course of each trial including the

issue of whether the evidence adduced in one trial would be considered evidence in the second trial. An Order to this effect was issued on the 5th day of August, 2008.

[6] The trial relating to the initial Statement of Claim did not proceed on September 22nd, 2008 as scheduled. Shortly before the trial, Economical applied for an Order requiring Ms. Ocean to be assessed by an independent medical expert to determine her competency to represent herself in this proceeding. After a hearing on the matter an Order to this effect was granted and the trial of the original proceeding was adjourned without day.

[7] The Court's Order requiring an assessment of Ms. Ocean was overturned by the Court of Appeal in a decision rendered on July 17th, 2009. In the course of its decision [reported at 2009 NSCA 81] the Court stated at ¶ 107:

A particular challenge for Ms. Ocean will be separating the issues in the original action from those that arise on the negligence claim. As I understand it, one of the reasons for bifurcating the claim was to preserve the September 2008 trial dates for the original action. Those trial dates have been lost. The trial court may wish to consider revisiting the bifurcation order to determine whether it would be more efficient to try both claims in a single proceeding. This is not an order but an observation. As matters now stand, the main action and the negligence claim will proceed as separate trials.

[8] At a Date Assignment Conference held on September 28th, 2009, I indicated that if Ms. Ocean wished to bring a motion asking the Court to reconsider the issue of bifurcation she should file and serve her documents in support of this motion no later than November 30th, 2009. I also indicated that if motion documents were not filed and served by that date the trial issues would remain bifurcated as originally ordered. On the same date, I rescheduled the trial to be heard commencing September 7th, 2010.

[9] Ms. Ocean did not apply to have the Court reconsider the issue of bifurcation.

[10] On May 20th, 2010, I held a pretrial conference in preparation for the trial scheduled to commence on September 7th, 2010. During the course of that pretrial conference, I raised the issue of how the Court is going to deal with the issues of causation and damages in the circumstances of this case. In particular, Ms. Ocean has alleged that as a result of the accident she has suffered injuries including Post Traumatic Stress Disorder. She further alleges that this disorder was exacerbated by the negligence and bad faith of Economical. In other words, she says that both Mr. Sullivan and her insurer, Economical, have been the cause of this disorder. In the circumstances, it appears unlikely that the Court will be in a position to assess Ms.

Ocean's damages and apportion any liability that may be found to exist until both proceedings have been heard.

[11] At a further pretrial conference held on July 16th, 2010, I raised the possibility of having all evidence relating to general and special damages in relation to any and all claims before the Court (whether advanced in the original Statement of Claim or the amended Statement of Claim) being heard at the first trial. This would help to avoid the obvious expense that could arise from having to call the damage witnesses twice. In addition, it would avoid the procedurally awkward and unusual situation of having to hear two separate trials in order to decide certain issues. In response to that suggestion, I was advised that the second proceeding has not advanced since the Plaintiff was granted leave to amend her pleadings in 2008 and that discoveries and documentary disclosure has still not taken place in relation to the amended claim. Accordingly, the parties are not in a position to proceed to trial on the issue of damages in relation to the amended Statement of Claim.

[12] In light of that information, I raised the possibility of having all evidence on damages (in relation to any and all claims before the Court) being heard at the second trial with Mr. Belliveau (who represents Economical in relation to the amended claim)

acting as counsel for Economical in relation to all damage claims. Mr. Belliveau indicated that, in his view, he would not be able to act for Economical concerning the damages arising from the motor vehicle accident as he may want to argue at trial that Ms. Ocean's damages were caused by the car accident rather than the alleged bad faith or negligence of Economical. He suggested, as an alternative, the possibility of trifurcating the proceedings so that all damage issues are heard after the trials are held on liability. In other words, liability for the motor vehicle accident and the issue of whether Economical is liable to Ms. Ocean under Section D of her motor vehicle policy in existence at the time of the collision will be dealt with at the trial commencing on September 7th, 2010. Liability for the alleged negligence and bad faith of Economical will be dealt with at a subsequent trial. Damages would then be dealt with in a third proceeding. My findings on liability following the first two trials would determine who would be participating in the damages trial.

[13] The parties had differing views on how the issue of damages should be dealt with and I therefore put everyone on formal notice that I was considering severing the issue of damages and having all damages dealt with at the time of the second trial or alternatively, trifurcating the proceeding so that all damages would be dealt with after a determination on liability in relation to both the original claim and the amended

claim. The matter was heard before me this morning. I think that it is important for me to give my decision forthwith in light of the impending trial in September. Accordingly, I am going to give an oral decision today reserving the right to edit and add to my reasons in the event that a written decision is required.

[14] Ms. Ocean opposes severing the issue of damages from liability. While she has not applied to have me revisit the issue of bifurcation (decided previously) she is encouraging me to have only one trial in relation to all issues.

[15] Ms. Mitchell (who represents Economical in relation to the original claim) does not wish to have damages severed. She is content to have the damages dealt with at both the trial scheduled to commence on September 7th, 2010 and at the subsequent trial dealing with Economical's alleged bad faith and negligence. Alternatively, she supports Mr. Belliveau's suggestion of trifurcation.

[16] Ms. Roberts supports the suggestion of trifurcation as it will likely avoid her having to be involved in the second proceeding dealing with Economical's liability for negligence and bad faith. As indicated previously, Mr. Sullivan is uninsured and, as with Ms. Ocean, the cost of the litigation is of particular concern.

[17] Mr. Belliveau supports the suggestion of trifurcation.

[18] Civil Procedure Rule 37 deals with consolidation and separation of proceedings.

Civil Procedure Rule 37.01 provides:

Scope of Rule 37

37.01 A judge may consolidate proceedings, trials or hearings or may separate or sever parts of a proceeding, in accordance with this Rule.

[Emphasis added]

[19] Civil Procedure Rule 37.04(1) provides:

Issues to be tried or heard together

37.04(1) A judge may order common issues in two or more proceedings be tried, or heard, together.

.....

[20] Civil Procedure Rule 37.05 provides:

Separating parts of a proceeding

37.05 A judge may separate parts of a proceeding for any of the following reasons:

.....

(c) The benefit of separating the party or claim from another party or claim outweighs the advantage of leaving them joined.

[21] In the case of *Rajkhowa v. Watson*, [2000 NSCA 50] the Nova Scotia Court of Appeal dealt with the issue of severing liability and damages and in the course of its decision, stated the following principles:

- 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 (¶ 27).
- In a judge alone trial the normal practice is that liability and damages are tried together although the court should be prepared to order separate trials whenever it is just and convenient to do so (¶ 51).
- 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 (¶ 53).

[22] I consider the matter before me with these principles in mind.

[23] I will begin by indicating that I maintain my previously stated view that it is appropriate that Ms. Ocean's negligence and bad faith claim against Economical be heard separately from the issues raised in her original Statement of Claim. We are still in a position where the parties are ready to proceed to trial on the issues raised in the original Statement of Claim but are not yet ready to proceed to trial on the issues raised in the amended Statement of Claim.

[24] Further, Ms. Mitchell may be a witness in the second proceeding. In my view – she should not be a witness in the same trial in which she is acting as counsel. If all of Ms. Ocean’s claims were heard together, Ms. Mitchell, in my view, would not be in a position to act in relation to the original claim.

[25] The above two factors would, in my view, result in the trial scheduled to commence on September 7th, 2010 being adjourned. I am most reluctant to see that happen.

[26] Of greater importance is the fact that if the original Statement of Claim and the amended Statement of Claim are heard together, Economical may have to disclose privileged information which would not ordinarily be producible – in order to properly defend the amended claim. The proper protection of privileged information is, in my view, a significant consideration in this type of situation that weighs heavily in favour of bifurcation.

[27] While I do not have a motion before me to reconsider my previous bifurcation decision, I will indicate that I maintain my view that Ms. Ocean's original claim and her amended claims should not be heard together.

[28] The issue that is before me today is whether I should order that the damages portion of the first trial be severed and heard at the time of the second trial. In addition, I am considering whether I should order that all damage issues be dealt with in one trial following the completion of two liability trials. The issues that I must take into account in coming to a decision on this matter are multi-faceted and involve a consideration of the effect of such an Order on all of the parties as well as the court system.

[29] After hearing all of the parties and reading their written submissions, I have concluded that in the unique circumstances of this case it is appropriate to sever the issue of damages from both trials and have the matter of damages heard separately after the two liability trials have been completed.

[30] As indicated previously, Ms. Ocean alleges that the injuries that she suffered as a result of the motor vehicle accident were exacerbated by the negligence and bad

faith of Economical. In light of this suggestion there is a real likelihood that I will need to hear the damage aspects of each claim before I will be able to fully assess damages and apportion any liability that exists. That will mean that I will hear two trials with some common evidence given on damages at both trials. Counsel for Economical will be different at each trial and, in light of the present state of unreadiness for the second trial, the two trials will likely be heard sometime apart. I can foresee that all of this will cause practical and procedural difficulties.

[31] In addition, dealing with damages in both trials will, in my view, likely result in some of the damage witnesses (including experts) having to testify in both proceedings. While I had reserved the right to give directions as to whether the evidence adduced in one trial would be considered evidence in the second trial - I can foresee the situation where the parties will want to call witnesses at the second trial that have already testified in the first proceeding. This will only drive up the cost of an action that has already been time consuming and expensive.

[32] Further, severing the issue of damages and having it heard at a separate proceeding will free Mr. Sullivan from having to participate in the liability aspects of

the negligence and bad faith claim against Economical. I anticipate that Ms. Ocean's amended claim against Economical could be a lengthy proceeding.

[33] Ms. Ocean is understandably concerned about the suggestion that this case will be heard in three parts. Last week, I believe that she expressed concern about having to prepare for three trials and also about having to wait to receive any compensation that she may be entitled to. She has indicated to the Court that she was hoping to finance the negligence and bad faith trial against Economical with the funds that she anticipated receiving from the first trial.

[34] While I understand and appreciate Ms. Ocean's concerns, I am not satisfied that these concerns outweigh the factors raised previously. It is true that trifurcating this proceeding will result in Ms. Ocean having to prepare for three trials, but I would anticipate that the trials will be much shorter and much easier for Ms. Ocean to handle. Ms. Ocean is self-represented. She says that she suffers from Post Traumatic Stress Disorder. There are times when she appears somewhat overwhelmed by the proceedings and what is expected of her to get ready for trial. I anticipate that breaking the action into three distinct hearings will actually result in the matter being easier for Ms. Ocean to handle.

[35] In addition, I am not satisfied that there will be a significant delay in Ms. Ocean receiving any funds that she may be entitled to as a result of severing the issue of damages. In light of Ms. Ocean's suggestion that her injuries have been exacerbated by Economical's alleged negligence and bad faith it is, in my view, highly unlikely that I would be in a position to award her damages before hearing all of the evidence relating to damages. Mr. Belliveau has suggested that he anticipates that a liability only trial (on the issues of Economical's alleged negligence and bad faith) can be ready for trial sooner than a trial could be held on both the issues of liability and quantum. I agree with that suggestion. I intend to case manage the second proceeding to try to insure that it is ready for trial as soon as is reasonably possible. In my view – any delay that may be incurred in having the issues severed will not be significantly different than if damages and liability were heard together.

[36] Ms. Ocean advises that she declined the opportunity to enroll in some Christmas craft shows this year in order to participate in the trial scheduled to commence on September 7th, 2010 and is hopeful that she will be able to return to the craft shows next year. [Ms. Ocean has a pewter business.] I assume that her concern

is that by severing the issue of damages it is more likely that she will miss the opportunity to participate in future shows.

[37] Regardless of whether I sever the issue of damages – there were going to be two trials that Ms. Ocean was going to participate in. While I will attempt to accommodate Ms. Ocean’s Christmas craft shows when setting dates for future proceedings, I am not satisfied that the possibility of her missing future craft shows tips the scales against trifurcation.

[38] I make a similar comment in relation to her daughter and Ms. Thompson – who she was apparently planning to have come and testify in September or October. It appears from Ms. Ocean’s comments this morning that these witnesses are not liability witnesses. A severance of the issue of damages will require these witnesses to reschedule their trip to Nova Scotia. In my view, that does not outweigh the considerations that I have referred to previously.

[39] I appreciate that trifurcation is not the norm. Nor is the proceeding before me. This is a unique case that calls for a unique solution. After considering the effect of

such a decision on all of the parties as well as the court system, I am satisfied that it is appropriate to sever the issue of damages.

[40] I am going to order that the issue of damages in relation to the original Statement of Claim and the amended Statement of Claim be severed and heard at one time following the trial dealing with the alleged liability of Economical for negligence and bad faith.

[41] The trial that is scheduled to commence on September 7th, 2010 will deal only with the issues of liability for the motor vehicle accident that occurred on December 13th, 2000 and whether Economical is liable to Ms. Ocean under Section D of her automobile policy in existence at that time.

[42] The issue of whether Economical is liable to Ms. Oceean for negligence and/or bad faith will be dealt with at a subsequent proceeding. I will case manage that aspect of the file to try to insure that it comes before the Court as soon as reasonably possible.

[43] Finally, a trial will be held on the issue of any and all damages that Ms. Ocean may be entitled to as a result of the motor vehicle accident as well as the alleged negligence and bad faith of Economical. I intend to case manage this portion of the proceeding also to try to insure that it comes before the Court in a timely manner.

[44] Costs of this motion shall be costs in the cause.

Deborah K. Smith
Associate Chief Justice