IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Terfry v. Smith, 2006 NSSC 259

Date: 20060830
Docket: SH 172709
Registry: Halifax

Between:

Carole Grace Laura Terfry

Plaintiff/Respondent

v.

Jason James Smith

Defendant/Applicant

and

Roger G. Spicer

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	April 13, 2006, in [Halifax], Nova Scotia
Counsel:	Anne Levangie and S.Raymond Morse, Q.C., for the Applicant Anne Marie Butler, for the Respondent Scott Barnett, for the Respondent, Roger G. Spicer

By the Court:

Application

[1] This is an application by the defendant Mr. Smith to sever the issues of liability and damages. The plaintiff opposes the application. The Defendant Mr.

Spicer does not take any position. In this application the defendant Mr. Smith will be referred to as the applicant and the plaintiff will be referred to as the respondent.

Background

[2] The respondent commenced this action on July 11, 2001. She seeks damages for injuries allegedly resulting from a motor vehicle accident. The plaintiff alleges that she was exiting a service station in Truro, Nova Scotia, and attempting to make a left turn across two lanes of traffic. The vehicle in the first lane, driven by Mr. Spicer, apparently stopped to let the respondent proceed, and as she did so Mr. Smith, who was driving in the opposite direction, collided with her vehicle. The respondent claims special damages, general damages and interest.

[3] The defendant Mr. Smith denies the allegations and disputes any responsibility for the accident and any resulting injury, claiming that the respondent is solely responsible. He pleads the *Contributory Negligence Act*.

[4] An amended Statement of Claim was filed against the other defendant, Mr. Spicer, on July 5, 2002. Discoveries of the respondent and the applicant were held March 4, 2002 and the applicant's counsel discovered the respondent on liability

and damages. Mr. Spicer was discovered on December 30, 2004. Mr. Spicer filed a Notice of Trial without a jury on August 15, 2005. The respondent filed a memorandum to the Notice on September 6, 2005 stating that it would take six days to complete the trial.

[5] On September 6, 2005, the respondent's counsel received correspondence from the applicant with reference to an Appearance Day matter. This correspondence, the Respondent noted, indicated that the Applicant consented to having the issues of damages and liability tried together. On September 14, 2005 the Prothonotary advised the parties that the matter was scheduled for a Date Assignment Conference on February 10, 2006. This Conference was cancelled by the Prothonotary's office.

[6] The applicant objected to the Notice of Trial because there were undertakings to be completed by the respondent. The respondent states that many of these undertakings relate to the respondent's damages and that she has been attempting to locate and secure the information requested.

[7] The respondent claims that she has incurred costs and disbursements relating to the litigation, for approximately 5 years and the first notice she had, the applicant, intended to make application to sever the issues, was received in March 2006.

[8] The respondent takes the position that having the trial on damages and liabilities at the same time is in her best interests. Discoveries on damages have been completed and experts' reports on damages have been obtained and exchanged.

[9] In his affidavit in support of the application, counsel for the applicant states that neither the respondent nor the applicant have retained an accident reconstruction expert. Therefore the issue of liability will be determined based on the testimony of the parties and any witnesses. The liability issue, counsel suggests, is straightforward and should consume at most two days. He also suggests that the determination of liability will result in an early termination of the litigation if the applicants are not found at fault. Alternatively, if liability is found against the applicant or is apportioned, that finding would be of assistance to the parties in so far as it might facilitate settlement negotiations premised upon each

party's understanding or knowledge of the extent to which they would have been determined to be liable. Mr. Morse notes that the respondent intends to call six expert witnesses at trial and says it may take approximately five days to present her case. Given the nature of the respondent's injuries, and the fact that she was on long-term disability benefits at the time of the accident, Mr. Morse claims that there is a significant possibility that the respondent will not be able to meet all of the costs associated with litigation, particularly if the defendants succeed on the question of liability. He maintains that if liability is determined prior to damages, the plaintiff would avoid the expense of advancing her damage claim. If the respondent is successful, then it would be beneficial to the parties having settlement discussions, since both defendants deny liability and furthermore, any apportionment would facilitate settlement negotiations.

[10] In her affidavit, Ms. Butler, counsel for the Respondent, states that the respondent seeks to have the trial proceed on both the issues of liability and damages together, as she believes it is in her best interest, and points out that expert reports have been prepared and provided to the applicants.

[11] The Applicant claims that the Respondent has a pre-existing condition that requires further investigation and assessment. It is possible that the applicant may retain an expert on damages, but not on liability.

[12] Both the applicant and the respondent deny fault and blame each other. The second defendant also maintains that he is not at fault for the accident. Since the accident, limited efforts have been made to discuss settlement but no meaningful settlement discussions have been held because the issue of liability is contested.

[13] The applicant seeks to sever the issues of liability and damages and relies on the following Civil Procedure Rules:

> 1.03 The object of these rules is to secure a just, speedy and inexpensive determination of every proceeding.
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> …
>
> 25.01(1) the court may, on the application of any party or on its own motion at any time prior to a trial or hearing,
>
> (a) determine any relevant question or issue of law or fact or both;
>
> (b) give directions as to the procedure to govern the future course of any proceeding, which direction shall govern the proceeding notwithstanding the provision of a new rule to the contrary;
>
> …

> (f) order different questions or issues to be tried by different modes and at different places or times.
>
> (2) where in the opinion of the court, the determination of any question or issue under paragraph (1) substantially disposes of the whole proceeding, or in the cause of action, ground of defence, counterclaim or reply, the court may thereupon grant such judgment or make such order, as is just.
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> …
>
> 28.04 the court may order any question or issue, whether a fund or law or part of fact and partly a wall, and whether raised by the pleadings or the was, be tried before, had or after the crown, and may give directions as to the manner in which the question or issue shall be stated.

Law & Discussion

[14] The applicant concedes the general proposition that issues of liability and damages ought to be tried together. Despite this, he maintains that there are circumstances where it is appropriate to sever the issues of liability and damages. The applicant understands that the burden is upon him to prove on the balance of probabilities that it is just and convenient to order a severance.

[15] The respondent agrees with the general proposition; however, she maintains that in this instance it is not just and convenient to order a severance

[16] In order to achieve the objectives set out in the *Civil Procedure Rules* of achieving a just, speedy and inexpensive resolution of proceedings, should the Court conclude it is just and appropriate to order a severance?

[17] The applicant submits that the respondent is required to produce documents and records relating to a pre-existing condition, and, depending on their contents, he may recommend the retention of an expert to prepare to an expert report. Therefore, he argues, there will be a delay in having the issue of damages ready for trial.

[18] The respondent maintains that the only issue to be addressed before the trial is ready to proceed is the fulfilment of the undertaking or queries arising therefrom. These have yet to be provided to the applicant. She points out that the bulk of expenditures have been incurred for the preparation of expert reports, and consequently that any delay in having the trial proceed on all of the issues would be unjust.

[19] The applicant argues, that if all of the experts are called to testify on the issue of damages, this will entail expense to the respondent. Given the suggestion

that the respondent is of modest means, he suggests that such expenditures ought to be avoided. If the issue of liability is resolved in favour of the applicants, then there will be no need to have these experts testify. Furthermore, if the respondent is successful, that this will likely lead to settlement discussions. The Respondent takes the view that, given the expenditures already incurred over the last five years, it is not convincing for the applicant to suggest that he is searching for an approach which will minimize her exposure to additional expenditures.

[20] The applicant relies on the following factors:

1. Lack of Jury. This is scheduled to be non-jury trial and the applicant suggests that severing a non-jury trial does not give rise to the issue of having different juries trying to resolve issues of credibility and liability and damages.

2. Current Practice. The applicant refers to a number of recent cases where it appears that the current practice is less restrictive and therefore, severance should be granted more readily than in the past.

3. The fact that a determination on the question of liability will either bring an end to the matter or require the applicants to negotiate a settlement.

4. It will be less costly for the respondent if the court orders the severance, as it will not be necessary to have five experts attend to testify on behalf of the respondent, and, if the applicant retains an expert at the expense of such an expert attending the trial prior to being required to be there in advance.

[21] The respondent suggests that the application to sever is a last-minute change in the applicant's strategy. She maintains that there no good reason to sever the action because it is likely that the applicant will be held responsible for the motor accident, either in whole or in part. Consequently, the applicant will bear some responsibility and a trial on damages will likely be inevitable.

[22] The respondent states that credibility is important to both liability and damages. Consequently, the possibility of a different finding of credibility may result from a severance. Further, she argues that evidence relating to speed, area of impact, and related matters is relevant to both liability and damages, and it is therefore more efficient for one judge to hear all of the evidence and to decide both issues.

[23] The respondent also maintains that the amount of time spent to conduct a damage assessment will not be great. Furthermore, dismissing an application to sever can encourage a settlement. Consequently, she argues, an application to sever should only be granted in an extraordinary or special cases.

[24] The respondent also suggests that consideration should be given to whether the plaintiff or the defendant seeks the severance. In *Nauss v. Rushton* (2001), 198 N.S.R. (2d) 191 (S.C.); [2001] N.S.J. No. 466**,** Hall J. granted the plaintiff's application for a severance. The plaintiff wanted liability decided before incurring the expense of experts, and preferred to wait for the results of surgery. The defendants argued that the issues of liability and damages were interwoven, particularly with respect to credibility as to how the accident happened and what injuries the plaintiff suffered.

[25] In *Nauss* Hall J. reviewed the law and concluded that in general, liability and damages should be tried together. He referred (at para. 9) to *Nova Scotia Savings & Loan Co. et al v. Exco Corporation Limited et al*, (1986) 72 N.S.R.(2d) 438, where the Appeal Division, in reversing a trial judge and ordering a severance, said, "we do not wish to create the impression that liability and damage issues will normally be severed. It is only in very complicated and unusual cases where it is clearly to the advantage of all concerned that such an order should be granted." Hall J. also referred (at para. 10) to *McManus v. Nova Scotia (Attorney General) et al.* (1993), 119 N.S.R. (2d) 137, where Tidman J. said:

> The rule currently being followed in most other courts was established in *Coenen v. Payne*, [1974] 2 All E.R. 1109 (C.A.,), by

> Lord Denning where he said in referring to the appropriate test then currently used by the courts in England:
>
> > "In practice this power has hitherto been exercised only in 'extraordinary and exceptional cases' or where 'the judge has serious reason to believe that the trial of the issue will put an end to the action'.
> > ...
> > "In future the courts 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 courts should be ready to order separate trials wherever it is just and convenient to do so."
> > ...
>
> As Lord Denning states in *Coenen* the normal practice should still be that liability and damages be tried together. In this case only the plaintiff wishes a severance and applies to the court to change the normal practice. Thus, the plaintiff must satisfy or prove to me, upon a preponderance of evidence, that it is just and convenient to order separate trials on the issues of liability and damages.
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> * * *
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> In order to find that it would be "just and convenient" to sever the issues of liability and damages I must consider the effect of such a decision on all of the parties as well as its effect on the court system, particularly in terms of time and the availability of trial dates.

[26] At para. 11 Hall J. cited *Piercey v. Board of Education of Lunenburg County District et al.*, (1993) 128 N.S.R. (2d) 232 where Goodfellow J. observed that “the law on this point is evolving and has reached the stage where the court must take a less restrictive view of severing the issues of liability and damages if the object of the Civil Procedure Rules is to be met.” However, Goodfellow J., like Tidman J. in *McManus*, declined to sever the issues.

[27] At para. 17 of *Nauss v. Rushton* Hall J. summarized the relevant authorities and suggested the following criteria in determining whether the issues of liability and damages should be severed:

> (1) The general rule is to try all issues together.
>
> (2) It is a basic right of a litigant to have all issues in dispute resolved in one trial, particularly where the trial is by jury.
>
> (3) The issues may be severed where it is just and convenient to do so.
>
> (4) The courts should now be more ready to grant separate trials than they used to.
>
> (5) In order to determine what is just and convenient, the court must consider the effect of a severance of the issues on all the parties as well as its effect on the court system.
>
> (6) The applicant for a severance has the burden of establishing by a preponderance of evidence that it is just and convenient to order separate trials.
>
> (7) Only in the rarest and most unique of situations where the trial is to be by jury should a severance be allowed.
>
> (8) Severance should not be ordered where significant issues are interwoven such as credibility.
>
> (9) Severance may be granted when the issue to be tried is simple.
>
> (10) Severance may be granted where there is some evidence that it is probable that the trial of the separate issue will put an end to the action.
>
> (11) Severance should be considered where it appears that an application for an interim payment of damages under Civil Procedure rule 33.01 would be justified. [citations omitted.]

[28] Applying the law to the case before him, Hall J. noted that the liability issue was straightforward and could be decided with two days of trial. Although the applicants denied fault, there was a real possibility of divided liability and "it would be of great assistance to all parties in conducting settlement negotiations to know with certainty the proportion of liability that would be assigned to each" (paras. 18-20). He continued:

> ¶21 Counsel for the respondent submitted that the damages issue would take five to six days to try and would involve her client in very substantial expense, particularly with respect to expert witnesses. Counsel for the applicants maintained that this aspect of the case could be disposed of in two additional days of trial. In this respect I accept the time estimate of the respondent's counsel as being the more accurate. After all, the respondent must take the lead in proving his damages. His counsel knows the nature of the evidence that will be presented and how long it is likely to take to do so.
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> ¶22 From the evidence presented, it appears that the respondent is a man of very modest means. It is doubtful that he can afford to invest substantial sums in what may ultimately turn out to be a losing cause. At the same time, if the question of liability goes against the respondent, the applicants will have saved all the expense of defending an unsuccessful claim for damages. As well, it will have avoided unnecessary utilization of court time and resources.
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> ¶23 [Applicant's counsel] advised the court that the liability issue is now ready for trial, whereas it will be some considerable period of time before she can proceed on the damages issue. I agree that it would be advantageous to present the evidence of the witnesses to the accident while it is relatively fresh in their minds.

[29] Hall J. concluded that it was to the advantage of all the parties to resolve the issue of liability in advance of damages. The only factor that militated against severing the issues was credibility, which, it was argued, was interwoven with both aspects of the trial. Hall J. said:

> ¶27 The "disagreements" and conflicts in the testimony of witnesses and other evidence alluded to by Mr. Rushton, in my experience are of the nature that always arise in cases such as this. It must be kept in mind that just because a witness is wrong in his version of the facts does not necessarily mean that he is lying or deliberately attempting to mislead. It should also be kept in mind that in every case credibility of witnesses is a relevant issue. Generally wide latitude in cross-examination is given to explore issues of credibility. Accordingly, I am satisfied that this issue can be dealt with satisfactorily if the two aspects of the trial are tried separately.

[30] As such, Hall J. concluded that a severance was “just and convenient” in the circumstances.

[31] I note also the decision of Orsborn J. of the Newfoundland Supreme Court Trial Division in *Boone v. King* 2004 N.J. No. 268. Orsborn J. noted that the primary focus of a severance application is on the litigation as a whole as opposed to the circumstances of one party:

> ¶26 I am not persuaded that a decision on severance is made simply, and without more, on a judge's view of what is just and convenient. While the overarching consideration may be what is

> just and convenient - for all parties - the cases indicate that a variety of factors should be considered before exercising any discretion to depart from a default 'all issues' position. The factors outlined in [*Elliott v. Western Health Care Corp.*, [2003] N.J. No. 242] focus on the litigation as a whole and on the impact of severance on all the parties to the proceeding. Noticeably absent from those factors is any reference to the particular circumstances of one party.
>
> ¶27 While there may indeed be situations in which the circumstances of one party may be a valid consideration, it seems to me that the primary focus must remain on the litigation as a whole and on the effect of severance on all parties and on the court system.

[32] Orsborn J. went on to comment on the general principle that all matters should be decided together:

> ¶28 The normal position that all issues be tried together is long standing and rests on a solid foundation of fairness and practicality. Fairness to applicants suggests that they be entitled at trial to have the full case against them laid out and examined, and that they should not be unwillingly subjected, without good reason, to piecemeal litigation. On the other side, a respondent who chooses to initiate litigation does so with the knowledge and expectation that he or she will have to present the full case in support of the relief requested; without demonstrated benefit to the proceeding as a whole, a respondent should have no expectation of tailoring the conduct of the trial to meet his or her own particular circumstances.
> ¶29 Practicality suggests that all matters be heard and decided at the same time; even though issues may be legally separate, a single trial and determination facilitates a more cohesive proceeding and decision. Carving up proceedings raises the possibility of additional appeals, or at least applications for leave to appeal, thus opening the door to additional time and cost. Witnesses may have to testify more than once, and court facilities and trial scheduling will be adversely affected.
>
> ¶30 The position that all issues be heard and determined at the same time has much to commend it and is firmly rooted in our trial

> system; that it should only be displaced in exceptional circumstances is likewise firmly rooted in sound policy and practical considerations.

[33] While the legal issues could be conveniently separated, Orsborn J. said, there were other necessary considerations:

> ¶32 There is no evidence giving any estimate of the length of time of a trial on damages, nor any estimate of the costs involved in preparing to present the damages claim. Although it is perhaps obvious that not insignificant resources will be required to prepare this claim, I am not prepared to assume that simply severing the issues will lead to "a substantial saving of costs". This would only follow if the respondent proceeded to trial on liability, lost, and elected not to appeal. There is no evidence that this is the respondent's position. Should the respondent succeed on liability, then the applicants may well appeal. If the applicants lose in the appeal then, subject to any further appeal, the damages and question remains to be dealt with. Given these various possibilities, I am not prepared to simply speculate on the question of costs savings.
>
> ¶33 Neither is there any evidence that severing the issues may, if liability were found, facilitate settlement. Again, one may speculate that, following a finding of liability at trail, the applicants may be more amenable to discussing settlement. But without some indication of the quantum of the respondent's claim and, importantly, recognizing the likelihood that the applicants will appeal any decision on liability, I am not prepared to conclude that a finding on liability will likely put an end to the action**.**

[34] In the circumstances, Orsborn J. concluded, severance might just as easily increase as decrease the potential for significant additional time and cost. He held

that, considering the litigation as a whole it had not been demonstrated that it would be just and convenient to sever the issues:

> ¶36 I am not persuaded that a decision on severance is made simply, and without more, on a judge's view of what is just and convenient. While the overarching consideration may be what is just and convenient - for all parties - the cases indicate that a variety of factors should be considered before exercising any discretion to depart from a default 'all issues' position. The factors outlined in Elliott focus on the litigation as a whole and on the impact of severance on all the parties to the proceeding. Noticeably absent from those factors is any reference to the particular circumstances of one party.
>
> ¶37 I have evidence of the length of time it is estimated that the trial of an issue of liability will consume. I have a fairly good estimate of the time required to deal with the issue of damages with the exception that that may vary if the applicant elects to retain an expert to prepare a report and testify at the trial. However, I do not know the effect that a severance will have on the dates to complete the damage portion of the trial, which I estimate to be up to six days.

[35] I am also mindful of the comment of Justice Hall that a finding of fault or a division of liability would be of assistance to the parties in attempting to negotiate a settlement. However, in the present case I do not know the amount of damages the respondent is seeking and this will, no doubt, have an impact on whether the applicant will be amenable to settlement discussions.

[36] In the matter before me, I have no assurance that the parties will not appeal a decision on liability. It would be presumptuous to conclude that although the trial

decision on liability would either end the respondent's claim or prompt the applicants to negotiate to settle the respondent's claim, there is no assurance by the applicant that an appeal would not be initiated nor do I have such assurance from the respondent. Although costs saving maybe realized if the parties elect not to appeal and accept the decision of the trial judge as final, I do not have an understanding from the parties that that will occur. Nor do I know the expenditures made by the respondent on the experts as against the amount of the incremental expenditures for these experts to attend the trial.

[37] Ms. Butler maintains that the issues are interwoven such as credibility. However, as was pointed out by Osborne, J., the fact that the respondent may be challenged on her version of events both as to liability and damages does not necessarily make the issues interwoven. I believe that they can be separated because the issue of liability will depend on the evidence directed as to fault, speed, lookout, braking, right of way etc., while the issue of damages will be governed by such matters as causation, pre-existing medical conditions, medical diagnosis, ability to return work, capability to perform housekeeping and mitigation.

[38] The time devoted to each issue was important to Justice Hall in *Nauss*. Unlike *King*, where there was no evidence of the length of time required, and no estimate of costs involved in the presentation of the damage claim, here we have evidence of the time estimated to try each issue and we know that experts' reports have been prepared and the experts have been discovered. We do not have evidence of the costs of the experts to testify at trial. However, such a saving may be largely hypothetical if the respondent did not appeal an adverse decision of the trial court. I do not believe that I have a firm understanding that the applicant would not appeal on adverse finding of the trial judge.

[39] In *Nauss* the applicant did not want to incur expenses for experts unless he knew the result on liability. Here the expenditures have already been made and the only issue are the costs associated with attendance at trial.

[40] On balance, although there are some reasons militating in favour of severance, I am satisfied that the applicant has not shown on a balance of probabilities that it is just and appropriate to grant a severance. The application is accordingly dismissed. In the circumstances, I award costs to the respondent of $750.00 payable in any event in the cause.

J.