IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Kroger v. Upshall, 2006 NSSC 327

Date: 20051220
Docket: S.H. No. 162260
Registry: Halifax

Between:

Heather Ann Kroger

- and -

Lynn Upshall; **Cole Harbour Service Centre Limited**, a body corporate; **Byways Automotive Group Limited**, a body corporate carrying on business as **Byways Rent-Car**; **John Charles Cole**; **Kelly Kelson**; and **Canada Life Assurance Company**, a body corporate

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Decision

Judge: The Honourable Justice Robert W. Wright

Heard: December 20, 2005 in Halifax, Nova Scotia

Oral Decision: December 20, 2005

Written Decision: November 2, 2006

Counsel: Counsel for the Plaintiff - Raymond Wagner
Counsel for the Defendants Lynn Upshall, Cole Harbour Service Centre Limited and Byways Automotive Group Limited - Philip Chapman
Counsel for the Defendant, Canada Life Assurance Company - John MacL. Rogers, Q.C.

Wright J. (Orally)

[1] This is an application on behalf of the defendants Lynn Upshall, Byways Rent-a- Car and Cole Harbour Service Centre Limited to sever issues of liability from damages in a serious personal injury case arising out of a motor vehicle accident which occurred on March 19, 1998.

[2] The material facts surrounding the occurrence of the motor vehicle accident are not seriously in dispute between the parties. Briefly, four employees of Canada Life embarked on a business trip to Saint John, New Brunswick on March 19, 1998 in a rented car to visit a major group insurance client in that community. The driver was the defendant Lynn Upshall, Canada Life's supervisor of Group Life and Disability. The passengers in the car were the plaintiff, Heather Kroger, who was Regional Manager of Atlantic Claims and Administration for Canada Life and the direct supervisor of Ms. Upshall, along with two disability claims examiners, Sherry Haines and Susan Henley.

[3] At some point along the way, the group decided that they would extend their trip to Saint John by driving on to Calais, Maine to do some shopping on that same day which they did. Tragically, on their return trip to Saint John just outside St. Stephen, there was a very violent collision when the vehicle in which they were travelling somehow went out of control and struck an oncoming car. As a result, Ms. Kroger suffered very serious personal injuries, including multiple fractures and even more seriously, a traumatic brain injury. It appears she has not been able to return to any form of employment in the seven years which have since passed.

[4] On March 1, 2000 Ms. Kroger filed an Originating Notice (Action) against six defendants, namely, Lynn Upshall as the driver of the rented vehicle, Cole Harbour Service Centre and Byways Rent-a-Car as the owner of the vehicle, John Cole and Kelly Kelson as the operator and owner respectively of the vehicle with which they collided and lastly, Canada Life Assurance Company as their common employer. In his pleadings on behalf of the applicant defendants, Mr. Chapman filed a crossclaim against Canada Life alleging that at the time of the accident, Ms. Upshall was acting in the course of her employment in furtherance of the objectives and enterprise of Canada Life; and that there was an express or implied contractual obligation (by operation of law) on the part of Canada Life to assume the risk and liability inherent in such activities and to bear the plaintiff's losses arising therefrom. Canada Life vigorously opposes that claim and the claim for vicarious liability.

[5] After discoveries were held, the action was eventually dismissed as against the defendants Cole and Kelson by Consent Order. A Notice of Trial was filed by Mr. Wagner on behalf of the plaintiff on April 10, 2003. The matter was subsequently set down for trial beginning on November 1, 2005, which meant a 2½ year wait for a 20 day civil jury trial.

[6] Eventually, I was assigned as the trial judge. Shortly before the trial, Mr. Chapman on behalf of the applicant defendants requested an adjournment. It was represented to the court by letter that in anticipation of a negotiated settlement thought to have resolved the matter, he had not prepared for trial, only to have the anticipated settlement fall off the rails.

[7] The stumbling block to the anticipated settlement, which still persists, was over the potential liability of Canada Life under two possible avenues. The first was whether or not Canada Life was exposed to vicarious liability to the plaintiff for the negligence of its employee Ms. Upshall, which invites the question of whether or not she was acting in the course of her employment at the time of the accident. Secondly, if she was so acting, the question remained whether the defendant Ms. Upshall could claim a right of indemnity against Canada Life for all or a portion of the damages assessed against her in the plaintiff's action.

[8] Because these three defendants were not ready for trial under these unforeseen circumstances, all counsel agreed to an adjournment of the trial on the basis that those defendants would make a substantial interim payment of damages to the plaintiff, which they did.

[9] In the two months that have since elapsed, a series of informal case management conferences have been held before me trying to find an expeditious way of resolving this litigation. When further talks between the parties did not lead anywhere, the defendants represented by Mr. Chapman were given leave to make application to sever liability issues from damages which brings us here today.

[10] The liability issues proposed to be severed can be stated as follows:

1. Are the defendants liable to the plaintiff for the injuries she sustained in the motor vehicle accident?

2. If so, does Lynn Upshall have a right of indemnity against Canada Life Assurance Company for all or a portion of the damages assessed against her in the action commenced by the plaintiff as outlined in the Originating Notice and Statement of Claim?

[11] The authority of the court to sever one or more issues to be tried at or before trial is found in Civil Procedure Rule 28.04, and also in Civil Procedure Rule 25. There is also to be considered the overall objectives set out in Civil Procedure Rule 1.03 which are to secure the just, speedy and inexpensive determination of every proceeding.

[12] The general test to be applied under these rules, as stated by our Court of Appeal in *Rajkhowa v. Watson* [2000] N.S.J. No. 110 is whether it is just and convenient to sever the issues. The Court of Appeal commented that "In order to determine what is just and convenient, the court must consider the effect of such a decision on all the parties as well as the effect on the court system."

[13] The Court of Appeal went on to say in that case that in the 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.

[14] There are two other notable decisions of this court often referred to on severance applications, because they identify the factors that should be canvassed in the court's analysis of whether an issue ought to be severed. I refer, of course, to *Fraser v. Westminer Canada Ltd.* (1998) 168 N.S.R. (2d) 84 and *Nauss v.*

Rushton (2001) 198 N.S.R. (2d) 191 . In the former case, Justice Gruchy set out four guiding principles of particular importance to the application then before him, which can be summarized as follows:

> (a) Severance should only be granted in extraordinary and exceptional cases;
>
> (b) Before ordering severance, the Court must be satisfied that there must be some reasonable basis for concluding that the trial of the issue or issues sought to be severed will put an end to the action;
>
> (c) An order for severance should hold the prospect that there will be a significant saving of time and expense; and
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> (d) Severance should not give rise to the necessity of duplication in a substantial way in the presentation of the facts and law involved in later questions.

[15] As stated by the Court of Appeal in *Rajkhowa*, the factors listed are only guidelines and the list may expand, depending on the nature and circumstances of the case (particularly if a trial by jury).

[16] In the subsequent decision in *Nauss*, Justice Hall summarized an expanded list of criteria that the court must consider in a severance application. They are as follows (at para 24):

> (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.
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> (7) Only in the rarest and most unique of situations where the trial is to be by jury should a severance be allowed.
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> (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.

[17] In short, whether it is just and convenient to sever an issue for separate trial requires a close examination of each individual case to determine if there are exceptional circumstances that carry it outside the general rule that liability and damages be tried together. Counsel for the applicant defendants says that this is such a case; counsel for Canada Life says that it is not; and counsel for the plaintiff says that he would be agreeable to severance only of the single issue of whether

Canada Life has any vicarious liability for the negligence of Ms. Upshall. Indeed, he initially attempted to have that single issue determined as a preliminary point of law under Civil Procedure Rule 25, but the application did not go ahead.

[18] In deciding this application, I begin with a restatement of the general rule that it is a basic right of a litigant to have all issues tried together, unless the court is satisfied that it would be just and convenient to order a severance. That remains the general rule in this province, although it has been tempered somewhat by the decision of the Nova Scotia of Court of Appeal in *Rajkhowa* where it was stated that the courts should now be more ready to sever trials than they used to, if satisfied that it would be just and convenient to do so. The burden nonetheless remains on the applicant to establish, on a preponderance of evidence, that it would be just and convenient for severance of an issue by separate trial.

[19] The liability issues which the applicant defendants propose to be severed, as identified in paragraph 10 of this decision, have a rather unique context and appear to be the lynchpin to the resolution of this litigation. Essentially, those issues involve two core questions: (1) Was Ms. Upshall acting in the course of her employment at the time of the accident? (2) If so, does she thereby have any right of indemnity against Canada Life for any damages awarded to the plaintiff? I interject here that I recognize that Canada Life counters that question in its brief, raising concurrently the question of a common law right of an employer who has paid damages to someone for the negligence of an employee to later sue that employee for indemnity.

[20] I use the word “lynchpin” in respect of these liability issues because I am

satisfied after hearing the submissions of counsel, and having informally case managed this file since the October adjournment, that there is a likelihood that the trial of the issues involving any possible liability of Canada Life has a reasonable chance of putting an end to this litigation altogether. In the submission of Mr. Chapman on behalf of the applicants, there are two results that can arise as a result of a severed hearing and he puts them this way:

> (1) Canada Life will be held not to be vicariously liable vis-a-vis the plaintiff and not to be responsible to indemnify Ms. Upshall for the damages assessed against her. In that scenario, Canada Life will be removed from the action and the matter will be settled as between the plaintiff and Ms. Upshall's insurers;
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> (2) Canada Life will be held vicariously liable for the negligence of Ms. Upshall. In addition, Canada Life may or may not be held liable on the claim back by Ms. Upshall against it. In such a case, the plaintiff would be at liberty to recover its full loss against Canada Life and against all other defendants. The insurance policy of Ms. Upshall will respond and presumably Canada Life will be held liable for the difference (if any).

[21] Counsel for Canada Life and for the plaintiff argue that the matter will not necessarily end there but nonetheless, I conclude that the strong likelihood is that the court's disposition of these two discrete issues will lead to the achievement of a final settlement. As Mr. Chapman from his vantage point says, at paragraph 29 of his brief, " The largest stumbling block to settlement at this point relates exclusively to the liability of Canada Life vis-a-vis the plaintiff, and vis-a-vis Ms. Upshall". I might add that has been a constant theme that I have heard ever since I began to case manage this file.

[22] I do hear other counsel in their submissions that there may still be other insurance or enforcement issues that pertain to liability left standing, some of

which can be properly decided only in the aftermath of a trial judgment. Some of the arguments made involve hypotheticals, at least at this stage, and involve a certain element of speculation. I do recognize, however, that there is a possibility that further questions might arise, especially as between Canada Life and the insurers for the other defendants.

[23] Next in the analysis is the comparative logistics of a severed trial versus one composite trial in terms of court time, court costs, complexity of issues and delay. I have canvassed with counsel again today the live issues in this litigation. Looking first at the issue of negligence, Mr. Chapman does not go so far as to formally admit fault on the part of Ms. Upshall for the accident but candidly states that it's not a prominent issue here. As earlier noted, the action as against the operator and owner of the other vehicle in the collision was dismissed two years ago by a consent order.

[24] Ms. Kroger's claim against Cole Harbour Service Centre and Byways, although pleaded both in terms of joint tortfeasor liability, and through ownership of the rented vehicle, appears to have an evidentiary basis only in the latter respect. That does not prevent Mr. Wagner from introducing evidence that would go to establishing liability of either of those corporations on a tortfeasor basis but he candidly admits that none has been discovered to date and given the passage of time, such is unlikely. After hearing submissions of counsel, all indications are that the only real liability exposure of these two corporate defendants is on the basis of their ownership of the rented vehicle.

[25] There is also, of course, the claim directly by Ms. Kroger against Canada Life based on vicarious liability for the negligence of Lynn Upshall. However, all things considered, the first issue proposed to be severed, i.e., the direct liability of any of the four remaining defendants to Ms. Kroger, is not complex.

[26] The second issue proposed for severance by Mr. Chapman is definitely more complex but not one that will require extensive evidence to try. The comparison of logistics that Mr. Chapman puts forward begins with his estimate that if the trial were to go ahead on the severed issues of liability as proposed, only three or four days would be required because it would involve the calling of only five to seven witnesses and entering about ten documents. He contrasts that with an anticipated 17 - 19 days to try the quantum of damages claim because that involves evidence covering a complete gamut of recoverable heads of damages. He notes that at least 13 experts will be called along with several lay witnesses to speak to the extent and effect of the plaintiff's injuries.

[27] Mr. Chapman estimates that the fees that would be incurred collectively from the plaintiff's 12 experts subpoened for trial might range from $50,000-$70,000, and could even get as high as $100,000 if discovery of experts between now and then were permitted by the court. Mr. Chapman puts forward as a conservative estimate an overall escalation of costs in the range of $200,000 if the trial on quantum has to be concurrently held. He points out the plaintiff's List of Documents contained some 1411 documents plus updates that relate to quantum.

[28] Some of these time and costs projections by Mr. Chapman are challenged by

opposing counsel and perhaps they have been a bit embellished, although they are certainly not beyond the realm of possibility. Even if they are on the high side, it can safely be said that the quantum issues will account for a sizeable majority of the costs and court time to be consumed in a single trial. As mentioned earlier, there is a strong prospect, in my assessment, that these may be avoided altogether once the liability issues in relation to the exposure of Canada Life are decided. If that holds true, the result would be beneficial both to the litigants and to the resources of the court.

[29] Another very important factor in this analysis is the delay in getting new long trial dates, if there is to be a single trial. That is a particular concern to the plaintiff, after a 2½ year wait already on the civil jury list. As I indicated in one of my exchanges with counsel today, I checked with the court schedulers at the end of last week and was advised that the wait time on the long trial list for a 20 day jury case would now extend into 2007 at best and possibly into 2008. Faced with that prospect, plaintiff's counsel has indicated a willingness to commit to a judge alone trial, if that meant being able to obtain earlier trial dates. Such would undoubtedly be the case, and I expect that the severance concerns presented by a jury mode of trial would fall away.

[30] The comparison of a further 1½ to 2 year wait for a single trial, with its added frustrations and costs, against the strong prospect of being able to effectively bring this litigation to an earlier end by ordering a severed trial on liability weighs significantly in favour of granting the application. This is all the moreso where I

am able to offer trial dates (5 days) for the severed issues to be tried as early as February, 2006, a mere two months away.

[31] I also want to make brief reference to two other factors favouring severance that are worthy of mention. One is that the issues of liability and damages are not significantly interwoven in terms of the potential for conflicting credibility findings. Secondly, severance on the terms proposed will not give rise to much duplication of evidence in later questions of fact or law to be decided, should that become necessary.

[32] In conclusion, I am persuaded after hearing submissions of counsel and after having presided over several informal case management conferences, that this is one of those exceptional cases where it is just and convenient to depart from the general rule and to order severance of the identified liability issues from damages. Hindsight may prove me wrong, but I am of the view that making such an order is the best solution for a more expedient and less costly resolution of this litigation. Costs of this application will be in the cause.

J.