2000 S.Am. No. 3513

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as Nauss v. Rushton 2001NSSC167]

BETWEEN:

PATRICK J. NAUSS

PLAINTIFF/APPLICANT

- and -

F. MURRAY RUSHTON, F.M. RUSHTON WOOD FARM LIMITED,
and the TOWN OF OXFORD, a municipal corporation

DEFENDANTS/RESPONDENTS

D E C I S I O N

HEARD: At Amherst, Nova Scotia, on October 4, 2001.

BEFORE: The Honourable Justice Donald M. Hall.

DECISION: November 21, 2001.

COUNSEL: Cindy A. Bourgeois,
Counsel for the Plaintiff/Applicant.

Ronald J. Savoy, Esq.,
Counsel for the Defendants, F. Murray Rushton & F.M. Rushton Wood Farms Ltd.

Carole A. Beaton,
Counsel for the Defendant, Town of Oxford.

Hall, J.

[1] This is an application for an order severing the issues of liability and damages. The question to be decided is whether in the circumstances of this case they ought to be tried separately.

[2] The plaintiff was injured when he was struck by the defendant Rushton's dump truck which had been diverted through the parking lot where the accident occurred by the defendant Town's employees. The plaintiff had been using a telephone in a public telephone booth that was located adjacent to the parking lot. After he finished his call he started to cross the parking lot to return to a restaurant where he was having breakfast. As he was crossing the parking lot, after looking both ways, he was distracted by a flag person employed by the Town who was shouting. It appears that the Town was doing some construction work on an adjacent street and had re-routed traffic through the parking lot. The plaintiff claims that at the time he was not aware of this as there were no pylons or signs to indicate that traffic was being re-routed and that as he turned to continue on his way he was struck by the Rushton vehicle and knocked to the ground. He contends that as a result he sustained severe personal injuries for which he has received ongoing medical treatment and recently has undergone surgery. Apparently he has not been able to work since the accident.

[3] The version of the facts surrounding the accident of the defendants, F. Murray Rushton and F.M. Rushton Wood Farm Limited, is set out in their joint defence as follows:

> . . . at approximately noon hour on October 25, 1999, he (Rushton) was proceeding, in the Rushton vehicle, in a Northerly direction along Main Street in the Town of Oxford, in a safe and prudent manner, when he came upon a construction area in front of the Parkview Restaurant and Motel. As traffic was being detoured off Main Street by a flagman through the parking lot of the Parkview Restaurant, Rushton proceeded in a cautious manner, at a slow rate of speed along the detour into the parking lot. Suddenly and without any warning, Nauss stepped out of a telephone booth directly into the path of the Rushton vehicle. At this point in time, Rushton was travelling 5 - 10 kilometres per hour. Rushton immediately applied the brakes, and Nauss fell to his left.

[4] The Town denies any responsibility for the accident.

[5] The plaintiff's counsel, Ms. Bourgeois, acknowledged that there is a serious question of liability which could be resolved in one or two days of trial. On the other hand, according to her, an assessment of damages would take five to six days. She said that her client does not want to incur the additional and substantial expense of medical experts' reports, discoveries of experts and experts' witness fees if no liability should be found on the part of the defendants. She stated further that the plaintiff is ready to go to trial on the issue of liability, but cannot be ready for trial for some time with respect to quantum of damages because it will be a considerable period of time before the results of the plaintiff's recent surgery will be known. She submitted that it is desirable to go to trial now with respect to liability while the events surrounding the occurrence of the accident are fresh in the witnesses' minds.

[6] In opposing the application counsel for all defendants took similar positions. They maintained that the issues of liability and quantum of damages are interwoven, particularly, with respect to the credibility of the plaintiff as to how the accident happened and what injuries were sustained by him in the accident. Both counsel stated that the assessment of damages would not take more than two days. They submitted that this case does not come within the criteria established by the jurisprudence to permit a severance of the two issues.

[7] The relevant provisions of the **Civil Procedure Rules** are the following:

> 1.03 The object of these **Rules** is to secure the 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,
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> (a) determine any relevant question or issue of law or fact, or both;
>
> (d) give directions as to the procedure to govern the future course of any proceeding, which directions shall govern the proceeding notwithstanding the provision of any rule to the contrary;
>
> (f) order different questions or issues to be tried by different modes and at different places or times.
>
> (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 any 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 of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial, and may give directions as to the manner in which the question or issue shall be stated.

[8] The foregoing **Rules** have been in existence for some time and have received a fair amount of attention from the judges of this Court and our Court of Appeal. A brief review of the jurisprudence that has developed may be helpful.

[9] The starting point as to the current position is the decision of the Appeal Division of this Court in **Nova Scotia Savings & Loan Co. et al v. Exco Corporation Limited et al,** (1986) 72 N.S.R.(2d) 438. At page 439, Hart, J.A., said:

> After considering the representations of the parties, we have reached the conclusion that the trial judge did not fully consider the extensive evidence that would have to be presented to establish the damage claims revealed by the pleadings and that the proof of these damage claims would cause

> tremendous court costs to be incurred by the parties. The trial has been estimated to require at least seven weeks of court time at the conclusion of which some or all of the parties may be found to have no liability for such damages.
>
> . . .
>
> We are unanimously of opinion that it would be manifestly unjust to require proof of damages before the liability of all parties is determined and would therefore grant leave to appeal, allow the appeal and direct that the issues relating to damages be postponed until after all questions of liability of the parties have been determined by the trial court.
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> . . .
>
> In delivering this ruling 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.

[10] In **McManus v. Nova Scotia (Attorney General) et al.,** (1993) 119 N.S.R.(2d) 137, Tidman, J., of this Court said at page 139:

> 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.

And at page 140:

> 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.

In the circumstances of this case, Tidman, J., refused to sever the issues, apparently in part due to a lack of evidence to support the applicant's position.

[11] In **Piercey v. Board of Education of Lunenburg County District et al.**, (1993) 128 N.S.R.(2d) 232, Goodfellow, J., of this Court said at page 235:

> In my view 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.
>
> A court must be concerned with the costs of litigation, not only in the human sense to the parties themselves and with the financial costs, but also the cost to society of the drain upon limited judicial resources. There has been a marked increase in litigation over the past few years and the court has to play a more active part in the scheduling and utilization of the resources available. That is why I said earlier that in a case where liability issue could be dealt with in a relatively short order and the damages aspect take an extremely long period of time severance might be in order. A more careful look at the situation must be taken by the court.

[12] In **Fraser et al. V. Westminer Canada Ltd. et al.** (1998) 168 N.S.R.(2d) 84, Gruchy, J., of this Court referred to and adopted the criteria suggested in the Ontario case of **Woodglen & Co. v. Owens**, (1995), 38 C.P.C.(3d) 354 and the British Columbia case of **Schemenaueur v. Smith,** [1997] B.C.J. No. 1068. He said at page 87:

> . . . The plaintiffs cite the case of **Schemenaueur** wherein the court looked at circumstances in which an order for severance might be made and set forth the following criteria for severance of issues:
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> (a) in an extraordinary and exceptional case;
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> (b) when the issue to be tried is simple;
>
> (c) when the issue to be tried separately is not interwoven with other issues in the action;
>
> (d) when there is some evidence which makes it at least probable that the trial of the separate issue will put an end to the action.
>
> The plaintiff has also pointed to the case of **Woodglen** as a case where the court allowed a severance of issues of liability and damages when it would produce a significant saving of time and costs for the litigants.

The decision of Gruchy, J., refusing severance was upheld on appeal, (1998) 171 N.S.R.(2d) 186.

[13] In **MacCulloch v. McInnes Cooper and Robertson** (1998), 167 N.S.R.(2d) 186, Cacchione, J., of this Court, after considering various issues presented by the parties said at page 189:

> . . . These are issues which a judge will have to determine based in large part on the credibility of the witnesses. To order severance would deprive the trier of fact of the opportunity of assessing credibility in respect of the larger picture. It may be that the plaintiff's credibility with respect of the liability issue could be affected by her testimony on the question of damages. Separate trials could cause the matter to be heard by different triers and thus lead to a different approach being employed on the question of credibility. I am satisfied that credibility is an issue that is inextricably linked to the issues of liability and damages and that it should therefore be determined by one judge at one sitting.

[14] In **Rajkhowa v. Watson** [2000] N.S.J. No. 110; 1 C.P.C.(5th) 218, the Nova Scotia Court of Appeal reversed the decision of the Chambers judge where the trial was to be by jury. Speaking for a unanimous court the late Justice Pugsley said at paras 26, 27 and 28:

> The general rule is to try all issues together.
>
> We would add that it is a basic right of a litigant to have all issues in dispute resolved in one trial, unless it is just and convenient considering the interests of all parties and the proper administration of justice to do otherwise.
>
> Here the appellant is entitled to have the issues of fact and the damages assessed by a jury.

And at para 38:

> Our examinations of the pleadings disclose that the appellant will obviously be a key witness. His credibility is a significant issue to be resolved in the determination of liability, as well as in the assessment of damages. The two issues are "interwoven". The appellant has the right to have both issues determined by the same jury, unless it is just and convenient to do otherwise. It is neither just nor convenient to require the appellant to establish his credibility before two separate juries. That could be the effect of the Chambers judge's order.

And at para 43:

> We would adopt the comments of Tidman, J., in **McManus v. Nova Scotia (Attorney General) et al.** (1993), 119 N.S.R.(2d) 137, at 140, that in order to determine what is just and convenient on the severance issue, the court must::
>
> > consider the effect of such a decision on all of the parties as well as its effect on the court system, . . .

And further on at para 47:

> . . . The Ontario position may be distinguishable from the Nova Scotia position in that the jurisdiction of the court in Ontario does not arise from the **Rules of Civil Procedure**, but rather from the inherent jurisdiction of the court. In Nova Scotia we have adopted the "just and convenient" test mandated by Lord Denning in **Coenen**, whereas the Ontario position was expressed by Morden, J.A., on behalf of the court in **Elcano** at p. 59 in these words:
>
> > The power should be exercised, in the interest of justice, only in the clearest cases.

And at para 49:

> It is only the rarest and most unique of situations that severance of the jury trial could be allowed.

And at para 51:

> The test to be followed, in a non-jury trial, for severance, should be that expressed by Lord Denning in **Coenen**:
>
> > The normal practice should still be that liability and damages should be tried together, but that the court should be ready to order separate trials wherever it is just and convenient to do so.

[15] It would appear that the principal basis for rejecting the Chambers judge's exercise of discretion in that case was that it was to be tried by a jury.

[16] In the unreported cases of **LeMoine v. Rasmussen,** S.AM. 3432, November 1, 2000, and **McCallum v. Wheaton,** S.AM. No. 3118, July 13, 2001, referred to by Ms. Bourgeois, there were lurking in the background potential applications for payment of interim damages pursuant to Rule 33.01.

[17] From the foregoing authorities it is apparent that in determining whether the issues of liability and damages should be severed the court must consider the following criteria:

(1) The general rule is to try all issues together. (**Rajkhowa v. Watson** appeal).

(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. (**McManus**, **Rajkhowa** appeal).

(4) The courts should now be more ready to grant separate trials than they used to. (**McManus, Rajkhowa** appeal, **Piercey, Fraser**).

(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. (**McManus, Rajkhowa** appeal, **Piercey**).

(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. (**McManus, Rajkhowa** appeal).

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

(8) Severance should not be ordered where significant issues are interwoven such as credibility. (**Fraser, MacCulloch, Rajkhowa** appeal).

(9) Severance may be granted when the issue to be tried is simple. (**Fraser**).

(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. (**Fraser**).

(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. (**LeMoine, McCallum**).

As noted by Pugsley, J.A., in **Rajkhowa v. Watson** appeal (supra), such factors are only guidelines "and the list may expand".

[18] In the present case it seems that the issue of liability is quite simple and that it could easily be decided in two days of trial. The issues in that respect seem to be straightforward, involving very few witnesses and relatively little expense for all parties.

[19] All defendants are adamant that there was no fault on their part and that the plaintiff is fully responsible for his own misfortune. If they are right and succeed in obtaining a favourable verdict in this respect, that certainly would put an end to the action.

[20] Furthermore, from the evidence that was presented, it seems that there is a real possibility that some degree of responsibility for the accident may be assigned to each of the parties. In my opinion, 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.

[21] Counsel for the plaintiff 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 defendants 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 plaintiff's counsel as being the more accurate. After all, the plaintiff 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.

[22] From the evidence presented, it appears that the plaintiff 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 plaintiff, the defendants 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.

[23] On behalf of her client, Ms. Bourgeois 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.

[24} In these circumstances, it seems to me that it would be to the advantage of all parties to decide the issue of liability in advance of the question of damages. In fact, other than the credibility issue, which I will deal with later, I fail to see why the defendants have opposed the application to sever.

[25] In my opinion, the only factor that militates against severing is the question of credibility. Both Mr. Savoy and Ms. Beaton submitted that this issue is interwoven with both aspects of the trial. This does give some cause for concern.

[26] In his affidavit, the defendant, F. Murray Rushton, stated:

> Based upon the plaintiff's evidence at examination for Discovery, I do verily believe that the plaintiff intends to submit to the Court that his current shoulder complaints are attributable to the accident, and that his current migraine headaches are also attributable to the accident.
>
> It is the position of the defendants, F. Murray Rushton and F.M. Rushton Wood Farm Limited, that there are serious issues of causality with respect to the plaintiff's injuries which will have to be resolved by a determination of fact by the trial judge.
>
> Based upon the documentary evidence and the testimony of the plaintiff at Discovery, I do verily believe that there are also disagreements with respect to the plaintiff's employment and past earnings history.

[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.

[28] On the whole, I am satisfied that the plaintiff has established by a preponderance of evidence that it would be just and convenient for all parties to sever the issues of liability and damages and I will so order.

Donald M. Hall, J.