

SUPREME COURT OF NOVA SCOTIA

Citation: *Wright v. Sun Life Assurance Company of Canada*, 2023 NSSC 13

Date: 20230117

Registry: Halifax

Docket: Hfx No. 496771

Between:

Eric Wright

Plaintiff

and

Sun Life Assurance Company of Canada

Defendant

Docket: Hfx No. 499428

Between:

Eric Wright

Plaintiff

and

Cody Brown

Defendant

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: January 11, 2023, in Halifax, Nova Scotia

Counsel: Thomas Champion and Philip Moreira, for the Plaintiff
Michelle Chai and Manon Landry, for the Defendant (Sun Life)
Ryan Lebans and Leah Robertson, for the Defendant (Cody Brown)

By the Court:

[1] This motion has been brought by Sun Life Assurance Company of Canada under *Nova Scotia Civil Procedure Rule 37* to have proceedings either consolidated or heard together. The two proceedings are actions brought by the Plaintiff, Eric Wright, who was involved in a motor vehicle accident on September 20, 2018. Mr. Wright has started an action against Sun Life for payment of long-term disability benefits and has started an action against Cody Brown, the driver of the other vehicle. Sun Life and Cody Brown agree that the cases should be consolidated while Mr. Wright does not. He has trial dates in the LTD matter involving Sun Life and that trial is set to begin on October 16, 2023. The dates were set on July 2, 2021, and Mr. Wright does not want to delay that trial. If the matters are consolidated that trial will be delayed potentially by two years.

[2] The issue is whether I should exercise my discretion under Rule 37.02 to consolidate the actions or order that they be heard together.

Civil Procedure Rule 37.02

[3] Rule 37.02 applies. It says that a judge may order the consolidation of proceedings if they are of the same kind (actions, applications, applications for judicial review, or appeals) and one of four conditions is met. The first is that there is a common question of law or fact. The second is that the same ground for judicial review or appeal is advanced. The third is that the claims, grounds, or defences involve the same transaction, occurrence or series of transactions or occurrences. The fourth is that consolidation is otherwise in the best interests of the parties. All four of those conditions need not be met. Only one is required.

[4] Consolidation is a discretionary remedy. The court must consider several factors in determining whether consolidation is appropriate when conditions under Rule 37.02 have been met. Justice Gatchalian set out the test in *MacDonald v. McPhee* 2022 NSSC 39.

[2] Subsection 41(g) of the *Judicature Act*, R.S.N.S. 1989, c. 240 provides general direction that the court should try to avoid a multiplicity of legal proceedings.

[3] Civil Procedure Rule 37.02 states that a judge may order consolidation if the proceedings are of the same kind (e.g. both are actions) and if one of the following additional conditions is satisfied (I have omitted the condition that only applies to judicial reviews and appeals):

- (a) a common question of law or fact arises in the proceedings;
- ...
- (c) claims, grounds or defences in the actions or applications involve the same transaction, occurrence, or series of transactions or occurrences;
- (d) consolidation is, otherwise, in the interests of the parties.

[4] The court considers other factors in determining whether to combine proceedings, including:

- (1) how far the actions have progressed;
- (2) the general convenience and expense;
- (3) whether a jury notice is involved;
- (4) whether the plaintiffs have separate solicitors; and
- (5) actions should not be consolidated where matters in one action have arisen subsequent to the commencement of the other, and the actions have proceeded to a considerable extent.

Stone v. Raniere, 1992 CarswellNS 219 (NSSC) at para.10

[5] The overarching consideration is what is just and convenient to the parties and to the administration of justice: *Healy v. Halifax (Regional Municipality)*, 2016 NSCA 47 at paras. 35 and 38.

Civil Procedure Rules 37.03 and 37.04

[5] Rules 37.03 provide that the court may order matters to be tried together or in sequence. Rule 37.04 provides that a judge may order common issues in two or more proceedings to be tried or heard together. Those Rules allow for specific issues common to two or more proceedings to be heard at the same time, while still keeping the proceedings separate. The parties to actions involving the same facts may have the liability portion heard together at a common trial while keeping the issue of damages as separate actions. The factors relevant to a motion for consolidation are relevant to a motion for actions to be tried together or in sequences. In *Healy v. Halifax (Regional Municipality)*, 2016 NSCA 47, the Court of Appeal noted that while the rule is brief an order issued under Rule 37.04 is akin to a consolidation, though a partial one. The same principles should be considered and the overarching factor continues to be what is just between the parties. Determining what is just may be aided by the court considering certain factors, but the Court of Appeal cautioned against the rigid application of any set of factors.

Consolidation

[6] The motion meets the threshold test under Rule 37.02. The tort proceeding involving the motor vehicle accident and the LTD matter are of the same kind. They involve different areas of law, contract and tort, but they are of the same kind in the sense that both are actions.

[7] There is a common question of law or fact. The LTD proceeding is based on an allegation of a breach of contract. The tort action is based in negligence. Both however relate directly to injuries sustained from the accident that took place on September 20, 2018. The extent of Mr. Wright's injuries and disability will be issues common to both matters.

[8] As Sun Life has noted, the amount that Mr. Wright receives in the tort action for loss of income will affect the LTD claim. Sun Life may be able to reduce any amount of LTD payments to which Mr. Wright is entitled by the amount he receives on the tort claim.

[9] Sun Life notes that there is nexus between the claims in the two proceedings. Had the motor vehicle accident not taken place the LTD claim would not have been made or at least would not have been made in its current form.

[10] Even though the threshold test has been met the question is whether the discretion should be exercised to order consolidation.

[11] As noted by Sun Life there are no reported cases in which a court in Nova Scotia has ordered the consolidation of a tort proceeding and the proceeding for payment of long-term disability benefits. It is argued to be common practice in other jurisdictions. *Paterson v. Gilbert*, 2021 ONSC 8469, *Kaur v. Blue Cross Insurance Co. of Canada*, 2018 ONSC 3303, *Aziz v. Blue Cross Life Insurance Co. of Canada*, 2019 ONSC 5020. It should be noted that in *Aziz* the order was not granted because the actions were not at the same stage. The LTD action had been set for trial and the tort action had not been and the plaintiff, who opposed the consolidation, provided evidence of prejudice.

[12] How far each action has progressed is a factor to be considered. The parties have different views about that. Sun Life contends that the LTD case and the tort case are really at the same stage and have proceeded in tandem. Discoveries have taken place and undertakings have largely been fulfilled. The next step is the filing of expert reports and proceeding to trial. The LTD case is set for trial in October 2023 while the Date Assignment Conference with respect to the tort matter has

been adjourned pending the outcome of this motion. Mr. Wright does not want to lose the trial dates for the resolution of the LTD claim.

[13] Mr. Wright argues that the difference is meaningful. Getting trial dates takes some effort and is a significant step in litigation, especially considering how far in advance trial dates are booked. The cases are at the same stage in the sense for both the pleadings have closed, there remains some ongoing disclosure and expert reports have not been exchanged. But practically the LTD case has an almost two - year lead on the tort case.

[14] Delay is presumptively prejudicial to a plaintiff. Having to wait another year or two for a trial is a prejudice to Mr. Wright. There has been no evidence filed to provide the details of his financial or other circumstances that might explain the nature of the prejudice. But some level of prejudice cannot be denied. Of course, that must be considered against the other factors that militate in favour of consolidation.

[15] The cases are closely linked. They relate to the same incident. The LTD claim is alleged to arise from the injuries that Mr. Wright sustained in the motor vehicle accident. The extent of his injuries and disability are common issues in both matters. Causation is an issue in the tort claim but it may also be an issue in the LTD claim when subrogation is considered. There is a potential for inconsistent findings if the trials proceed separately. Courts may find different levels of injury or disability and may make different determinations about the cause of any disability.

[16] There is no issue in this case about matters having arisen in one case subsequent to the commencement of the other. Discovery proceedings in neither matter are privileged so that evidence in one matter can be used in the other.

[17] Jury notices have not been filed. Mr. Wright has different lawyers representing him on the two actions, but they are in the same law firm.

[18] If these cases were to proceed separately there would be a substantial overlap in terms of witnesses and evidence. The witnesses about the accident itself could be called in both cases to provide evidence about the impact and Mr. Wright's behaviour immediately after the accident. Witnesses about the extent of his injuries or disability would be called in both trials.

[19] Having one trial of one action would be substantially more convenient than having two trials dealing with many of the same issues. But it is not just a matter of “convenience”. Having two trials dealing with such intertwined or linked issues presents the real risk of inconsistent findings. That is an issue that impacts on the administration of justice. A judge hearing the second trial is required to hear that trial fairly and impartially but could be faced with findings of fact made by another judge in a case involving the same parties and the same incident that are determinative of the issues in the trial before them.

[20] The loss of Mr. Wright’s trial dates in October 2023 is an inconvenience and prejudice to him but that is outweighed by the other considerations in this case.

[21] The motion for consolidation is granted.

[22] On the matter of costs, the hearing itself was brief and very much to the point. Sun Life made the motion which was supported by Mr. Brown. Costs should be paid by Eric Wright to Sun Life in the amount of \$750.

Campbell, J.