SUPREME COURT OF NOVA SCOTIA

Citation: *Tyler v. Halifax Convention Centre Corporation*, 2024 NSSC 109

Date: 20240412
Docket: 502595
Registry: Halifax

Between:

Jennifer-Jayne Tyler

Plaintiff

v.

Halifax Convention Centre Corporation, Events East Group, Halifax Regional Municipality, 3280404 Nova Scotia Limited, and Servomation Inc.

Defendants

DECISION ON MOTION TO SEVER

Judge: The Honourable Justice Scott C. Norton

Heard: April 9, 2024, in Halifax, Nova Scotia

Decision: April 12, 2024

Counsel: Janus Siebrits, for the Plaintiff
Tipper McEwan and Calvin DeWolfe, for the Defendant 3280404 Nova Scotia Limited
Andrew J. Sowerby, for the Defendants Halifax Convention Centre Corporation, Events East Group, and Halifax Regional Municipality

By the Court:

Introduction

[1] This action relates to an incident which is alleged to have occurred on January 23, 2019, during a Bryan Adams concert held at the Scotiabank Centre in Halifax. The Plaintiff, Jennifer-Jayne Tyler, attended the performance with her husband. The Statement of Claim alleges that an unidentified woman, exhibiting signs of extreme intoxication, tripped, fell down the staircase, and landed on Ms. Tyler while she was watching the performance from her assigned seat. Ms. Tyler claims to have been injured in this alleged incident.

[2] Halifax Convention Centre Corporation ("HCCC") and Events East Group ("Events East") manage and operate the Scotiabank Centre in Halifax ("Premises") and Halifax Regional Municipality ("HRM") owns the Premises. 3280404 Nova Scotia Limited, doing business as Shadow Security ("Shadow"), is an independent contractor who was hired by Events East to provide security services at the Premises on the date of the Incident. Servomation Inc. provided concession services to Events East. The action against Servomation Inc. has been discontinued.

[3] The Plaintiff claims that the Defendants are occupiers under the *Occupiers' Liability Act*, SNS 1996, c. 27 (the "*Act*") and breached their statutory duties or were negligent by failing to keep the staircase free of tripping hazards, serving the unidentified woman too much alcohol, failing to train their employees to properly manage the incident, and failing to have adequate systems in place to prevent disorderly conduct of patrons.

[4] The Defendants, HCCC, Events East and HRM (collectively the "HRM Defendants"), filed this motion to sever the trial of the issues of liability and damages. The motion was heard the same day and immediately following a motion by Shadow for summary judgment on evidence. Shadow supported this motion in the event it was unsuccessful on the summary judgment motion. In a separate decision I granted Shadow's motion for summary judgment.

Evidence and Objections

[5] The parties proceeded on the basis that the affidavit evidence filed was admissible for both motions before the Court.

[6] On March 22, 2024, the Plaintiff filed a response affidavit from her husband, Geoff Tyler, and a brochure titled: "Plaintiff's Exhibit Book". In written submissions, the Defendants made substantive objections to the content of the Exhibit Book as discussed below. On April 4, 2024, three "days" before the hearing and apparently in response to some of the objections being made, the Plaintiff filed her own affidavit, with attachments. She also filed an affidavit from a paralegal at her lawyer's firm, attaching a copy of an expert report and the expert's *curriculum vitae*.

[7] At the outset of the hearing, all Defendants objected to the late filing of these affidavits. These motions were scheduled for a full day hearing. By *Civil Procedure Rule* 23.11(1) any response affidavit was required to be filed 10 days before the hearing. *Rule* 23.12(1) prescribes that a party may only file an affidavit after a deadline with the permission of a judge. *Rule* 23.12(2) requires the judge to consider the prejudice to the party if the motion proceeds without the affidavit, the prejudice to the other parties by allowing the affidavit to be filed, and the prejudice caused to the public if motions set by appointment are frequently adjourned when it is too late to make the best use of the time on counsel, the judge and court staff.

[8] In oral submissions the Defendants acknowledged that there was no particular prejudice to them and advised that they were not seeking an adjournment in the event that the affidavit was permitted.

[9] Having considered the balance of prejudices and, subject to any objections as to admissibility of the contents, I permitted the late filing of the affidavits. The time lines set out in the *Rules* are for the benefit of the parties and the administration of justice and further the object of the *Rules* to provide a just, speedy and inexpensive determination of every proceeding. Counsel well know the filing restrictions. The Court should not and will not permit and thereby promote a casual approach to filing deadlines. Accordingly, I awarded costs of $250, payable to the HRM Defendants forthwith and in any event of the cause.

[10] The Defendants objected to certain contents of the "Exhibit Book" as well as the late-filed affidavits. At the hearing I heard submissions and made the following rulings with these reasons to follow:

1. An expert report of Gil Fried was not admitted.
2. It was included in the "Exhibit Book" and attached to the late-filed affidavit of the paralegal. First, there is no such thing as an "Exhibit Book" on a motion contemplated by the *Rules*. The manner of

providing evidence on a motion is prescribed by *Rule* 23.08. Absent agreement by all parties to place documents before the court in a common book of exhibits, as being agreed facts, this is not permissible evidence.

3. The affidavit of the paralegal did not conform to *Rule* 39. The paralegal cannot prove the expert report. Mr. Fried was not called as a witness and did not attest to the contents of the report in an affidavit. The report is hearsay.

4. The report was also not admissible as it does not speak to the issue before the court: causation. Rather, it speaks to the standard of care. It was therefor not relevant or necessary for the Court, both requirements of the common law admissibility test set out by the Supreme Court of Canada in *White Burgess v. Abbott*, 2015 SCC 23

5. Excerpts of discovery examinations that are not compliant with the requirements for admissibility in the *Rules* were not admitted.

6. Specifically, the discovery testimony of non-party witnesses Elias Moscovitch and Crystal Williams are not admissible because *Rule* 18.20 only permits the use of discovery transcripts of witnesses which are either not adverse, not an individual party, or not a designated manager when "it is necessary to provide the evidence through the discovery transcript", for example if the witness cannot testify, is too ill or infirm to attend court, or the court cannot compel the witness to attend the hearing. No submission, nor any evidence, was tendered to support such a finding.

7. The Plaintiff sought to introduce a document titled "Scotiabank Centre Concession Services Partner Agreement in the "Exhibit Book". As stated above, absent consent by all parties, this is not permissible evidence and was not admitted.

8. In the late-filed affidavit of the Plaintiff, para. 21 speaks to and attaches, as Exhibit "A", the unsworn statement of the Plaintiff to an insurance adjuster. Similarly, in para. 24, the Plaintiff identifies, and attaches as Exhibit "C", unsworn correspondence she sent to her lawyer. Both are hearsay: prior consistent statements introduced for the truth of their contents. They are inadmissible. Both paragraphs and attached exhibits were struck.

Procedural and Factual History

[11] The woman who allegedly fell on the Plaintiff is not party to this action and remains unidentified.

[12] The Plaintiff filed a Statement of Claim in connection with this alleged incident on December 9, 2020.

[13] The proceeding is currently scheduled for a 12-day trial before judge alone, beginning June 1, 2026. Discovery examinations of the parties proceeded on July 11, 12, and 14, 2023. The parties participated in a Date Assignment Conference with Justice Coughlan on February 9, 2024. Discovery of one non-party witness was held on March 6, 2024. Documentary disclosure has been ongoing.

[14] To date, the Plaintiff has produced approximately 2,851 pages of records in this proceeding, pertaining almost exclusively to damages. Among these are voluminous medical and treatment records, which reveal an extensive pre-incident medical and psychological history, including cholecystectomy, two prior motor vehicle accidents, headaches, insomnia, idiopathic autoimmune disease, a partial hysterectomy, intermittent back pain, elbow pain, sleep apnea, diabetes, bowel and bladder problems, incontinence, and functional Parkinson's disease.

[15] The Defendants' documentary disclosure, all of which relates to the issue of liability only, consists of just 370 pages.

[16] The Plaintiff has so far disclosed three purported expert reports related to damages, from Dr. Emile Saad (her family physician), Dr. Richard Leckey (neurologist), and Katelyn d'Entremont (occupational therapist). The Plaintiff has disclosed one report (from Mr. Fried) related to liability.

[17] The Defendants have yet to disclose any expert reports but intend to file evidence from three to four expert witnesses in the event this matter proceeds to trial, in the fields of rheumatology, neurology, neurosurgery, urology, and psychiatry/psychology. This is in addition to three to four lay witnesses.

[18] According to the Request for Date Assignment Conference, the Plaintiff intends to call up to nine expert witnesses at trial, in addition to five treatment providers and five lay witnesses. Only one of the Plaintiff's intended expert witnesses would speak to liability. The remaining experts are all related to damages.

[19] Of the (approximately) 30 intended witnesses, only the Plaintiff and her husband can provide evidence on both liability and damages.

Legal Framework for Severance

[20] The sole issue for determination is whether it is just and convenient to sever the issues of liability and damages.

[21] *Civil Procedure Rule* 37 provides the Court with the discretion to separate or sever parts of a proceeding:

> **37.01 Scope of Rule 37**
>
> A Judge may consolidate proceedings, trials, or hearings or may separate or sever parts of the proceeding, in accordance with this Rule.
>
> **37.05 Separating parts of a proceeding**
>
> A Judge may separate parts of the proceeding for any of the following reasons:
>
> (a) a party joined a party or claim inappropriately;
>
> (b) although appropriately joined in the first place, it is no longer appropriate for the party or claim to be joined with the rest of the parties and claims in the proceeding;
>
> (c) the benefits of separating the party or claim from another party or claim outweighs the advantage of leaving them joined.

[22] In *Rajkhowa v. Watson*, 2000 NSCA 50 , the Nova Scotia Court of Appeal set out the test for severance, stating that the court should be prepared to grant separate trials where it is just and convenient to do so. When determining whether severance is just and convenient, the court must consider the effect of such a decision on all parties, as well as its effect on the court system:

> 42. The test was expressed by Lord Denning in *Coenen v. Payne*, [1974] 2 All E.R. 1109, at p. 1112:
>
> > In 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.
>
> 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, ...

[23] In *The Jeanery Limited v. Dartmouth Crossing Limited*, 2020 NSSC 297, Justice Gabriel listed the following factors, which may help guide the assessment of whether severance is just and convenient in the circumstances of a given case, at para. 124:

> - Whether the case is extraordinary and exceptional;
> - Whether the issue to be tried separately is simple;
> - Whether the issue to be tried separately is not interwoven with other issues in the action;
> - Whether severance would introduce too much danger of substantial delay before the matter is concluded in all its aspects;
> - Whether the proceedings will be lengthier by reason of severance and whether two sets of pretrial proceedings would be required;
> - Whether one portion of this proceeding would proceed more expeditiously on its own than if it were tied to a more complex portion of the proceeding;
> - Whether substantial cost had already been incurred on both issues of liability and damages;
> - Whether several of the witnesses will give evidence on both issues of liability and damages;
> - The reasonable likelihood that an appeal against the determination of liability may follow;
> - Whether the Plaintiff's credibility is a significant issue to be resolved in both issues of liability and damages;
> - Whether there is a reasonable basis on which to conclude the determination of liability will add or reduce to the cost and delay of the final determination of the proceeding.

[24] In the earlier case of *Jeffrey v. Naugler*, 2010 NSSC 385, Justice Duncan (as he then was) summarized the applicable factors as had been established by case law that predated the new Rule as follows:

> 29 In the case at bar, all parties have advanced their arguments on the basis of factors set out in the case law that predates the new rule. Those may be summarized as follows (with case references):
>
> - whether the proceedings "will be lengthier by reason of severance" and whether the plaintiff would be required to go through two trials and two

sets of pretrial proceedings, *Lockhart v. New Minas (Village)*, 2005 NSSC 93 (N.S. S.C.) at paras. 29, 30;

- the extent of overlap of issues and evidence between the severable portions of the proceedings (*Lockhart, supra*, at para. 33)
- whether severance would allow the parties to dispense with a major issue that may save time and resources in the long term (*Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* 1999 NSCA 39, at pp. 6 and 12.
- the relative complexity of the respective severable portions of the proceeding. *i.e.*, whether one portion of the proceeding could proceed more expeditiously on its own than if tied to the more complex portion of the proceeding. *Kirby v. Strickland*, 2008 NSCA 14, at para. 29.
- whether "substantial cost has already been incurred on both issues" of liability and damages. *Piercey (Guardian ad litem of) v. Lunenburg (County) District School Board*, 1993 NSSC 7; 128 N.S.R. (2d) 232 at para. 20.
- whether "several of the witnesses will give evidence on both the issues of liability and damages" *Piercey, supra*, at para 20.
- the reasonable likelihood that an appeal against the determination of liability may follow. *Piercey, supra* at para 21.
- whether the plaintiff's credibility is a significant issue to be resolved in the determination of liability as well as damages *Rajkhowa, supra*, at para. 38
- whether there is a reasonable basis to conclude that a trial on liability only will bring that matter to a conclusion, or only add to the cost and delay of the final determination. *Fraser v. Westminer Canada Ltd*. (1998), 168 N.S.R. (2d) 84 (NSSC), at para 22; *Stevens (Guardian ad litem of) v. Welsh* (2003), 216 N.S.R. (2d) 253 (NSSC) at para 14.

[25] The HRM Defendants assert that the applicable factors all favour severance. The onus is on the HRM Defendants to satisfy the Court that severance should be granted.

[26] The Plaintiff opposes severance. I will consider each of the factors as listed by Justice Gabriel in *The Jeanery*.

1. *Whether the case is extraordinary or exceptional*. This is a claim in negligence and breach of the *Occupiers' Liability Act*. It is scheduled to be heard by a judge alone. Although the facts are interesting in that the woman involved in the incident is unidentified, there is nothing extraordinary or exceptional about the case that would weigh in favour

of severance. The HRM Defendants point to the fact that there are far more witnesses to speak to damages than to fault. With respect, that is the norm in personal injury litigation.

2. *Whether the issue to be tried separately is simple*. The issue of liability is straight forward. It is a claim in negligence, a type of claim made regularly before the Court. There is nothing complex about the liability claim. This weighs in favour of severance.

3. *Whether the issue to be tried separately is not interwoven with other issues in the action*. The HRM Defendants argue that the damages component raises entirely separate issues and that there is no overlap as between the issues of liability and damages. With respect, I disagree. The issue of causation is an element necessary to establish liability. This requires that the Plaintiff prove that the damages that are established flowed from the breach of a standard of care by the HRM Defendants. While not every case in which causation is in issue is unfit for severance, in this case the HRM Defendants have identified an "extensive pre-incident medical and psychological history, including cholecystectomy, two prior motor vehicle accidents, headaches, insomnia, idiopathic autoimmune disease, a partial hysterectomy, intermittent back pain, elbow pain, sleep apnea, diabetes, bowel and bladder problems, incontinence, and functional Parkinson's disease". The HRM Defendants, in their written submissions, acknowledge that:

> "Damages causation, and the effect of the Plaintiff's various pre-existing conditions, will be significant and time-consuming issues at trial. This complex analysis will be avoided if the Defendants are successful at a trial on the liability issue".

During oral argument, the HRM Defendants acknowledged that causation is a component of the liability finding. They refined their argument to seek a severance of the issue of fault. This would contemplate a trial on the issues of whether the Plaintiff was owed a duty of care and whether the Defendants breached the standard of care. If the court decided in favour of the Plaintiff on these issues, it would not resolve the issue of liability as causation would be left for determination along with quantum of damages in the second trial.

4. *Whether severance would introduce too much danger of substantial delay before the matter is concluded in all its aspects*. On this issue,

I believe that there is a real likelihood that either the Plaintiff, the HRM Defendants or, in the event of apportionment, both would appeal an adverse finding on fault. It raises an interesting issue as to whether it could be appealed from before the issue of causation is determined. The HRM Defendants say that if severance is granted they will seek early trial dates on liability and maintain the existing trial dates for any damages trial. It is not clearly apparent to me that an early fault trial date could be obtained with the necessary expert witness deadlines met. Further, even if it could be met, the time required for a probable appeal to be decided would not, in my respectful opinion, result in the matter being concluded any earlier than the presently scheduled trial dates. This factor weighs against severance.

5. Whether the proceedings will be lengthier by reason of severance and whether two sets of pretrial proceedings would be required. There is no evidence that severance will cause a material increase in the length of the hearings, or that it will cause a material shortening of the combined hearings. Most of the pre-trial proceedings have already been completed. The trial has already been shortened by the summary dismissal of the claim against Shadow. This factor is neutral.

6. Whether one portion of this proceeding would proceed more expeditiously on its own than if it were tied to a more complex portion of the proceeding. As discussed in item "4" there is no evidence of severance allowing the fault issue to be dealt with expeditiously. There are likely to be admissibility disputes regarding expert reports regardless of severance. This is a neutral factor.

7. *Whether substantial cost had already been incurred on both issues of liability and damages*. The Plaintiff asserts that she has already incurred substantial costs on both issues (securing expert reports) and that there may be some cost saving to some witnesses only having to appear at one hearing. There is no material evidence before me about the costs incurred or to be incurred.

8. *Whether several of the witnesses will give evidence on both issues of liability and damages*. The HRM Defendants say that the only witnesses who will be required to testify in both trials are the Plaintiff and her husband. The Plaintiff does not refute this. That said, this factor does not weigh heavily in favour of severance.

9. The reasonable likelihood that an appeal against the determination of liability may follow. This issue was addressed in "4" above.

10. *Whether the Plaintiff's credibility is a significant issue to be resolved in both issues of liability and damages*. The HRM Defendants say that there is no specific credibility issue about the Plaintiff's evidence than in any other trial. This factor is neutral.

11. Whether there is a reasonable basis on which to conclude the determination of liability will add to or reduce the cost and delay of the final determination of the proceeding. If the court determines that there is no fault , this would obviously remove the need of a damages trial, however, as stated above, in the event that there is a liability finding, it will likely delay the final determination of the proceeding due to the time necessary to resolve an appeal.

[27] In summary, having considered all of the factors identified in the cases, I am not persuaded that the benefits of severing the issue of fault for a separate trial outweighs the benefits of leaving the issue joined. Having conducted this analysis, I conclude that the HRM Defendants have failed to overcome the burden on them to establish that severance is just and convenient in the circumstances of this case.

[28] The motion is dismissed with costs payable to the Plaintiff.

[29] If the parties cannot agree on costs, I will receive written submissions within three weeks of the date of the decision.

[30] Order accordingly.

Norton, J.