IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Pitzel v. Deasty et al.,* 2003 YKSC 1

Date: January 9, 2003
Docket: S.C. No. 00-A0082
Registry: Whitehorse

BETWEEN:

Robert Pitzel

Plaintiff

AND:

Michael John Deasty and Newcourt Financial Ltd., formerly known as Commcorp Financial Services

Defendants

Appearances:
Debra L. Fendrick — Counsel for the Plaintiff
Don Dear — Counsel for the Defendant

Before: Mr. Justice R.E. Hudson

REASONS FOR JUDGMENT

[1] This is an application by the defendant for the severance of the issues of liability and quantum pursuant to Rule 39(29), which reads:

> The court may order that one or more questions of fact or law arising in an action be tried and determined before the others, and upon the determination a party may move for judgment, and the court, if satisfied that the determination is conclusive of all or some of the issues between the parties, may grant judgment.

The parties have provided the court with authorities and have made submissions. The defendant asserts that the liability issue is a simple one in that it involves a not unusual motor vehicle accident at an intersection and that because of the manner in which the plaintiff is presenting his case and arising out of discoveries, the issue of quantum is complicated by the fact that the plaintiff is a lawyer and a sole practitioner whose records and financial plans present a challenge to interpretation.

[2] It is also argued that the plaintiff appears to be involving several medical witnesses in the matter so that there will be controversy regarding the physical effects of the accident on the plaintiff. The difficulty of assessing the future wage loss or loss of capacity or loss of opportunity, all in the future, arising out of his professional expectations is also cited.

[3] Defence counsel's estimates of the time likely required with respect to the two issues are that the issue of liability could be taken care of in one day, but the issue of quantum, should it proceed, and if the plaintiff presents his case in the manner apparent from the discoveries, pleadings and disclosures, would take in excess of two weeks.

[4] Defence points to the possibility of a saving of judicial and court time of more than two weeks should the issue of liability be decided in the defendant's favour.

[5] Defence counsel also undertakes that if an order is made for severance that the defendant will, in no way, appeal a decision made on the severed issue of liability which goes against the defendant. This would appear to apply no matter what proportion of liability is ordered.

[6] The plaintiff argues that liability is not as straightforward and simple as the defendant says and that there is an accident reconstruction expert testifying. It is interesting to note that defence will not be filing an opposing reconstruction report, being content to simply attack the plaintiff's expert.

[7] The task before me, as I see it, is to determine whether there are compelling circumstances to make the order requested. As Macaulay J. states in *ERSS Equity Retirement Savings Systems Corp* v. *Canadian Imperial Bank of Commerce*, [2001] B.C.J. No. 285 (B.C.S.C.) at para. 8:

> It appears from these decisions that compelling reasons, as distinct from extraordinary or exceptional ones, will primarily relate to a demonstrable cost benefit of splitting a trial.

[8] The circumstances here do not show a likelihood that without an order for severance the matter will proceed in any manner different from the norm. This case seems to be one typical of its kind.

[9] In my view, at the worst, without a severance order, it involves a two-week trial. It is indicated that the medical evidence regarding the plaintiff may not be available and put in the hands of the defendant until the passage of approximately six months. While this is regrettable, I do not find it to be compelling or extraordinary**.**

[10] Other considerations that might be given are whether the circumstances are exceptional and whether factors of convenience and expense, when considered, would render the matter compelling. I refer to the case of *Kalaman* v. *Hamilton,* [1991] B.C.J. No. 3729 (B.C.S.C.) and the case of *Comox-Strathcona (Regional District)* v. *Insurance*

Corp. of British Columbia, [1996] B.C.J. No. 183 (B.C.S.C.), where Henderson J. suggested at para. 12 that an applicant should demonstrate “a real likelihood of a significant saving in time and expense” before the court finds the reason compelling.

[11] Both counsel refer to the case *Bernhardt* v. *Vernon (Board of Education)*, [1979] B.C.J. No. 910 (B.C.S.C.) wherein Trainor J. states at para. 3:

> It is not disputed that the issues of liability and quantum will each involve considerable evidence, including expert testimony and that if the issue of liability was concluded against the plaintiff the time and expense of the trial of the other issue would be unnecessary.

[12] He quotes Lord Denning in *Coenen* v. *Payne,* [1974] 2 All E.R. 1109 at p. 1112, who says three things. First, “In future the courts should be more ready to grant separate trials than they used to do.” And later, “The normal practice should still be that the liability and damages should be tried together.” And returning to the first phrase, then says, “But the courts should be ready to order separate trials whenever it is just and convenient to do so.”

[13] In conclusion, Mr. Justice Trainor states at para. 8:

> However, I am not satisfied that in this proceeding before a jury it would be just to require determination of the quantum of damages, in the event that liability went against the defendants, before a court consisting of a different jury and perhaps a different Judge. Both the assessment of credibility and an appreciation of the nature and extent of injuries and consequent damage can best be achieved by trying the issues together.

[14] There are other cases cited in which juries were involved and where the complications that arose therefrom were employed as a reason against the granting of an order of severance. In the case at bar, it is still open to either party to select trial by jury, and I believe that must be a consideration. The issues before the court, as I see them, are not so complicated as to justify the expense of two juries or the risk of contradictory credibility findings. Judge Trainor goes on:

> This is not an application to have one Court resolve the question of liability before going on, if necessary, to hear further evidence on the issue of quantum. If so advised, that sort of application should be brought to the trial Judge for the exercise of his discretion and I would think it could be done at the time of pretrial conference.

[15] I find myself in agreement with the latter sentiments expressed by Trainor J. I am alert to the fact defence counsel in the case at bar has indicated that they have no argument against an order providing that the same judge hear both issues. But this would have severe timing problems with judges being scheduled months ahead.

[16] Notwithstanding the generous offer of the defendant to be bound by the decision of a trial judge on liability, I must still consider the inconvenience and expense that might be experienced if an appeal was taken by either party from the decision on liability. I consider, as well, the difficulties peculiar to the Yukon of mobilizing counsel, parties and witnesses for a trial and that this might be duplicated.

[17] In conclusion, I cannot find that the degree of compulsion necessary, in my view, to order severance has been made out. As I said above, this is a case typical of its kind and will offer counsel many opportunities to save time and money through the normal

processes, including pre-trial conferences and settlement conferences. If severance were to be ordered, in my view, it would put the parties in a position of considerable uncertainty regarding the appropriateness of pre-trial procedures, and a possibility remains that severance could increase the cost of the proceedings.

[18] The application is dismissed, with costs to the plaintiff.

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Hudson J.