

SEVERING THE ISSUES OF LIABILITY AND DAMAGES

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Frequently plaintiff's counsel finds him or herself in the situation where they either wish to sever a trial as to the issues of liability or damages or are faced with an application for such severance. This article will briefly review the Alberta law in this regard.

This issue is governed by Rule 221 of the *Alberta Rules of Court*. That Rule does not, however, provide a precise test as to when severance should be granted.

The Alberta courts have generally held that severance of issues for trial will be granted only in "exceptional cases" and numerous authorities have warned as to the hazards of splitting cases, as in the leading case of *Lim Estate v. Home Insurance Co.*²

The decision in *Lim* relied on *Esso Resources Can. Ltd. v. Stearns Catalytic Ltd.*³ for the principle that a preliminary trial of an issue should be directed in only "exceptional cases". (The decision in *Esso Resources* in turn relied on a series of earlier cases including *Canadian Cancer Society v. Bank of Montreal*⁴ and *Karlsen Shipping Co. v. Sefel J. & Associates Ltd.*⁵.)

This "exceptional cases" test came to stand in contrast to what became known as the "just and convenient test" articulated by Lord Denning in *Coenen v. Payne*.⁶

McMahon J. in *Lim Estate*⁷ summarized the factors to be considered in applications to have a trial of a preliminary issue, as follows:

"It is clear that a preliminary trial of an issue should be directed only in exceptional cases...the following appear to be the relevant factors:

1. Will it end the suit, at least if decided one way?
2. Will there be a saving in time or money spent on litigation, again at least if decided one way?
3. Will it cause an injustice?

4. Are the issues complex or difficult?
5. Will it result in a delay in the trial?"

This five factor test has often been quoted in cases in Alberta; other cases have included additional factors, although these have been of a similar nature to those described in *Lim*.

For example, Langston J. in *Vandavelde v. Smith*,⁸ noting that the court had a discretion under Rule 221 which must be exercised cautiously and only in rare and exceptional circumstances, cited seven factors rather than five factors that must be considered. However, the factors were similar to those set forth in *Lim Estate*. Langston J. also noted that the onus was on the applicant to establish that exceptional circumstances existed. In refusing to order the trial of a preliminary issue with respect to the issue of liability for an alleged brain injury as a result of negligent medical care, Langston J. noted that there was a real prospect of appeal on any determination with respect to the proposed preliminary issue, which would simply protract the proceedings.

Similarly, in *Oberik v. Mendoza*,⁹ Veit J. dismissed an application by the defendants to sever the issue of liability from the issue of damages in an action arising from a motor vehicle accident. She noted that where the damages issue is complicated, it would initially appear to make sense to grant an application for severance. However, upon closer consideration concerns about possible appeal of the determination of liability, with resultant delays, and concerns about the impact that apportionment of liability would have on the integrity of a severed trial, required that the application for severance be dismissed.

In the leading case of *Tanguay v. Vincent*,¹⁰ Binder J. extensively reviewed the prior case law, including the decision in *Lim*, and summarized it¹¹ as follows:

“The following are the principles set out in the case law with respect to applications under Rule 221:

* The Courts do not encourage the piecemeal trial of actions, but where the issue is readily severable and where the Court is satisfied that the cost of a long trial may thereby be saved, the order will be granted...

- * The test is whether there is some evidence which will make it at least *probable* that the issue will put an end to the action...
- * There is a danger in granting such orders, and they should be granted only in exceptional circumstances where it is clear that the questions to be determined are completely severable, and where their determination will substantially expedite the litigation or materially curtail the cost of the same...
- * Lord Denning's 'just and convenient' test propounded in *Coenen v. Payne*, [1974] 2 All E.R. 1109 has not been adopted in Alberta....
- * The Courts should not attempt to determine substantial or difficult questions as preliminary issues...
- * Where it appears clear that the trial of the issues would not save time or money unless the Applicant wins them completely, it is worth asking whether such a complete win is highly likely...
- * The amount of documentation to be produced should be considered, and the Court must be satisfied that the cost of a long trial would be saved by granting the order....
- * The following appear to be the relevant factors: 1. Will it end the suit, at least if it is decided one way; 2. Will there be a saving in time or money spent on litigation, again at least if decided one way; 3. Will it create an injustice; 4. Are the issues complex or difficult; 5. Will it result in a delay in the trial?...
- * There is little that is unique or unusual in finding a Plaintiff with limited resources who faces the considerable expense of a long trial with multiple experts, nor is increased chance of settlement a persuasive factor...."

In refusing the application for severance, Binder J. strongly emphasized that without an undertaking not to appeal any finding with respect to liability until after damages had been determined, the possibility of an appeal on the issue of liability led to the likelihood of a resultant increase, rather than saving, in time and cost if the issues were split.

Some subsequent courts have begun to incorporate elements of the Lord Denning "just and reasonable" test, however, and have taken into consideration factors such as the limited resources of a party and the increased chances of settlement as supporting the severance of issues.

In *Vanderlee v. Doherty*,¹² Veit J. granted an application by the plaintiff in a personal injury action arising from a motor vehicle accident to split the trial so as to have the liability issue determined first. The plaintiff offered an undertaking not to appeal the liability issue until after determination of the damages issue. Veit J. acknowledged the factors that were to be taken into consideration as summarized by Binder J. in *Tanguay*, but added to them the court's role in ensuring access to justice, which, she noted, was one aspect of the "just and convenient" guide to making severance decisions. She noted that the increased level in costs since the adoption of the new costs tariff might be effectively denying some individuals access to civil justice, particularly where long trials with many experts were involved. Although Veit J. acknowledged that Lord Denning's "just and convenient" test had not been adopted in Alberta, she held that Alberta severance decisions did not exclude justice and convenience as considerations and held that despite the principle that courts should not encourage the piecemeal trial of actions, they must nevertheless remain open to consideration of newly important stresses in the litigation process such as the impact that the increased schedule of party and party costs have on access to justice. She noted that the undertaking not to appeal by the plaintiff had had a positive influence on her decision to grant the severance in this case. She then emphasized both the uniqueness of each case and the changing environment to which the test for severance should adapt.

In *Swamy v. Schell*,¹³ Moreau J. dismissed an application of one defendant to sever the liability claim against him. In this case the deteriorating memory of the injured plaintiff (probably related to her injuries) was balanced against other factors to hold that severance was not warranted. Moreau J.¹⁴ quoted with approval the statement by Veit J.¹⁵, "severance decisions come in all sizes and shapes and each decision must focus on the circumstances of that case".

In *Ratcliffe v. Nakonechny*,¹⁶ Moen J. extensively reviewed the somewhat conflicting law across Canada and, to some extent, in Alberta, regarding the applicability of the Lord Denning "just and convenient" test as contrasted with the "exceptional case" test for severance. Although acknowledging some recent cases in Alberta that had either applied or commented favorably on the "just and convenient" test and/or the *Coenen* decision, he concluded that the weight of authority in Alberta was that the "exceptional case" test should be applied. Amongst the facts favoring dismissal of the application was the likelihood of appeal and the absence of

undertakings by the applicants not to appeal the issue of liability, if it should go against them, until the damages issue was determined.

In *Bakker v. Van Santen*,¹⁷ Lee J. considered an application for severance of liability from quantum in an action for damages for personal injury resulting from a motor vehicle accident. He thoroughly discussed the conflicting case law on when a Court should order severance. He noted cases across Canada which had applied the “just and convenient” test, as contrasted with cases which had applied the “exceptional case” test, and concluded that the weight of authority in Alberta was that the “exceptional case” test should be applied.

The motion was adjourned and ultimately denied in *Bakker v. Van Santen*.¹⁸ Two of the many factors which weighed against severance were, firstly, the likelihood that the liability issues were such that they may well go to the Court of Appeal and Supreme Court of Canada and, secondly, the complexity of the liability issues, which included issues of contributory negligence.

In *Lane (Trustee of) v. Lynes*,¹⁹ the “exceptional case” test and the 5 factors were applied to sever the issues of liability and quantum. Some of the factors considered were that there was no significant overlap in witnesses on the two types of issues and that, although there might be an appeal on the liability issue, it could likely be heard and determined prior to the quantum issue coming up for trial.

In *Robinson v. Terra Nova Shoes Ltd.*,²⁰ Watson J. applied the 5 factors in granting the application in a “slip and fall” case to sever the issues of liability and quantum. The application was granted conditional on the trial as to quantum continuing as scheduled, regardless of whether or not there was a desire to appeal the liability determination. Watson J. responded to the assertion by the respondent of the “exceptional case” test²¹:

“...To my mind, calling severance ‘exceptional’ sheds little light on the nature of the discretion to be exercised. That adjective does not assist in deciding which cases are and are not appropriate for severance. Justice must be served; when it is, the situation should never be ‘exceptional.’”

Several cases have refused an application for severance if there are significant issues of credibility. For example, Johnstone J. in *Fattah v. Alberta (Motor Vehicle Accident Claims Act, Administrator)*,²² applying an “exceptional circumstances” test and applying the 5 factors to be considered, in the context of a motor vehicle accident, dismissed the application to have issues of liability and quantum tried separately. Amongst the facts supporting dismissal was the likelihood of an appeal and the likelihood that an injustice would be created by severance as credibility issues in the case may not be fully placed before the trial judge in the damage portion of the trial if the liability issue was severed.

In contrast, in *Fagervick (Guardian ad litem of) v. Dzaman*,²³ Master Powers of the British Columbia Supreme Court granted severance of issues of liability and damages in the context of a motor vehicle accident where there were credibility issues. On the facts of the case, however, this concern was outweighed by other concerns related to the interests of justice and the loss of evidence due to fading memories. The damages had been sustained by a child and the full extent of the damages would not be known for many years. In the meantime, memories were fading with respect to the liability issues. Hence it was in the interests of justice to have the issues of liability determined first, with the issue of damages to be determined later when those damages could be properly assessed.

Thus it can be seen that, in an application for severance, the unique facts of each case are pivotal.

ENDNOTES

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- ¹ With thanks to Jeanette Dechant for preparing the research memorandum which gave rise to this article.
- ² [1995] A.J. No. 356 QB at para. 12; (1995), 168 A.R. 308; (varied as to issue to be tried [1996] A.J. No. 832 CA; (1996), 43 Alta. L.R. (3d) 301)
- ³ [1991] A.J. No. 129 CA; (1991) 114 A.R. 27
- ⁴ (1986), 57 W.W.R. 182 (Alta. C.A.)
- ⁵ (1978), 9 A.R. 341 (C.A.)
- ⁶ [1974] 2 ALL E.R. 1109 CA
- ⁷ at para. 12
- ⁸ [1997] A.J. No. 620 QB at para. 8; (1997), 203 A.R. 279
- ⁹ [1998] A.J. No. 670 QB; (1998), 225 A.R. 339
- ¹⁰ [1999] A.J. No. 1229 QB; (1999), 75 Alta. L.R. (3d) 90
- ¹¹ at para. 8
- ¹² [2000] A.J. No. 131 QB; (2002), 258 A.R. 194
- ¹³ [2000] A.J. No. 767 QB; (2000), 269 A.R. 66
- ¹⁴ at para. 38
- ¹⁵ at para. 19 of *Vanderlee*
- ¹⁶ [2003] A.J. No. 1040 QB at paras. 7-21; (2003), 23 Alta. L.R. (4th) 21
- ¹⁷ [2003] A.J. No. 1044 QB at paras. 26-51; (2003), 342 A.R. 133
- ¹⁸ [2003] A.J. No. 1398; (2003), 127 A.C.W.S (3d) 237
- ¹⁹ [2004] A.J. No. 605; (2004), 131 A.C.W.S. (3d) 1049
- ²⁰ [2005] A.J. No. 283 QB; (2005), 138 A.C.W.S. (3d) 46
- ²¹ at para. 16
- ²² [2005] A.J. No 1037 QB
- ²³ [1996] B.C.J. No. 3159 Master; (1996) 4 C.P.C. (4th) 262