ONTARIO SUPERIOR COURT OF JUSTICE

COURT FILE NO. 03B-6288

B E T W E E N :

KYLE JOHN CLIFFORD

Plaintiff

and

DAWN MacKINNON

Defendant 1

and

PRIMMUM INSURANCE COMPANY INC

Defendant 2

COURT FILE NO. 04-B7248

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N :

FRANK RYCKMAN ET AL

Plaintiffs

and

DAWN MacKINNON

Defendant 1

and

WAWANESA MUTUAL INSURANCE CO.

Defendant 2

and

PRIMMUM INSURANCE COMPANY INC.

Defendant 3

RULING ON BIFURCATION MOTION

GIVEN ORALLY BY THE HONOURABLE MR. JUSTICE G.P. DiTOMASO

ON THE 16TH DAY OF OCTOBER, 2008

AT THE COURT HOUSE, BARRIE, ONTARIO

APPEARANCES:

MR. R. CALDER, Counsel for Mr. Clifford

MR. M. BIRNIE, Counsel for Mr. Ryckman et al

MR. D. ZAREK, Counsel for Ms. MacKinnon

MR. N. KOSTYNIUK, Counsel for Primmum Insurance Co. Inc.

MR. H. BROWN, Counsel for Wawanesa Mutual Insurance Co.

RULING ON MOTION TO BIFURCATE THE TRIAL ON ISSUES OF LIABILITY AND DAMAGES

DiTOMASO J (ORALLY):

OVERVIEW

[1] There are two actions arising out of a motor vehicle accident which occurred on April 13th, 2003: namely, the Clifford action and the Ryckman action. Mr. Ryckman was a passenger in a motor vehicle operated by Mr. Clifford in a northbound direction on Highway 11 in Strong Township in the District of Parry Sound. The defendant Dawn MacKinnon was operating her motor vehicle in a southbound direction on Highway 11 in an area of the highway where there are two southbound lanes prior to the right southbound lane ending by merging into one southbound lane. It is alleged that an unidentified red Gulf Volkswagen motor vehicle swerved from the lane to Ms. MacKinnon's right directly in front of the MacKinnon motor vehicle just as the right lane ended. The plaintiffs Clifford and Ryckman both allege that Ms. MacKinnon lost control of her motor vehicle resulting in a head-on collision with the Clifford motor vehicle. The unidentified driver was never found. In her statement of defence Ms. MacKinnon alleges that the collision was solely caused by the negligence of the unidentified driver. There was no allegation of any contributory negligence on the part of either Mr. Clifford or Mr. Ryckman. The allegations involving the unidentified motorist, results in the motor vehicle insurer for Clifford, Primmum Insurance Company Inc., being a party defendant in both actions as the uninsured or, unidentified automobile coverage provisions of that policy of insurance are engaged. In the Ryckman action Wawanesa Mutual

Insurance Company is also named as a party defendant, along with the defendants MacKinnon and Primmum. Wawanesa is Mr. Ryckman's automobile insurer and the uninsured or, unidentified automobile coverage, together with the under-insured coverage provisions of that policy of insurance are also engaged.

THE MOTION

[2] The defendant MacKinnon brings her motion at the commencement of trial to bifurcate the trial so as to sever the issues of liability from the issues of damages for both these actions which are to be tried together. The motion is supported by the plaintiffs Clifford and Ryckman. The motion is vigorously opposed by Primmum and Wawanesa.

POSITION OF THE PARTIES

POSITION OF THE DEFENDANT DAWN MacKINNON AND THE PLAINTIFFS CLIFFORD AND RYCKMAN:

[3] Counsel for MacKinnon as supported by counsel for Clifford and Ryckman, submits this is an appropriate case for bifurcation of the trial severing the liability and damages issues in both actions. There is no relationship between liability and damages where credibility is in issue. The plaintiffs have minimal evidence to give on liability. Bifurcating the trial will save time and costs and will increase the likelihood of settlement in both plaintiffs' actions. Counsel submits that there is one discrete issue to determine: namely, whether the defendant MacKinnon was found to be one percent negligent. If MacKinnon is found to be one percent negligent, it was highly likely these actions would settle.

[4] The criteria set out by Tobias J in ***Bourne v. Saunby [1993] O.J.No.2606*** to be analyzed on a motion of this kind were reviewed. Counsel submits the preponderance of the criteria have been met in our case, such that bifurcation of the trial ought to be ordered. Counsel further

reviewed authorities in instances where bifurcation was either granted or denied.

POSITION OF THE DEFENDANTS PRIMMUM and WAWANESA:

[5] Counsel submit that a litigant has a basic right to have all issues resolved in one trial and a judge should be hesitant to exercise the power if one of the parties objects to its exercise. Counsel rely on the decision of the Court of Appeal in ***Alcano Acceptance Ltd. et al v. Richmond*** **[1986] O.J. No.578:see page 47 of 69.** Counsel also relied upon cases where a bifurcation order was denied. It was submitted there was no overwhelming reason here, not to have these two actions tried in the ordinary course. The criteria in the ***Bourne*** decision were also cited to support the contrary view that these were not the appropriate circumstances where a bifurcation order should be granted. In particular, the prospect of settlement in the event such an order being granted, is purely speculative. Concern was expressed regarding the exercise of any appeal rights that these defendants might have arising out of this motion and arising out of the trial. These defendants submit that this motion be dismissed, with the trial of these actions to proceed in the ordinary course.

ANALYSIS

[6] All counsel do not disagree with the legal principles applicable to the bifurcation motion at bar. Rather, it is the application to the facts surrounding these actions which give rise to dispute.

[7] The defendants opposing the motion submit there is nothing exceptional about these actions or their factual context. If bifurcation were granted, there would be a flood of motions to bifurcate trials in passenger hazard claims. Such motions would become a standard tactic to disengage earlier from a trial.

[8] The moving party defendants, supported by the

plaintiffs submit that the discrete issue to be decided would make settlement prospects highly likely with the result of the significant savings of time and expense. Trial of the liability issues would take four to five days, whereas trial of all issues is estimated to take between three to four weeks.

[9] The law is well settled that it is a basic right of a litigant to have all issues in dispute resolved in one trial. The *Rules* do not expressly confer the power to split a trial and render a judgment on one issue in the action only. However, a narrowly circumscribed power exists as part of the inherent jurisdiction of the court to be exercised in the interests of justice in the clearest of cases. A court may give substantial weight to the consent of both parties to the splitting of the trial, but should be slow to exercise the power where one party objects: **see Alcano supra at page 47, s.138 The Courts of Justice Act**.

[10] I am also cognizant that a trial judge should only exercise his or her discretion to split a trial in the clearest of cases and not where:

1) the issues are not simple;

2) there could be a conflict and findings of credibility based on the overlapping evidence necessary to determine the first and second segments; or

3) there is no assurance that segmenting the trial will result in substantial cost savings or a greater likelihood of settlement.

[11] We do not have the consent of all parties to bifurcation. As a result, the moving party bears the onus that:

- the preponderance of criteria is met;

- the issues of liability are not so intermingled with the issues of damages that a just resolution of the claim would be unlikely; and

- on a balancing of interest between the parties, expense will be minimized and no prejudicial delay will occur**: see *Bourne v. Saunby supra.***

[12] The most common situation where the parties propose bifurcation is where there would be substantial cost and time required to prove the quantum of damages and neither party wishes to incur the cost of trying that issue until liability is proved. The reasons which might favour this approach are discussed in ***Carreiro (Litigation Guardian of) v. Flynn*** **[2005] O.J. No. 877 Divisional Court.**

[13] In evaluating the merits of a motion to separate the liability and damages issues, the following questions are considered by the court. These questions emerge from the ***Bourne*** case as follows:

i) Are the issues to be tried simple;

ii) Are the issues of liability clearly separate from the issues of damages;

iii) is the factual structure upon which the action is based so extraordinary and exceptional that there is good reason to depart from normal practice requiring that liability and damages be tried together;

iv) does the issue of causation touch equally

upon the issues of liability damages;

v) will the trial judge be better able to deal with the issues of the injuries of the plaintiff and his financial losses by reason of having first assessed the credibility of the plaintiff during the trial of the issue of damages;

vi) can a better appreciation of the nature and extent of injuries and consequential damage to the plaintiff be more easily reached by trying the issues together;

vii) are the issues of liability and damages so inextricably bound together that they ought not to be severed;

viii) if the issues of liability and damages are severed, are facilities in place which will permit these two separate issues to be tried expeditiously before one court or before two separate courts, as the case may be;

ix) is there a clear advantage to all parties to have liability tried first;

x) will there be a substantial saving of costs;

xi) is it certain that the splitting of the case will save time, or will it lead to unnecessary delay;

xii) has there been an agreement by the parties to the action on the quantum of damages;

xiii) if a split be ordered, will the result of the trial on liability cause other plaintiffs in companion actions, based on the same facts to withdraw or settle;

xiv) is it likely that the trials on liability will put an end to the action.

[14] Before an order can be made to sever phases of a trial, the court must be satisfied that there would be little or no overlap or interweaving between damages and liability issues and the evidence.

[15] Cited by counsel for the moving party was the decision of Jennings J. in ***Marelli v. Deathe*** **[2003] O.J. No.2204.** In ***Marelli*** two actions were being tried together involving claims for damages for injuries received in a single motor vehicle accident, as in our case. The defendants were the same in each action, except in the ***Ryckman*** action, Wawanesa is an additional party defendant. At the commencement of trial, the defendant ***Deathe*** moved for an order that the issues of liability and damages be heard separately with liability being determined first. The plaintiffs in both actions, as in our case, supported the motion. In ***Marelli*** one defendant opposed. In our case, two defendants opposed. The liability portion of the trial would take between seven days, with the whole trial estimated to take 12 weeks.

[16] The distinguishing feature in ***Marelli*** was that the plaintiffs and one defendant had settled on damages. Here, there was no such settlement. However, counsel for MacKinnon advises that if liability is determined, settlement prospects would be highly likely. As in ***Marelli*** there was no suggestion that if the issues were separated they would be tried before

separate juries. Rather, if the order is granted, the assessment of damages would begin immediately after the receipt of the jury's verdict on liability before the same jury. That same scenario presents itself in our case.

[17] In ***Marelli*** at paragraph 11, Justice Jennings referred to the questions posed in ***Bourne*** and concluded that the liability issues are clearly separate from those of damages. All parties, but one, supported the motion. Further, the chances of settlement were significantly increased if liability were determined, first with the consequent benefit for the parties and savings on costs if the actions could then be resolved; and any delay resulting from disposing of liability first would be minimal.

[18] On a motion to bifurcate the issues of liability and damages, the facts must support such an order being granted. In ***Marelli***, as in our case, the factual context drives the ultimate decision on bifurcation. I would adopt the reasoning and approach of Jennings J. in ***Marelli*** as particularly applicable to our case.

[19] I have considered the questions posed in ***Bourne*** and address each question *seriatim* and make the following findings:

1) the issues to be tried are simple. The single point to be determined is whether the defendant MacKinnon is one percent negligent;

2) the issues of liability are clearly separate from the issue of damages. There is very little evidence on liability and no credibility issues that impact on these two components;

3) the factual structure, although simple, is exceptional enough to depart from the normal

practice that liability and damages be tried together;

4) there is no overlapping issue of causation touching equally on the issues of liability and damages;

5) credibility is not an issue;

6) there would be no better appreciation of the nature and extent of damages to the plaintiffs by trying the issues together;

7) the issues of liability and damages are not so inextricably bound together that they ought not to be separated;

8) the liability issue is tried first, with the damages issue to be tried immediately after by the same jury;

9) there is clear advantage to the defendant MacKinnon and the plaintiffs, but not to all parties, to having the liability issue tried first;

10) I agree that the order of bifurcation will result in a substantial savings of costs;

11) splitting the case will save time;

12) while there has not been agreement regarding quantum of damages, splitting the case with the result of a finding of one percent negligence on the defendant MacKinnon, will make settlement highly likely;

13) is not an applicable consideration to our case;

14) it is likely that the trial on liability

will put an end to the actions.

[20] On the preponderance of the criteria met by the moving party, I am persuaded that the moving party has satisfied her onus on this motion. I find that the liability issues are clearly separate from the damages issues. There exists a discrete issue, the determination of which significantly increases the likelihood of settlement and would also result in a cost-savings benefit if the actions can be resolved not only for the parties, but also for the administration of justice: ***see Morniga v. State Farm Mutual Automobile Insurance Co.*** **[2002] O.J. No.2094, a decision of Justice Colin Campbell.**

[21] The delay resulting from disposing of liability first will be minimal. As in ***Marelli***, I find that on the facts presented, the potential benefits to the parties of an early resolution to this dispute outweigh any possible prejudice.

DISPOSITION

[22] Accordingly, the motion is granted. Order to go bifurcating the trial and severing the liability issues from the issues of damages. The trial shall proceed in the manner suggested by those parties supporting the motion.

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ORAL REASONS APPROVED AS REVIEWED AND EDITED:

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G.P. DiTOMASO

JUSTICE

SCJ