SUPREME COURT OF NOVA SCOTIA
Citation: *Russell v. A.R.C. Management Ltd.*, 2023 NSSC 326

Date: 20231023
Docket: 478951
Registry: Halifax

Between:

Shelby Russell

Applicant

v.

A.R.C. Management Ltd. and Jennifer Jeffrey and Kirk Jeffrey

Respondents

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	July 13, 2023, in Halifax, Nova Scotia
Counsel:	Jeff T. Mitchell, for the Applicant Dennise K. Mack for the Respondents

By the Court:

Introduction

[1] This is a motion by the plaintiff, Shelby Russell, to sever the issue of liability from the issue of damages pursuant to Civil Procedure Rules 37.01 and 37.05. The defendants oppose the motion.

Background

[2] The plaintiff is a tenant of Skyline Towers, an apartment complex located at 5252 Tobin Street in Halifax. The defendant A.R.C. Management Ltd. ("ARC") is a property management company which provides apartment leases to tenants at Skyline Towers. The individual defendants, Jennifer and Kirk Jeffrey, are resident managers of Skyline Towers who provide on-site services, including snow and ice removal on the property.

[3] On February 9, 2017, Ms. Russell fell on a pedestrian walkway in front of the main doors of Skyline Towers and reportedly suffered injuries. She says she fell on a patch of unsalted ice as a result of the defendants' failure to ensure that Skyline Towers premises were reasonably safe and free of ice. The defendants deny liability.

[4] On August 1, 2018, the plaintiff filed an occupier's liability claim against ARC. In her statement of claim, she pleaded:

> 5. The Plaintiff repeats the preceding paragraphs and relies on the *Occupier's Liability Act*, RSNS, 1996, c. 27, Section 4, as amended, and says that A.R.C. breached the duty owed to the Plaintiff and led to the Plaintiff's injuries, the particulars of which are:
>
> (a) Failure to put down salt, sand, or other suitable material to prevent the surface of the pathway from being slippery;
>
> (b) Failure to properly clear the pathway of ice or snow;
>
> (c) Failure to warn Ms. Russell of the dangerous icy and slippery conditions of the pathway;
>
> (d) Failure to inspect the pathway and premises adequately or at all;
>
> (e) Failure to see and guard against ice and snow and other slippery conditions on the pathway and premises;
>
> (f) Failure to rectify the existence of the dangerous icy and slippery conditions of the pathway and premises;

> (g) Failure to take such care as [*sic*], in all the circumstances of the case, to see that Ms. Russell was reasonably safe while on the pathway and premises;
>
> (h) Such other negligence or breach of duty as may appear.

[5] ARC filed a defence on April 9, 2019. It pleaded, among other things, that if Ms. Russell suffered injury, it was as a result of her own negligence.

[6] On July 23, 2019, the plaintiff filed the expert report of Lloyd Richard, an occupational therapist and kinesiologist, who performed a functional capacity evaluation of the plaintiff.

[7] Discovery examinations were conducted on January 20, 2020, with the plaintiff examining Jennifer Jeffrey for ARC, and defence counsel examining the plaintiff.

[8] On February 17, 2020, the defendants filed a request for date assignment conference. The defendants stated that they were ready for trial, would be calling 2-3 lay witnesses, and estimated that their case would take 1 ½ days to be tried.

[9] On February 20, 2020, the plaintiff filed a memorandum for the date assignment conference. She indicated that:

- She was seeking a jury trial;
- She was requesting discovery of two additional ARC employees;
- She estimated that trial would take nine days;
- She anticipated obtaining additional expert evidence;
- She may be undergoing additional treatment which might cause a delay gathering expert evidence. This potential delay was reflected in the June 2022 trial readiness date.

[10] The date assignment conference never occurred. It was adjourned without date on October 23, 2020.

[11] On July 8, 2021, the plaintiff amended her pleadings to add Jennifer Jeffrey and Kirk Jeffrey as defendants. Defences were filed on behalf of the individual defendants on October 7, 2021.

[12] At the plaintiff's request, discoveries of Kirk Jeffrey and Neel Ahuja, a representative of ARC, were conducted on November 29, 2021.

[13] At the start of this hearing, the plaintiff advised that if her severance motion is successful, she undertakes to proceed by way of trial by judge alone.

Law and Analysis

[14] The parties agree on the relevant law. In fact, the defendants chose to rely on the plaintiff's book of authorities rather than filing their own.

[15] This motion is brought under Rules 37.01 and 37.05. Rule 37.01 states:

> A judge may consolidate proceedings, trials, or hearings or may separate or sever parts of a proceeding, in accordance with this Rule.

[16] Rule 37.05 states, in part:

> A judge may separate parts of a proceeding for any of the following reasons:
>
> …
>
> (c) the benefit of separating the party or claim from another party or claim outweighs the advantage of leaving them joined.

[17] Although Rule 37.05(c) refers to the separation of one claim from another, rather than the separation of issues within a claim, it is commonly cited as the authority for a motion to separate the issues of liability and damages (*Ocean v. Economical Mutual Insurance Company*, 2010 NSSC 314; *Jeffery v. Naugler*, 2010 NSSC 385; *Dalhousie University v. Cogeneration and Energy Management Engineering Inc.*, 2017 NSSC 303; *The Jeanery Limited v. Dartmouth Crossing Limited*, 2020 NSSC 297).

[18] In *Nauss v. Rushton*, [2001] N.S.J. No. 466 (S.C.), decided under the 1972 Rules, Hall J. reviewed the jurisprudence and set out the following non-exhaustive criteria for determining whether it is "just and convenient" to sever liability from damages:

> (1) The general rule is to try all issues together. (*Rajkhowa v. Watson* appeal).
>
> (2) It is a basic right of a litigant to have all issues in dispute resolved in one trial, particularly where the trial is by jury.
>
> (3) The issues may be severed where it is just and convenient to do so. (*McManus, Rajkhowa* appeal).

> (4) The courts should now be more ready to grant separate trials than they used to. (*McManus, Rajkhowa* appeal, *Piercey, Fraser*).
>
> (5) In order to determine what is just and convenient, the court must consider the effect of a severance of the issues on all the parties as well as its effect on the court system. (*McManus, Rajkhowa* appeal, *Piercey*).
>
> (6) The applicant for a severance has the burden of establishing by a preponderance of evidence that it is just and convenient to order separate trials. (*McManus, Rajkhowa* appeal).
>
> (7) Only in the rarest and most unique of situations where the trial is to be by jury should a severance be allowed. (*Rajkhowa* appeal).
>
> (8) Severance should not be ordered where significant issues are interwoven such as credibility. (*Fraser, MacCulloch, Rajkhowa* appeal).
>
> (9) Severance may be granted when the issue to be tried is simple. (*Fraser*).
>
> (10) Severance may be granted where there is some evidence that it is probable that the trial of the separate issue will put an end to the action. (*Fraser*).
>
> (11) Severance should be considered where it appears that an application for an interim payment of damages under Civil Procedure rule 33.01 would be justified. (*LeMoine, McCallum*).
>
> (para. 17)

[19] In *Jeffery v. Naugler*, *supra*, one of the earliest decisions under Rule 37, Duncan J. (as he then was) observed that "the underlying basis of the court's determination" on a motion to sever liability from damages "has not been changed by the new rule" (para. 38). He noted that judicial statements from cases decided prior to the implementation of the 2009 Rules "provide particular guidance" in considering the question posed by Rule 37.05(c) – that is, whether the benefit of separating liability from damages outweighs the advantage of leaving them joined (para. 37). Justice Duncan summarized the relevant factors outlined in the earlier jurisprudence at para. 29:

> - 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 Village of New Minas* 2005 NSSC 93 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 Acoini) 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 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.

[20] Duncan J. added that he had also considered the criteria identified in *Nauss v. Rushton, supra*, which, in his view, "incorporates some of the points set out above" (para. 30).

[21] The factors relevant to severance were recently restated in *The Jeanery Limited v. Dartmouth Crossing Limited, supra,* where Justice Gabriel wrote:

> [121] The normal practice is that liability and damages are tried together. That said, it is clear that the Court should be prepared to order separate trials whenever it is just and convenient to do so.
>
> [122] In order to determine what is just and convenient, the Court must consider the effect of such a decision on all of the parties, as well as its effect upon the Court system.
>
> [123] As per usual, one cannot lay down a definitive list of circumstances in which, when present, it will be appropriate for the Court to grant such a motion. The characteristics peculiar to each of the decided authorities simply provide some guidance with respect to when the Court has been disposed to exercise that discretion. They are simply guidelines.
>
> [124] Some of these factors previously have included:
>
> - 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.

The plaintiff's position

[22] The plaintiff submits that separating liability and damages is just and convenient for two reasons: (1) it will allow the parties to dispense with a major issue; and, (2) it will likely bring the matter to a conclusion.

[23] The plaintiff estimates that a minimum of 9 days of trial time would be necessary for her case to be heard in full. She says the issue of liability, however, could likely be determined in 2.5 days.

[24] The plaintiff says the determination of liability will be straightforward. She describes this as a simple winter slip and fall case, and expects that only 5 witnesses will testify on the issue of liability: the plaintiff, her partner, the individual defendants, and Neel Ajuha. The plaintiff anticipates no overlap between the evidence on liability and the evidence on damages.

[25] The plaintiff says the issue of damages, as compared to liability, is more complex. She says the medical evidence is likely to be voluminous. She anticipates calling 4 expert witnesses on the issue of damages, along with several lay witnesses. The plaintiff notes in her brief at page 8 that "the issue of quantifying the Plaintiff's medical damages will be a long, complicated process when compared to the isolated issue of liability." Plaintiff's counsel clarified during the hearing, however, that the plaintiff does not consider the issue of damages in her case to be particularly "thorny", or otherwise more complex than the typical personal injury case. The issue is simply more complex than the issue of liability, and will require more trial time as a result.

[26] The plaintiff cites *Piercey (Guardian ad litem of) v. Lunenburg (County) District School Board*, 1993 CarswellNS 263 (S.C.), where the court commented that in cases where the liability issue is straightforward but the damages issue is complex, there could be a clear case for severance:

> 5 I venture to say that in a case where the liability issue was not complex but the damage issues were complex, there could well be a clear case for severance.
>
> …
>
> 21 A court must be concerned with the costs of litigation, not only in the human sense to the parties themselves and with the financial costs, but also the cost to society of the drain upon limited judicial resources. There has been a marked increase in litigation over the past few years and the court has to play a more active part in the scheduling and utilization of the resources available. That is why I said earlier that in a case where liability issue could be dealt with in a relatively short order and the damages aspect take an extremely long period of time severance might be in order. A more careful look at the situation must be taken by the court.
>
> [Emphasis added]

[27] The plaintiff also says bifurcation of liability and damages would likely bring this matter to a conclusion. In *Nauss*, *supra*, the court recognized that "severance may be granted where there is some evidence that it is probable that the trial of the separate issue will put an end to the action" (para. 17). In that case, where the determination of liability was expected to take 1-2 days and the damages assessment 5-6 days, Justice Hall stated:

> 19 All defendants are adamant that there was no fault on their part and that the plaintiff is fully responsible for his own misfortune. If they are right and succeed in obtaining a favourable verdict in this respect, that certainly would put an end to the action.

> 20 Furthermore, from the evidence that was presented, it seems that there is a real possibility that some degree of responsibility for the accident may be assigned to each of the parties. In my opinion, it would be of great assistance to all parties in conducting settlement negotiations to know with certainty the proportion of liability that would be assigned to each.
>
> [Emphasis added]

[28] The plaintiff submits that the same is true here. If the defendants are not at fault, a liability-only trial will put an end to the plaintiff's claim, saving the defendants the expense of defending an unmeritorious damages claim, and saving scarce judicial resources. If, on the other hand, liability is established against the defendants, such a determination could foster a settlement of the claim. The plaintiff submits that without a severance of liability from damages, it is virtually impossible that this matter will settle short of trial, as the defendants' position is that they have no liability for the incident.

[29] The plaintiff submits that it is "highly probable" that separating the issues of liability and damages will resolve the issues between the parties, thereby reducing the trial time and significantly reducing costs for everyone involved.

[30] On the issue of the plaintiff's credibility, the plaintiff says the issues of liability and damages can be clearly separated, making any concerns about credibility insufficient to preclude severance. The plaintiff cites *Terfry v. Smith*, 2006 NSSC 259, where the court considered a severance motion by the defendant in a personal injury claim arising out of a motor vehicle accident. In arguing against severance, the plaintiff (respondent) argued that the potential for conflicting findings on credibility militated against severance:

> 22 The respondent states that credibility is important to both liability and damages. Consequently, the possibility of a different finding of credibility may result from a severance. Further, she argues that evidence relating to speed, area of impact, and related matters is relevant to both liability and damages, and it is therefore more efficient for one judge to hear all of the evidence and to decide both issues.

[31] Although Justice LeBlanc ultimately refused severance, the potential for conflicting findings of credibility was not a significant factor in his decision:

> 37 Ms. Butler maintains that the issues are interwoven such as credibility. However … the fact that the respondent may be challenged on her version of events both as to liability and damages does not necessarily make the issues interwoven. I believe that they can be separated because the issue of liability will depend on the evidence directed as to fault, speed, lookout, braking, right of way etc., while the issue of

> damages will be governed by such matters as causation, pre-existing medical conditions, medical diagnosis, ability to return work, capability to perform housekeeping and mitigation.

[32] The plaintiff also refers to *Nauss*, *supra*. In that case, the plaintiff was struck by a vehicle driven by the defendant Rushton which had been diverted through the parking lot where by the accident happened by employees of the defendant Town of Oxford. The plaintiff had been using a telephone booth that was located adjacent to the parking lot. After he finished his call, he started to cross the parking lot to return to the restaurant where he was having breakfast. As he was crossing the parking lot, after looking both ways, he was distracted by a flag person employed by the Town who was shouting. The Town had been doing some construction work on an adjacent street and had re-routed traffic through the parking lot. The plaintiff claimed that he was not aware of this as there were no pylons or signs to indicate that traffic was being re-routed. As he turned to continue on his way, he was struck by the Rushton vehicle and knocked to the ground. He contended that he sustained severe personal injuries for which he had received ongoing medical treatment and had recently undergone surgery. He had not been able to work since the accident. The defendants all denied liability.

[33] The plaintiff filed an application to sever liability from damages. His counsel estimated that liability could be resolved in 1 or 2 days of trial while an assessment of damages would take 5 or 6 days. She said her client was ready to go to trial on the issue of liability but not damages because he would not know the results of his recent surgery for a considerable period of time. Plaintiff’s counsel also said her client did not want to incur the additional and substantial expense of medical experts' reports, discoveries of experts, and experts' witness fees if no liability should be found on the part of the defendants.

[34] The defendants all opposed the application. They maintained that the issues of liability and the quantum of damages were interwoven, particularly with respect to the credibility of the plaintiff as to how the accident happened and what injuries were sustained by him in the accident. Defence counsel also said the assessment of damages would not take more than 2 days. On the issue of credibility, Hall J. stated:

> 25 In my opinion, the only factor that militates against severing is the question of credibility. Both Mr. Savoy and Ms. Beaton submitted that this issue is interwoven with both aspects of the trial. <u>This does give some cause for concern.</u>
>
> …

> 27 The "disagreements" and conflicts in the testimony of witnesses and other evidence alluded to by Mr. Rushton, in my experience are of the nature that always arise in cases such as this. It must be kept in mind that just because a witness is wrong in his version of the facts does not necessarily mean that he is lying or deliberately attempting to mislead. It should also be kept in mind that in every case credibility of witnesses is a relevant issue. Generally wide latitude in cross-examination is given to explore issues of credibility. Accordingly, I am satisfied that this issue can be dealt with satisfactorily if the two aspects of the trial are tried separately.
>
> [Emphasis added]

[35] The plaintiff submits that there is nothing unique about her case that would give rise to heightened credibility concerns, and, as in *Nauss*, *supra*, any issues of credibility can be dealt with satisfactorily in two separate trials.

[36] The plaintiff also points to recent occupier's liability cases where the parties agreed to bifurcate liability and damages – see for example, *MacPherson v. Strait Regional Center for Education*, 2023 NSSC 167, and *Ricketts v. Best Buy Canada Ltd.*, 2023 NSSC 209. In both cases, the plaintiff's claim was dismissed. The plaintiff says the reason that parties in occupier's liability cases are reaching these agreements is because severance in this context makes good sense. It saves parties time and money, and preserves court resources.

[37] To sum up, the plaintiff says there are significant benefits to severing the issue of liability from the issue of damages in this case and no advantage to leaving the issues joined. Severance will resolve the thorny issue of liability and either save the defendants the time and expense of defending against an unmeritorious damages claim or, if there is a finding of liability against the defendants, lead to meaningful settlement discussions which will likely end the matter. The parties will both save time and money, while the court will save trial days which can be used for other matters. The plaintiff describes severance as a win-win-win situation.

The defendants' position

[38] The defendants say this is not a case where the benefits of separating liability and damages outweigh the advantage of leaving the issues joined. The defendants emphasize that Rule 37.05(c) presumes that there are benefits to having the issues determined in a single trial. As recognized in the case law, the general rule is to try all issues together. It is a litigant's basic right to have all issues in dispute resolved

in one trial, and the burden is on the party seeking severance to establish, on a balance of probabilities, that it is just and convenient to separate them.

[39] The defendants submit, based on a review of the jurisprudence, that severance is typically awarded where there are unique facts or circumstances which make it reasonable to conclude that severing liability will save costs or time. For instance, it will often be just and convenient to sever liability where there is a contest between two or more defendants as to who is liable for the plaintiff's injuries, or where the issue of damages is anticipated to take substantially more court time to resolve than the issue of liability. The decision in *Kroger v. Upshall*, 2006 NSSC 327 is a good example. In that case, the plaintiff was a passenger in a rental vehicle driven by her colleague, one of the defendants. They had been on a business trip, and, during a side excursion, were involved in a serious accident. The plaintiff sued the defendant driver, the owner of the rental car, and Canada Life, the employer of both the plaintiff and the defendant driver. The main issue preventing settlement was the potential vicarious liability of Canada Life for the negligence of its employee, the defendant driver. Whether the defendant driver had been negligent was not a prominent issue, although liability had not been admitted. In determining whether to sever liability from damages, Wright J. stated:

> [17] In short, whether it is just and convenient to sever an issue for separate trial requires a close examination of each individual case to determine if there are exceptional circumstances that carry it outside the general rule that liability and damages be tried together. Counsel for the applicant defendants says that this is such a case; counsel for Canada Life says that it is not; and counsel for the plaintiff says that he would be agreeable to severance only of the single issue of whether Canada Life has any vicarious liability for the negligence of Ms. Upshall. Indeed, he initially attempted to have that single issue determined as a preliminary point of law under Civil Procedure Rule 25, but the application did not go ahead.
>
> [18] In deciding this application, I begin with a restatement of the general rule that it is a basic right of a litigant to have all issues tried together, unless the court is satisfied that it would be just and convenient to order a severance. That remains the general rule in this province, although it has been tempered somewhat by the decision of the Nova Scotia of Court of Appeal in *Rajkhowa* where it was stated that the courts should now be more ready to sever trials than they used to, if satisfied that it would be just and convenient to do so. The burden nonetheless remains on the applicant to establish, on a preponderance of evidence, that it would be just and convenient for severance of an issue by separate trial.
>
> [Emphasis added]

[40] In *Kroger*, *supra*, the liability trial was estimated to take 3-4 days, while the damages trial was estimated to take upwards of 17-19 days due to the severity of the plaintiff's injuries. In awarding severance, the court noted that there was "a strong likelihood" that the court's disposition of the liability issues "would lead to the achievement of a final settlement" (para. 21).

[41] In *Nauss*, *supra*, the plaintiff's injuries would not plateau for a considerable period of time, making it unclear when he could be ready for a damages trial. He had not yet obtained expert reports on damages and he did not have the resources to obtain them without success on liability. The case also involved multiple defendants who each denied liability. In awarding severance, the court noted that there was a real possibility that some degree of liability for the accident would be assigned to each of the parties, and, in the court's view, it would be of great assistance to the parties in negotiating settlement for them to know the proportion of liability that would be assigned to each.

[42] The defendants submit that unlike these cases, and others, where severance has been granted, the present case has no unique circumstances or facts which would warrant severance. It is a very straightforward case where liability and damages are both in issue, like any other case before the court. There is no contest between two or more defendants as to who is liable. There is no evidence that the plaintiff's injuries have not yet plateaued, or that she cannot afford to obtain expert reports without first obtaining a finding of liability against the defendants. Nor is it probable that a decision on liability will lead to settlement, as the quantum of the plaintiff's damages is very much in dispute. It follows that if severance is granted in an unremarkable case like this one, it would effectively overturn the existing case law and reverse the general rule that issues are to be tried together. Every other ordinary case would be eligible to be tried in piecemeal fashion. The defendants submit that the purpose of severance is not to eliminate the risk of taking a damages issue to trial when proving liability might be an uphill battle for the plaintiff.

[43] The defendants submit that the factors identified in the case law militate against awarding severance in this case. Contrary to the plaintiff's submissions, severance could lengthen the proceeding, as opposed to shorten it. If the plaintiff is successful on liability, it is very likely that the defendants will appeal. The case law on occupier's liability requires an occupier to take reasonable steps to make the premises reasonably safe. It does not impose a standard of perfection. The authorities dealing with slips and falls in icy conditions have also repeatedly recognized the realities of winter conditions in Nova Scotia, and that the elimination of all ice is not

possible. Moreover, if either party is not satisfied following a damages alone trial, there is a risk of an appeal. Bifurcating the trial consequently gives rise to the possibility of not one, but two appeals.

[44] The defendants further submit that there will be overlap between the evidence on liability and the evidence on damages. They point out that the plaintiff lives in the same apartment building as the individual defendants. In their roles as resident managers, the Jeffreys have observed Ms. Russell both before and after her fall. Like the plaintiff and her partner, the Jeffreys will provide evidence on both liability and damages. Moreover, because the reason for the plaintiff's fall is in dispute, it may be necessary to cross-examine one of the medical experts on both liability and damages. The defendants submit that in a slip and fall case, the manner in which a person falls can be indicative of the reason for the fall. As such, a medical expert such as the plaintiff's orthopaedic surgeon might be cross-examined both with respect to her injuries, as well as whether the manner in which she fell is consistent with falling on ice, or whether some other reason could have caused her to fall.

[45] As to whether severance would allow the parties to dispense with a major issue, the defendants say there is no "major issue" and "minor issue" in this case. Both are fairly straightforward and, contrary to the plaintiff's submissions, the issues of liability and damages will each require a similar amount of trial time, give or take a few days. The defendants say this is not a case where liability could be determined in 2 days while damages would require 20 days.

[46] In the plaintiff's memorandum for date assignment conference, she estimated that 9 days of trial would be required. She repeated that estimate in her motion brief. The 9 day estimate included 1.5 days for jury selection, deliberation, and instruction, along with ½ day for submissions, which would be necessary in any event. The evidence component of the trial is therefore estimated to take 7 days. If 2.5 days are required for liability, that would leave 4.5 days for damages. There has been no additional disclosure to suggest that the matter of damages is more complex or will require more experts than when the memorandum was filed. The defendants say the insignificant difference in trial time between liability and damages does not justify separating the issues.

[47] On the issue of whether substantial cost has already been incurred on both issues, the defendants acknowledge that the plaintiff would like to avoid the cost of further Rule 55 expert reports. They point out, however, that she has already filed one, and is unlikely to set it aside based solely on the passage of time. The defendants

further note that significant costs have already been incurred in relation to disclosure of medical records and discovery examinations on both liability and damages.

[48] The defendants say the plaintiff's credibility is of paramount importance to both liability and damages in this case. The state of the sidewalk, what caused Ms. Russell to fall, how she fell, and what she saw and did immediately preceding her slip and fall will be critical. The defendants anticipate that her evidence will differ from the evidence of the defendants' witnesses in many instances. Moreover, the plaintiff's credibility on liability could be affected by her credibility on damages. Separate trials create the risk of a favourable assessment of the plaintiff's credibility on liability and a less favourable one on damages. The defendants say this would be "hugely prejudicial" to them, as the credibility findings on liability are often informed by the credibility of the evidence on damages. They say all the evidence should be heard at the same time to enable the court to fully and robustly assess the credibility of all the witnesses.

[49] Finally, the defendants reiterate that it is entirely speculative to say that a trial on liability will bring this matter to a conclusion, particularly if the defendants appeal the liability decision.

Analysis

[50] The general rule is that liability and damages are tried together. However, the court will order separate trials where the party seeking severance establishes that the benefits of separating the issues outweigh the advantages of leaving them joined. In other words, the moving party must satisfy the court that it is just and convenient to order severance. In determining what is just and convenient, the court must consider the effect of separate trials on the parties and on the court system.

[51] The case law establishes a non-exhaustive list of factors which the court can consider in determining whether severance is appropriate. The plaintiff relies mainly on two of these factors to show that the benefits of separating liability and damages outweigh the advantages of leaving the issues joined: (1) severance would allow the parties to dispense with a major issue; and, (2) it would likely bring the matter to a conclusion. The plaintiff says there are no advantages to having the issues remain joined.

[52] Despite the able argument of plaintiff's counsel, the plaintiff has not satisfied me that severance should be granted. The parties appear to agree that there is nothing extraordinary or exceptional about this case. Liability and damages are both in issue.

Neither issue is “major” or “minor”. While the issue of liability might require fewer trial days to resolve than the issue of damages, this is not a case where liability could be dealt with in relatively short order while damages would take an extremely long time (*Piercey*, *supra*, at para. 21). The difference in the trial time required for each issue is not sufficient to take this case outside the general rule that liability and damages be tried together.

[53] There is also no reasonable basis to conclude that a separate trial on liability is likely to bring this matter to a conclusion. The plaintiff’s assertion to the contrary is pure speculation. There is nothing in the evidence to suggest that once the issue of liability is out of the way, the parties will reach agreement on damages. The quantum of damages is very much in issue. Moreover, if the defendants are found to be at fault – which the plaintiff urges the court to conclude is the most likely outcome – there is a substantial likelihood that the defendants will appeal the liability decision instead of negotiating a settlement. In *The Jeanery Limited*, *supra*, the likelihood of an appeal was one of the factors cited by Gabriel J. in denying severance:

> [139] The Respondents argue that they would appeal any adverse finding of liability in the circumstances of this case. If so, this would result in the reality of the very concerns discussed above in *Walsh*. While it is (perhaps) unsurprising that a party opposing bifurcation would say such a thing at this juncture, the objective circumstances in this case lend support to such a contention. The litigation has been very protracted to date, and what I have seen and heard of the evidence, issues and the arguments advanced during the course of these motions is also supportive of the probability of an appeal in the event of a liability ruling adverse to the Respondents.
>
> [Emphasis added]

[54] The potential for appeal was also a factor in Justice LeBlanc’s decision to deny severance in *Terfry*, *supra*:

> [36] In the matter before me, I have no assurance that the parties will not appeal a decision on liability. It would be presumptuous to conclude that although the trial decision on liability would either end the respondent’s claim or prompt the applicants to negotiate to settle the respondent’s claim, there is no assurance by the applicant that an appeal would not be initiated nor do I have such assurance from the respondent. Although costs saving maybe realized if the parties elect not to appeal and accept the decision of the trial judge as final, I do not have an understanding from the parties that that will occur. Nor do I know the expenditures made by the respondent on the experts as against the amount of the incremental expenditures for these experts to attend the trial.

[Emphasis added]

[55] In my view, if severance is granted, it is entirely possible that this proceeding will be lengthier, more costly, and use more court resources than if the issues are heard together.

[56] The issue of credibility also militates against severance. At least four of the witnesses – the plaintiff, her partner, and the two individual defendants – will testify on both liability and damages. It is also possible that one of the medical experts will be cross-examined on both liability and damages. Where there are other compelling reasons to separate the issues of liability and damages, credibility concerns may not be sufficient to defeat a motion for severance. In this case, however, I agree with the defendants that there is benefit to the trier of fact assessing each witness's credibility after hearing all the evidence in one trial.

[57] In short, the plaintiff has not met her burden of satisfying the court that the benefits of separating the issues of liability and damages outweigh the advantages of leaving them joined. It simply requires too much speculation to accept that a separate trial on liability is likely to result in the final determination of this proceeding requiring less time and fewer resources than if the issues are dealt with together in a single trial.

Conclusion

[58] The plaintiff's motion for severance is dismissed.

[59] I encourage the parties to reach agreement on costs. If they are unable to do so, I will accept brief written submissions within 30 calendar days of the release of this decision.

McDougall, J.