

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Volkers v. Emcon Services Inc.*,
2024 BCSC 1986

Date: 20241029
Docket: M192502
Registry: Vancouver

Between:

Tekla Marie Volkers

Plaintiff

And

**Emcon Services Inc., His Majesty the King in Right of the Province of British
Columbia on Behalf of the Ministry of Transportation and Infrastructure, the
Regional District of Central Kootenay, Gracier Valley Tree Care Ltd. and Davey
Tree Expert Co. of Canada, Limited La Compagnie des Experts Pour Arbres
Davey Limitee**

Defendants

Before: Associate Judge Hughes

Reasons for Judgment

Counsel for Plaintiff:

K. Gourlay

Counsel for Emcon Services Inc.:

R. Johal

Place and Date of Hearing:

Vancouver, B.C.
September 26, 2024

Place and Date of Judgment:

Vancouver, B.C.
October 29, 2024

[1] In this personal injury case, the defendant Emcon Services Inc. (“Emcon”) applies for an order that the issue of liability be severed from the issue of damages. His Majesty the King in Right of the Province of British Columbia on behalf of the Ministry of Transportation and Infrastructure (“the Province”) has filed an application response consenting to the order sought, and did not appear at the hearing. The plaintiff is opposed. The action has been discontinued as against the remaining defendants, save for the Regional District of Central Kootenay which has not filed a response to civil claim and is therefore not a party of record.

[2] On May 16, 2017, the plaintiff was driving on a highway near Castlegar, BC, when a tree fell perpendicular to the road and landed on the hood of her pickup truck (the “Accident”). There is no dispute that the tree fell and that the plaintiff suffered injuries as a result.

[3] The Province was responsible for the design and maintenance of the highway where the Accident occurred. Emcon was contracted by the Province to maintain the highway in question, including the removal of dangerous trees that are unsafe or have the potential to become unsafe for highway users. Emcon and the Province both deny liability for the Accident. At its essence, the liability issue between the plaintiff and Emcon relates to the standard of care required of Emcon and whether Emcon met that standard of care.

[4] The plaintiff filed her notice of civil claim on March 8, 2019, and an amended notice of civil claim on March 21, 2019. The Province and Emcon filed their responses to civil claim on April 10, 2019 and June 13, 2019 respectively.

[5] On June 2, 2023, Emcon sought counsel’s availability for a one-day summary trial on the issue of liability. Emcon was successful in obtaining a one-day “long chambers” date for September 29, 2023. However, that date was adjourned generally at the request of Emcon’s counsel for unexplained reasons.

[6] The plaintiff filed a notice of trial on September 13, 2023, setting the trial for 10 days commencing March 3, 2025. The trial date and time estimate were agreed to by all parties of record.

[7] Due to a combination of counsel's lack of availability and the difficulty in obtaining dates from Supreme Court Scheduling for a long chambers hearing, Emcon has been unable to reschedule its summary trial application. As a result, it has brought on this application to sever the trial in order to have the issue of liability determined before the issue of damages. The parties agree that proceeding with a viva voce trial on the issue of liability only would likely take three days.

[8] Rule 12-5(67) provides that the court may order that one or more questions of fact or law arising in an action be tried and determined before the others.

[9] The court's authority to sever issues is discretionary. The principles relevant to the exercise of that discretion are articulated in *Nguyen v. Bains*, 2001 BCSC 1130 at paras. 10 and 11:

[10] Rule 1(5) sets out the overall object of the *Supreme Court Rules*. That object is "to secure the just, speedy and inexpensive determination of every proceeding on its merits." Rule 39(29) must be interpreted with that object in mind.

[11] Courts have considered the question of when some issues should be tried before others. These are some of the points that have been made:

- a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.
- b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.
- c. Severance is most appropriate when the trial is by judge alone.
- d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.
- e. A party's financial circumstances are one factor to consider in the exercise of the discretion.

f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.

(See *BC Practice: Issue 37* (May/00) where the authors provide a useful overview of the relevant cases and issues arising from them, and *Goldman, Sachs, & Co. v. Sessions*, [1999] B.C.J. No. 1226 (S.C.))

[10] The court of appeal recently reviewed the general jurisprudence on severance applications in *British Columbia (Director of Civil Forfeiture) v. Conrad*, 2024 BCCA 10 [*Conrad*] at paras. 69-101, and confirmed the principles set out in *Nguyen*. I have considered each of those principles as set out below.

Real likelihood of significant saving in time and expense

[11] There must be some substance to the arguments in favour of severance, more than just a bare assertion that severance would be preferable: *Conrad*, para 79. The test is not one of a balance of probabilities, as that would usurp the role of the trial judge: *Conrad*, para. 80.

[12] In the case at bar, there is a possibility of a significant saving in time and expense, but only if the issue of liability is resolved in the defendants' favour. If so resolved, that is the end of the matter. No assessment of damages would be necessary, thus avoiding the need for expert evidence regarding damages.

[13] If the plaintiff is successful on liability, damages would then need to be assessed. That would involve further discovery, the obtaining of expert evidence, and possibly a second trial. The total number of trial days needed would not be reduced.

[14] The court is not to simply consider the possibility that determination of a preliminary issue could be dispositive, but also consider the possibility that resolution of one issue may promote settlement: *Conrad*, para. 77. Emcon submits that it would be much more likely to engage in meaningful settlement discussions if found liable for the Accident.

Issue to be tried first could be determinative

[15] As indicated above, if liability is resolved in either defendant's favour, that is determinative and puts an end to this action for that defendant.

Trial by judge alone

[16] Since the Province is a defendant, this trial must be by judge alone: *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 4(2).

Interwoven issues

[17] In the case at bar, there is no dispute as to the facts of the Accident. The issue of liability deals solely with the applicable standard of care and whether each defendant met that standard of care. The evidence related to liability is limited and unrelated to any assessment of the plaintiff's injuries or her credibility. There are no interwoven issues.

Financial circumstances of the parties

[18] The plaintiff is a single mother of four children, three of whom are financially dependent on her. She works in sales at a car dealership. Her evidence is that she has little in the way of assets, lives in a rented home, and has accumulated approximately \$35,000 in debt since the Accident. Delaying the damages portion of this trial, which would be the effect if severance is granted, could have a negative effect on the plaintiff in the event that liability is determined in her favour.

[19] There is no evidence as to Emcon's financial circumstances. Emcon argues that the fact that the Province is a defendant, with its legal fees being funded by taxpayers, is a relevant consideration.

[20] On balance, the plaintiff bears the greater financial risk. She is an individual of modest means who can ill afford protracted or delayed litigation.

[21] While considering each of the *Nguyen* factors, the court's discretion must be exercised in light of the object of the Rules as set out in Rule 1-3(1): to secure the just, speedy and inexpensive determination of every proceeding on its merits:

Emtwo Properties Inc. v. Cineplex (Western Canada) Inc., 2009 BCSC 1592 at para. 13.

[22] The present case has some notable similarities to *Hewson v. British Columbia*, 2016 BCSC 803. The severance issue in *Hewson* arose in the context of the court's determination of suitability for a summary trial. As in the case at bar, the liability issue in *Hewson* related to causation and whether the defendant had breached its standard of care. The plaintiff alleged that he was injured when his vehicle struck a large raised manhole or manhole cover on a bridge which was designed and constructed by the defendant. Although the court ultimately dismissed Mr. Hewson's claims due to a lack of evidence as to the cause of his accident, it first found in favour of severance.

[15] In the present case, significant time and expense will be saved by proceeding in this fashion, with liability determined separately from quantum of damages. If the defendant is found liable, then a truncated trial will occur; whereas if the defendant is held not to be liable, the entire trial will be avoided. The assessment of damages, if it is necessary, will be complicated by the plaintiff's extensive medical history and potential pre-existing conditions. A number of experts will likely be required, at a significant cost. The evidence related to liability is relatively limited, the legal framework is uncontentious, and the issue of liability is discrete from the assessment of damages. To the extent that the plaintiff's credibility is relevant, in my view, it primarily relates to the issue of damages, given that the issue of liability in this case turns on the question of whether the defendant has breached its standard of care and if so, whether the test for causation has been met. Thus, severance is appropriate in this case.

[23] Here, if the defendants are found not to be liable for the Accident, significant time and expense will have been saved for all parties, as the damages portion of the trial will have been avoided.

[24] As in *Hewson*, the assessment of damages will require expert evidence and will be complicated by the plaintiff's pre-existing conditions, as she was recovering from surgery at the time of the Accident.

[25] The evidence related to liability in the present case is also relatively limited, the legal framework on the standard of care is uncontentious, and the issue of liability is discrete from the assessment of damages.

[26] Unlike *Hewson*, Ms. Volkers' credibility is not relevant to the issue of liability. There is not dispute as to the facts of the Accident.

[27] Having considered each of the *Nguyen* factors, I have concluded that it is appropriate for me to exercise my discretion in favour of severance in this case.

[28] Accordingly, the issue of the defendants' liability is severed from the issue of damages. The trial scheduled for March 3, 2025 will proceed on the issue of liability only.

[29] As the successful party, Emcon is entitled to its costs from the plaintiff in the cause.

“Associate Judge Hughes”