

CANADA / JUDGMENT

Pritchard v. Patterson

2020 BCSC 1937

COURT

Supreme Court of British Columbia

DECIDED

6 November 2020

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2020 BCSC 1937 Pritchard v. Patterson IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Pritchard v. Patterson, 2020 BCSC 1937 Date: 20201106 Docket: M09287 Registry:

Courtenay Between: Annie Pritchard Plaintiff And Owen Patterson, Her Majesty the Queen in Right of the Province of British Columbia (Provincial Ministry of Transportation and

Infrastructure), and Emcon Services Inc. Defendants And Owen Patterson, Todd Thompson,

Dynamite Logging Ltd., and Gordon McMillan Third Parties -and- Docket: M176028 Registry:

Vancouver Between: Jennifer Gomez-Fox Plaintiff And Owen Alan Patterson Defendants And Her

Majesty the Queen in Right of the Province of British Columbia, (Provincial Ministry of

Transportation and Infrastructure) and Emcon Services Inc. Third Parties -and- Docket: M176032

Registry: Vancouver Between: Justin Fox Plaintiff And Owen Alan Patterson Defendant Before:

The Honourable Mr. Justice Thompson Oral Reasons for Judgment In Chambers Counsel for the

Plaintiff, Annie Pritchard, and agent for Defendant and Third Party, Owen Patterson (by

teleconference): M. Tinmouth Counsel for Plaintiffs, Jennifer Gomez-Fox and Justin Fox (by

teleconference): M. Cleary Counsel for Emcon Services Inc. (by teleconference): B. Carter No

other appearances Place and Date of Hearing: Nanaimo, B.C. October 29, 2020 Place and Date of Judgment: Nanaimo, B.C. November 6, 2020

- [1] THE COURT: The plaintiffs were injured in a motor vehicle accident on Lake Trail Road in Courtenay on 14 December 2015. This is an application by the plaintiff in each of the three actions for an order that the liability issues be tried separately from the quantum of damages issues, and for an order that the liability issues in each action be tried first but at the same time as the liability trial of the other two actions.
- [2] During the hearing, I was given an account of the sequence of events giving rise to these actions. It involved four vehicles, all driven in the same direction. The sequence began with Ms. Pritchard losing control of her vehicle on what was evidently a slippery road. Her vehicle went off road and into a ditch. A vehicle occupied by Mr. Fox and Ms. Gomez-Fox stopped on the roadway shoulder in order to render assistance. A vehicle being operated by Mr. McMillan, allegedly owned by Mr. Thompson and Dynamite Logging Ltd., stopped on the roadway. Finally, Mr. Patterson came along. He lost control of his vehicle, which struck Ms. Pritchard, Mr. Fox, and Ms. Gomez-Fox, all of whom were out of their vehicles and on the shoulder of the roadway. All three plaintiffs suffered multiple serious injuries.

- [3] Ms. Pritchard claims against Mr. Patterson for failing to maintain control of his vehicle and against the Province for alleged shortcomings in roadway design, and against Emcon Services Inc., the road maintenance contractor, for failing to comply with the standard of care regarding maintenance of the roadway. Mr. Patterson and Emcon each have \$2 million insurance coverage. The Province third partied Mr. Patterson. Emcon, too, third partied Mr. Patterson, and also added Mr. McMillan, Mr. Thompson, and Dynamite Logging Ltd. as third parties. All defendants and third parties deny liability and contributory negligence is alleged, including on the part of Ms. Pritchard for standing where she was when she was struck by the Patterson vehicle.
- [4] Ms. Gomez-Fox claims against Mr. Patterson, who has issued a third party notice against the Province and Emcon. The defendant and third parties deny liability and allege contributory negligence, including as against Ms. Gomez-Fox. Mr. Fox claims against Mr. Patterson, who denies liability and pleads contributory negligence. To this point, there are no third party proceedings in the Fox action.
- [5] The Province is a party in the Pritchard and Gomez-Fox actions. It follows that these cases must be tried without a jury: Crown Proceeding Act, R.S.B.C. 1996, c. 89, s. 4(2). There is no suggestion that either of the parties in the Fox action intend to file a jury trial notice.
- [6] This application for severance and Emcon's opposition reflect two competing conceptions on how best to try the issues in these three actions. The plaintiffs proposed severance of the liability issues with a three-week trial of those issues to proceed together for all three actions and, if liability is established against a defendant or defendants, separate trials of the damages issues in each case. All parties except Emcon agreed with this plan. Emcon opposes severance. It contends that the better plan is to try all issues in all three cases at the same time. My sense is that the quantum cases would take about two weeks' of trial time each and a trial of all issues in all three cases at the same time would last approximately nine weeks.
- [7] The principles to be applied to the question of whether to sever were reviewed by Voith J., as he then was, in *National Bank Financial Ltd. v. LePoidevin*, 2018 BCSC 1190 at paras. 11-15. I respectfully agree that the authorities support his observation that, whatever formulation is applied to the exercise of this discretion, severance orders should be made infrequently and carefully, and that conducting litigation in slices is usually best avoided (para. 12).
- [8] I will consider this application employing the main factors in the exercise of the discretion to sever identified by Fenlon J., as she then was, in *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2009 BCSC 1592 at para. 16:
1. Is there evidence that severance is likely to result in a significant saving of time and expense?
 2. Is there some evidence that a severed trial will put an end to the action?

3. Are the issues of liability and damages intertwined?
 4. Is there a compelling reason to justify severance other than savings of time and expense? It is readily apparent that these four factors are not watertight compartments. These considerations are to be borne in mind, all the while approaching the exercise of this discretion with the recognition that urgings of the benefits of severance too often turn out to be a siren song.
- [9] This is a case in which the combination of the parties' submissions and the material in the record produce a clear picture of the issues. This information, together with the pleadings and a trial judge's experience with these cases, leaves little room for mystery about the evidence that will be adduced and the arguments that will be heard on the liability and quantum issues. On the liability side in the Pritchard and Gomez-Fox actions, there will likely be expert opinion reports that bear on the issues of highway design and the maintenance contractor's standard of care. In all three actions, there will likely be expert opinion reports on the cause of the loss of control of the Patterson and Pritchard vehicles. On the causation and damages issues, I expect most of the following types of experts will put in an appearance in all three cases: orthopedic surgeons, neurosurgeons, physiatrists, psychiatrists, occupational therapists, vocational consultants, and economists. In the Pritchard action, Emcon is contemplating leading expert evidence on biomechanics to support a hypothesis that some of the plaintiff's injuries were caused by her vehicle coming to a sudden stop in the ditch.
- [10] My impression is that there are many reasonably possible outcomes of a liability determination:
- (a) A case may be proved against none of the defendants. For instance, the judge may find that Patterson's loss of control was not negligent because of the road conditions, and that neither the roadway design nor its maintenance were carried out negligently. In these circumstances, there would be no damages assessments resulting in the saving of significant time and substantial expense of these assessments.
 - (b) A case may be proved against one or more, but not all of the defendants or third parties. For instance, the judge may find that Patterson was negligent with or without contributory negligence on the part of the plaintiffs, but the Province and Emcon and the McMillan third parties are not liable. If this were to occur, then only Patterson, represented as he is by one counsel, would be required to participate in the damages assessments. The Province and Emcon and ICBC -- and indirectly the taxpayers of British Columbia and the ICBC ratepayers funding the defence of the McMillan third parties -- would realize significant savings. Even if most but not all defendants and third parties are caught in the liability net, significant savings would occur through the non-participation of the non-liable parties in the damages assessments.

- (c) A case may be proved against all defendants and all third parties. In this scenario, which I think has only a small possibility of coming about, any savings of time and expense would only come about if the liability determination promoted the chances of settlement of the actions.
- [11] In this case, I think there is an excellent chance that a liability determination will directly put an end to the actions for at least one party; and I think there is a good chance that it will directly put an end to the actions for more than one party. As for the prospects of a decision on liability indirectly putting the cases at an end via settlement, the two sides on this application disagree. In other cases, presiders have concluded in the circumstances of those cases that severance would increase the chances of settlement bringing an end to the action; e.g., see: *Hemmerling v. Hole*, 2005 BCSC 35 at para. 23. In still other cases, courts have adverted to the possibility that severance may, in fact, dampen the prospects for settlement; e.g., see *MacEachern v. Rennie*, 2008 BCSC 1064 at para. 16.
- [12] In this case, the plaintiffs argue that knowing which defendants and third parties are liable to contribute to a settlement will sweep away layers of uncertainty, including uncertainty about the amount of insurance money available to satisfy three large damages awards, and thus bring a narrowed and clearer focus to settlement discussions. Emcon, on the other hand, emphasizes the balancing of risk that occurs during settlement negotiations and submits that removing uncertainty will impair the negotiation process. This is clearly a matter of impression. In this particular situation, given the nature of the issues and the presence of multiple plaintiffs, defendants and third parties, and the possibility of insurance policy limit considerations, I think the chances of success in settlement negotiations are likely to be promoted by resolution of the liability issues.
- [13] In fact, I think there is a high degree of likelihood that a liability determination (assuming of course that liability is found against at least one defendant) will be followed by the settlement of all three actions. The plaintiffs were all seriously injured; fractured skulls and broken legs leave less room for argument on most heads of damages than cases centred on subjective complaints of sore backs and chronic pain. In assessing this question, I have not lost sight of the fact that a settlement of all issues in advance of the trial of any of the issues -- the prospect held out by Emcon -- would result in a large amount of savings of time and expense. I have weighed this chance in the balance.
- [14] Emcon argues that severance would be unwise because the liability and damages issues are intertwined. It submits that the plaintiffs will be called upon to give evidence that bears on liability, especially about the roadway and weather conditions. It argues that the credibility of the plaintiffs will be important on both the liability and damages issues, and the just determination of the case will be risked if severance occurs. It is the extremely rare case where there is zero overlap between liability and damages issues. The cases at bar are, however, quite close to that end of the spectrum. Any concerns may be addressed by having the same judge that presides over the liability determination hear the damages assessment, with the evidence heard at the first part of the trial applying to the second part: *Nguyen v.*

Bains, 2001 BCSC 1130 at para. 11. In any event, the evidence to be called at a liability trial would overlap in miniscule measure with the evidence expected at the damages assessments. This factor favours severance.

- [15] In the totality of the circumstances made known to me through the pleadings, the material filed, and the submissions of counsel, I conclude that the proposed severance will best promote the just, speedy, and inexpensive determination of all issues in each of these actions. However, an applicant for severance must go further than showing that severance would be just and convenient: *Emtwo Properties*, at para. 15. I have kept in mind throughout my consideration of this application the pitfalls that have too often attended the apparent but illusory shortcut offered by severance of liability and damages issues in personal injury litigation. That said, I make the severance order as sought in each of these actions because, notwithstanding Ms. Carter's able submissions, I consider the case for severance to be compelling.
- [16] Emcon agrees that in the event the severance is ordered, the liability hearing should take place in Nanaimo in accordance with the proposal of the plaintiffs and agreed to by all other parties. The liability trial will be heard in Nanaimo. (SUBMISSIONS ON COSTS)
- [17] The position of Emcon on this application is not something that should attract any criticism from the Court, even implicitly through a costs order. It is just a matter of different conceptions of the best path forward. Ms. Pritchard will have her costs against Emcon in the cause respecting Emcon. Ms. Gomez-Fox will have her costs against Emcon in the cause respecting Emcon. And, there will be no costs to any party in the Fox action. So, for clarity, the way that this will work is if Ms. Pritchard succeeds against Emcon, she will have her costs of this application. If Pritchard succeeds against defendants other than Emcon, then those unsuccessful defendants will not be required to bear the costs of this application in circumstances where they supported the severance. Any clarification required?
- [18] MR. CLEARY: None from my perspective, My Lord.
- [19] MR. TINMOUTH: No, My Lord, that is clear.
- [20] THE COURT: Very well.
- [21] MS. CARTER: Fine, thank you.
- [22] THE COURT: We are adjourned then. "Thompson J."

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