

Jury Strikes and Bifurcation Applications

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insight INFORMATION

DISABILITY CLAIMS MANAGEMENT AND LITIGATION

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BIFURCATION AND JURY STRIKE APPLICATIONS

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Whiten v. Pilot Insurance Co., 2002
SCC 18, para. 122:

“Where a trial judge is concerned that the claim for punitive damages may affect the fairness of the liability trial, bifurcated proceedings may be appropriate...”

Bifurcation Application

- Sever the bad faith allegations from the claim for contractual benefits.
- Stay any oral discovery or production of documents relating to the bad faith allegations.

Rules of Court

■ **Rule 5(6)**

“Where a joinder of several claims or parties in a proceeding may unduly complicate or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials of hearings or make any other order it thinks just.”

■ **Rule 39(29)**

The trial of one question before others

■ **Rule 26(15)**

Provides for the determination of an issue before the right to discovery of a document.

Wonderful Ventures Ltd v. Maylam et al, 2001 BCSC 775

- The bad faith claim was severed because:
 - **The Insurer may be required to disclose privileged communication to defend against the allegations of bad faith.**
 - **The prejudice to the plaintiff of two trials was less significant than the prejudice to the Insurer if it had to disclose privileged communication.**

Stevens v. Sun Life Assurance Co. of Canada, 2004 BCSC 468

- Allegations of corrupt corporate structure.
- Live issue of solicitor-client privilege which should be protected.
- The bad faith allegations would necessitate extensive, intrusive and costly discovery and occupy a significant number of days at trial which would be irrelevant if the plaintiff failed on the contract claim.
- Plaintiff should not be allowed to engage in a fishing expedition with respect to confidential corporate policies.
- Distinguishes the Ontario and Newfoundland authorities which provide that bifurcation should only be granted in “exceptional circumstances”.

Stuart v. Manufacturers Life Insurance Co., 2004 BCSC 501

- Allegations of continuing bad faith through the conduct of the litigation.
- “..in balancing the prejudice considerable weight must be given to the very real danger that a breach of privileged communication between client and counsel could result if the case is continued to be tried as one”.
- Plaintiff has a “considerable hill to climb to tip the prejudicial balance in his favour”.

Mode of Trials

- **“I am thus left with the issue of whether or not the jury notice should be struck. For the trial of the entitlement issue there is an open argument. On the other hand, there can be no doubt, in my view, that insofar as the right to a jury on the punitive damage claim is concerned, the plaintiff is entitled to a jury..”**

Sanders v. Clarica Life Insurance Co., 2003 BCSC 403

- **Except where there are issues as to credibility.**

Deelman v. Maritime Life Insurance Company, unreported, October 24, 2006, Vancouver Registry, No. S014074.

Chambers Material

- Notice of Motion should seek an Order that:
 - a. The Plaintiff's allegations of breach of fiduciary duty and claim for bad faith, punitive and exemplary damages as set out in paragraphs ? to ? of the Statement of Claim be severed from the balance of the Statement of Claim and be tried at a separate trial; and
 - b. Any further oral discovery or production of documents on the issues raised in paragraphs ? to ? of the Statement of Claim be stayed until determination of the plaintiff's entitlement to disability benefits under the subject policy.

Chambers Material

Consider including the following in the supporting Affidavit material:

- ☐ Statement of Claim;
- ☐ Demand for Particulars;
- ☐ Examination for Discovery;
- ☐ Correspondence;
- ☐ Estimates regarding the length of trial;
- ☐ Details regarding the witnesses necessary to address the allegations of bad faith;
- ☐ Details regarding the volume and confidential nature of the documents necessary to address the allegations of bad faith; and
- ☐ Details regarding when counsel was retained and generally the matters upon which legal advice was sought.

Jury Strike Applications

- There are two basis:
 - The principal question at issue is one of construction of a written contract or enactment.
 - The issues are too intricate or complex to be determined by a jury.

Principal Question – applicable *Rules of Court*

Rule 39(25)

- A trial shall be heard by the court without a jury where it relates to...
 - (g) the specific performance of a contract;
 - ...
 - (j) a matter referred to in Rule 10(1)

Rule 10(1)

- An application other than an interlocutory application or an application in the nature of an appeal may be made by originating application where...
 - (b) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract, or other document.

*Edwards v. Mutual Life Assurance Company of
Canada, (1982) 41 B.C.L.R. 269, BCCA*

“Since the issue as described by the parties is whether the nature of the disability alleged to have been suffered by the plaintiff is a disability within the meaning of the policies, it is my opinion that Rule 10(1) applies.”

Disability Claims in which Jury Notice was not struck pursuant to Rule 39(25).

- *Penner v. Great-West Life Assurance Co.*, 2002 BCSC 1131

- The issue will turn on whether the provision applies, not what, in the context of the contract, does the provision mean.
- The principal issues involve matters of fact, including whether the plaintiff, in light of the medical evidence was “totally disabled”.

- *Naicker v. Great West Life Assurance Co.*, 2002 BCSC 443

Disability Claims in which Jury Notice was struck pursuant to Rule 39(25).

- *Russell v. The Mutual Life Assurance Company of Canada*, 2001 BCSC 391
 - “Principal question at issue” was the interpretation of the insurance policy.

- *Sanders v. Clarica Life Insurance Company*, supra.
 - Bound by *Edwards*, supra.

Disability Claims in which Jury Notice was struck pursuant to Rule 39(25).

- *Macdonald v. Maritime Life Assurance Co.*, 2004 BCSC 203
 - Applies *Nelson Marketing International Inc. v. Royal & Sun Alliance Insurance Co. of Canada*, 2003 BCSC 439.
 - If the findings of fact substantially dispose of the issues to be tried then Rule 39(25) should not be applied.
 - The next step necessarily requires an interpretation of the policy including interpreting clauses that relate to:
 - total disability (i.e., solely because of illness);
 - partially disability;
 - exclusion for chronic alcoholism/drug abuse; and
 - rehabilitation and benefits offset clauses including CPP legislation.
- *Peters v. Co-operators Life Insurance Co.*, 2007 BCSC 1103.

Chambers Material

- Statement of Claim
- Statement of Defence
- Policy of insurance
- Declination Letter
- Medical evidence

Intricate or Complex - *Rules of Court*

Rule 39(27)(a)

...a party to whom a notice under subrule (26) has been delivered may apply

(a) within 7 days for an order that the trial or part of it be heard by the court without a jury on the ground that

(i) the issues require prolonged examination of documents or accounts or a scientific or local investigation which cannot be made conveniently with a jury, or

(ii) the issues are of an intricate or complex character.

Intricate or Complex Character

Struck:

- *Russell v. The Mutual Life Assurance Company of Canada*, supra.

Not Struck:

- *Macdonald v. Maritime Life Assurance Company*, 2003 BCSC 1940 (Master's decision).
- *Naicker v. Great West Life Assurance Co.*, supra.
- *Larlee v. Manufacturers Life Insurance Co.*, 2006 BCSC 1497.

