

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

MICHAEL JACK

Plaintiff

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE
MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES
OPERATING AS THE ONTARIO PROVINCIAL POLICE AND ITS EMPLOYEES
MARC GRAVELLE, JOHN POLLOCK, SHAUN FILMAN, JENNIFER PAYNE, JAMIE
BROCKLEY, MELYNDA MORAN, MARY D'AMICO, RICHARD NIE, BRAD
RATHBURN, ROBERT FLINDALL, PETER BUTORAC, RONALD CAMPBELL,
COLLEEN KOHEN, HUGH STEVENSON AND MIKE ARMSTRONG AND ITS
RETIREES MIKE JOHNSTON AND CHRIS NEWTON**

Moving Party/Defendants

BOOK OF AUTHORITIES

April 10, 2013

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Shaun Filman, Karen German, Jim Styles and
Marty McNamara.

Case Name:

Logtenberg v. ING Insurance Co.

Between

**Lynn Logtenberg, Plaintiff, and
ING Insurance Company and Acclaim Ability Management
Inc., Defendants**

[2008] O.J. No. 3394

66 C.C.L.I (4th) 145

2008 CanLII 43573

2008 CarswellOnt 5100

169 A.C.W.S. (3d) 32

Court File No. C-10670/08

Ontario Superior Court of Justice

R.D. Gordon J.

Heard: June 18, 2008.

Judgment: July 7, 2008.

(20 paras.)

Civil litigation -- Civil procedure -- Actions -- Causes of action -- Joinder and consolidation -- Commencement of -- Avoidance of multiplicity of proceedings -- Motion by defendant insurance company, for an order a bad faith claim and a tort claim be either tried together or one immediately after the other, dismissed -- There was no evidence there would be a savings in pre-trial procedures or a reduction in the number of trial days and there was little evidence there would be any real savings in experts' time and witness fees -- Plaintiff would suffer prejudice if the tort claim, which was more advanced than the bad faith claim, was delayed -- There were many elements that were completely different between the two proceedings -- Rules of Civil Procedure, Rule 6.

Motion by defendant insurance company for an order the action (the bad faith claim) and another proceeding (the tort claim) be tried together or one immediately after the other. The plaintiff was involved in a motor vehicle accident. The tort claim was brought by the plaintiff and her immediate family against the driver of the other vehicle and the defendant. The plaintiffs in the tort claim were represented by a solicitor, discovery of the defendants was complete, discovery of the plaintiff was to continue in the fall and productions were complete. The bad faith claim was an action issued by the plaintiff against the defendant and Acclaim Management Inc., alleging, amongst other things, breach of contract and bad faith. There was evidence the plaintiff, who was self-represented in the bad faith claim action, was unable to function effectively for more than short periods of time due to her injuries and disability.

HELD: Motion dismissed. There was no evidence there would be a savings in pre-trial procedures or a reduction in the number of trial days and there was little evidence there would be any real savings in experts' time and witness fees. It was hard to imagine the tort action was not more advanced than the bad faith action, and the plaintiff would suffer prejudice if the tort action was delayed. Although the two proceedings had some common elements, there were many that were completely different, such as damages claimed in the bad faith action that were not related to the plaintiff's injuries.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 6

Counsel:

Patrick Wymes, for the Plaintiff.

Kadey Schultz, for the Defendants.

1 R.D. GORDON J.:-- This decision pertains to a motion brought by the defendant ING Insurance Company (hereinafter referred to as "ING") asking that this action and the proceedings in Court File No. C-8534/04 be tried together or one immediately after the other.

2 The Plaintiff was involved in a motor vehicle accident on December 3, 2002 and alleges that she sustained injuries in this accident. She and the members of her immediate family began an action (Court File No. C-8534/04) against the driver and owner of the other vehicle involved in the accident alleging his responsibility for the accident and claiming various heads of damages, including non-pecuniary damages for pain and suffering, pecuniary damages for out-of-pocket expenses incurred as a result of the accident, damages for past and future cost of care, damages for

costs of household and home maintenance chores, and damages for loss of income, loss of competitive advantage and loss of earning capacity. Her immediate family has advanced what are commonly known as Family Law Act claims. Mr. Wymes is solicitor of record in this action. The claim was issued on November 30, 2004. Discovery of the Defendants is complete. Discovery of the Plaintiff is to continue this fall. Productions are complete. From the Plaintiff's perspective, the matter is ready to be set down for trial. I will refer to this action hereafter as the "tort claim".

3 The Plaintiff has also issued the action against ING and Acclaim Ability Management Inc. under which this motion is brought. Lynn Logtenberg is the sole Plaintiff in this action and she is self-represented. For the purposes of this motion, Mr. Wymes attended and made argument on her behalf. This claim was issued January 25, 2008 and claims accident benefits, damages for breach of contract, negligence, misrepresentation, breach of fiduciary duty, bad faith, mental anguish and distress and intentional infliction of mental anguish and distress. It also claims aggravated, exemplary and/or punitive damages and a declaration that the Defendants acted in bad faith. Discovery of the Plaintiff has yet to take place in this action. Discovery of a representative of ING has yet to be undertaken. There is little doubt that there will be motions brought by the Plaintiff to discover more than one representative of ING and to have certain production issues addressed. I rather suspect that ING will also have a motion relative to production. I will refer to this action hereafter as the "bad faith claim".

4 The grounds advanced by ING in support of its motion are that:

1. Both actions relate to damages arising from the same motor vehicle accident;
2. Both actions involve common questions of fact and law; and
3. The issues of apportionment of damages between the defendants are contingent on findings of fact as against each of the defendants in both proceedings.

5 It is the contention of ING that the trial of these actions together or one following the other would result in the most expeditious and least expensive determination of the civil proceedings and would avoid duplicitous and possibly inconsistent rulings given by separate courts.

6 I am advised that the remaining defendants in each action consent to the relief sought by ING. The Plaintiff does not. The Plaintiff contests the motion on the following bases:

1. That ING has not met the onus required for the order requested;
2. That the actions are at very different stages and considerable delay and prejudice would result to the Plaintiff if the order were granted;
3. The nature of the two claims are very different;
4. There are different parties in the two claims;
5. There is no prejudice to ING if its request is denied;
6. There are few, if any, witnesses who are common to each action;

7. The Plaintiff's disabilities would make it extremely difficult for her to prepare and attend at two trials within a short period of time.

7 I believe that it is now commonly accepted that the underlying policy of Rule 6 is to avoid a multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes and to avoid inconsistent judicial findings.

8 In order for a moving party to be successful in having the court consider its request to have two actions tried together or one immediately following the other, it has the onus of meeting one of the criteria set out in Rule 6, namely that:

- (a) the separate proceedings have a question of law or fact in common;
- (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
- (c) for any other reason an order ought to be made under this rule.

9 I am satisfied that the two proceedings have a question of fact in common. Indeed, the Plaintiff as much as admits the same in paragraph 14 of her factum. The nature of the Plaintiff's injuries, the extent of her disability, and whether or not such disability arose as a result of the motor vehicle accident in question are issues that will figure to one extent or another in both actions.

10 As ING has satisfied one of the criteria set out in Rule 6, it becomes necessary to consider other factors that might lead a court to consider whether or not the requested order ought to be granted. This involves a balancing of such factors as expediency, convenience and prejudice to the parties. A useful list of criteria has been developed in the cases of *Webster v Webster* (1979) 12 B.C.L.R. 172 and *Shah v Bakken* [1996] B.C.J. No. 2836:

- Will the order sought create a savings in pretrial procedures?
- Will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?
- What is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may only have a marginal interest?
- Will there be real savings in experts' time and witness fees?
- Is one of the actions at a more advanced stage than the other?
- Will the order result in a delay on one of the actions?
- Are any of the actions proceedings in a different fashion?

11 When I consider these issues, it is my opinion that the order requested by ING is not appropriate in the circumstances of this case for the following reasons.

12 There is no evidence before me upon which I could find that there would be a savings in pre-trial procedures.

13 There is no evidence before me upon which I am able to find that there will be a real reduction in the number of trial days taken up by the trials being heard at the same time or one immediately following the other. On the contrary, given the evidence of the Plaintiff's inability to function effectively for anything more than short periods of time, and given that she is represented in only one of the actions, it is likely that trial time would be increased by having the actions heard together.

14 There is little evidence before me by which I can find that there would be any real savings in experts' time and witness fees. The Plaintiff has provided evidence that in fact the witnesses will largely be different at the two trials. ING has not provided a list of witnesses. Furthermore, in the event a combined trial lasts longer than the two trials heard individually, it is likely that there would be no such savings.

15 On the evidence before me, it is hard to imagine that the tort action is not far more advanced than the bad faith action. In the tort action discoveries are nearly complete. In the bad faith action they have not yet begun. In the tort action, document production is complete. In the bad faith action, not only is document production not complete, but there are motions contemplated with regard to it. Given the history of the first six months of the bad faith action, and the number of motions already brought within it, it is very unlikely that it will be ready for trial within any reasonable time frame. I recognize that it is the position of ING that any delay in the bad faith action has been the fault of the Plaintiff. However, I do not have sufficient evidence before me to make that determination and in any event, that has little bearing on what amount of time it will take to get the action ready to proceed to trial in the future. In my view, the order sought by ING will almost certainly result in a delay in getting the tort action to trial.

16 I will add that although there are some common elements to the two actions, there are many elements that are completely different. For example, in the bad faith action, some damages are claimed which are not related to the injuries suffered in the motor vehicle accident, but are alleged to be the result of the poor treatment of the insured by the insurer. This issue exists completely independently of the tort action and is based upon an entirely different set of allegations.

17 Lastly, it is apparent from the evidence before me that the Plaintiff stands to suffer substantial prejudice if the tort action is delayed both in regards to her financial situation and her health. There is no evidence before me to support the notion that ING would be prejudiced by having the two actions tried independently.

18 When one balances all of these considerations, it is apparent that this is not a situation where it is appropriate to order that the actions be tried together or one immediately following the other notwithstanding that there are some common factual issues.

19 Given that the Plaintiff has been successful in defending ING's motion, it is appropriate that it have its costs on a partial indemnity basis. Considering the costs outline provided by Mr. Wymes and the various factors set out in Rule 57.01 the sum of \$3,500.00, all inclusive, is a reasonable and

appropriate costs award in all of the circumstances. Such amount is payable forthwith.

20 Counsel for the Defendant in the tort action appeared on this motion and made argument in support thereof. It does not seem appropriate that there be an award of costs in favour of or against this party.

R.D. GORDON J.

cp/e/qlaxs/qlpxm/qlaxw/qlaxr/qlaxw/qljyw

MICHAEL JACK

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO et al.

Plaintiff

Defendants

Court File No. CV-13-476321

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

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