

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Geoffrey Fine v. Josh Botelho

BEFORE: Master Graham

HEARD: October 5, 2015

APPEARANCES: S. D'Souza for the plaintiff (moving party)
J. Botelho defendant in person
A. Mladenovic for the plaintiff Sommerville in action no. CV-10-410126

REASONS FOR DECISION
(Plaintiff's motion to consolidate)

[1] The issue on this motion is whether two actions should be consolidated.

[2] In one action, (*Sommerville v. Fine*, no. CV-10-410126), the plaintiff Andrew Sommerville alleges that on September 21, 2008 he sustained a number of wounds including one to his right knee. On that date, he attended at the emergency department of the Trillium Health Centre where he came under the care of Dr. Geoffrey Fine, the defendant in his action and the plaintiff in the action in which the motion is brought. Sommerville's allegations against Dr. Fine are as follows:

1. Dr. Fine failed to undertake any investigations to determine whether there was any damage to the internal structures of Somerville's knee (statement of claim para. 6);
2. As a result of the wound to the right knee, "the patellar tendon was completed [sic] transected". Further "the failure to treat it in a timely way has resulted in injury and damage" (para. 9);
3. The "casualty aforementioned" resulted from the negligence of the defendant, which Sommerville particularizes as (a) failing to take a proper history, perform proper examinations and order necessary testing, (b) failing to ensure that CAT scans and MRI investigations were done in a timely way, (c) failing to refer the plaintiff to an appropriate specialist and (d) notwithstanding that Dr. Fine knew or ought to have known of the possibility of serious damage to the plaintiff's right knee, failing to ensure that he received timely and appropriate examination, investigations, testing and treatment (para 10);

4. As a result, the plaintiff has sustained serious and lasting personal injuries including loss of use of his right knee resulting in pain and suffering, an impairment of his ability to earn his livelihood and medical and other out-of-pocket expenses.

[3] In Dr. Fine's statement of defence, he pleads as follows:

1. When the plaintiff attended at Trillium Health Centre, he complained of having been stabbed "by a known person in his right knee, right ear and left flank" (para. 5).
2. He denies the allegations of negligence and pleads that the injuries alleged by the plaintiff are not attributable to any act or omission on his part but rather were caused or contributed to by (i) the acts of an assailant known to the plaintiff and (ii) the acts of the plaintiff including, *inter alia*: A. his consumption of an excessive amount of alcohol and/or other intoxicating substance and B. his failure to give an accurate medical history, report relevant symptoms, follow medical advice, re-attend at hospital and/or seek medical advice or care when needed (para. 21).

[4] At his examination for discovery held on June 12, 2013, the plaintiff Sommerville first identified Josh Botelho as the individual who assaulted him with a knife.

[5] On February 6, 2014, Dr. Fine issued a statement of claim naming Botelho as a defendant (*Fine v. Botelho*, no. CV-14-497978) and claiming from him contribution and indemnity for all damages that may be awarded to Sommerville as a result of Sommerville's claim in action no. CV-10-410126 and which damages are found to be caused or materially contributed to by Dr. Fine. Dr. Fine pleads that Sommerville's injuries were caused by Botelho and did not result from his care and treatment. He alleges that Botelho's actions constitute the torts of assault and/or battery and pleads that if he is found liable in Sommerville's action, Botelho is liable for those damages.

[6] In his statement of defence, Botelho, who does not have counsel, pleads that the dispute between Sommerville and Dr. Fine has no connection to him because it concerns malpractice and he did not affect Dr. Fine's actions in relation to Sommerville's condition.

[7] Dr. Fine now moves to consolidate his action for contribution and indemnity against Botelho with Sommerville's negligence claim against him such that it would be advanced as a third party claim in the *Sommerville* action. Both Sommerville and Botelho oppose the motion.

[8] Dr. Fine moves to consolidate the two actions under rule 6.01:

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they 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,

the court may order that,

(d) *the proceedings be consolidated*, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them. R.R.O. 1990, Reg. 194, r. 6.01 (1).

[9] First, Dr. Fine requests an order for consolidation on the basis that the two actions have a question of law or fact in common (rule 6.01(1)(a)) in that they share the issue of causation of the plaintiff's damages. He maintains that in both actions the court must consider whether and to what extent the plaintiff's damages resulted from the original stab wound or from Dr. Fine's alleged failure to properly diagnose Sommerville's injury.

[10] Second, Dr. Fine submits that both Sommerville's claim against him and his own claim against Botelho arise from "the same transaction or occurrence or series of transactions or occurrences" (rule 6.01(1)(b)), the occurrences in question being the incident in which Sommerville sustained the stab wound to his knee and Sommerville's attendance at Trillium Health Centre where he alleges that Dr. Fine failed to properly diagnose his injury.

[11] Finally, Dr. Fine submits that as the two actions are at essentially the same stage, there would be no prejudice to Sommerville and Botelho if the actions were ordered consolidated. The *Sommerville* action is to be spoken to at Trial Scheduling Court on October 21, 2015 and the *Fine v. Botelho* action can now be set down for trial such that the trial of the actions can be scheduled at the same time. Based on Dr. Fine's contention that the two actions have in common the issue of causation of Somerville's damages, the same medical evidence will be required for the trials of both actions.

[12] Sommerville submits that the only issues in his action are whether Dr. Fine breached the applicable standard of care in failing to diagnose the full extent of his knee injury, if so whether the delay in treatment of his transected patellar tendon resulted in a less favourable outcome and if so what damages resulted from the delay in treatment. Any liability on Dr. Fine is limited to damages arising out of his alleged negligence as a treating physician. Accordingly, there is no basis on which Botelho can be found liable for any such damages because notwithstanding his involvement in the incident that resulted in the original injury, he can have had nothing to do with any medical negligence in the treatment of the injury. The fact that the causation issue in the *Sommerville v. Fine* action is limited to Dr. Fine's alleged negligence means that there is no basis for a successful claim for contribution against Botelho and accordingly, no basis for the two actions to be consolidated.

[13] The issue is whether the two actions that Dr. Fine seeks to consolidate have a question of law or fact in common (i.e. causation) or whether they arise from the same occurrence or series of occurrences. If either or both of these requirements are met, then the court “*may* order that the proceedings be consolidated”, which means that the court may exercise its discretion as to whether or not to make the order, considering all of the circumstances.

[14] Any order for consolidation must be based on the claims as pleaded. To resolve the issue, it is therefore necessary to examine Sommerville’s pleading against Dr. Fine. Sommerville alleges that when he attended at Trillium Health Centre, Dr. Fine failed to investigate whether there was any damage to the internal structures of his knee and that the failure to treat the knee in a timely way resulted in injury and damages. The particulars of Dr. Fine’s negligence are all in respect of his examination, testing and treatment of the injured knee. Dr. Fine’s claim in his action against Botelho is for contribution and indemnity in respect of any damages awarded in the *Sommerville* action and can only be in respect of any possible liability found on Dr. Fine for medical negligence.

[15] I disagree with Dr. Fine that the claims as pleaded against him by Somerville include a claim for damages arising from the original stab wound such as would give rise to an issue of whether he may claim contribution from Botelho. The fact that Dr. Fine, in his statement of defence in the *Sommerville* action, pleads that the injuries alleged by the plaintiff were caused or contributed to by an assailant, does not alter the fact that Sommerville’s claim is exclusively for damages for medical negligence and any claim for contribution and indemnity can only be in respect of that claim.

[16] I therefore accept Sommerville’s submission that the claim against Dr. Fine is limited to those damages that resulted from any negligence in his diagnosis and treatment and does not encompass the damages attributable to the original stab wound. Because Botelho could not have caused or contributed to any damages flowing from Dr. Fine’s alleged medical negligence, there is no issue of causation common to the two actions.

[17] Similarly, the “occurrence” giving rise to Sommerville’s action against Dr. Fine is his attendance at Trillium Health Centre. In Dr. Fine’s action against Botelho, he pleads that “Mr. Sommerville’s injuries were caused by Mr. Botelho”, but the only occurrence in which Mr. Botelho is alleged to have been involved is the stabbing. The two actions therefore arise from different individual occurrences. Once again, the only damages that Botelho could be responsible for are the damages arising from the original stab wound, which Sommerville has apparently chosen not to sue for.

[18] For the reasons set out above, I conclude that the two actions do not share an issue of causation and therefore do not have a question of law or fact in common. Similarly, as the relief claimed from Dr. Fine in the *Sommerville* action can only be for damages arising out of his alleged medical negligence and the defendant Botelho can only be liable for damages arising from the original stabbing the two actions cannot be said to arise from the same occurrence.

[19] Even if one were to accept that both actions arise from the same series of occurrences, being the stabbing and the alleged medical negligence, as stated above rule 6.01(1) confers discretion on the court as to whether or not to order consolidation. There is no claim against Botelho for damages arising from the stabbing and the damages claimed as against Dr. Fine for medical negligence could not be recovered from Botelho. As the only damages issue at trial will be what damages flow from any medical negligence on the part of Dr. Fine, and that issue may be resolved solely in the *Sommerville* action, this is an appropriate case for the court to exercise its discretion not to order consolidation.

[20] For these reasons, Dr. Fine's motion to consolidate the actions is dismissed.

[21] At the hearing, counsel for Sommerville also sought an order under rule 2.1.01 (1) that the *Fine v. Botelho* action be stayed or dismissed on the basis that it is frivolous or vexatious or otherwise an abuse of process of the court. As stated at the hearing, I decline to make such an order. First, Sommerville has no standing to seek that order in an action in which he is not a party. Second, there is no motion before the court for a stay or dismissal of the *Fine* action. Third, the only notice to Dr. Fine that such an order would be sought was in the last paragraph of Sommerville's factum. Service of the factum was not effective until September 30, 2015, only three business days before the motion was argued, which is insufficient notice.

Costs

[22] Following the hearing of the motion, counsel provided costs outlines and made submissions. They agreed that the costs of the motion should be awarded to the successful party, which means that the plaintiff Sommerville should recover his costs. Sommerville has submitted a costs outline seeking partial indemnity costs of \$6,319.00. By contrast, Dr. Fine's costs outline sets out costs of \$4,277.00. The hours spent are similar and the difference is largely attributable to the higher hourly rate of counsel for Sommerville, whose year of call is not indicated but who informed the court that he has been practicing for 13 years. Taking into account Dr. Fine's costs outline, which provides some guidance as to what he would consider reasonable costs, and Sommerville's counsel's additional years of experience, I assess the costs payable by Dr. Fine to Sommerville at \$5,000.00 inclusive of disbursements. These costs shall be payable within 30 days.

MASTER GRAHAM

DATE: October 13, 2015