BIFURCATION IN ESTATE LITIGATION

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September 10, 2024

Overview

Bifurcation is a tool that has been available to litigators for decades, pursuant to the inherent jurisdiction of the court, with case law (and in some cases, statute) prescribing the factors to be considered by the court when evaluating the potential bifurcation of a hearing.[1]

Bifurcation has been most often seen in personal injury, intellectual property and family law proceedings. For personal injury and intellectual property cases, the calculation and assessment of damages is substantial and requires expert evidence. If there is no liability, there is no need to assess damages.

In intellectual property cases, liability can be severed from damages. A determination of liability will analyse, *inter alia*, whether there was infringement by the defendant, whether the plaintiff is entitled to declaratory or injunctive relief, and whether there should be an accounting of profits. In contrast, a determination of the quantum to which the plaintiff is entitled will analyze various financial issues, including profits by the defendant, losses to the plaintiff, and the extent of infringement. Liability analysis is clearly severable from quantification analysis. In fact, the Federal Court has a Model Order that specifically address bifurcation.[2]

Similarly, in personal injury cases, liability of one or more defendants can be severed from an analysis of damages, which requires extensive disclosure and complex calculations. Bifurcation is frequently requested in personal injury matters, as discussed in specific cases below.

In family law cases, various issues can be severed and heard first. One example is where spouses having signed a domestic agreement that releases all entitlement to support. One spouse may seek a declaration that the agreement is of no force and effect, thus potentially opening the door to spousal support. In that situation, bifurcation would result in a more cost effective, focused, and efficient process because the parties could first address the validity of the agreement, while postponing a determination of the residual issues that might be rendered academic. The Family Law Rules specifically provide for bifurcation in Rule 12(5)[3], similar to new Rule 6.1.01.

Bifurcation in civil proceedings

In 2010, bifurcation was codified in the *Rules of Civil Procedure*, by adding rule 6.1.01, which states:

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[1] Justice Coulter A. Osborne, Civil Justice Reform Project: Summary of Findings and Recommendations (Toronto: Ministry of the Attorney General, 2007), at page 99, and *Bourne v. Saunby*, 1998 CanLII 1394 (ON CA) (1993).
[2] See Model Orders at: https://www.fct-cf.gc.ca/en/pages/law-and-practice/notices
[3] O. Reg. 114/99: Family Law Rules.

> 6.1.01 With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

This amendment legislated the availability of bifurcation in civil proceedings, but maintained a requirement that all parties consent to the proposed bifurcation.

Prior to the rule change, "the authority to order a bifurcated proceeding [was] a narrowly circumscribed power" and was only be used in the clearest of cases.[4]

However, on July 1, 2024, an amendment to rule 6.1.01 came into effect, which permits the court to order a bifurcation on a motion without the consent of other parties, or at a case conference with consent of parties. The new rule is more expansive and codifies the considerations established by case law, with a focus on balancing the economy and equity of separate hearings.

The new rule reads as follows:

> **6.1.01** (1) The court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages,
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> a) on a party's motion, with or without the consent of the other parties; or
> b) at a conference under Rule 50, with the consent of the parties.
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> (2) In determining whether to order a separate hearing, the court shall consider,
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> a) whether ordering a separate hearing will dispose of some or all of the issues, shorten or simplify the rest of the proceeding or result in a substantial saving of costs;
> b) whether the issues are clearly severable and can be heard separately without unduly repeating evidence or risking inconsistent findings of fact;
> c) whether ordering a separate hearing would unduly prejudice or advantage a party, including the impact on any counterclaim, crossclaim or third or subsequent party claim or, in cases where a jury notice has been delivered, on a party's election to have the action heard by a jury;
> d) the impact of ordering a separate hearing at the applicable stage in the proceeding; and
> e) any other relevant matter. O. Reg. 175/24, s. 1.

Notwithstanding the consent of the parties to the bifurcation, the rule is merely permissible, leaving the court as the ultimate adjudicator as to whether bifurcation is appropriate in the circumstances.

As of the date of this paper, there appear to be only two reported decisions applying the new rule, both of which rely heavily on the various considerations set out in case law under old rule 6.1.

The case of *Wynn v. Wynn*[5], a family law proceeding, was the first reported case under the new rule. The respondent husband brought a motion to bifurcate the application, which was opposed by the applicant.

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[4] *Wang v. Byford-Harvey*, 2012 ONSC 3030 (CanLII) at para. 23.
[5] *Wynn v. Wynn*, 2024 ONSC 4624 (CanLII) (*"**Wynn**"*).

Justice Sharma stated that the new rule 6.1.01 factors were not dissimilar from those set out in *Simioni v. Simioni*, 2009 CanLII 934 (ONSC), namely:

a. The power to bifurcate a proceeding ought to be exercised if it is convenient and would be in the interests of justice. The interests of justice will be served if there are clear time and expense benefits to be gained from bifurcation and the determination of threshold issues, provided no real or meaningful prejudice is caused to either party (para. 15).
b. The court should also give consideration to the fundamental principle that a multiplicity of proceedings is to be avoided. As a result, the onus lies with the moving party to establish that bifurcation will result in the "just, expeditious and least expensive determination of the proceedings on its merits" (para. 16).
c. When considering whether to bifurcate, the court should consider (para. 17):
    i. Whether the issues for the first trial are relatively straightforward and the extent to which the issues proposed by the first trial are interwoven with those that will arise in the second.
    ii. Whether a decision from the first trial will likely put an end to the action, significantly narrow remaining issues, or significantly increase the likelihood of settlement.
    iii. The extent to which resources have already been devoted to all issues.
    iv. The possibility of delay.
    v. The advantages or prejudice the parties are likely to experience.
    vi. Whether the severance is sought on consent.[6]

Justice Sharma ordered that the application be severed into three separate trials to be heard in the following order: 1) a determination under s. 4(1) of the *Family Law Act* as to what property was to be included in the net family property of the respondent and what was excluded, 2) a determination of whether the marriage contract should be set aside, and 3) a valuation of the parties' property interests within their net family property, the quantum of equalization payments, the spousal support claims, and any residual claims.[7]

Rule 6.1.01 factors to be considered

(a) Disposing of some or all of the issues, shortening or simplifying the rest of the proceeding or resulting in a substantial saving of costs

Courts will be inclined to grant bifurcation if the issues are easily severable, if the issue to proceed first is straightforward, if it can be made ready for trial quickly, and if minimal production and discovery will be required.[8] As well, bifurcation may be granted where it could increase the chance of settlement, thereby reducing costs.[9] It will be up to the moving party to establish that these goals can be achieved.

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[6] *Wynn*, at para. 35, citing *Simioni v. Simioni*, 2009 CanLII 934 (ONSC) at paras. 15-17.
[7] *Wynn* at para. 73.
[8] *Woodbury v. Woodbury*, 2013 ONSC 7736 (CanLII) ("***Woodbury***") at para. 18.
[9] *Cohen v. Cohen*, 2019 ONSC 4456 (CanLII) ("***Cohen***") at para. 52 and *Wynn* at para. 42.

In personal injury matters, the damages aspect of claims can be complex and require significant production and expert evidence. All of these come with increased cost to the parties. Bifurcation will often eliminate, or at least delay the need for medical evidence and expert reports, as well as the complex calculation of future needs, until the threshold issue of liability has been met. Where a finding on a liability issue would result in a much less complicated and expedited damages assessment, even where it does not dispose of remaining issues, bifurcation will likely be granted.[10] However, where there is no clear evidence that a bifurcation will shorten or simplify the hearing, or increase the likelihood of settlement, bifurcation will be refused.

In *LaPointe v. Simcoe Muskoka Catholic District School Board*[11], the second of the two published cases under the new rule, the plaintiff sought damages from injuries suffered from a school softball tournament. The defendant brought a motion for separate hearings of liability and damages, with the liability issue to be heard first.

The parties agreed that if the trial were bifurcated, the liability portion would use 5 of the 15 days allocated to the trial. Justice Healey found that there was no evidence from the defendant that a separate hearing would dispose of some or all of the issues, shorten or simplify the proceeding, or result in a substantial cost savings.[12] Rather the trial was expected to take 5 days for liability and 10 for damages, regardless of bifurcation.[13] There was also no evidence to suggest that settlement was more likely if liability were determined first.[14] On this basis, and on others discussed below, the motion was dismissed.

(b) Issues are clearly severable and can be heard separately without unduly repeating evidence or risking inconsistent findings of fact

As discussed above, in cases involving questions of both liability and damages, the evidence and analysis required for the determination of each issue may be completely severable. A party may acknowledge liability but challenge quantum of damages, and vice versa. In other cases, where liability of the defendant is not established by the plaintiff, a determination of damages may not be required at all. These are the cases that will be most easily bifurcated.

If a moving party can establish that different witnesses and documents are required for each issue, this will weigh heavily in favour of bifurcation.[15] In *LaPointe*, the parties were not aligned on the standard of care required of the defendant, an issue that could not be assessed in a vacuum. The evidence and expert opinions needed to determine the standard of care were also relevant to the issue of causation and injury suffered.[16] As mentioned above, Justice Healy dismissed the motion.

Sometimes witness and documentary evidence duplication is inevitable. That does not necessarily render a bifurcation motion fatal. The issue is whether bifurcation can occur "without *unduly*

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[10] *Woodbury* at para. 23.
[11] *LaPointe v. Simcoe Muskoka Catholic District School Board*, 2024 ONSC 4040 (CanLII) ("***LaPointe***").
[12] *Lapointe* at para. 53.
[13] *Lapointe* at paras. 49-50.
[14] *Lapointe* at para. 52.
[15] *Woodbury* at para. 16-18.
[16] *Lapointe* at paras. 55-60.

repeating evidence."[17] Further, in many cases, the court can implement procedures to prevent duplication of evidence. Procedural orders, including directing that the same judge hear both trials and/or directing that the evidence from one trial be used for the other, can be made at the time of bifurcation.[18]

However, if the issues are not easily severable, securing a bifurcation order will be an uphill battle.

(c) Prejudice or Unfair Advantage

Parties must address prejudice and unfair advantage in their materials and explain why this would or would not occur if bifurcation were granted. If the moving party can establish that there would be time and financial benefit to bifurcation, the burden shifts to the opposing party to demonstrate that prejudice or unfair advantage outweighs those benefits.[19] The prejudice or unfair advantage must be real and demonstrable, not speculative or hypothetical.[20] For example, the opposing party may need to present evidence that full production and examinations have been conducted, and/or expert reports obtained addressing all issues.

There may also be differences between jury and non-jury trials, which impact on the prejudice to the parties. In *Lapointe*, Justice Healey was troubled by splitting a jury trial, stating that bifurcation a jury trial would run contrary to the long-entrenched principle that a litigant has the right to elect to have their case heard by a single trier of fact from start to finish.[21] He also commented that juries could not be held over from one trial sitting to another, so it would not be feasible to have the two issues tried by the same jury.[22] With the overlap in witnesses and in evidence required for each trial, there could be inconsistent findings with two juries.[23]

(d) Impact of ordering a separate hearing at the particular stage in the proceeding

Bifurcation makes the most sense early on in a proceeding. If the parties have already exchanged productions on all issues, completed discoveries, engaged experts and delivered reports, and are ready to set the matter down for trial, bifurcation will likely serve little purpose, and the objectives of the bifurcation test will not be met.[24]

The significance of timing and proceeding stage in a bifurcation motion was highlighted in *LaPointe*, one of the two reported decisions under the new rule. As mentioned above, at the time of the defendant's motion, the matter was already scheduled for a 15-day jury trial.[25] Several

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[17] *Wynn* at para. 55.
[18] *Cohen* at para. 38 and *Wynn* at para. 56.
[19] *Cohen* at para. 24 and and *Wynn* at para. 62.
[20] *Wynn* at para. 63-67.
[21] *Lapointe* at para. 70. The case has some interesting commentary at paras. 30-31 on the new rule vis-à-vis the common law prior to its enactment, and suggests that there is a possible conflict with subsection 108(1) of the *CJA*, which provides that a litigant has the inherent right to have issues of fact or of mixed fact and law decided by a jury. This could be interpreted to mean that a party could require that all substantive issues be tried by a single jury.
[22] *Lapointe* at para. 74.
[23] *Lapointe* at para. 75.
[24] *Wynn* at para. 43.
[25] *Lapointe* at para. 8.

expert reports had been served and a witness schedule had been proposed.[26] Notably, the defendant did not counter the plaintiff's evidence that it had already begun trial preparation.[27] The defendant did not meet the test and bifurcation was refused.

As they say, timing is everything: if you believe your case is appropriate for bifurcation, move for it as early as possible.

Application of Bifurcation to Estates

Many estate-related proceedings involve multiple issues, including challenges to one or more Wills, challenges to *inter vivos* transfers, attorney accountings and estate accountings. Certain issues may be threshold issues. In cases where timelines are extended for various events, thus requiring different documentary and witness evidence, bifurcation may be appropriate to determine the threshold issue(s) first.

In other estate cases, where various impugned events have occurred within a short time frame, evidence and analysis of capacity, undue influence and financial abuse will necessarily be interwoven and not severable. For example, where an *inter vivos* transfer for nil consideration occurred at the same time as a significant amendment of an individual's Will, the medical records and other evidence will be relevant for both events and will likely be limited to a specific time frame. Similarly, a determination that the deceased was incapable of managing finances will not only result in the voiding of the transfer but will significantly impact on the analysis of whether the deceased's Will should be set aside. In these cases, bifurcation may not be appropriate.

While the application of the bifurcation provisions may be available in many types of estate matters, two are highlighted: Will challenges and dependant support applications.

Will Challenges

Consider the case of a Will signed 10 years before death, which completely disinherits a child. The child could bring an application challenging the validity of that Will, but could also seek to set aside an *inter vivos* transfer that occurred shortly before the deceased's death.

[26] *Lapointe* at paras. 9-10 and 12.
[27] *Lapointe* at para. 78.

The question arises as to whether the applicant has standing to challenge the transfer, when the issue of the Will's validity has not yet been determined. If the applicant is successful in setting aside the Will, thereby establishing an interest in the residue of the estate, then the applicant will also have standing to challenge the *inter vivos* transfer. However, if the Will challenge fails, the applicant will have no financial interest in the estate and will have no right to challenge the *inter vivos* transfer.

If the disinherited party also requests an estate accounting from the named estate trustee within the Will challenge application, the Will challenge again becomes a threshold issue. If the Will is upheld, the applicant will have no right to any form of accounting from the estate trustee.

Dependent Support Applications

Another potential application of the new rule is within dependant support applications.

Generally, there are three main questions to be determined in a dependant support application:

1. Was the applicant a dependant of the deceased within the meaning of section 57 of the *Succession Law Reform Act*?[28]
2. Did the deceased make adequate provision for the applicant?
3. If the answer to #2 is no, what provision should be made from the estate for the proper support of the applicant?

Question 1 is often viewed as a threshold question, similar to the issue of legal entitlement versus quantum of support seen in family law support matters. If the claimant cannot establish that he or she was the spouse, parent, child, brother or sister of the deceased, the first part of the test under section 57(1)[29] cannot be met and there is no entitlement to support.

In some cases, complexity arises. For example, a "spouse" under s. 57(1) can include a common law spouse, or even a romantic partner who did not reside with the deceased. The question will be whether the applicant and the deceased were in a conjugal relationship of some permanence. The evidence needed to determine this issue will relate to the nature and length of the relationship, often provided by neutral third-party witnesses.

There are also cases in which the claimant may seek to prove that the deceased demonstrated a "settled intention to treat [the claimant] as a child"[30]. This question may require significant evidence, but the evidence is limited to pre-death facts to establish the relationship between the claimant and the deceased, again most often proved by evidence from neutral third parties.

The issues in the above-referenced scenarios are clearly severable from other questions that must be adjudicated in a dependant support claim analysis.

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[28] *Succession Law Reform Act*, RSO 1990, c S.26
[29] *Succession Law Reform Act*, at s. 57(1).
[30] *Succession Law Reform Act*, at s. 57(1).

Even where a claimant can establish that he or she falls into the categories of relationship recognized under the *SLRA*, the second part of legal entitlement to support requires evidence that the deceased was either providing support immediately before death, or was under a legal obligation to provide support.[31] Evidence will be limited to pre-death financial circumstances and transactions, and post-death financial circumstances and transactions will not be relevant.

More significantly, none of the above mentioned scenarios require a needs and means analysis for the claimant, which analysis often requires evidence from voluminous medical and financial records, with opinions as to future needs and means of the claimant set out in a costly expert report and expert examination.

Another discreet issue that could be bifurcated is where a deceased parent had a pattern of giving funds to an adult child. The court will need to determine whether the funds were gifts or whether they constituted support. It may be beneficial to sever this threshold issue, in that only pre-death financial circumstances and transactions, and evidence as to the relationship, will be considered.

The above scenarios may benefit from a bifurcation of the issues, with an early and discreet determination of legal entitlement to support. Evidence will be less voluminous, examinations shorter and abbreviated hearings on the written record may be appropriate. Only when the threshold question is determined will the balance of issues be considered, thus saving on cost and time.

Obviously, there will be situations where both pre-death and post-death circumstances will need to be considered by the court and it may be more efficient to have all factual evidence and legal analyses available to the court. In these cases, bifurcation may not be appropriate.

Conclusion

Given the expanded availability of bifurcation, it is likely that courts will begin to see more requests for this relief, as well as requests for bifurcation in other areas of law, including estate litigation. Estate litigation can often take years and significant financial investments by the clients before matters are determined. It is important to recognize this new tool and apply it in appropriate cases, to ensure that time, effort, and money are not wasted.

[31] *Succession Law Reform Act*, at s. 57(1)