

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Adams v. Fillion*,  
2023 BCSC 357

Date: 20230310  
Docket: M180934  
Registry: Victoria

2023 BCSC 357 (CanLII)

Between:

**Rebeca Adams**

Plaintiff

And:

**Claude Fillion and Suzanne Fillion**

Defendants

And:

**Dr. Navraj Heran, Medtronic Canada ULC, Micro Therapeutics Inc.,  
Fraser Health Authority, John Doe and Jane Doe**

Third Parties

Before: The Honourable Justice Young

**Reasons for Judgment**

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Counsel for the Plaintiff:	M. D. Selly and K. Bergsson
Counsel for Defendants:	J. Corbett
Counsel for the Third Party Dr. Navraj Heran:	D. W. Pilley
Counsel for the Third Party Medtronic Canada ULC and Micro Therapeutics Inc.:	M. McGreevey
Counsel for the Third Party Fraser Health Authority:	A. Wickett
Place and Dates of Hearing:	Victoria, B.C. February 28 and March 2, 2023
Place and Date of Judgment:	Victoria, B.C. March 10, 2023

**The Application**

[1] The plaintiff sustained injuries in a motor vehicle accident on October 26, 2016 and 7 weeks after the accident she endured a brain hemorrhaging event that ultimately required surgery performed by the third party Dr. Heran in a hospital operated by the third party Fraser Health Authority with the device manufactured by the third parties Medtronic Canada ULC and Micro Therapeutics Inc. During the surgery there were several complications that led the plaintiff to suffer from strokes that resulted in severe neurological deficits and disabilities. The complex issue in this case is whether the initial hemorrhage was caused by the collision. The Fillion defendants seek to have the causation issue determined by way of a summary trial.

[2] The plaintiff seeks a declaration pursuant to Supreme Court Civil Rule 9-7(11) that a Rule 9-7 summary trial is not a suitable modality for determining whether the motor vehicle collision of October 26, 2016 caused the rupture of the plaintiff's intracranial arteriovenous malformation ("AVM") on December 16, 2016.

[3] The plaintiff further seeks the adjournment of the Rule 9-7 summary trial sought by the defendants' notice of application filed February 9, 2023.

[4] This application is opposed by the defendants and the third parties.

**Applicable law**

[5] Rule 9-7(11) states:

- (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
  - (a) adjourn the summary trial application, or
  - (b) dismiss the summary trial application on the ground that
    - (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
    - (ii) the summary trial application will not assist the efficient resolution of the proceeding.

[6] I will review the authorities relied on by the plaintiff and defendants on the suitability of a summary trial.

[7] The factors relevant to determining whether matter is suitable for a summary trial are set out in *Inspiration Management Ltd. V. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) [*Inspiration Management*] and *Gichuru v. Pallai*, 2013 BCCA 60 [*Gichuru*].

[8] In *Inspiration Management* the British Columbia Court of Appeal said at para. 48 that in deciding whether it would be unjust to give judgment, the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency and any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question. *Inspiration Management* involved a commercial dispute.

[9] In *Gichuru* the chambers judge dismissed the claim in a summary trial in a defamation case because there was no evidence that the alleged defamatory statement had been published by the respondent. On appeal Mr. Gichuru argued the claim was unsuitable for a summary trial. The Court of Appeal said that the decision as to suitability of a summary trial to determine an action or issue is discretionary. The plaintiff bears the onus of proving their claim even if they are not the party bringing the summary trial application. In *Gichuru* there was a discrete threshold issue to be determined that did not involve any issues of credibility, complexity or conflicting evidence. The court held that a summary trial was suitable to resolve this discrete issue.

[10] In *Eisler v. GWR Resources Inc.*, 2018 BCSC 162, Justice G. P. Weatherill considered Rule 9-7(11) at paras. 56 and 57. He noted that a key element of a Rule 9-7(11) application recognizes that some matters are simply not appropriate for summary determination on affidavits and in such cases it would be a waste of time and resources to require a party to prepare material on the merits of a proposed summary trial when it is clear that the dispute cannot be resolved summarily.

[11] Justice Weatherill found the case was not suitable for a summary trial because of the complexity of the factual matrix; the significant amount of damages

that would be involved; the fact that there was no urgency and the fact that credibility issues were central to resolving the dispute. He also found that there would be little savings in cost or time given that extensive cross-examination on affidavits would be required. He was concerned that the summary trial would add a layer of time, work and expense and would not likely resolve the issues between the parties no matter what the outcome. It would result in litigating in slices which brings with it an inherent risk of inconsistent findings by two judges in two different forums.

[12] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, Justice Griffin (as she then was) determined that the matter was not appropriate for a summary trial on the basis that she could not find the necessary facts and was persuaded that it would be unjust to decide the issue sought summarily. She was concerned about making findings of fact in a legal vacuum unconnected to the other outstanding issues. She found it to be unjust from two perspectives: first there was a strong possibility that any present findings could have unintended consequences on the other outstanding issues and second there was a strong possibility that the hearing of the other outstanding issues could have an important influence on the determination of the present issue.

[13] In *Prevost v. Vetter*, 2002 BCCA 202, dealing with the issue of host liability, the summary trial judge found that the host owed a duty of care to the young person who left her home in an intoxicated state. The plaintiff denied this and denied that she was contributorily negligent. At para. 8 the Court of Appeal found it was impossible for the summary trial judge to determine the existence of a duty of care, the appropriate standard of care and whether there had been a breach of the standard of care without also determining facts that the plaintiff must establish in order to succeed on the issue of causation. There was a risk in trying the issues of duty of care and breach separately because the summary trial judge made findings of fact that could be embarrassing to the subsequent trial judge who would be asked by the appellants to make contrary findings on the basis of full evidence.

[14] *Bell v. Levy*, 2011 BCCA 417, involved the enforceability of a settlement agreement. The Court of Appeal allowed the appeal of a summary judgment on the basis that there were substantial conflicts in the evidence. The trial judge found that a central issue was whether there had been economic duress and that there were no significant issues of creditability related to the central issue in dispute. He concluded that he did not have to deal with conflicts of representation between the two sides. The Court of Appeal found this was an error as it ignored relevant material evidence tendered on the central issue of the defence of duress. The evidence of duress had to be considered within the broad context of findings as to the existing nature and effect of the alleged threats. The court noted at para. 67 that in the rush for expediency the court must not overlook the central goal of arriving at a just result. A just result is one that fairly addresses each party's claim and response to that claim.

[15] In *Western Delta Lands Partnership v. 3557537 Canada Inc.*, 2000 BCSC 54, the trial judge allowed a summary trial to proceed on a breach of partnership agreement claim. At para. 24 the court said that a motion to dismiss a summary trial as being unsuitable is likely to fail unless the following circumstances apply:

- (a) the litigation is extensive and the summary trial itself will take considerable time;
- (b) the unsuitability of a summary determination of the issues is relatively obvious; e.g., where credibility is a crucial issue;
- (c) it is clear that a summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity; or
- (d) the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial

[16] *Opetchesat v. Canada*, unreported, (February 1, 1993), Victoria 92/0911, (B.C.S.C.) found that the fact that the declaration sought will not dispose of the whole of the case is not a bar to a summary trial on an issue.

[17] In *Stewart (District) v. Stewart Harbour Authority*, 2004 BCSC 8 at paras. 5-11, the court considered the suitability of an application for summary judgment on an issue and not the full claim. The court was satisfied that a summary determination of the issue was possible, and that such would advance the litigation. The court found that a decision would also increase the prospects of settlement even if the court was unable to dispose of the entirety of the litigation.

**Plaintiff's submission on the application of the facts**

[18] The plaintiff submits that her evidence of the symptoms she experienced after the motor vehicle accident is crucial to a determination of causation. The plaintiff was well prior to the accident. After the accident she suffered from headaches continuously. The plaintiff was unaware that she had an AVM. An AVM is a congenital defect. It is a cluster of blood vessels that have high blood flow and fragile dilated vessel walls.

[19] The plaintiff's expert Dr. Rathbone says that the risk of hemorrhaging from a cerebral AVM is approximately 3% but that risk increases based on several clinical and anatomical features. AVM's are vulnerable to the shear stressors experienced in a motor vehicle accident and to an increase in blood pressure. The shearing forces of a motor vehicle accident can stretch and weaken the blood vessel walls making a plaintiff more susceptible to hemorrhaging.

[20] In Dr. Rathbone's opinion it is likely that the plaintiff suffered a mild traumatic brain injury from the accident. Mild traumatic brain injuries have been found to be more prevalent in women, in young drivers and those wearing seatbelts. The plaintiff meets all three criteria. The airbag in the plaintiff's vehicle deployed so the forces in the accident were significant enough to cause a shearing force in the brain.

[21] The expert for the defendants Dr. Honey is of the opinion that the mild traumatic brain injury did not cause the rupture of the AVM and that there was no literature ever observing such a clause.

[22] The defendants' expert relies very heavily on the clinical records. The clinical records do not report symptoms of headache on a regular basis and so the defendants' expert has concluded that the plaintiff was not suffering headaches. The plaintiff gave evidence under examination for discovery that she suffered headaches every day and that they never went away. The headaches got dramatically worse immediately before the hemorrhage.

[23] The defendants say that the plaintiff's evidence in examination for discovery was that she had suffered constant headache symptoms in between the car accident and the rupture. These were mainly in the back of her head, but sometimes radiated to her jaw area and to the top of her head. She rated the severity of the headaches between the car accident and the rupture as varying between 2 out of 10 at best and 7 out of 10 at worst. Aggravating factors included loud noises, neck pain, shoulder pain and strenuous activities. At the time of the December 16, 2016 incident she suddenly experienced "a huge headache" and fell to the ground. The headache was in the back of her head and it was the "worst pain [she] had ever felt". She had never before experienced pain of that intensity.

[24] The plaintiff asserts that her credibility is a critical factor in determining what her post-accident symptoms were especially where there is an absence of evidence in the clinical records. The court will need to hear from her and from all of the medical experts before making the determination of causation.

[25] The defendants submit that causation is a very distinct issue and if determined could result in significant savings in trial preparation to the parties and the third parties. They submit there is no head-on issue of credibility and that the competing experts can be cross-examined effectively in a summary trial proceeding. The defendants say the court can resolve this issue and can do so without needing to address the plaintiff's credibility. The defendants submit that none of the facts relied on by Dr. Honey are controversial with perhaps one exception. Dr. Honey notes the plaintiff's headaches occurred every 2 to 3 days whereas notes taken from

the massage therapist on November 16, 2016 report that the plaintiff said that her headaches were constant from the date of the accident.

### **Analysis**

[26] Relying on the factors set out in *Inspiration Management* and the other cases cited above, I will evaluate whether a summary trial is suitable.

#### **The amount involved**

[27] The amount involved in this claim is high for a personal injury claim. The strokes the plaintiff suffered after the hemorrhage had a catastrophic effect on her life. She is a young woman who is no longer able to work since the strokes.

[28] If the court finds that the motor vehicle accident did not cause the AVM rupture then the claim against the defendants will be substantially less. There is an advantage to the defendants in running a summary trial first on the issue causation. If they are successful they will not have to proceed with the third party claims and there could be significant savings to the defendants.

#### **The complexity of the matter**

[29] I find the causation issue to be complex. It requires an assessment of the plaintiff's credibility and of the competing opinions of two experts who will be extensively cross-examined. The defendants say the issue is not factually complicated and relies on their examination for discovery evidence of the plaintiff. The plaintiff will have more extensive evidence to deliver at trial. The court will have to assess whether the plaintiff's evidence is credible when compared to the entries made by clinical practitioners. This assessment is better made after hearing *viva voce* evidence. I find it unjust to the plaintiff to restrict her testimony to affidavit evidence and discovery testimony.

**Urgency**

[30] The parties agree there is no particular urgency in deciding the matter summarily. Prejudice does not arise from the passage of time but rather from the cost of preparing for a full trial.

**Cost of a conventional trial**

[31] I agree with the plaintiff that there is unlikely to be significant cost savings by proceeding to a summary trial to resolve only some of the issues. The summary trial will likely take a week. The trial is set for four weeks. Time will only be saved if the defendants succeed in their position however, even if they do, much of the evidence relied on in the summary trial will need to be repeated at trial.

[32] Cross-examination of Dr. Honey, the defendants' neurologist and the plaintiff's neurologist, Dr. Rathbone will be required both at the summary trial and at the trial requiring both experts to provide evidence on two occasions.

[33] No matter what the outcome of the summary trial, all of the issues between the parties will not be resolved. This leads to an inherent risk of inconsistent findings between two judges in two different forums.

[34] The plaintiff's evidence regarding her headaches will need to be considered both in the summary trial and at the main trial because even if the causation issue is resolved in the defendants' favour, the plaintiff submits that she has suffered a mild traumatic brain injury (MTBI) from the motor vehicle accident. The assessment of the quantum of damages will be complicated by the effects of the strokes and of the MTBI. The plaintiff's loss of earning capacity, loss of housekeeping and cost of future care will all need to be considered to the extent of her disability due to the motor vehicle accident. If the accident is not found to be the cause of the hemorrhage then the symptoms of the hemorrhage will have to be separated out from the symptoms of the MTBI. This means the judge will have to hear all of the evidence and determine what portion is related to the motor vehicle accident.

[35] If the defendants were to succeed at a summary trial on causation, the plaintiff would appeal. It is possible that the reverse is also true. Appeals on one issue will cause further delay and further expense. It would be better to have all issues determined at once so that there is only one appeal stream.

**Whether credibility is a factor**

[36] As I alluded to earlier, I am of the view that the credibility of the plaintiff is a central issue in the determination of causation. The defendants' expert Dr. Honey relies heavily on the evidence of headaches the plaintiff experienced between the motor vehicle accident and the initial hemorrhage, when they started, how they occurred, their severity and extent to which the plaintiff reported them to others. A determination on these issues does depend on an assessment of the plaintiff's credibility especially where her evidence may differ from the evidence recorded in clinical records. Dr. Honey's opinion is that intermittent headaches do not fit with the expected constant headaches associated with an AVM. The plaintiff's evidence on discovery on more than one occasion was that the headaches she experienced prior to the initial hemorrhage were constant, not intermittent. This is a conflict in the evidence.

[37] A judge will consider her evidence and whether she was asymptomatic before the accident and suffered continuing headaches from the day of the accident to the day of the rupture. The judge will have to consider whether it was more likely than not that the AVM was affected by the shearing force of the motor vehicle accident and over time led to a rupture or whether this was a spontaneous event unrelated to the motor vehicle accident.

[38] I find it would be unfair to restrict the plaintiff's evidence to an affidavit to consider such a significant aspect of her claim.

[39] I am also concerned about the prospect of litigating in slices. A trial judge is going to hear all the evidence of the plaintiff's injuries. The symptoms of an MTBI and of a stroke are interwoven. Within the MTBI the plaintiff may have suffered subtle cognitive effects that will be difficult to assess given the subsequent

hemorrhage. The defendants' expert does not think the plaintiff suffered an MTBI and would still have to be cross-examined on this issue even if the defendants were successful at the summary trial.

[40] There is a risk that the results of a summary trial and trial itself may differ.

[41] Causation is not a discrete issue that the judge can separate out. I agree with the plaintiff it will involve a complicated array of symptoms and factors following the motor vehicle accident.

[42] I declare that a summary trial is not suitable for determining whether the motor vehicle collision of October 26, 2016 caused the rupture of the plaintiffs intracranial AVM on December 16, 2016.

[43] I order an adjournment of the Rule 9-7 summary trial sought in the defendant Fillion's notice of application filed February 9, 2023.

[44] I order that the defendants pay costs of this application in the cause.

"B. M. Young, J."  
The Honourable Madam Justice Young