

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lam v. University of British Columbia*,  
2014 BCSC 673

Date: 20140417  
Docket: S035269  
Registry: Vancouver

Between:

**Howard Lam**

Plaintiff

And

**University of British Columbia**

Defendant

And

**Arpel Industries Ltd., carrying on business as Arpel Security Systems, Arpel Security Systems Ltd., Arpel Security and Monitoring Ltd., Enerand Holdings Ltd., carrying on business as Caltech Tech Services, Peter Moore, carrying on business as Moore Security Systems, Thermo Forma Inc., Vancouver Coastal Health Authority operating as Vancouver General Hospital and UBC Hospital, Mallinckrodt, Inc. and Sanyo Electric Co., Ltd.**

Third Parties

Before: The Honourable Mr. Justice Butler

## **Ruling on Third Party Participation in Common Issues Negligence Trial**

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Place and Date of Trial/Hearing:

Vancouver, B.C.  
March 10, 2014

Place and Date of Judgment:

Vancouver, B.C.  
April 17, 2014

[1] The University of British Columbia (“UBC”) applies to amend the certification order by certifying a sixth common issue dealing with causation. It also seeks an order that the third party claims be tried concurrently with the common negligence issues.

[2] I need not describe the background facts or the history of the proceedings in any detail as these are set out in a number of reported decisions. In *Lam v. University of British Columbia*, 2010 BCCA 325, the court certified the action as a class proceeding. The common issues certified included three negligence issues and two contract issues. The contract issues were threshold issues which were ordered to be considered in advance of the negligence issues. Following a summary trial application with an agreed, modified contract issue, I issued my decision in *Lam v. University of British Columbia*, 2013 BCSC 2094, which determined the contract issues in favour of the representative plaintiff.

[3] The next step in the litigation is to hear and determine the common negligence issues. The main question raised by UBC on this application is whether those issues should be heard separately from the issues raised in the third party proceedings between UBC and the third parties. For the reasons that follow, I have dismissed UBC’s application to amend the certification order to add an additional common issue regarding causation and determined that the third party issues should not be heard at the same time as the negligence issues.

**Application to Amend the Certification Order**

**Position of the Parties**

[4] Pursuant to subsection 8(3) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the “CPA”) the court may amend a certification order at any time. Given causation is an essential element of any negligence claim, UBC says the issue of causation must be a common issue for all class members. As the class members were not involved in any aspect of the installation, operation or maintenance of the freezer which stored the sperm, the question of causation should not involve individual class members but only a consideration of the activities of UBC and the

third parties. UBC says that a determination of causation as a common issue will advance the litigation in a fair and efficient manner. As causation must be addressed at some stage of the litigation, it will be practical and efficient to consider it at the same time as the other common negligence issues. In essence, UBC says causation was overlooked by the parties at the certification hearing and appeal when the common issues were determined and that there is no reason to leave out this essential element when determining the common negligence issues. It argues that the certification order should thus be amended to include causation as a common issue.

[5] The plaintiff argues that causation is not a common issue to all class members. This is because causation involves consideration of more than just the activities of UBC and the third parties. For example, the actions of UBC were not the cause of any loss to class members who were not rendered infertile by chemotherapy treatments or who decided not to have children. Causation would thus require consideration of individual issues. The plaintiff says he made a conscious, strategic decision not to include a common causation issue because of the individual issues that would have to be considered to determine causation. Further, the plaintiff chose not to name the third parties as defendants and says there is no need for those parties to be brought into the common negligence issues trial. If the activities of the third parties have to be examined, it would significantly lengthen and complicate the proceedings. If a causation issue was added at this late date, it would take the plaintiff out of the driver's seat in his own class action.

### **Analysis**

[6] In many class proceedings it may well be expedient to consider a causation issue at the same time that other common negligence issues are determined. As UBC properly notes, causation is an essential element of a negligence claim. However, that will always depend on the factual and legal issues which underlie the proceeding. If this proceeding could best be advanced by including a causation common issue with the other negligence issues, I would have thought the issue would have been raised relatively early on in the proceedings. It has now been more

than 13 years since the cause of action arose and 6 years since the certification application was brought.

[7] The plaintiff brought certain common issues to the court for certification based on his assessment of the questions of fact and law that underlie this proceeding. As the plaintiff argues, the proposed common issues did not include a causation issue for practical and strategic reasons. It is apparent that there are two kinds of causation questions which may need to be considered: those which may raise individual issues for some of the class members; and those which require consideration of the activities of UBC and the third parties. The plaintiff chose to leave consideration of those issues for later determination so as not to complicate and lengthen the common issues trial.

[8] In these circumstances, I am of the view that it would be inappropriate to “take the plaintiff out of the driver’s seat” by requiring him to add a causation common issue to the issues which are presently before the court. The defendant should have raised this issue at the time of certification or on appeal rather than at this late date. As the common issues are presently framed, there is no doubt the litigation will be advanced in a fair and efficient way. Further, it is not essential for the causation question to be considered at the same time as the other common negligence issues. The questions dealing with causation which the parties have highlighted will be considered either in the context of the third party proceedings or when the individual issues are considered.

[9] Before leaving this issue, I should note that UBC brings its application to add a causation common issue in part to support its application to have the third party issues tried concurrently with the common negligence issues. UBC’s submission focuses on the argument that the court will be asked to determine causation as between the acts and omissions of UBC and those of the third parties. UBC says that if the plaintiff proves it breached the standard of care, that conclusion is insufficient to establish causation and liability if the effective cause of the loss was an action of a third party which was unrelated to its own breach of the standard of

care. In other words, UBC is inviting the court, by way of the causation issue, to examine the actions of the third parties. Of course, this could not be done in the context of the common issues negligence trial if the third party claims are to be tried separately. I have already indicated that I am dismissing the application to have the third party issues determined at the same time as the common negligence issues. If I had arrived at a different decision on that issue, I would likely have arrived at a different decision on this application.

[10] However, I must acknowledge that the issue identified by UBC could arise. The plaintiff has created a potential problem for himself and the other class members by proceeding on the negligence issues without determining causation. It is possible there could be a finding in the common issues trial that UBC failed to meet the standard of care and a determination in the third party proceedings that the acts or omissions of one or some of the third parties were the effective cause of the freezer failure but that those acts or omissions were unrelated to UBC's breach of the standard of care owed to the plaintiff. If those findings are made, the class members may not be able to succeed with their claims against UBC because they will be unable to prove that UBC's negligence was the cause of their loss.

[11] The reason for this potential problem is that the plaintiff chose not to sue the third parties. The plaintiff was and is content to proceed solely against UBC. That is a strategic choice which should not be set aside based on UBC's desire to have the third parties present at the common issues trial. UBC's interest in having the causation issue determined and the plaintiff's choice to proceed solely against UBC can be accommodated by having the third party trial heard following a decision in the common negligence issues trial but before consideration of the damage issues. If the plaintiff chooses to do so, counsel could apply to have standing at the trial of the third party issues to protect the plaintiff's interest with regard to the causation issues raised by UBC.

**Application to have the Third Party Issues heard Concurrently with the Common Negligence Issues**

**Position of UBC**

[12] UBC says the third party issues should be tried at the same time as the common negligence issues for the purpose of practicality, efficiency, economy and trial fairness. The third party claims all relate to the failure of the freezer which gives rise to the common negligence issues. In other words, it says the factual and legal issues all involve or arise from the same incident. UBC's principal defence to the claims of the class members is that it did not breach the standard of care; it took all reasonable steps in relation to the manufacture, installation, operation, maintenance and monitoring of the freezer. UBC says that overlap between the common issues and the third party issues is inevitable given that the third parties were all involved in one or more aspects of those matters. It distinguishes cases where third party proceedings have been stayed because there were claims for indemnity, lack of oversight, or vicarious liability which could be heard separately. UBC says there is nothing peripheral about any of the third parties here. Quite simply, it says the third parties are all necessary parties at a trial of the negligence issues, whether those issues are common issues or third party issues.

[13] UBC highlights the efficiency which would be achieved by having the third party claims heard at the same time because some, or all of the evidence which must be considered at the trial of the third party claims, will have to be heard in the negligence common issues trial. At the same time, judicial economy would be served by ordering the third party claims to be tried concurrently with the common issues.

**Position of the Plaintiff**

[14] The plaintiff takes the position that the third party claims should be stayed or that the trial of the third party proceedings should not be heard at the same time as the trial of the common issues.

[15] The plaintiff's position on this application is founded on the same position advanced on the first application. The plaintiff chose to bring this proceeding against UBC based on particular allegations of negligence which centre on UBC's decision to use an electric freezer to store the sperm. The plaintiff says the principal allegations of negligence are unrelated in any way to the third parties. The common negligence issues trial will focus on UBC's decisions not to use cryogenic refrigeration but rather to store sperm in an electric freezer without a source of backup power. While the plaintiff has advanced further allegations of negligence against UBC, the majority of those allegations relate solely to decisions made by UBC without any input from or involvement of third parties. Given the way the class proceeding has been framed, it is clear that the allegations advanced against the third parties are not closely intertwined with the allegations of negligence that will be considered in the common issues trial. Accordingly, if the third party issues are heard at the same time as the common issues, the trial would be delayed and lengthened considerably at a significant cost to the class members.

#### **Position of the Third Parties**

[16] All of the third parties oppose UBC's application to have the third party proceedings tried with the common negligence issues. They note that the primary allegations of the plaintiff against UBC do not directly involve any of the third parties. Further, the liability issues in the third party proceedings all involve questions of either contractual liability between a third party and UBC, the standard of care owed by a third party to UBC, or particular allegations of negligence. These questions are all distinct from those raised by the common negligence issues. With these new issues and the six additional parties, the third parties say that if the third party claims are tried concurrently, the length and complexity of the trial would be dramatically increased. As a result, the third parties would be prejudiced by having to attend a trial which may be unnecessary if the plaintiff is unsuccessful in the common issues trial. Further, such a trial would be longer and more costly than a trial of the third party proceedings alone.



[17] The third parties also say the order should provide that any findings of fact made at the common negligence issues trial will not be binding on them.

**Analysis**

[18] The court has jurisdiction to make the order sought by UBC as provided in ss. 12 and 13 of the *CPA* which provide:

12 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

13 The court may at any time stay any proceeding related to the class proceeding on the terms the court considers appropriate.

[19] Outside of the class action context, the leading case in British Columbia on whether third party proceedings should be tried at the same time as the issues between plaintiffs and defendants is *Aylsworth v. Richardson Greenshields of Canada Ltd.* (1987), 20 B.C.L.R. (2d) 43 (S.C.). The decision was premised on a finding that the addition of the third party issues would lengthen the trial considerably. The court ordered that the third party issues be tried after the trial of the issues between the plaintiffs and the defendants in order to prevent delay and unnecessary prejudice to the plaintiffs in the prosecution of their claim. The court also ordered that the third parties would not be bound by the results of the trial so there would be no need for them to take part in that trial. The court concluded that the risk of inconsistent verdicts would be minimized by having the same judge preside at both the main trial and the trial of the third party issues.

[20] A similar result was reached in *Module Resources Inc. v. Sookochoff* (1997), 41 B.C.L.R. (3d) 319 (S.C.), where Leggatt J. applied *Aylsworth* and stated at para. 16:

If third party proceedings will lengthen the trial significantly, the plaintiff will suffer prejudice and delay. The appropriate terms to order pursuant to Rule 22(18) are that third party issues are to be tried separately and that the third parties would not be bound by the determination of issues between the plaintiffs and defendants...

[21] The current version of former Rule 22(18) is R. 3-5(14) which provides:

The court may impose terms on any third party procedure to limit or avoid any prejudice or unnecessary delay that might otherwise be suffered by a party as a result of that third party procedure.

[22] The questions of prejudice and unnecessary delay are of particular importance in class proceedings. As noted in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 15, class proceedings are intended to provide fair and expeditious access to justice because of the important advantages they offer to class members over individual suits. To the extent that a class action is unnecessarily delayed or prolonged, the underlying purpose of class proceedings may be frustrated.

[23] I agree that the trial of the common negligence issues would be prolonged considerably if the third party proceedings were tried concurrently. Various estimates as to the amount of time that might be added to the trial were given by counsel at the hearing of this application. It was suggested that the trial of the common negligence issues might be heard in ten days, while a combined trial would take six to ten weeks. While I cannot be particularly confident in the estimates given to me, my best estimate is that if the third party proceedings are tried concurrently with the common issues, it would add three or more weeks to the length of trial and would at least double the trial time. In addition to lengthening the trial, the commencement of the trial would undoubtedly be delayed to accommodate all of the pretrial procedures that would be required for the third party proceedings.

[24] It is also clear that an increase in the length of the trial and a delay in the commencement of it would cause prejudice to the class members. This action has proceeded extraordinarily slowly and the hearing of the common negligence issues trial should not be delayed any further. Of course, the order sought by UBC would also result in potential prejudice to the third parties. If UBC is successful in a common issues trial, there would be no need for a trial of the third party issues. Even if UBC is unsuccessful, the findings in the common issues trial may help to narrow the issues that need to be considered at the third party trial.

[25] It will be evident that my current views regarding the connection between the common negligence issues and the third party issues are different than those expressed in my initial ruling on certification. In that decision (which is indexed at 2009 BCSC 196), I commented at para. 60 on the close intertwining of the third party issues with the common negligence issues:

... It is difficult to see how the Negligence Issues could be heard, or what could be accomplished, without the third parties present. The question as to whether UBC breached the standard of care for a sperm storage facility operator is so closely intertwined with the issues raised between the third parties and UBC that this approach is unworkable.

[26] I am now persuaded that my earlier view is incorrect. The plaintiff's allegations of negligence against UBC are focused almost entirely on decisions which are alleged to have been made by UBC alone. This includes UBC's decision to store the sperm samples in an electric freezer rather than to use cryogenic refrigeration, which the plaintiff says is the only system which can meet the standard of care. Other important decisions alleged to have been made by UBC alone include: the failure to have a source of backup power available for the freezer; the decision to allow the freezer to fluctuate to temperatures below the minimum required for safe storage of sperm; and the failure to separate the sperm specimens into two or more freezers as a precautionary measure. The principal allegations are all based on acts or omissions of UBC which do not involve the third parties.

[27] As UBC argues, there are some allegations of negligence made against it which do involve its interaction with third parties. These are primarily allegations in relation to the alarm system. It may be that these allegations will require some witnesses from the third parties to give evidence at the common issues trial. Of course, that can be accommodated. However, I accept the plaintiff's submission that the allegations of negligence in relation to the alarm system are secondary to the principal allegations advanced by the plaintiff. The plaintiff says that an electric freezer system for storage of sperm which relied primarily on an alarm system to prevent damage to the sperm is inadequate. The fact that there may be some duplication of evidence on relatively minor issues is a consideration. However,

where the common issues and third party trials will be heard by the same judge, there is little risk of inconsistent findings. In short, I accept that the third party issues are intertwined with the allegations to be considered in the common negligence issues trial to a minor degree. This consideration is not sufficient to counterbalance the other considerations.

[28] As I have indicated above, the plaintiff's decision to limit the allegations of negligence and to bring the action only against UBC should not be lightly disregarded. A similar point was considered in *Rumley v. British Columbia*, 2001 SCC 69, where the Court at para. 30, specifically approved of the comment of Mackenzie J.A. in the Court of Appeal decision: class members "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so". The plaintiff chose to bring the class proceeding solely against UBC focusing on the acts and omissions of UBC alone. Given the limited degree of interconnection between the third party issues and the common negligence issues and the prejudice which would be suffered to both the plaintiff and the third parties, I dismiss UBC's application to have the trials heard concurrently.

[29] The remaining consideration is what terms should be ordered to avoid prejudice to any of the parties and to put in place a fair and efficient process for the resolution of the claims.

[30] While I have dismissed UBC's application to have the third party actions tried concurrently, I am of the view that I need not order a stay of the third party proceedings. No stay has been ordered to date which has permitted the parties to conduct discoveries and obtain discovery of documents. There is no need to stop those pre-trial proceedings at this stage. Indeed, they should continue so that the third party issues can be ready to proceed to trial in the event the plaintiff is successful in the common issues trial. The only order I need to make is that the trial of the third party proceedings take place after a decision has been rendered in the common issues trial. I also order that both trials shall be heard by the same judge.

Of course, I have been assigned to this matter and will continue to hear any applications as well as the trial of any issues.

[31] The next issue to be considered is whether the third parties will be bound by findings made in the common issues trial. Contrary to the submissions of UBC, the circumstances of this case are such that there is little risk that the efficacy of the class proceeding would be destroyed because of re-litigation of issues of fact in the third party proceedings.

[32] This question has been considered in a number of class proceedings. The decisions turn on the extent to which the third party claims are interconnected with the issues between the plaintiffs and defendants. In *Campbell v. Flexwatt Corp.*, [1996] B.C.J. No. 2052 (S.C.), the court determined that the third parties should be bound by the findings of fact which would be made in the common issues trial. This was not surprising given that the third parties were in a similar position in relation to the class members as the primary defendants. In other words, the ruling was necessary to bind both the plaintiffs and third parties to a decision that would be made in the common issues trial. That situation is very different from the present case where the class members have no claims against or interaction with the third parties.

[33] In *Cooper v. Hobart* (1999), 68 B.C.L.R. (3d) 293 (S.C.), Tysoe J. issued a stay of the third party claims at the time of certification of the class proceeding. In doing so, he distinguished *Campbell* because he was of the view that the common issues trial would not involve extensive investigation into the activities of the third parties. He concluded at para. 57:

I agree with the submission of counsel for Mr. Nairne that the decision of Hutchinson J. in *Campbell v. Flexwatt Corp.* to bind the third parties with the findings at the trial of the common issues is distinguishable from the present situation. First, it was the view of Hutchinson J. that the third parties had relied on the defendants with respect to the matter which was to be one of the common issues. It appears that these defendants had an identity of interest with the third parties on the common issues. There is not the same identity of interest between the Defendants and the Third Parties in the case at bar, and it is possible that the Defendants may introduce evidence which is prejudicial to the Third Parties. Second, Hutchinson J. based his decision on the goal of

the *Act* to promote administrative efficiency in the courts. In my view, there will be little, if any, improvement in administrative efficiency in this case by not requiring the Third Parties to be bound by the findings of fact at the trial of the common issues. In the circumstances of the case before me and for the reasons outlined by McEachern C.J.S.C. in *Aylsworth v. Richardson Greenshields of Canada Ltd.*, I prefer the more traditional approach of directing that third parties are not to be bound by findings of fact at trials in which they do not participate. Of course, the rulings on the common issues themselves will be binding on the Third Parties.

[34] These comments are applicable to the present case. The third parties do not have an identity of interest with UBC who may introduce evidence prejudicial to them. There would be little or no administrative efficiency in proceeding as UBC proposes. There is no reason to deviate from the traditional approach of directing that the third parties not be bound by findings of fact at the common issues trial at which they are not participating.

[35] In summary, I make the following orders:

- (1) I dismiss UBC's application to amend the certification order by adding a common issue dealing with causation.
- (2) I dismiss UBC's application to have the third party proceedings tried concurrently with the common negligence issues.
- (3) The trial of the third party proceedings shall be heard after a decision has been rendered in the common negligence issues trial. The same judge will hear both trials.
- (4) The third parties will not be bound by any findings of fact made at the trial of the common negligence issues.

"Butler J."