SUPREME COURT OF NOVA SCOTIA
Citation: *Drysdale v. Bev & Lynn Trucking Ltd.,* 2016 NSSC 109

Date: 2016-04-18
Docket: Hfx No. 406250
Registry: Halifax

Between:

Brenda Drysdale

Plaintiff

v.

Bev & Lynn Trucking Limited and Lynn Swinemar Executrix and Personal Representative of the Estate of Beverly W. Swinemar

Defendants

Judge: The Honourable Justice James L. Chipman

Heard: April 18, 2016, in Halifax, Nova Scotia

Counsel: John A. McKiggan, Q.C. and Mark Raftus, for the Plaintiff/Applicant
Jocelyn M. Campbell, Q.C., for the Defendant/Respondent, Bev & Lynn Trucking Limited
Derek Wells, Q.C., (not appearing) for the Defendant, Lynn Swinemar Executrix and Personal Representative of the Estate of Beverly W. Swinemar

Orally by the Court:

Introduction

[1] By Notice of Motion filed December 17, 2015, the Plaintiff/Applicant moved for an order seeking:

a) summary judgment on the evidence; and
b) to amend the Notice of Action to add a claim for aggravated damages.

[2] The Applicant relies on Rules 13.04, 83.01, 83.02 and 83.11. In support of the motion, the Applicant filed these affidavits:

1) Counsel Mark Raftus', sworn December 16, 2015;
2) Delmar Kenneth Mestdagh, sworn December 15, 2015; and
3) Rebecca Denise Babcock, sworn December 11, 2015;

[3] The Applicant filed her brief on December 17, 2015, and Book of Authorities on January 11, 2016. On March 29, 2016, she filed an affidavit of Adam Paul Henneberry, sworn March 24, 2016.

[4] On February 25, 2016, the Defendant/Respondent filed their brief and book of authorities. On February 25, 2016, they filed an affidavit deposed the same day by their counsel, Jocelyn M. Campbell, Q.C..

Preliminary Matters

[5] At the outset of the hearing, the parties agreed to the following:

1) that exhibits L, M, N, and O be struck from Mr. Raftus' affidavit;

2) that s. 248 of the *Motor Vehicle Act*, R.S. c. 293, s. 1 ("*MV Act*") is the applicable substantive law governing the liability subject matter of this lawsuit; i.e. a truck-pedestrian accident which occurred on November 30, 2011; and

3) that the new summary judgment Rule 13, published in the Royal Gazette on March 2, 2016, applies to the motion.

[6] Given the above agreements, which I find to be correct, I make the following observations:

1) only admissible, non-hearsay evidence shall be considered on the application;

2) section 248 of the *MV Act* reverses the onus of proof. Accordingly, the legislation creates a presumption that the driver in a pedestrian-vehicle collision such as we have here, is entirely at fault. Authority from the Supreme Court of Canada and the Nova Scotia Court of Appeal confirms the onus never shifts; and

3) given that this is an application for summary judgment on the evidence, the focus is on the new Rule 13.04(1), (2) and (5).

Summary Judgment on The Evidence

[7] Rule 13.04(1), (2) and (5) read as follows:

> **13.04 (1)** A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> **(2)** When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> …
>
> **(5)** A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the

> contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

[8] Two years ago, the Supreme Court of Canada released a landmark decision respecting summary judgment, *Hryniak v. Mauldin*, 2014 SCC 7. Although the case deals with the much more broadly-worded Ontario summary judgment rule, the Court set out some principles of general application. The applicability of *Hryniak* in this Province has been considered on a number of occasions. In *Armoyan v. Armoyan*, 2014 NSSC 174, Justice Forgeron stated:

> **19** The Nova Scotia Court of Appeal has not yet commented on the impact, if any, of the summary judgment decisions of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, and its companion case, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8. That these pronouncements possess both a specific and general value, is noted by Karakatsanis, J.A., in para. 35 of *Hryniak v. Mauldin*, *supra*., which states as follows:
>
> > 35 Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.
>
> **20** *Rule* 13 does not contain the expansive powers that are found in Ontario's summary judgment *Rule*. The Ontario rule grants evidentiary powers that have little or no parallel to *Rule* 13. Weighing evidence, drawing inferences, and making credibility findings, all of which are presumptively available on summary judgment in Ontario, are foreclosed or limited under *Rule* 13. The summary judgment test in Nova Scotia, therefore, continues to be based upon the two part test and analytical framework outlined in *Coady v. Burton Canada Co.*, 2013 NSCA 95, but subject to the proportionality principles reviewed in *Hryniak*. Summary judgment rules are to be "interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims": para. 5 of *Hryniak v. Mauldin*, *supra*.
> [emphasis added]

[9] With the advent of the new *Rule*, there is no longer a two-part test; however, the analytical framework outlined in *Coady v. Burton Canada Co.*, 2013 NSCA 95, is essentially the same. Further, in the time since Justice Forgeron's decision, our Court of Appeal has provided guidance concerning the impact of *Hryniak*. In *Blunden Construction v. Fougere*, 2014 NSCA 52, Justice Saunders stated as follows at paras. 6-9:

[6] In our respectful view, the recent decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, has little bearing upon the circumstances, analysis, reasoning or result in this case. There, Justice Karakatsanis, writing for a unanimous Court, considered the application of a new Rule in Ontario (their Rule 20) which now empowers judges in that province to weigh the evidence, draw reasonable inferences from the evidence, and settle matters of credibility when deciding whether to grant summary judgment. Those powers are foreign to the well-established procedures and settled law which operate in Nova Scotia.

[7] We recognize of course the guidance provided by Justice Karakatsanis in her reasons concerning the importance of interpreting summary judgment rules "broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims." She spoke of the values and principles that underlie our civil justice system and raised a clarion call for a shift in culture to provide alternative adjudicative measures to the conventional trial model; and invoke procedures which will provide access to justice that is simplified, proportionate, less expensive, just and fair. A process for summary judgment is one such measure designed to streamline technical and often cumbersome rules, and enable judges to dispose of appropriate cases, summarily. In signalling the urgent need for such a transformation Karakatsanis, J. wrote at paras. 27-28:

> [27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[8] Karakatsanis, J. emphasized that judges have a critical role to play in ensuring that the case is well suited to summary judgment and presents as one which will allow the judge to decide the facts with confidence and choose a fair and proportionate way to resolve the dispute. She wrote:

> [50] ... When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[9] Justice Karakatsanis cautioned that while such motions can save time and expense, their application can also produce the opposite effect by slowing the pace and adding to the cost of litigation and in that way denying or delaying a responding party's access to justice. Thus, judges must be vigilant that such processes are used appropriately and are not abused:

> 32 This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

[emphasis added]

[10] Accordingly, *Hryniak* is of limited application in assessing summary judgment in Nova Scotia. The task of the Court is to ensure that the case is well suited to summary judgment.

[11] The wording of *Rule* 13.04 indicates that the decision to grant summary judgment is not a discretionary one; a judge *must* grant summary judgment in the absence of a genuine issue of material fact for trial and when there is an absence of a question of law requiring determination (13.04(2)).

Analysis & Disposition

[12] The Respondent did not file any affidavits on the summary judgment issue, nor did they chose to cross-examine the Applicant's deponents. In their brief and argument, they emphasize portions of the Applicant's May 27, 2014 discovery, in particular excerpts at pp. 98-102 and 107-108. They also draw on excerpts from

the statements of witnesses and Mr. Swinemar. Quoting from Ms. Campbell's brief at para. 32, their position may be summarized as follows:

> This evidence, when viewed in light of the above-mentioned authorities, raises an arguable issue of contributory negligence. In light of the poor weather conditions, darkness, and rush hour traffic at the time of the Accident, the Plaintiff should have kept an especially careful lookout for obstacles or hazards as she crossed the road. Respectfully, she failed to comply with this duty; indeed, irrespective of any enhancement of her obligations due to the prevailing weather and traffic conditions, she should have seen the Defendants' slow-moving, 72-foot long transport truck and trailer before it struck her if she had been paying any attention to her surroundings.

[13] The Respondent goes on to argue that the fact that Mr. Swinemar voluntarily paid a $687.41 ticket regarding the charge under s. 125 of the *MV Act* does not, in and of itself, entitle the Applicant to succeed on the motion. In support of this, they draw on *Greenhalgh v. Vaillancourt*, 2010 ONSC 552. This case involved a motion for partial summary judgment in circumstances where the plaintiff lost a leg in a motor vehicle accident, and where the defendant paid a fine after pleading guilty to an offence under motor vehicle legislation. Justice Stewart denied the plaintiff's motion on the basis that there was a genuine issue of contributory negligence which required a trial, noting:

> [22] Although the fact of Vaillancourt's plea of guilt and conviction under the *Highway Traffic Act* will be admissible in these civil proceedings as *prima facie* proof that the events underlying it occurred, the contribution or degree of contribution of that fact to the sequence of events which resulted in the collision remain very much in dispute.

[14] The Applicant relies on the remaining exhibits from Mr. Raftus' affidavit and the three witnesses' affidavits and statements in support of their motion. As for Mr. Swinemar's statement, the Applicant submits as follows in Mr. McKiggan's brief at para. 15:

> Mr. Swinemar stated in his witness statement to his insurer that he was driving a 72 foot Western Star truck and trailer (with the trailer measuring 48 feet). He rolled out of Sambro at 4:30 and made his way to the intersection. He said he put his left signal light on and began to make his left turn. He said he saw no one in the crosswalk then he heard a horn and felt a small bump. He said a passerby ran up and opened his door and told him not to move the truck as a woman was lying near his truck. He said he never exited the car as he kept his foot on the brake to keep the truck/trailer stopped. He said later the police told him not to exit the

> truck. He said he never did see the woman. He was issued a ticket for failing to yield to a pedestrian in a crosswalk. Police told him witnesses said he hit the woman in the crosswalk. Incredulously, he said in his statement he felt the woman had run into his truck and he would fight the ticket. In the end he admitted his guilt and paid the fine.

[15] The Applicant points out that Mr. Swinemar was never presented for discovery, as his counsel advised he was too ill to attend. He subsequently died, approximately two years ago. In the result, he is obviously unavailable to be questioned on such things as his statement or why he paid the fine. On January 19, 2014, the Applicant sent a Request for Admissions and Interrogatories to the Respondents. The Request for Admission was met with this response:

> As a result of the death of Beverley W. Swinemar and because there is no other individual including any officer or director of Bev & Lynn Trucking Limited that has any knowledge of the matters pertaining to this lawsuit the Defendants are not in a position to admit any of the items herein and should not be taken to have admitted any of the items herein. The Defendants hereby give the Plaintiff notice that they will require the Plaintiff to strictly prove her case at trial.

[16] To the interrogatories, there was the following answer:

> As a result of the death of Beverley W. Swinemar and because there is no other individual including any officer or director of Bev & Lynn Trucking Limited that has any knowledge of the matters pertaining to this lawsuit, the Defendants are not in a position to respond to the questions posed.

[17] In deciding summary judgment on the evidence in this case, I am mindful of all of the evidence I have before me in the context of s. 248 and other relevant sections of the *MV Act*. Section 248 reads as follows:

> **Onus of proof of liability**
>
> 248(1) Where any injury, loss or damage is incurred or sustained by any person by reason of the presence of a motor vehicle upon a highway, the onus of proof:
>
> a) That such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner of the motor vehicle, or of the servant or agent of such owner acting in the course of his employment and within the scope of his authority as such servant or agent;

> b) That such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the operator of the motor vehicle, shall be upon the owner or operator of the motor vehicle.
>
> …
>
> (3) A person operating a motor vehicle, other than the owner thereof, shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent unless and until the contrary is established.
>
> …
>
> (5) Unless and until it is established that such person was not operating such motor vehicle as aforesaid, such person shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent. *R.S., c. 293, 2. 248*.

[18] The Supreme Court of Canada in *Feener v. McKenzie*, [1972] SCR 525, stated that this section of the *MV Act* (under a prior section number) creates a presumption that the driver of the motor vehicle is entirely or solely at fault for a car-pedestrian collision unless proven otherwise. Justice Ritchie (dissenting on other grounds) stated at pp. 537-538:

> In my opinion the effect of s. 221(1)(b) of the *Motor Vehicle Act* in the trial of an action where damages are claimed for an injury sustained by any person by reason of the presence of a motor vehicle upon a highway, is to create a rebuttable presumption that such injury arose "entirely or solely" through the negligence or improper conduct of the operator of the motor vehicle. This presumption against the operator remains until the very end of the case, but it is a presumption which can be rebutted either in whole or in part, and if after all the evidence has been heard the jury is satisfied that the operator was only partly to blame, then the fault is to be divided in accordance with the provisions of the *Contributory Negligence Act*. If, on the other hand, the jury is satisfied on the whole of the evidence that there was no fault on the part of the operator which caused the collision, the plaintiff's action must be dismissed. The question of whether, and to what extent, the presumption has been rebutted is one which can only be determined at the conclusion of the case.

[19] In following *Feener*, the Court of Appeal in *Eisnor v. Gracie* (1987), 82 N.S.R. (2d) 41, reaffirmed that the actions of the driver of the vehicle are to be examined first, with no consideration of the pedestrian's actions until the end. Justice Matthews stated at para. 16

> … The onus is upon the owner or operator of the motor vehicle to prove by a preponderance of evidence that the collision was not caused entirely or solely by his or her negligence or improper conduct. That burden is upon that owner or operator until the end of the case. It does not shift.
>
> [Emphasis added]

[20] The application of s. 248 is also seen in *Courtney v. Neville*, 1995 CanLII 4486 (NSSC), where liability was determined as a result a pedestrian-vehicle collision in which the pedestrian suffered a fractured leg. The conditions surrounding the collision were less than optimal with complaints of heavy traffic and poor visibility due to fog and rain.

[21] In *Courtney*, Associate Chief Justice Palmeter examined the circumstances on the day of the collision and evaluated the driver's actions (with the onus placed on her by s. 248 of the *MV Act*) and determined that due to her inattention, the driver was completely liable.

[22] Other positive duties are imposed on vehicle drivers through the *MV Act*. Section 100(1) of the *MV Act* imposes a duty to drive carefully and reads:

> Every person driving or operating a motor vehicle on a highway or any place ordinarily accessible to the public shall drive or operate the same in a careful and prudent manner having regard to all the circumstances.

[23] Further, s. 101 of the *MV Act* reads:

> A person operating or driving a vehicle on a highway shall operate or drive the same at a careful and prudent rate of speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of all other conditions at the time existing, and a person shall not operate or drive a vehicle upon a highway at such a speed or in such a manner as to endanger the life, limb or property of any person.

[24] These sections of the *MV Act* place a positive responsibility on an operator of a motor vehicle to operate the vehicle with due care and consideration of all the circumstances surrounding him or her.

[25] Once again, the effect of s. 248 is to reverse the burden of proof in this summary judgment motion. Accordingly, the key question is whether the Respondent has been able to demonstrate whether there are material facts in issue such that contributory negligence is an issue that requires a full trial.

[26] When I consider all of the evidence, I come to the overriding conclusion that the Respondent has failed to meet this burden. In this regard, when I consider the discovery evidence and statements, I see no basis to conclude Ms. Drysdale was contributorily negligent. Indeed, if I were to entertain the Respondent's arguments, I might just as well adopt the pronouncement that no one should cross the street on a marked crosswalk when they are properly attired, wearing a rain coat with a hood possibly up, on many typical evenings in Nova Scotia; i.e., when it is dark, rainy and foggy.

[27] When I scrutinize the evidence, I find no fault in Ms. Drysdale's actions. In particular, she had not been drinking. She had not taken drugs. She was properly attired. She observed the conditions. She crossed on a crosswalk. She was approximately three-quarters of the way or, as was said in her discovery, a couple of steps from safety or from the median when she was hit. She was obviously noticed, such that the other vehicles stopped for her. She was observable by all drivers except the Defendant driver. Indeed, one blew his horn to attempt to warn the oblivious Mr. Swinemar. Ms. Drysdale was not hurrying. She was not distracted, texting or listening to music through headphones or the like. She had her required hearing aid device in. She did not require glasses for distance vision. She had no time to get out of the way.

[28] On the Application, I have had the evidence of the parties, through Ms. Drysdale's discovery transcript portions and Mr. Swinemar's statement brought in through Mr. Raftus' affidavit. In addition, I have had the benefit of three affiants who were witnesses to the November 30, 2011 motor vehicle accident. In all three cases, the affiants attach their statements concerning their observations on the night in question. These individuals were not cross-examined. I must assume from their statements that they are impartial observers. To coin a phrase, they had "no skin in the game".

[29] On balance, I find these statements to be very helpful to the Court in coming to the conclusion that there are no material facts in issue to justify contributory negligence. For example, we know from Mr. Henneberry, a truck driver himself, that based on his observations he holds the opinion that the accident was 100

percent Mr. Swinemar's fault. He said Mr. Swinemar was not looking in front. Mr. Henneberry noticed Ms. Drysdale was three-quarters of the way through the crosswalk when she was struck. He notes it was the front bumper of the truck that struck Ms. Drysdale.

[30] Ms. Babcock points out that she saw Ms. Drysdale. She confirms the pedestrian was on the crosswalk. She says the Applicant made sure it was "ok" for her to cross. She offers the opinion, "it was obvious to me that the truck was at fault in this instance".

[31] Mr. Mestdagh stated he sounded his horn and confirmed Mr. Swinemar did not sound his horn.

[32] Given the evidence, I have no hesitation in concluding that the Respondent has failed to demonstrate any material facts in issue such that Ms. Drysdale could be held contributorily negligent. In my view, this case amounts to a 72 foot truck mowing over a pedestrian when she was almost to the end of a crosswalk. There is no evidence whatsoever to show that she could be held contributorily negligent.

[33] In light of the evidence and law, I find on a balance of probabilities that the Respondents contributory negligence arguments have no reasonable chance of success at trial.

[34] Returning to the direction of the Supreme Court of Canada in *Hryniak*, this case is well suited to summary judgment because it presents as one which allows me to decide the facts with confidence and chose a fair and proportionate way to resolve the dispute. In particular, the liability dispute deserves to be dealt with today. A trial would not be proportionate, timely or cost-effective on the liability issue. I am satisfied as well there is no genuine issue of material fact on its own or mixed with a question of law for trial. The matter does not require determination of a question of law. Accordingly, I grant summary judgment as requested by the Plaintiff.

Amendment To Include An Aggravated Damages Claim

[35] I will now deal with the second part of the Application, the Plaintiff's motion to permit the Notice of Action to be amended to include a claim for aggravated damages. When I consider this aspect of the motion, the only evidence before me is Ms. Campbell's affidavit and, in particular, the background

concerning a possible liability admission. In this regard, I refer to paras. 4-6 as well as the exhibit of her affidavit:

> 4. Attached as **Exhibit 1** is a copy of an email I received from John A. McKiggan, Q.C., counsel for the Plaintiff, Brenda Drysdale, on February 26, 2014.
>
> 5. In his email, Mr. McKiggan states as follows:
>
> > This is further to our conversation this morning regarding discovery examination of Mr. Swinemar.
> >
> > I understand your clients' insurer is prepared to admit liability if I provide you with an undertaking not to make a claim in excess of your policy limits. I have been advised by the insurance adjuster that your policy limits are $2 million.
> >
> > I am not in a position to provide you with that undertaking since we have not quantified Ms. Drysdale's claim.
>
> 6. I confirm that Mr. McKiggan and I had a telephone conversation on the morning of February 26, 2014, during which I informed him that the Defendants' insurer, Aviva Canada Inc. ("Aviva"), was prepared to admit liability for the accident that gave rise to these proceedings, if Mr. McKiggan provided me with an undertaking that the Plaintiff's claim would not be in excess of the limits under the Defendants' insurance policy.

[36] The Applicant says there is a basis for a claim for aggravated damages and held this view back at the time of the Date Assignment Conference. In the Applicant's brief at para. 89, the following is asserted:

> Given the Defendant has refused to admit liability in this matter additional stress has been placed on the Plaintiff. Brenda Drysdale has had to spend the last four years knowing that the Defendants are blaming her for the accident in which she suffered her terrible injuries. Her suffering has been aggravated by the emotional distress of wondering what she may have done to cause or contribute to her injuries.

[37] The Respondent vigorously contests this and I adopt their arguments in this portion of my decision.

[38] A proposed amendment to a statement of claim must raise a justiciable or triable issue, in the sense that the amendment should not be allowed if it is "plain

and obvious" that it discloses no reasonable claim or cause of action: see *Roynat Inc. v. A&A Auctioneers and Appraisers Ltd.*, 2003 NSSC 114, at paras. 7-9.

[39] In my view, the Plaintiff's proposed amendment fails to raise such an issue. This action does not involve a claim by an insured against an insurer under an insurance contract, in which a claim for aggravated damages could be made on the basis of bad faith or negligence by the insurer. Rather, this is a claim for third party liability, in which an insurer is providing a defence for their insured. As such, the conduct which the Plaintiff raises in support of her claim for aggravated damages is more accurately seen as that of the Defendants' insurer, rather than that of the Defendants themselves.

[40] The Plaintiff has provided no authorities to establish that an insurer owes a third party claimant a duty which could found a claim for aggravated damages. Indeed, there is considerable authority to the contrary. For example, in *1013952 Ontario Inc. v. Sakinsofsky*, 2009 CarswellOnt 5993 (S.C.J.), the court ruled that an insurer is not obliged to take account of or protect the interests of a party adverse to its insured, and does not owe that adverse party a duty of care. Similarly, in *Overload Tractor Services Ltd. v. Insurance Corp. of British Columbia*, 1988 CarswellBC 54 (S.C.), affirmed 1989 CarswellBC 130 (C.A.), the court accepted (at para. 10) that bad faith "can only arise where an insurer has committed a tort against its own insured" – not in situations or dealings between an insurer and a party making a claim against its insured.

[41] Similarly, the Plaintiff has provided no authorities to establish that a failure to admit liability is a sufficient basis at law for an award of aggravated damages. Indeed, a claim of this nature was rejected in *Tannereye Ltd. v. Hansen*, 2001 PESCTD 51, where the court noted (at para. 365) that although "parties have a responsibility to attempt to settle their disputes, there is no obligation on the defendants to admit liability or agree to settlement proposals acceptable to the plaintiff."

[42] Finally, the statement at para. 22 of Mr. Raftus' affidavit that "the Plaintiff has asked counsel for the Defendant to admit liability for the incident and to date the Defendant has not admitted liability" is an incomplete summary of the parties' discussions regarding this issue. In this regard, the Defendant's position on this issue is more fully outlined in a February 26, 2014 email, as referenced in para. 36 of this decision.

[43] In my view, the position set out in the email constitutes an effort by the Defendants' insurer to comply with the duty of good faith it owes to the Defendants, and try to effect a settlement within the limits of their policy.

[44] It is for all these reasons that it is plain and obvious that the Plaintiff's claim for aggravated damages are doomed to fail. Accordingly, the proposed amendments do not raise a justiciable or triable issue, and must be refused.

[45] There is no authority to permit the kind of amendment the Plaintiff seeks. As the Respondent points out, the Applicant's allegations do not amount to a cause of action. In the result, I find there is no basis in law for what the Applicant is seeking. To allow the proposed amendment would amount to a waste of time and, having regard to *Hryniak* and the concept of proportionality, to my mind it would offer nothing and consume a completely unnecessary and unwarranted part of the trial time.

[46] Accordingly, I dismiss this aspect of the application.

Costs

[47] I could call on you now and invite you to give submissions on costs, but I am going to short-circuit it and say this. In my view, there is mixed success on the application. Ms. Campbell has won the second part. Mr. McKiggan has prevailed on the first and I am going to exercise my discretion and award no costs on the application.

Chipman, J.