NOVA SCOTIA COURT OF APPEAL

Citation: Dunn v. Nova Scotia Utility and Review Board, 2004 NSCA 131

Date: 20041028
Docket: CA 218275
Registry: Halifax

Between:

Jane M. Dunn

Appellant

v.

Nova Scotia Utility and Review Board and
Department of Justice - Victims' Services

Respondent

Revised Decision:	Although this decision is subject to a publication ban, it has been released with the full name on the cover page according to the erratum issued October 9, 2004, in accordance with the request of the appellant.
Restriction on publication:	Publication Ban pursuant to s. 14(1) of the ***Victims' Rights and Services Act***
Judge(s):	Glube, C.J.N.S.; Cromwell & Saunders, JJ.A.
Appeal Heard:	October 7, 2004, in Halifax, Nova Scotia
Held:	Appeal allowed, as per reasons of Saunders, J.A.; Glube, C.J.N.S. and Cromwell, J.A. concurring
Counsel:	Jane M. Dunn, self-represented appellant Kenda L. Murphy, for the respondent

<u>Publishers of this case please take note</u> that s. 14(1) of the <u>Victims' Rights and Services Act</u> applies and may require editing of this judgment or its heading before publication.

14(1) The Governor in Council may make regulations (ci) respecting appeals including

(ci) respecting appeals including, but not limited to, authority, jurisdiction, quorum, powers and immunities of the person or tribunal hearing an appeal, forms, notices, parties, witnesses, subpoenas, evidence, counsel, restricting openness of hearings and prohibiting publication of evidence in appropriate cases, and procedure;

Reasons for judgment:

[1] At the conclusion of the hearing we declared our unanimous opinion that the appeal was allowed with reasons to follow. These are our reasons.

[2] In light of our disposition we need not canvass the chronology or health care history and documentation pertaining to this case in great detail. It is enough to simply record some of the material background in order to explain how the case came before this court.

[3] The appellant, whom I will refer as J.M.D., claims that when she was a nursing student in Halifax in the mid 1960's she was a victim of both sexual assault and "medical assault" at the hands of Dr. N, a prominent psychiatrist, now deceased. The substance of J.M.D.'s claim is that as a form of discipline for breaking curfew while living in residence as a student nurse, she was obliged to report to Dr. N., a licensed psychiatrist with hospital privileges in the city, who then took charge of her "treatment" for "depression," had her hospitalized without her consent, where under his direction she was then administered heavy doses of drugs and subjected to electric shock, insulin treatment and other procedures which she says brought on and exacerbated the very mental illness for which she was confined, while Dr. N. then subjected her to repeated sexual and "medical" assaults in the hospital or in his office. These incidents occurred, she says, with the complicity or willful blindness of administrators and employees of the Victoria General Hospital, and brought on a life time of ill health, including post traumatic stress disorder, for which she required and continues to require ongoing therapy and medical intervention. The appellant says it was only recently, through the success of her own therapy and investigations, that she found, as she alleges, another woman said to have been victimized by Dr. N., in much the same way.

[4] On December 10, 1996 she filed an application for compensation under the Criminal Injuries Compensation Program ("the Program") with respect to those alleged assaults said to have occurred between the autumn of 1967 and the autumn of 1968.

[5] By letter dated May 20, 1997, the manager of the Program advised the appellant that based upon the information provided by her and obtained from other

sources, a recommendation would be made to the Director of Victims' Services to deny her application for compensation.

[6] On November 6, 1997, the appellant filed a Notice of Appeal with the Nova Scotia Utility and Review Board ("the Board") appealing the decision of the director.

[7] At an application heard November 28, 2002, the Board heard as a preliminary issue the appellant's application to admit as "similar fact evidence" a statement of claim filed in the Nova Scotia Supreme Court by K.A., who alleged that she too had been victimized by certain physicians, including Dr. N., under circumstances which J.M.D. claimed were remarkably similar to her own. In a decision rendered March 25, 2003, the Board dismissed J.M.D.'s application to adduce similar fact evidence saying, *inter alia*:

> [10] The principles relating to the admissibility of similar fact evidence have been addressed in a number of decisions by the Supreme Court of Canada. Similar fact evidence is an exception to the evidentiary rule that prohibits evidence of the accused's bad character or the accused's propensity to engage in unlawful or immoral conduct. Such evidence is not considered to be logically probative, with respect to the actual crime charged. The danger of admitting such evidence, of course, is that the trier of fact may assume from the evidence of other bad acts, that the accused is a bad person, and find on that basis, instead of the evidence on the present alleged charge.
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> [11] Similar fact evidence, however, will be admissible if it has probative value in relation to a matter at issue, other than its tendency to show disposition, and if that probative value outweighs its prejudicial effect.
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> [15] Thus, the basic and fundamental question is whether the probative value of the evidence outweighs its prejudicial effect.
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> [17] When the Board considers the points referred to by the Complainant, whatever similarities there are in the allegations, they are not particularly distinctive not persuasively unique. In the Board's opinion, there does not appear to be a pattern of behaviour or a consistent context, so as to overcome the prejudice associated with the evidence of propensity. In the Board's opinion, the

> similarities of the acts alleged by the Complainant are not sufficient to allow the admissibility of the Statement of Claim.
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> [19] . . . As they stand, the allegations, in themselves, have no probative value in this proceeding in terms of establishing whether Dr. N., or any other person, committed an offence against the Claimant, JMD, which would give rise to compensation under this **Act**. In short, the allegations set out in the Statement of Claim are of no assistance to the Board in resolving the issues of fact before it respecting JMD and, accordingly, neither the Statement of Claim not any *viva voce* evidence of KA, will be received in evidence by the Board. (underlining mine)

[8] The actual appeal from the Director's decision was heard by the Board on October 10, 2003. The Board rendered its decision on February 27, 2004, dismissing J.M.D.'s claim for compensation. By her notice of appeal filed March 26, 2004, J.M.D. appealed to this court.

[9] Again, considering our disposition of the matter, it is not necessary to reiterate the various issues, grounds, or arguments advanced by the appellant. We need only comment upon two matters which compelled us to allow this appeal.

[10] At the hearing, after questioning by the panel, counsel for the respondent conceded, quite properly, that the Board had erred in law in two respects. First, in the manner in which it considered and disposed of the evidence of K.A., as similar fact evidence; and second, in not adjourning to consider the qualifications of a witness, Dr. Gerd Schneider, whom J.M.D. proposed to call, or otherwise assess the evidence Dr. Schneider was prepared to give.

[11] I will now briefly explain how, in our respectful opinion, the Board so erred.

[12] As appears from the Prothonotary's records K. A., like J.M.D., commenced a civil action, S.H. No. 123732, against, *inter alia*, Dr. N. for damages arising from what she describes as sexual, emotional and physical assaults and gross medical malpractice, said to have occurred between 1969-1970. K.A. claims, as does J.M.D., that her "treatment" at the hands of Dr. N. and others led to a regime of electric shock, pharmacological, psychoanalytical, and other interventions, which were unnecessary and dangerous and posed an unreasonable risk to the patient, all of which brought on and later exacerbated serious injury to the patient's mental and physical health and well being.

[13] The Board's consideration of similar fact evidence, insofar as it applied to the statement of claim of K.A., was misconceived. A statement of claim is not evidence. It is nothing more than a pleading, in the context of a civil case, in which allegations sought to be proved at trial, and the relief claimed, are asserted. The written pleading, without more, is not proof of anything. The Board's responsibility in this case was to address the *evidence* from K.A., which J.M.D. sought to introduce in her own case, and determine if it qualified as proper similar fact evidence. There is nothing in the record to indicate that the Board ever addressed its mind to such an inquiry; nor consequently was the requisite analysis ever under taken. The Board simply stated:

> . . . and, accordingly, neither the Statement of Claim nor *viva voce* evidence of K.A., will be received in evidence by the Board."

[14] As counsel for the respondent acknowledged at the hearing before us, J.M.D. had given ample notice of her wish and intention to call K.A. to testify, so that the relevance and admissibility of her evidence might then be considered by the Board. The Board erred in failing to give any consideration at all to whether whatever evidence K.A. was prepared to give might meet the requisite threshold requirements for introduction as similar fact evidence.

[15] Without in any way presuming to decide the question of the admissibility of K.A.'s evidence, it should be emphasized that while the rules for admissibility of similar fact evidence remain the same, different considerations may obtain where, as here, one is dealing with a civil matter, where the standard of proof is much different. As noted by Sopinka, Lederman & Bryant in ***The Law of Evidence in Canada***, 2d ed. (Toronto and Vancouver: Butterworths) at ¶ 11.182:

> As stated earlier, the dangers associated with the admission of similar fact evidence are not present to the same degree in civil cases as in criminal proceedings. However, the same rules apply, and the evidence sought to be introduced must have a sufficient nexus with or display the requisite relevance or materiality to the issues in the case. (citations omitted)

In **Mood Music Publishing Co. v. De Wolfe Ltd.** [1976] 1 All E.R. 763 (C.A.), the plaintiffs, in an action for infringement of copyright, sought to adduce evidence

that in three other cases, the defendants had reproduced other musical works which were subject to copyright. Lord Denning stated the test of admissibility of similar fact evidence in civil cases as follows:

> The criminal courts have been very careful not to admit [similar fact] evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it.

[16] There is another reason why a strict application of the rule that would apply in the criminal context might be relaxed in these circumstances. It should be recalled that Dr. N. (or his estate) is not a party to these proceedings. The claim is advanced by J.M.D. and relates only to the extent of compensation, if any, available to her pursuant to the provisions of the **Victims' Rights and Services Act**, provided the statute's requirements for qualification are met. As such, the matter before us is limited to errors acknowledged to have been made by the Board in its consideration of J.M.D.'s appeal from the Director's denial of her claim.

[17] The notion of prejudice, which weighs so heavily in the context of a criminal prosecution, bears much less significance in a civil case. As is pointed out by the authors in ***The Law of Evidence in Canada***, supra:

> 11.208 It is apparent from the foregoing that while the rules relating to the admissibility of similar fact evidence in civil cases reflect very strongly the influence of the "category" approach of the earlier criminal cases, they in fact focus on whether the evidence is relevant to a material issue. The categories of relevance are not closed and the inquiry should concentrate on determining the probative value of evidence without the constraint of fitting the evidence into a particular pigeonhole. Moreover, prejudice, which dominates the determination of admissibility of similar fact evidence in criminal cases, plays a significantly lesser role in civil cases, and evidence of similar facts should be admitted if it is logically probative to an issue in the case as long as, to borrow the formula of Lord Denning, it is not unduly "oppressive or unfair" to the other side, does not consume a disproportionate amount of court time, and does not bear the whole burden of proving the case.

Moreover, there is good reason to question whether the law relating to similar fact evidence is even applicable to the proposed evidence. The similar fact rule permits evidence to be admitted that would otherwise be excluded under the rule barring evidence of the bad character of a party. As pointed out earlier, neither Dr N. (nor his estate) is a party to this application for criminal injuries compensation. Both Wigmore and Cross maintain that generally no special exclusionary rules apply to character evidence of a non-party: see **R. Cross Evidence** (5th, 1979) at 410; I Wigmore, s. 68 at 488 (3d), 1940 as cited in S. Schiff, ***Evidence in the Litigation Process***, vol 2, 4th Edition/Master Edition (Scarborough: Carswell, 1993) at, 1162, n. 87. If that is so, there is no need to rely on the similar fact doctrine to admit the proposed evidence because it is not excluded by the exclusionary rule relating to character evidence in the first place; the focus of analysis should be on relevance. With the benefit of these succinct statements of the law it will be for the Board in this case to conduct the necessary inquiry and appropriate analysis when evaluating the testimony of K.A..

[18] The Board also erred in failing to adjourn to consider the qualifications of a witness, Dr. Gerd Schneider, whom J.M.D. proposed to call, or otherwise assess the evidence that Dr. Schneider was prepared to give. He is a licensed medical practitioner practising in Ottawa. J.M.D. has been his patient since 1984. It was not until 1995 that she disclosed to Dr. Schneider her recollection of having been molested by Dr. N., when she was 19 years of age and a student nurse in Halifax. Since that disclosure J.M.D. has undertaken regular, supportive psychotherapy with Dr. Schneider. In his letter to the Board dated August 20, 2003, Dr. Schneider writes:

> I believe _____(J.M.D.'s) story, and her symptoms are absolutely consistent with significant past trauma (i.e. she has been the victim of a crime). Since there has been no other history to account for these symptoms apart from the specific memories of abuse, and because of the consistency of these memories, I conclude that these experiences were the most likely cause of her PTSD. I have been seeing her regularly for supportive psychotherapy since 1995. She has improved significantly over the last 2 years and only takes Ativan 1 mg. at times of extreme stress. She has always refused to take antidepressants.
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> The following is an outline of the criteria in the DSM IV Manual for Posttraumatic Stress Disorder that _____(J.M.D.) has exhibited over the course of the past 7 ½ years of therapy. She satisfies all of the six requirements for that

> diagnosis. She continues to recover from the effects of those traumatic events. . .
> .

[19] As conceded by counsel for the respondent before us, the record of proceedings at the Board hearing on October 10, 2003 confirms a failure on the part of the Board to afford J.M.D. an adequate opportunity to attempt to demonstrate the admissibility of the evidence of Dr. Gerd Schneider.

[20] The appellant was representing her own interests. While her submissions there and before this court are commendable, it is obvious that she was unfamiliar with the rules of procedure, especially concerning the introduction of expert opinion evidence. It would appear from the transcript that she could not afford to fly Dr. Schneider to Halifax to testify, but that she had hoped to introduce his evidence by, at the very least, a recorded telephone link to the Board hearing. No consideration was given to that possibility, nor any suggestion offered to adjourn so that, for example, rules of procedure might be explained to the appellant whereby she might then be given the chance to establish the admissibility of Dr. Schneider's evidence. In that way the Board, with the assistance of counsel, could give fair and proper consideration to the qualifications of J.M.D.'s treating physician and the evidence that he was prepared to give, especially in the context of this case where the principal question to be resolved was whether J.M.D. is a person to whom compensation is payable under the **Victims' Rights and Services Act**, R.S.N.S. 1989, c. 14.

[21] Whether some or all of Dr. Schneider's evidence concerning his professional care and treatment of J.M.D. and his opinion concerning her diagnosis and prognosis, and the causes of her illness, was admissible, could only be determined by the Board after first giving J.M.D. an opportunity to demonstrate its admissibility. She was denied the chance to do so.

[22] For all of these reasons we allow the appeal and direct that there be a new hearing of Ms. D.'s appeal of the Board's decision with respect to the Director's decisions dated May 20, 1997 and September 30, 1997 before a differently constituted Board.

[23] As confirmed at the hearing, we award the appellant $1,500.00 as disbursements incidental to this appeal.

Saunders, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.