Date: 19980128 Docket: CA 140626

NOVA SCOTIA COURT OF APPEAL

Cite as: Fagan v. Savoie, 1998 NSCA 41

Bateman, Jones and Hallett, JJ.A.

BETWEEN:

WENDY FAGAN and ECONOMICAL MUTUAL INSURANCE COMPANY	)	Nancy Murray and David Miller, Q.C. for the Appellants
Appellants	)	
- and -	)	
DAVID SAVOIE	)	Raymond F. Wagner for the Respondent
Respondent	)	
	)	Appeal Heard: January 15, 1998
	)	Judgment Delivered: January 28, 1998

THE COURT: The appeal is allowed, per reasons for judgment of Bateman, J.A.; Jones and Hallett, JJ.A., concurring.

Bateman, J.A.:

This is an appeal from a decision of Associate Chief Justice Kennedy wherein he declined to grant an application by the appellants, Wendy Fagan and Economical Mutual Insurance Company (the defendants in the Supreme Court action) to dismiss an action for want of prosecution.

Background:

The respondent (plaintiff before the Supreme Court), David Savoie, alleges that he was injured in a motor vehicle accident on June 21, 1987 in New Brunswick. He was a passenger in a vehicle driven by Wendy Fagan when it struck a moose, at night, on the highway.

The chronology of the resulting proceeding is relevant. Mr. Savoie commenced action in New Brunswick on September 30, 1987. On April 11, 1988, there was an independent medical examination on behalf of the appellants. On May 11, 1988, Mr. Savoie commenced action in Nova Scotia through his solicitor, Craig Garson. In July of that same year Mr. Garson advised that Mr. Savoie intended to proceed with the Nova Scotia action. In February of 1989, the

appellants filed a defence. The New Brunswick action was dismissed, by consent, on June 5, 1989, with costs to the appellants of $1,000.

Appellants' counsel, Mr. Miller, had been provided with medical reports generated in the late summer and early fall of 1987. On September, 12, 1989, appellants' counsel wrote to Mr. Garson asking for any additional medical reports and copies of Mr. Savoie's law school file. He received no response. There was no further action until January 11, 1994, when the Prothonotary gave notice of intention to dismiss the action pursuant to **Civil Procedure Rule 28.11**, the case having been on the General List for more than three years. The notice called for an answer within 60 days to forestall dismissal of the action. On March 4, 1994, by letter, Mr. Garson, advised that his client intended to continue with the action.

The request for medical records and additional information in Mr. Miller's letter of September 12, 1989, remained unanswered. On June 28, 1994, Raymond Wagner, Mr. Savoie's current counsel, advised that he was assuming conduct of the action. On July 18, 1994, counsel for the appellants acknowledged receipt of Mr. Wagner's letter and noted the years of inaction on the file. In reply, on July 29, 1994, Mr. Wagner advised that he intended to proceed with the matter and was

gathering medical records which he would provide as soon as available. Hearing nothing, Mr. Miller again wrote to Mr. Wagner on August 29, 1994. He asked for an explanation for the prolonged delay in advancing the action. On September 19, 1994, Mr. Wagner advised that he had received several medical documents that he would provide after review. On the matter of delay, he responded that Mr. Savoie was of the view that his previous solicitor had not moved the matter forward efficiently.

No further material being forthcoming, Mr. Miller again wrote Mr. Wagner on March 21, 1995, noting that the eighth anniversary of the accident was approaching and absent some action on the file he anticipated instructions to apply for dismissal for want of prosecution.

Mr. Wagner replied indicating that he anticipated receipt of requested medical information shortly and intended to expeditiously pursue the matter. On August 16, 1995, Mr. Miller again wrote to Mr. Wagner. Receiving no response, Mr. Miller followed up with letters dated October 11, 1995 and December 8, 1995. On December 19, 1996, Mr. Wagner advised that he would forward a volume of

documents and a settlement proposal in January of 1997. Such was not forthcoming.

On July 2, 1997, Mr. Miller made application in the Supreme Court for an order dismissing the action for want of prosecution. The application, which was heard on July 29, was dismissed in a decision rendered orally on August 13.

Issues on Appeal:

The appellant states the issue before this Court as follows:

> What is the legal test applicable to an application by the Defendants for an Order dismissing the Plaintiff's action for Want of Prosecution. In particular:
>
> (a) Is the test set out by the Court of Appeal in *Martell v. Robert McAlpine Ltd.* still the applicable test?
>
> (b) If so, has the Learned Chambers Judge erred in fact or law in dismissing the Appellant's application for an Order dismissing the within proceeding for want of prosecution?
>
> (c) On the facts before the Learned Chambers Judge, would a patent injustice result if this proceeding is permitted to continue?

Test on Appeal:

When the effect of the order sought is to terminate an action, the test applied by this Court on appeal is as stated in **Frank v. Purdy Estate** (1995), 142 N.S.R. (2d) 50: "Whether there was an error of law resulting in an injustice."

Analysis:

In dismissing the appellants' action the Associate Chief Justice said:

> . . . I do not question but that the defendant will be prejudiced by the time this matter will have taken to go to trial. I believe that there will be some prejudice. However, the specifics of the prejudice suggested by the defendant do not convince me that the remedy sought is appropriate. The plaintiff's explanation for the delays is suspect and deficient in some respects and yet, he has not ignored court orders or directions. The defendants have not sought court intervention or assistance until this application and I find that significant. The plaintiff, although neglectful of his duty to move the matter forward, has not been disobedient, insubordinate or perverse, has not shown contumacy requisite to justify the termination of his action. There is no evidence that witnesses are unavailable. The defendant's complaint about the provision of medical reports and documents seems legitimate, but the court has not been asked to assist. Although there have been apparently subsequent injuries to the plaintiff, the defendant does have the benefit of the independent medical examination conducted in 1988, within one year of the relevant accident.

In **Martell v. Robert McAlpine Ltd.** (1978), 25 N.S.R. (2d) 540 (N.S.S. C.C.A.) Cooper, J.A. wrote at p.545:

> I now direct my attention to the principles which should govern the exercise of a judge's discretion in deciding whether or not an application for dismissal of an action for want of prosecution should

be granted. *There must first have been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and, secondly*, as put by Russell L.J., in *William C. Parker Ltd. v. Ham & Son Ltd.*, [1972] 3 All E.R. 1051, at p. 1052:

> *... that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants ...*

— and see the *Supreme Court Practice 1976*, p. 425. I refer also to *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229, [1968] 1 All E.R. 543, where Lord Denning, M.R., said at p. 547:

> The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight.

These words were referred to in *Austin Securities Ltd. v. Northgate & English Stores Ltd.*, [1969] 2 All E.R. 753, by Edmund Davies, L.J., at p. 756 — and see *Paxton v. Allsopp*, [1971] 3 All E.R. 370, at p. 378.
(Emphasis added)

In that same case, McKeigan, J.A., concurring with Cooper, J.A. said at p. 542:

> The law is clear that when a plaintiff has delayed so long, here nearly ten years, he cannot successfully resist an application to have the action dismissed for want of prosecution unless he can satisfy the court, and the onus is on him to do so, that the defendant has not been seriously prejudiced by witnesses becoming unavailable or their recollections becoming "eroded" (Gale C.J.O., in *Farrar v. McMullen*, [1971] 1 O.R. 709 (Ont. C.A.)), or by documents having been lost.
>
> Bearing in mind the onus on the plaintiff I can find nothing in the affidavits filed on his behalf to show such lack of prejudice to the defendant. They contain nothing to show, for example, that all key witnesses could probably be produced, that blasting and other records were kept and are still available. No attempt was made to check such

> matters or to prove that Mr. John M. Davison, Q.C., counsel for the defendant, was wrong in his sworn belief that memories of witnesses had been impaired and that many records would no longer be available.
> (Emphasis added)

In **Saulnier v. Dartmouth Fuels Ltd.** (1991), 106 N.S.R. (2d) 425 (N.S.S.C.C.A.) Chipman, J.A. confirmed the test set out by Cooper, J.A. in **Martell**. On the question of onus he said at p.430:

> All that can be said generally about onus is that while the onus is initially upon the defendant as applicant to show prejudice, *there may be cases where the delay is so inordinate as to give rise in the circumstances to an inference of prejudice that falls upon the plaintiff to displace.* The strength of the inference to be derived from any given period of delay will depend upon all the circumstances of the case. . . .
> (Emphasis added)

In **Moir v. Landry** (1991), 104 N.S.R. (2d) 281 (N.S.S.C.C.A.), (a case involving a three-year delay) Hallett, J.A., writing for the Court, noted that the onus to establish prejudice falls to the defendant on such an action except in cases of unusually long delay, such as the ten years in **Martell, supra**. He said at p.284:

> A plaintiff has a right to a day in Court and should not lightly be deprived of that right. Therefore, it is only in extreme cases of inordinate and inexcusable delay that a Court should presume serious prejudice to the defendant in the absence of evidence to support such a finding.

The respondent submits that the test in **Martell, supra** has been altered by the decision of this Court in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143. With respect, I disagree. **Minkoff** involved an appeal from the dismissal of an application to renew an originating notice. There, liability, while not admitted, appeared not to be seriously in dispute. Indeed, Chipman, J.A., writing for the Court, expressly rejected the appellant's submission that the Chambers judge had applied the two-part test from **Martell v. McAlpine** in disposing of the action. In view of the fact that both **Saulnier** and **Moir** were decided subsequent to **Minkoff**, involve precisely the same **Civil Procedure Rule** and confirm **Martell** as the governing test, I do not accept the respondent's submission that the test has changed.

The respondent submits that the Chambers judge applied the correct test in dismissing the appellant's application. Again, with respect, I disagree. While the Chambers judge cited the correct test at the outset of his decision, he had apparently been asked to consider the decision of this Court in **Frank v. Purdy Estate, supra**. There, the plaintiff by counterclaim had appealed dismissal of her action pursuant to **Civil Procedure Rule 18.15**. The plaintiff had failed to attend a discovery examination notwithstanding an order that she do so. Justice Roscoe, writing for the Court, stated that where an application to dismiss a claim is based upon the failure of

a party to comply with the **Rules**, the failure must be "contumacious" before the Court will entertain dismissal as the remedy.

I accept the appellants' submission that Kennedy, A.C.J. erred in that he applied wrong principles in assessing the matter before him. In particular, drawing upon the principles set out in **Frank, supra**, Kennedy, A.C.J. appears to have required that the respondent's failure to advance the action amount to contumaciousness. ("The plaintiff, although neglectful of his duty to move the matter forward, has not been disobedient, insubordinate or perverse, has not shown contumacy requisite to justify the termination of his action.") Nor did the Associate Chief Justice consider whether, given the length of this delay, a presumption of prejudice arose, with the burden falling first upon the respondent to demonstrate no serious prejudice to the appellant. ("However, the specifics of the prejudice suggested by the defendant do not convince me that the remedy sought is appropriate.") Finally, Kennedy, A.C.J. required that before making the application to dismiss the appellant must have sought the assistance of the Court to move the action along. ("The defendants have not sought Court intervention or assistance until this application and I find that significant.")

The respondent further submits, that in the event the judge did apply the wrong test, he nevertheless reached the right result. With respect, I disagree.

I am satisfied, as was Kennedy, A.C.J., that the delay in this matter was inordinate. In my view, in these circumstances, the delay was of sufficient length to give rise to a presumption of prejudice to the appellants. At the time of the application to dismiss, ten years had elapsed from the date of the accident and almost ten years from the commencement of the first action in New Brunswick.

Nor am I satisfied that the evidence before the Chambers judge excused the delay. In his affidavit filed on the application Mr. Savoie (who is a lawyer) recited several factors to which the Court was to infer that the delay was attributable: Mr. Garson chose not to continue with this claim while another lawyer, acting for Mr. Savoie, pursued an action resulting from a boating accident in which he was injured. That accident occurred in September of 1988 and was settled in June of 1991. In August and October of 1992 he was hospitalized for cardiac investigations. He does not say for how long. In addition, his brother had passed away (he does not say when) and he was having difficulty dealing with his death. After retaining Mr. Wagner and while sorting through the medical records of Dr. Stalker, Mr. Savoie was “faced with

a lot of personal emotions arising from the notes concerning his past". He suffered further unspecified injuries in an accident in January of 1996 and underwent extensive medical treatment, requiring him to wear a shoulder harness for six weeks and attend physiotherapy. In December 1996, he fell down and injured his hand which required a cast. In January 1997, he fell on ice and re-injured his hand. That same month he required oral surgery to remove an infected tooth. There was a misunderstanding between him and Mr. Wagner about a draft settlement proposal prepared in March of 1997, as a result of which it was not forwarded to Mr. Miller. In March of 1997, he applied for employment with Mr. Miller's firm. Absent is any specific evidence detailing how the intervening injuries and other events impeded Mr. Savoie's progress with this file. Nowhere in his lengthy affidavit does he say that he was unable to instruct his solicitor to the extent necessary. At least part of the delay is attributable to a conscious decision not to pursue this action while working on settlement in relation to a subsequent accident. It is telling that when Mr. Miller, in his letter of August 29, 1994, asked for an explanation of the delay, Mr. Wagner responded only that it was due to the inaction of Mr. Savoie's previous solicitor. He did not attribute it to any inability on Mr. Savoie's part to advance this lawsuit.

In my view, the explanation for the lengthy delay is inadequate.

On the question of prejudice, Mr. Savoie states in his affidavit that he does not believe that the appellants will be seriously prejudiced, that he has excellent recall of the events surrounding the accident and that he knows of no eroded memories in other witnesses. This is not sufficient to rebut the presumption of prejudice, bearing in mind the comments of McKeigan, J.A. in **Martell, supra**.

The impact of delay can vary depending upon the nature of the case. In this regard, the comments of Macdonald, J.A. from **Martell, supra** are instructive. Although in dissent on the result, he said at p.554:

> In cases such as those arising out of motor vehicle accidents one can readily appreciate how a delay of several years or longer can so affect the memory of witnesses as to what they saw and observed as to make it practically impossible for a defendant to then properly prepare and present his case.

It is the appellants' submission that not only did the respondent fail to offer evidence sufficient to rebut the presumption of prejudice arising from the delay, but that the appellants had shown actual prejudice. I agree. In particular the appellants say:

(i) The respondent failed to respond to a request in 1989 that the respondent provide his law school records. (The respondent had commenced attendance at Dalhousie Law School in 1983 and took a leave of absence in 1986, graduating in 1990.) Those records are no longer available.

(ii) In 1994 the respondent was asked to produce copies of income tax records, in relation to any loss of income claim. The respondent is now not certain what, if any, records are available for the pre-1991 period.

(iii) In August of 1994 the appellants requested all relevant medical reports and records relating to Mr. Savoie to that date. They were not produced. In particular the running chart notes of the doctor who treated him immediately after the accident have not been produced and the respondent does not know if they are available.

(iv) The respondent does not know where the physiotherapist with whom he had extensive therapy after the accident is today.

(v) The respondent has suffered a series of accidents since the motor vehicle accident in 1987 - in particular, a boating accident in September of 1988, a fall in April of 1995, a fall down stairs in December of 1996, a serious car accident in January 1996 resulting in a closed head injury and a fall on ice in January of 1997. The relationship of these accidents to the respondent's current state of health will be difficult to determine. Sorting out the complexities of the respondent's medical situation will be difficult as the appellants have not conducted further independent medical examinations after these events.

(vi) While the respondent professed excellent recall of the events leading up to the accident, on cross-examination at the application counsel for the appellants established that he is reported to have given substantially different estimates (to various medical professionals) of the speed at which the vehicle was traveling and the location in which the vehicle came to rest. The speed of the vehicle is particularly material on liability.

I am satisfied that the appellant had established that, should the action continue, there would be actual prejudice on both the question of liability and damages. Indeed, Associate Chief Justice Kennedy was satisfied that there would be some prejudice.

In my view, a patent injustice would result if the action were permitted to proceed. I make this determination taking into account the prejudice presumed to result from this inordinately lengthy delay; the fact that the delay was not adequately explained; the fact that the respondent is not an unsophisticated plaintiff, being both a lawyer and involved in other personal injury actions at the relevant time; that there is a serious issue of liability; that the respondent's professed excellent recollection of the events is suspect; that the appellants, although no onus lies upon them to do so, actively prompted the respondents to move the action along, and warned of this application some two years in advance.

The words of Lord Diplock in **Allen v. Sir Alfred McAlpine & Sons, Ltd.,** [1968] 1 All E.R. 543 (C.A.) are apt. At p.553:

> Moreover, where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court's being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. *There may come a time, however, when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible.* When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.
> (Emphasis added)

Disposition:

I would allow the appeal and dismiss respondent's action for want of prosecution. The appellants shall have costs in the amount of $1,500 inclusive of disbursements.

Bateman, J.A.

Concurred in:

Jones, J.A.

Hallett, J.A.

C.A. No.140626

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

WENDY FAGAN and ECONOMICAL MUTUAL INSURANCE COMPANY	)	
Appellants	)	
- and -	)	
DAVID SAVOIE	)	REASONS FOR JUDGMENT BY:
Respondent	)	BATEMAN, J.A.