**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***March v. Hyndman***, 2010 NSCA 100

**Date:** 20101209
**Docket:** CA 326467
**Registry:** Halifax

**Between:**

Andrew March

Appellant

v.

John Hyndman

Respondent

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| **Judges:** | Saunders, Farrar and Bryson, JJ.A. |
| **Appeal Heard:** | November 9, 2010, in Halifax, Nova Scotia |
| **Held:** | Appeal allowed; order on costs below set aside and matter remitted to Supreme Court for retrial per reasons for judgment of Farrar, J.A.; Saunders and Bryson, JJ.A. concurring. |
| **Counsel:** | Anna Marie Butler, Michael Dull and Denise Mentis-Smith, for the appellant<br>Daniel M. Campbell, Q.C. and Joseph Herschorn, for the respondent |

**Reasons for judgment**:

## Background

[1] The appellant, Andrew March, appeals from a jury verdict rendered January 21, 2010, dismissing his action against the respondent, Dr. John Hyndman. He alleges the trial judge, Justice C. Richard Coughlan, erred in charging the jury.

[2] For the reasons which I will now develop, I would allow the appeal, set aside the order for costs below, and remit the matter to the Supreme Court for retrial.

[3] I would also fix costs on the appeal in the amount of $2,500 plus taxable disbursements; costs of the appeal shall be costs in the cause.

## Facts

[4] On July 6, 1986, when the appellant was five years old, he fell off his bicycle fracturing his left upper arm bone.

[5] The appellant was taken to the IWK Children's Hospital (IWK) where he was treated by the respondent who set the bone in place and put a plaster cast on his arm.

[6] The appellant was subsequently diagnosed with a compartment syndrome which required surgeries at the IWK on July 10, July 16 and July 22, 1986.

[7] The appellant was discharged from the IWK on August 6, 1986, to seek further treatment at the Hospital for Sick Children in Toronto, where he had further surgeries.

[8] He was eventually diagnosed with Volkmann's Ischemia, a condition caused by the interruption of blood flow in the forearm. This condition resulted in a permanent deformity of his left hand.

[9] In February, 2002, the appellant commenced action against the respondent and the IWK alleging negligence against both parties with respect to his care while

in the IWK, which negligence caused his hand to be deformed. The action against the IWK was dismissed by Consent Order on January 4, 2010.

[10] This matter came on for trial on January 5, 2010, before a judge and jury on the issues of liability and damages. On the issue of liability, the jury had two questions to answer:

> 1. Did the defendant, Dr. John Hyndman, breach the standard of care expected of a pediatric orthopaedic surgeon in his treatment of the plaintiff, Andrew March?
>
> 2. If you answered yes to Question 1, did Dr. Hyndman's breach of the standard of care cause injury to Andrew March?

[11] On January 20, 2010, the trial judge gave his charge to the jury. He told the jury that the burden of proof in a civil trial was on the balance of probabilities. He correctly stated that this meant that the jury must be convinced that a contested fact is "more probable than not" before the party with the burden can succeed on this issue.

[12] When specifically discussing the burden applicable to Questions 1 and 2, the trial judge instructed the jury as follows:

> If you are not satisfied on the balance of probabilities that Dr. Hyndman breached the standard of care expected of a reasonably competent paediatric orthopaedic surgeon in his treatment of Andrew March, you should answer question 1 "No".
>
> <u>If you are not satisfied, if you are in a state of doubt</u>, the burden of proof on the Plaintiff has not been satisfied and then the answer to question 1 should be "No."
>
> ...
>
> <u>If you are not satisfied on the balance of probabilities, or if you are in a state of doubt that Dr. John Hyndman breached the standard of care</u> expected of a reasonably competent paediatric orthopaedic surgeon in his treatment of the Plaintiff, Andrew March, the burden of proof on the Plaintiff has not been satisfied…

> …
>
> If you are not satisfied on the balance of probabilities that breach of the standard of care by Dr. John Hyndman caused injury to Andrew March, you should answer question 2 "No". If you are not satisfied, if you are in a state of doubt, the burden of proof on the Plaintiff has not been satisfied, the answer to question 2 should be "No".
>
> ...
>
> If you are not satisfied on the balance of probabilities, or if you are in a state of doubt that the breach of the standard of care by Dr. John Hyndman caused injury to Andrew March, the burden of proof on the Plaintiff has not been satisfied, and you should answer question 2 "No".
>
> (My emphasis)

[13] Following the trial judge's charge, the appellant objected to the instructions on the burden of proof. He argued that the trial judge's instructions as to the standard of proof to be applied was incorrect, in particular, in equating balance of probabilities to being in a state of doubt, the charge was confusing.

[14] The trial judge, after hearing argument on the issue, re-charged the jury on the balance of probabilities burden by simply reading the standard "balance of probabilities" definition.

[15] On January 21, 2010, the jury returned its verdict by answering Question 1 in the negative. They found that Dr. Hyndman had not breached the standard of care owed to Mr. March (it was conceded at trial that Dr. Hyndman owed Mr. March a duty of care).

[16] By Order of the trial judge, dated March 15, 2010, the action was dismissed with costs to the respondent in the amount of $80,000.

[17] The appellant appeals from this Order.

**Issues**

[18] The sole issue for determination on this appeal is:

> Whether the Learned Trial Judge erred by misstating the burden of proof in his charge to the jury and, further, by failing to adequately repair the misstatements.

**Standard of Review**

[19] Both parties agree that when reviewing a jury charge, the correctness standard of review applies to whether the trial judge misdirected the jury with respect to the burden and standard of proof, failed to consider the essential elements of a legal test or made some other error in principle. **R. v. Assoun**, 2006 NSCA 47.

**Analysis**

[20] The principles applicable on a review of a jury charge were discussed by Saunders, J.A. in **Campbell v. Jones**, 2002 NSCA 128, ¶197-98:

> 197 It is well established that a jury charge is not to be picked apart and examined microscopically. See for example **R. v. Evans**, [1993] 2 S.C.R. 629 (S.C.C.) at p. 640, and **R. v. W. (D.)**, [1991] 1 S.C.R. 742 (S.C.C.), at p. 758.
>
> 198 Not every misdirection will result in a new trial. They must be substantial or result in a potential for a substantial wrong or miscarriage of justice before a court will intervene. See **Williams v. Reason** (1983), [1988] 1 All E.R. 262 (Eng. C.A.); **Leslie v. Telegram Publishing Co.**, [1956] S.C.R. 871 (S.C.C.); and **McLean v. Campbell** (1905), 38 N.S.R. 416 (N.S. C.A.), at 426-7.

[21] In **Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.**, 2006 CarswellOnt 2279 (C.A.), Borins, J.A. of the Ontario Court of Appeal said:

> 51 An appellate court reviewing a trial judge's charge will not hold the instructions to a standard of perfection: *Pietkiewicz v. Sault Ste. Marie (District) Roman Catholic Separate School Board* (2004), 71 O.R. (3d) 803 (Ont. C.A.) at para. 19. The reviewing court is concerned less with whether the law was perfectly stated and more with whether the jury would have properly understood the law at the end of the charge.

[22] Although the jury charge need not be perfect, it must ensure the jurors understand the issues involved, the relevant law and the evidence that bears upon the case. **R. v. McClenaghan**, 2008 ABCA 7, ¶2.

[23] In this case, the trial judge correctly set out the definition of "balance of probabilities" at the very outset of his charge. However, when specifically addressing the first question, on the standard of care, the trial judge instructed the jury, on two occasions, that the plaintiff has not met his burden, "*if you are not satisfied on the balance of probabilities, or if you are in a state of doubt*". If the jurors were not satisfied on the "balance of probabilities" or if they were "in a state of doubt", the trial judge directed the jury that the plaintiff had not met his burden in proving that the defendant had breached the standard of care.

[24] Likewise, when addressing the second question, the causation issue, on two more occasions the trial judge instructed the jurors that if they were not satisfied on the "balance of probabilities" or if they were "in a state of doubt", they should find that the plaintiff had not met his burden.

[25] The instructions to the jury on these two questions was the most fundamental aspect of the appellant's case — whether he had proven his claim to the requisite burden of proof as required by law.

[26] The trial judge's instructions, in my view, could be taken by the jury as:

1. creating two separate burdens of proof; one being on a balance of probabilities and the other being in a state of doubt; failure to satisfy either would be fatal to the appellant's case; or,

2. equating balance of probabilities to being in a "state of doubt".

[27] Neither of these alternatives properly describes the burden on a plaintiff in a civil proceeding.

[28] The respondent acknowledged that the use of the word "doubt" was "not ideal" because of the wide recognition of the phrase "beyond a reasonable doubt" with respect to the standard in criminal law. However, he goes on to suggest that the trial judge's charge, when read as a whole, would not be confusing to the jury.

He says we should read the trial judge's charge and the use of the term "state of doubt" as saying to the jury:

> If you are in a state of doubt about whether the assertion is more probable than not, then you must find against the plaintiff.

[29] Had the trial judge defined the burden of proof in the manner suggested by the respondent, it may have been acceptable. However, he did not. In a jury trial, an understanding of the applicable burden of proof is critical to the jury's decision-making. The trial judge's instructions provide the jury with a foundation from which its decision will flow. A clear and unequivocal charge with respect to the burden of proof is fundamental to the jury's function. The jury must be able to understand that the applicable burden is on "the balance of probabilities". Further, it must be clearly explained to them what is meant by "balance of probabilities".

[30] With respect, the trial judge, in this case, failed to do so. By incorporating into his instructions the concept of a "state of doubt", he created confusion about the applicable burden and further, what was required to meet that burden.

[31] To be successful on an appeal alleging an error in the jury charge, the appellant must demonstrate that the case was not fairly put to the jury. Examples of situations where it has been found that cases have not been fairly put to the jury are: (1) where the charge leaves the jury with a misapprehension as to the applicable legal principles; (2) where the jury charge was materially deficient; and, (3) where the law was not clearly stated on a critical issue. **Quan v. Cusson**, 2009 SCC 62, ¶ 42 - 43.

[32] I am satisfied that this test is met. The charge was unclear, and confusing on the very critical issue of the burden of proof. Further, the defective instruction on the burden of proof was not rectified in the standard wording of the jury charge. It followed the recitation of the very questions which had to be answered by the jury in determining its verdict. The failure to properly instruct the jury on this aspect of the plaintiff's case is an error going to the most fundamental issue in the plaintiff's case.

[33] I am satisfied that there is a very serious likelihood that the jury would have been confused and would have misapprehended the correct standard of proof based on the instructions given to them.

***The Re-Charge to the Jury***

[34] The respondent argues that any defect in the judge's charge to the jury was cured by the re-charge. With respect, I disagree.

[35] Following the charge to the jury, the appellant raised concerns about the contents of the charge. He submitted that the repeated use of the words "in a state of doubt" left the jury with misleading or confusing instructions on the applicable burden of proof.

[36] The trial judge, as a result of the appellant's objection, re-charged the jury. However, he simply reiterated the standard definition of proof on a balance of probabilities.

[37] He did not remedy his earlier misstatements. In particular, he did not clarify his earlier remarks by telling the jury what he meant by "if you are in a state of doubt".

[38] Given the significance of the issue, it was incumbent upon the trial judge to explain, to the jury, what he meant by the term "in a state of doubt". By failing to do so, the re-charge could not and did not cure the confusion created by his earlier statements.

[39] The respondent also asks us to take into consideration that trial counsel did not raise any objection to the re-charge given by the judge.

[40] Appellant's counsel raised the concern with the trial judge, the trial judge indicated the manner in which he was going to try to remedy the concern. It was clear that the appellant was not satisfied with the trial judge's initial charge to the jury. Failure to object, again, following the re-charge, while it may have been preferable, is not fatal. **Campbell v. Jones, supra**, ¶ 200.

[41] I have taken the failure to object to the re-charge into consideration but in my view, in these circumstances, it is not a significant factor.

**Conclusion**

[42] In circumstances where errors in the instructions to the jury on the onus of proof are confusing, such that there is a serious risk the charge has left the jury with a misapprehension of the proper legal principles to apply in deciding proof, a substantial wrong arises and the appropriate remedy is a new trial. **Senger v. Lachman**, 2008 ONCA 323.

[43] The trial judge's charge to the jury on the burden of proof was confusing and had the potential for a substantial wrong or miscarriage of justice. As a result, the appeal is allowed, the matter is remitted to the Supreme Court for a re-trial.

[44] With respect to costs, the March 15th, 2010, order awarding costs against the appellant is set aside. The costs to be awarded on the original trial, to either party, if any, will be left to the discretion of the trial judge on the retrial.

[45] With respect to costs on appeal, the amount is set at $2,500 plus disbursements. The costs of this appeal will be costs in the cause.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Bryson, J.A.