

NOVA SCOTIA COURT OF APPEAL

Citation: Ocean v. Economical Mutual Insurance Company,
2009 NSCA 24

Date: 20090316

Docket: CA 301593

Registry: Halifax

Between:

May Ocean

Applicant/Appellant

v.

Economical Mutual Insurance Company of Canada

Respondent

Judge: The Honourable Justice Fichaud

Application Heard: March 12, 2009, in Chambers

Held: Hearing date changed and directions given.

Counsel: May Ocean, the appellant, in person
Patricia Mitchell for the respondent Economical Mutual
Insurance Company of Canada
Bryna Fraser for Raymond Patrick Sullivan

Decision:

[1] The appellant Ms. Ocean applied for directions and for a new hearing date.

[2] Ms. Ocean's statement of claim alleges that she was injured in a motor vehicle accident with a vehicle operated by Mr. Sullivan, who was uninsured. In December 2002, Ms. Ocean, through counsel, sued Mr. Sullivan and Ms. Ocean's insurer, Economical Mutual Insurance Company. In August 2006, Ms. Ocean's solicitor withdrew and Ms. Ocean has since represented herself.

[3] In June 2008, Ms. Ocean applied to amend her statement of claim and Economical cross applied to sever the trial of the new causes of action. According to Smith A.C.J., in the decision under appeal, during those applications "Ms. Ocean indicated that she did not feel that she is mentally capable or competent to represent herself in this proceeding". As a result of that statement, later retracted by Ms. Ocean, the judge asked Ms. Ocean to obtain a certificate of competence from her family doctor. On August 11, 2008 Ms. Ocean filed a document signed by her family doctor saying that "the above is competent to defend herself in court".

[4] The judge's decision (2008 NSSC 282, ¶ 6, 8) referred to statements by Ms. Ocean in various documents filed with the court which raised a concern about Ms. Ocean's competency.

[5] On September 17, 2008 the judge heard a motion by Economical whether Ms. Ocean should be directed to submit to an independent medical examination of her competence to represent herself at the trial. Economical filed an affidavit of Dr. Edwin Rosenberg, a psychiatrist, who was questioned orally at the September 17th hearing. The judge issued a decision on September 30, 2008 directing that Ms. Ocean be examined. This was followed by an order of December 15, 2008, with more detail, directing an examination by Dr. Aileen Brunet to determine Ms. Ocean's competency to represent herself in this proceeding.

[6] Ms. Ocean, representing herself, has appealed Smith A.C.J.'s order to the Court of Appeal. On January 22, 2009, Justice Oland in chambers granted a partial stay and set the dates for the filing of the appeal book and factums and a hearing date of one-half day on May 25, 2009. On March 12, 2009, Ms. Ocean applied in chambers for directions on several matters. Also making representations were

counsel for Economical and counsel for Mr. Sullivan. I reserved my decision. This decision contains the directions on the following eight points.

[7] **First:** Ms. Ocean sought clarification on Mr. Sullivan's status in the appeal. Mr. Sullivan was neither an applicant for the order under appeal nor named as a respondent in Ms. Ocean's notice of appeal, but has appeared by counsel on the chambers hearings. Mr. Sullivan's counsel said at the hearing on March 12th, 2009 that Mr. Sullivan does not intend to apply under *Rule* 90.16 to be added as a respondent. Accordingly, Mr. Sullivan is not a party to the appeal.

[8] **Second:** Ms. Ocean asks that the date for filing the appeal book be delayed. Currently she was to file the appeal book by March 10th and her factum by March 31st. Ms. Ocean suggests April 14th for both the appeal book and her factum and a delay of the hearing date to the first week of June.

[9] From what was said in chambers on March 12th, 2009, it appears that Ms. Ocean may be making an application to adduce new evidence. This likely will require that the appeal hearing be expanded to a full day from the currently scheduled half day. The latest full day available on the docket before the end of June is May 28, 2009. The next available full day is in September. As trial dates are impending, it is better that the appeal be heard before September. So I will reschedule the hearing to May 28th, 2009, at 10 A.M. for the full day. Given the difficulties Ms. Ocean says she is having with preparation of the appeal book, I will delay the date for her filing the appeal book to April 14, 2009. Ms Ocean's factum will be due on the same day, April 14th. Economical's factum will be due on May 1, 2009.

[10] **Third:** Ms. Ocean and Economical cannot agree on the contents of the appeal book. Ms. Ocean has provided a list proposing over one hundred items. Counsel for Economical says that about half of these items were not part of the record for the motion of September 17, 2008 under appeal, and are irrelevant. The material before me for this chambers application does not include copies of the disputed items. Nor does it contain the transcript of the motion of September 17, 2008, so that I can determine what was before Smith A.C.J. for that motion. I do not have the record to identify, item by item, the appropriate contents of the appeal book. If there is to be a further application for directions to clarify the contents of the appeal book, by either party, the motion should provide the chambers judge with a complete transcript of the hearing of September 17, 2008.

[11] My direction is that the appeal book comply with and contain the items set out in *Rule 90.30*, of which Ms. Ocean has a copy. With respect to the evidence and related materials in *Rule 90.30(2)(b)*, the Appeal Book should contain only: (1) those items that were provided to Smith A.C.J. for the hearing on September 17, 2008; (2) the items provided to Smith A.C.J. for the preparation of the order of December 15, 2008 that is appealed; and (3) the documents containing Ms. Ocean's statements that are quoted in paragraphs 6 and 8 of Smith, A.C.J.'s written decision, if these documents are not included already in category (1).

[12] Other items on Ms. Ocean's list should be placed in a separate volume. That separate volume should be entitled "Disputed Evidence and Materials". Copies of both the Appeal Book and the Disputed Evidence and Materials should be prepared, filed with the court and served on Economical's counsel in accordance with *Rule 90.30*. Then, in factums and at the hearing, Ms. Ocean and Economical's counsel may make submissions respecting whether the court should consider any or all of the items in the Disputed Evidence and Materials, either as properly part of the record for the motion that is under appeal or as new evidence in the Court of Appeal under *Rule 90.47*.

[13] **Fourth:** At the hearing on March 12, 2009, Ms. Ocean was directed to *Rule 90.47*, respecting evidence adduced in the Court of Appeal. If the materials upon which Ms. Ocean seeks to rely are properly considered as evidence to be newly adduced in the Court of Appeal (i.e., not evidence that was before Smith A.C.J. for the motion of September 17, 2008), then Ms. Ocean will be required to make a motion, in accordance with 90.47, for the Court of Appeal to receive that evidence. *Rule 90.47* refers to a motion to the "Court of Appeal", meaning a panel. A chambers judge has no authority to allow new evidence under *Rule 90.47*. So, if Ms. Ocean wishes to apply under *Rule 90.47*, she should file and serve a notice of motion identifying that evidence to be adduced, and an affidavit containing the evidence to support her motion. This notice of motion and supporting information should be included in the volume of Disputed Evidence and Materials mentioned earlier. Ms. Ocean's factum, due on April 14, 2009 should address why the court should receive this material. Economical's factum may, of course, respond to Ms. Ocean's submission.

[14] **Fifth:** Ms. Ocean has a transcript of the hearing on September 17, 2008, under appeal. According to Economical's counsel, the respondent is content with that transcript. I direct that this transcript be included in the Appeal Book.

[15] **Sixth:** Ms. Ocean says that she wishes to place before the Court of Appeal copies of transcripts of other motions heard by Smith A.C.J. I direct that any such other transcript be included in the Disputed Evidence and Materials volume. It will then be up to Ms. Ocean either to make a motion to add the transcript to the appeal record, as discussed above, or to submit that the Court of Appeal should consider this material was part of the record in the motion under appeal. Ms. Ocean should include her submissions on this matter in her factum due April 14th .

[16] **Seventh:** Ms. Ocean asks that, instead of having these additional transcripts prepared by an official court reporter, she be permitted to type the transcripts herself. At one point in the hearing before me, Ms. Ocean suggested that she would prepare only those portions of the transcripts that supported her position. When questioned, she said she would type the entire transcripts. I deny Ms. Ocean's request that she may tender transcripts prepared other than by an official court reporter. Official court reporters are neutral to the dispute between the parties. The court is entitled to rely on that neutrality for transcription of the evidence. This appeal will be complex enough, without adding still another layer of debate between Economical and Ms. Ocean about accuracy of transcription.

[17] **Eighth:** Because of the issues respecting additional evidence, I give leave that each party's factum may extend to 60 pages.

Fichaud, J.A.