

NOVA SCOTIA COURT OF APPEAL

Citation: MacIntyre v. Cape Breton District Health Authority,
2011 NSCA 3

Date: 20110118
Docket: CA 317064
Registry: Halifax

Between:

Duncan F. MacIntyre

Appellant

v.

Cape Breton District Health Authority

Respondent

Judge: The Honourable Justice Oland

Appeal Heard: October 13, 2010

Subject: **Fresh evidence; tort law; negligence; burden of proof; causation; expert evidence; costs**

Summary: The appellant, an oral surgeon, formerly practiced from leased premises in a hospital owned and operated by the respondent. Hospital renovations were done, including near his premises. The appellant claimed that he was disabled by heavy metals released from materials demolished during the renovations and, as a result of toxicity, was forced to stop working in April 2003 and has been unable to work in his profession since.

The trial judge found that the respondent owed the appellant a duty of care and had breached its statutory duty to conduct an assessment of the materials to be demolished and by not taking adequate precautions. However, he concluded that the appellant had not proven that heavy metals were released by the renovations

or that they caused his medical condition. The appellant appeals the dismissal of his claim, the provisional assessment of damages, and the costs award.

Issues: Whether fresh evidence should be admitted. Whether the trial judge erred: (a) by not finding that the burden of proof shifted to the respondent; (b) by applying the wrong legal test for causation; (c) by failing to address breach of contract and breach of statutory requirements and to find the cause of the illness; (d) by admitting certain expert evidence; (e) in several findings of fact, including that the appellant is not suffering from heavy metal toxicity; (f) in his provisional assessment of damages; (g) by allowing increased costs.

Result: Fresh evidence motion and the appeal dismissed and costs awarded to the respondent. The proffered fresh evidence put forward a new theory of the case and was not relevant to a decisive issue. In these particular circumstances, the trial judge did not err by using the “but for test” rather than the material contribution test. It was not necessary that he deal with the claim in contract separately from that in tort, he correctly addressed the effect of the statutory breach, and he was not obliged to make a medical diagnosis or suggest treatment. There is no support in his decision that the trial judge unduly or erroneously relied upon the impugned expert evidence. He did not commit any palpable and overriding errors with respect to his findings of fact. Where the appeal on the merits is dismissed, it is not necessary to deal with the provisional assessment of damages. The trial judge’s costs decision does not indicate that he took an offer to settle into account and there are no grounds which warrant appellate intervention.

This information sheet does not form part of the court’s judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 42 pages.