NOVA SCOTIA COURT OF APPEAL
Citation: ***Marshall v. Annapolis County District School Board***,
2010 NSCA 13

Date: 20100219
Docket: CA 323155
Registry: Halifax

Between:

Johnathan Lee Marshall, an infant, represented
by his litigation guardian, Gladys Hardwick

Appellant

v.

Annapolis County District School Board and
Douglas Ernest Feener and Betty Acker

Respondents

Judge: The Honourable Justice Jamie W.S. Saunders

Application Heard: February 18, 2010, in Halifax, Nova Scotia

Held: Motion for leave to file an amended notice of appeal granted. Motion to limit the record of evidence in the court below to witnesses' testimony "on liability only" denied. Motion to strike out certain grounds in the amended notice of appeal denied.

Counsel: Robert K. Dickson, Q.C., for the appellant
G. Grant Machum, for the respondents Annapolis County District School Board and Douglas Ernest Feener
Respondent, Betty Acker not appearing

Decision:

[1] These written reasons are intended to confirm and, to some extent, amplify the directions I gave in Chambers this morning.

[2] Mr. Robert K. Dickson, Q.C. appeared on behalf of the appellant; Mr. G. Grant Machum attended on behalf of the respondents. Ms. Betty Acker, described as "Respondent and Self-Represented Third Party" did not attend, but Mr. Dickson reported that Ms. Acker was aware of today's hearing and told him that she chose not to appear. Mr. Dickson reported that Ms. Acker had attended portions of the trial but had not offered written or oral submissions. He said that if I were disposed to fix dates for the eventual appeal hearing, today, we need not concern ourselves with Ms. Acker's availability. He undertook to inform Ms. Acker of my directions.

[3] At this morning's hearing counsel sought my directions with respect to the appellant's amended notice of appeal to which Mr. Machum had consented on behalf of the School Board and the bus driver, as had Ms. Acker on her own behalf.

[4] I reminded counsel for the appellant that his amended notice of appeal was out of time and would require my leave to be received.

[5] **Civil Procedure Rule** 90.39(1) is clear. It states:

> 90.39 - Amending notice of appeal
>
> (1) A party may amend a notice of appeal, notice of cross-appeal, or notice of contention no more than fifteen days after the day the notice is filed.

[6] In this case the appellant's first notice of appeal was filed January 21, 2010. The appellant had 15 days thereafter to amend his notice of appeal which (excluding Saturday and Sunday in the period, **Civil Procedure Rule** 94.02(1)(b)) would take us to February 11. Yet the purported amended notice of appeal, consented to by the respondents, which is not dated but was faxed to the Registrar on February 17, is clearly out of time.

[7] The Registrar would have been entitled – in fact obliged – to reject the amended notice of appeal , absent leave granted by a judge of this Court to receive it.

[8] **Civil Procedure Rule** 90.39(2) states:

> 90.39. (2) A judge of the Court of Appeal may permit a party to amend a document filed at any time.

[9] I made it clear to the parties this morning that consenting to a proposed amended notice of appeal, which on its face was out of time, cannot side step the clear meaning of the **Rule** or the Registrar's duties thereunder. No amount of consent can create jurisdiction where none exists.

[10] Counsel for the appellant then sought my leave. Counsel for the respondents did not oppose the application. Ordinarily such an application would be brought on motion, with a supporting affidavit and proposed form of order. In the circumstances this morning I was prepared to waive those requirements, grant leave and receive the appellant's amended notice of appeal. No prejudice was occasioned and it would be pointless and needlessly expensive to require the parties to attend another day.

[11] I then proceeded to deal with counsels' motion for directions and setting dates. Here some context would be useful. For today's purposes I will describe the background summarily. The action is brought by Gladys Hardwick on behalf of Jonathan Marshall (d.o.b. December 21, 1989) who, on April 12, 1994, on Highway No. 201 at West Paradise, Annapolis County, Nova Scotia, was struck by a school bus owned by the respondent, Annapolis County District School Board, and driven by its employee, the respondent Douglas Feener. The third parties and other respondents Betty (Marshall) Acker and Vaughan Caldwell are identified, respectively, as the infant plaintiff's mother and stepfather. In taking third party proceedings against Ms. Acker and Mr. Caldwell, the School Board and Mr. Feener alleged that they were negligent in failing to take proper care of their son.

[12] Substantial damages were sought for Jonathan's serious and lasting brain injuries. The case was tried before a jury. Nova Scotia Supreme Court Justice Arthur W.D. Pickup presided. The trial lasted 10 weeks. After deliberating, the jury said there was no negligence on the part of the school board or its bus driver,

effectively dismissing the infant's claim in its entirety. The trial record is massive. Counsel estimated this morning that should all of the trial transcript be prepared, including a record of all of the trial judge's rulings, the record will exceed 10,000 pages.

[13] Not surprisingly, a host of witnesses, including experts, testified at trial on matters touching upon issues of liability, causation, and quantum of damage.

[14] The amended notice of appeal lists a variety of errors in law alleged to have been made by the trial judge both in his directions to the jury, and in rulings he made during the course of the trial. The appellant says the effect of these alleged errors, independently or collectively, deprived them of a fair trial. They ask that the appeal be allowed, that the jury's verdict be "reversed", that liability be found against the respondents, and that a new trial be ordered.

[15] This morning, Mr. Dickson, counsel for the appellant advised that he had made only two "slight" changes to the original grounds, but that the *effect* of these changes would, in his submission, result in a remarkable saving of production time and expense. Mr. Machum, counsel for the School Board and bus driver, disagreed. In his submission the so-called "slight" changes would effectively distort a proper and thorough review of the issues on appeal unless I were to agree to strike out two grounds contained in the amended notice of appeal.

[16] For clarity I need only reproduce here the two grounds challenged by the respondents and the two "slight" changes made by the appellant to his first notice of appeal:

> The grounds of appeal are:
>
> (1) THAT the learned Trial Judge made errors in law in that he misdirected the Jury or failed to adequately instruct the Jury or both, whereby the Appellant did not receive a fair trial. Specifically, the learned Trial Judge misdirected the Jury by:
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> ...
>
> (e) failing to require the Jury to assess damages regardless of its finding on the issue of liability, which gave the Jury an incentive

> to answer the first question in the negative and thereby avoid the difficult and time consuming task of assessing the Appellant's damages;
>
> (2) THAT the learned Trial Judge made errors at law during the course of the trial, whereby the Appellant did not receive a fair trial. Specifically, the learned Trial Judge erred when he:
>
> (a) permitted inadmissible hearsay discovery evidence, on a vital and controversial issue, of a witness who was not called at trial to be read to the jury by the Respondents, Annapolis County District School Board and Douglas Ernest Feener;
>
> ...
>
> (d) refused to admit a S.P.E.C.T. Scan Test Report in as evidence, which report provided important objective evidence that the Appellant had suffered lasting brain damage.
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> ...
>
> **Order requested**
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> The appellant says that the court should allow the appeal, that the judgment appealed from be reversed and liability found against the Respondents, Annapolis County District School Board and Douglas Ernest Feener; that (~~Damages should be assessed by the Court of Appeal (or in the alternative,~~) a new trial be ordered on the issue of damages, or in the alternative that a new trial should be ordered on liability and damages; and that costs of the initial Trial and Appeal should be awarded to the Appellant.
>
> ...

[17] The appellant says the changes were made so as to avoid having to reproduce any of the evidence relating to quantum of damage. Now, according to the appellant, the appeal need only be concerned with issues surrounding liability such that all of its grounds of appeal may be conveniently (and less expensively) considered based on evidential extracts from the trial proper limited to liability, together with portions of discovery evidence, and transcripts of the trial judge's rulings challenged by the appellant as being wrong in law.

[18] Mr. Machum disagrees. In his submission, grounds (1)(e) and (2)(d) cited above should be struck because they involve "damages". If, as the appellant now suggests, its appeal is really restricted to matters of liability then Mr. Machum says (1)(e) and (2)(d) are irrelevant and should be struck from the notice of appeal. In the alternative, if I were not disposed to strike out these grounds of appeal, Mr. Machum urged that the entire record from trial be produced as part of the appeal book. In his submission, it would be impossible to isolate those parts of the trial where witnesses "dealt only with liability". He said that *causation* was very much in dispute at trial, such that the evidence of many witnesses, including experts, crossed over liability, causation and quantum. In his submission it would be difficult and entirely impractical to attempt to isolate bits and pieces, here and there.

[19] After considering counsels' submissions I rejected both the appellant's request that the record on appeal be confined to evidence dealing with liability only and the respondents' request that impugned grounds (1)(e) and (2)(d) be struck out.

[20] By all accounts, this was a long, difficult and hard fought trial with senior, highly skilled lawyers appearing on both sides. In such a case, with such a record, I do not intend to second guess counsel on either the extent of the record that ought to be produced on appeal, or whether a claim of alleged error on the part of the trial judge should, technically, fall on the "liability", as opposed to the "damages" side of the ledger.

[21] The wiser course would be to err on the side of caution and take steps to ensure that the complete record is available, so that counsel are not hamstrung in their arguments because of some artificial construct.

[22] Better that, than to be faced with a request for an adjournment in the weeks leading up to the appeal hearing because someone concludes that other portions of the evidence from trial ought to have been transcribed and produced.

[23] From the limited record before me, I cannot say that grounds (1)(e) and (2)(d) are complaints related <u>only</u> to damages. A reading of (1)(e) demonstrates that it is at least tangentially related to liability in that the appellant complains the jury's answer to the first jury question on liability was a direct result of the trial judge's "failure" to require the jury to assess provisional damages in any event.

Further, Mr. Machum acknowledged in argument that (2)(d) is relevant both to causation, and the trial judge's ruling that the impugned report was inadmissible because, among other reasons, it was not proper rebuttal evidence. My quick reading of the file confirms that the S.P.E.C.T. report was produced to rebut the medical opinion evidence put forward by the respondents' experts. From all of this, it seems to me impractical to suppose that these grounds of appeal could be fairly considered without the benefit of the medical and other evidence led at trial on damages. Put simply, the entire record should be accessible to the parties, and the panel hearing it.

[24] Accordingly, I will permit the amended notice of appeal to stand as is. I will direct that the appeal book must contain the entire trial record including all of the transcribed evidence, the submissions made to Justice Pickup and the judge's rulings.

[25] The decision, at the end of the day, as to whether such a substantial record was necessary in order to deal with the issues on appeal, will best be left to the panel assigned to hear it. I reminded counsel this morning that they may well wish to make submissions at the appeal hearing, or may be invited to do so, as to the actual cost in reproducing this record. Thereafter, the panel may choose to address the question of recovery or reduction or apportionment of such a disbursement. I leave all of that to the panel to decide.

[26] As a result of this morning's directions it was understood the appellant's declaration in his certificate of readiness that the appeal book could be filed by June 1st, 2010, would need to be modified. Accordingly, I fix the following dates:

Appeal Book: July 16, 2010
Appellant's factum: August 13, 2010
Respondents' factum: September 10, 2010
Appeal hearing (Full Day) Wednesday, December 1, 2010.

[27] I have fixed the costs for today's Chambers appearance at $750.00 inclusive of disbursements, and they will be costs in the cause.