NOVA SCOTIA COURT OF APPEAL
Citation: ***Mahoney v. Cumis Life Insurance Company***, 2011 NSCA 31

Date: 20110330
Docket: CA 327577
Registry: Halifax

Between:

Mary Isobel Mahoney

Appellant

and

Cumis Life Insurance Company

Respondent

Judges:	Saunders, Hamilton and Fichaud, JJ.A.
Appeal Heard:	March 16, 2011, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is allowed in part per reasons for judgment of Fichaud, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Daniel J. MacIsaac, for the appellant Karen N. Bennett-Clayton and Matthew W. Pierce, for the respondent

Reasons for judgment:

[1] For several years Mr. Mahoney had a heart condition. Then, soon after being in a motor vehicle accident, he had a heart attack and died. His widow sued Mr. Mahoney's life insurer for benefits under an accidental death policy. On the insurer's motion for determination of a preliminary issue of law, the chambers judge decided Mr. Mahoney's death was not "accidental" under the policy, because of his pre-existing condition, and dismissed Ms. Mahoney's action. Ms. Mahoney appeals. She says this factual matter should not have been decided on a preliminary motion for a determination of law, and should go to trial.

Background

[2] Mr. Anthony Thomas Mahoney had a heart attack in 2002. After this, his cardiac condition was monitored and he took medication for hypertension.

[3] On July 20, 2005, Mr. Mahoney was in a van, travelling westward through New Brunswick. The van struck a moose on the highway. Mr. Mahoney had minor abrasions that did not need hospital attention. But an hour or so later, while in another vehicle, Mr. Mahoney had chest pains. His daughter, also in the vehicle, helped administer nitroglycerin. He was taken to Upper River Valley Hospital in Waterville, New Brunswick, and treated for a heart attack. Several hours later, he died.

[4] Cumis Life Insurance Company had issued a group accidental death policy insuring Mr. Mahoney's life, with his spouse Amy Mary Isobel Mahoney as beneficiary. The policy covered accidental death defined as follows:

> Accidental death means death occurring within 180 days of the date of the accident which results directly and independently of all other causes
>
> (a) solely from a bodily injury caused by external violent and accidental means and visible on the surface of the body or disclosed by an autopsy or
>
> (b) solely from an accidental drowning.

The policy's Exclusions said:

> Benefits are not payable for accidental death resulting directly or indirectly from any of the following causes ...
>
> (e) Any bodily or mental infirmity, illness, disease or bacterial/viral infection.

[5] Ms. Mahoney sued Cumis for the accidental death benefit under the policy. Cumis' Defence says that Mr. Mahoney's death was not "accidental" under the policy's coverage and, alternatively, was excluded because it was caused, directly or indirectly, by infirmity, illness or disease.

[6] Cumis then applied under *Rule* 12 for an order that Mr. Mahoney's death either was not an "accidental death" under the policy or was excluded from coverage. The Notice of Motion said:

> **Motion**
>
> The Defendant, Cumis Life Insurance Company moves for an order determining that the death of Anthony Thomas Mahoney was not an "Accidental Death" as defined in Cumis Credit Union Group Accidental Death Insurance Policy #0527278-1 issued by Cumis Life Insurance Company to Anthony Thomas Mahoney and naming Mary Isobel Mahoney as beneficiary, or, in the alternative, that coverage under Cumis Credit Union Group Accidental Death Insurance Policy #0527278-1 is excluded by the express terms of said Policy issued by Cumis Life Insurance Company to Anthony Thomas Mahoney.
>
> . . .
>
> **References**
>
> Cumis makes this application pursuant to Rule 12 of the Civil Procedure Rules.

[7] Justice McDougall heard Cumis' motion in Chambers on March 8, 2010, issued an oral decision on March 26, 2010 and a written decision on August 6, 2010 (2010 NSSC 307). He determined that Mr. Mahoney's death resulted partially from his pre-existing heart condition, and was not an "accidental death". He said:

> [19] Based on my review of the evidence Mr. Mahoney died of myocardial infarction, or in lay terms, a heart attack. While the motor vehicle accident in which he was involved likely was a factor that contributed to the stresses that

> eventually led to his heart attack, it did not cause his death. He suffered only minor injuries in the accident. Mr. Mahoney clearly had a pre-existing heart condition. He also suffered from hypertension and was diabetic. In the past he had other ailments for which he had to undergo treatments. Sadly, his time had come.
>
> [20] The nature of Mr. Mahoney's ultimate demise does not fit the definition of accidental death contained in the Cumis Credit Union Group Accidental Death Insurance Policy #0527278-1. This conclusion is based on a plain and simple interpretation of the wording of the insurance policy. The plaintiff has failed to satisfy the burden of establishing a causal relationship between the accident and the deceased's death.

Respecting Cumis' alternative submission based on the exclusion, the judge added:

> [21] Although I do not have to decide if the alternative argument advanced by counsel for the defendant succeeds or fails (since I have concluded that Mr. Mahoney's death was not an accidental death as defined under the policy), I will nonetheless offer these comments. Mr. Mahoney's death resulted, directly or indirectly, from a pre-existing heart condition which was further compromised by hypertension or high blood pressure. The exclusion clause which the Courts strictly enforce makes it clear that even if an accidental death occurs benefits will not be paid if it results directly or indirectly from any bodily or mental infirmity, illness, disease or bacterial/viral infection.
>
> [22] The defendant would likely succeed in satisfying the burden of establishing that the deceased's pre-existing conditions were operating factors that directly or indirectly resulted in his death. I would have ruled in favour of the defendants on this issue if I had found that an accidental death as defined in the policy had occurred. The motion therefore is granted and I will ask counsel if they wish to make submissions now on cost or, if you would prefer more time, I will entertain submissions later in writing.

[8] The judge's order of April 30, 2010 dismissed Ms. Mahoney's action:

> **IT IS ORDERED** that the death of Anthony Thomas Mahoney was not an "Accidental Death" that did not result "directly or indirectly from ... any bodily or mental infirmity, illness, disease or bacterial/viral infection" within the meaning of Cumis Credit Union Group Accidental Death Insurance Policy #0527278-1 provided by the Defendant to Anthony Thomas Mahoney.

> **IT IS FURTHER ORDERED** that the Plaintiff's action is dismissed without costs.

[9] Ms. Mahoney appeals.

Issues

[10] Ms. Mahoney submits that *Rule* 12 authorizes a determination of only an issue of law, and did not permit the judge to decide an issue of fact, namely the cause of Mr. Mahoney's death.

Standard of Review

[11] An interlocutory decision with a terminating effect is reviewed for "error of law resulting in an injustice": *Frank v. Purdy Estate* (1995), 142 N.S.R. (2d) 50, at para. 10. *Frank v. Purdy Estate* has been followed in many later decisions of this court. An interlocutory ruling without terminating effect is reviewed for error of principle *or* patent injustice. In *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26, at paras. 26-36, Justice Saunders signalled that this counterintuitive distinction might be reviewed at some point. The distinction does not affect this appeal. If the judge's error in law or principle affected the result, then his dismissal of Ms. Mahoney's action would be a patent injustice: *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, para. 15; *Turner v. Halifax (Regional Municipality)*, 2009 NSCA 106, para. 14. So I will focus on whether the judge erred in law or principle which, to be clear, includes an error in the interpretation of the *Civil Procedure Rules*.

Analysis

[12] This was just a motion under *Rule* 12 for the preliminary determination of a question of law. There was no motion for summary judgment under *Rule* 13.

[13] Before considering the circumstances of this case, I will discuss the ambit of *Rule* 12.

[14] *Rules* 12.01 and 12.02 and 12.03(1) say:

> **Scope of Rule** 12

> 12.01 (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.
>
> (2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.
>
> **Separation**
>
> 12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:
>
> (a) the facts necessary to determine the question can be found without the trial or hearing;
>
> (b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;
>
> (c) no facts to be found in order to answer the question will remain in issue after the determination.
>
> **Determination**
>
> 12.03 (1) A judge who orders separation must do either of the following:
>
> (a) proceed to determine the question of law;
>
> (b) appoint a time, date, and place for another hearing at which the question is to be determined.

[15] Under *Rule* 25.01 of the former *Civil Procedure Rules*, the practice was that the chambers judge could decide a preliminary issue of law only if the parties filed an agreed statement of fact: *e.g. Seacoast Towers Services Ltd. v. MacLean* (1986), 75 N.S.R. (2d) 70 (S.C.A.D.), paras. 18-23, and various other authorities.

[16] The new *Rule* 12 does not require an agreed statement for the determination of a preliminary question of law. This is clear from *Rule* 12.01(1) - a party may "in

limited circumstances, seek the determination of a question of law ... even though the parties disagree about the facts relevant to the question".

[17] *Rule* 12.02 recites those "limited circumstances": (a) "the facts necessary to determine the question can be found without the trial or hearing", (b) the determination will reduce the length or expense of the proceeding, and (c) "no facts to be found in order to answer the question will remain in issue after the determination". Conditions (a) and (c) contemplate that the Chambers judge, on a *Rule* 12 motion, may find facts, but only (1) the facts necessary to determine the pure legal question before him and (2) if all those facts, necessary to decide the pure legal question, can be determined without a trial.

[18] So the first step with *Rule* 12 is to identify the pure legal question to be determined. *Rule* 12.01(1) permits a motion for determination of "a question of law". *Rule* 12.03(1) permits the judge either to determine "the question of law" or appoint a time to determine that question of law. The *Rule* does not authorize a determination of a question of fact or mixed fact and law, excepting only those facts that scaffold the point of pure law under *Rule* 12.02(a) as I have discussed.

[19] The second step is to identify all the facts that are necessary to determine that question of pure law. Nothing in *Rule* 12 permits a judge to decide facts that are unnecessary to determine the question of pure law in the motion. A party who wishes an assessment of evidence on other matters, leading to a judgment by interlocutory ruling, should make or join a summary judgment motion under *Rule* 13.04 ("Summary judgment on evidence").

[20] The third step under *Rule* 12 is to decide whether all those facts necessary to determine the issue of pure law in the motion "can be found without the trial or hearing".

[21] This third step generates the question - What does *Rule* 12.02(a) mean that those facts "can be found without the trial or hearing"? In my view, it does not mean that a judge under *Rule* 12 can assess evidence in the same fashion as in a motion for summary judgment on the evidence under *Rule* 13.04. Under *Rule* 13.04, a responding party must "put his best foot forward" with evidence or risk a determination that there is no genuine issue of material fact requiring trial, or that its claim or defence has no real chance of success, and a consequent dismissal of the

action or defence: *Aylward v. Dalhousie University*, 2011 NSCA 20, para. 11, affirming *Dalhousie University v. Aylward*, 2010 NSSC 65, paras. 20-25; *Ristow v. National Bank Financial Ltd.*, 2010 NSCA 79, paras. 5-9; *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, para. 173. *Rule* 12 does not give the chambers judge that power. A judge under *Rule* 12 may not determine contested facts that might hinge on testimony at a trial. That is the point of *Rule* 12.02(a)'s condition that "the facts...can be found without the trial".

[22] With that interpretive backdrop, I will turn to the motion and ruling in this case.

[23] Cumis' Notice of Motion (above para. 6) asked for an order under *Rule* 12 that Mr. Mahoney's death was not an Accidental Death under the policy or that coverage was excluded by the policy.

[24] The judge (above para. 7) said that Mr. Mahoney's death was not accidental and, alternatively, coverage would be excluded. To reach those conclusions the judge both interpreted the insurance policy and made a finding of fact as to cause of death. On cause of death, the judge considered statements by the coroner and by the ER treating physician. Neither physician filed an affidavit or testified. Both physicians' statements were attached to the affidavit of Cumis' solicitor, meaning the physicians gave no evidence and could not be cross-examined.

[25] The ER physician's statement said: "I consider that the stress of the accident triggered the events that led to his death and that without the car accident he would have arrived safely at his destination." To this, the judge commented:

> [18] While Dr. Tooley's opinion "that the stress of the accident triggered the events that led to his death" might not be seriously challenged, her added assertion "and that without the car accident he would have arrived safely at his destination" might not stand up under serious questioning. It is obviously the result of sheer speculation on her part.

The judge found (para. 21) "Mr. Mahoney's death resulted, directly or indirectly, from a pre-existing heart condition which was further compromised by hypertension or high blood pressure", and (para 19) "Sadly, his time had come."

[26] The judge's order dismissed Ms. Mahoney's action, a remedy neither sought in Cumis' Notice of Motion nor authorized by *Rule* 12.

[27] The interpretation of the insurance policy's unambiguous terms was, in this case, a question of pure law. The pleadings agree that the policy in evidence for the motion was the document whose terms govern this claim. No trial testimony would alter that reality. All the facts necessary for the interpretation of those policy terms were before the judge on the motion. *Rule* 12 entitled Cumis to an interpretation of the policy's unambiguous terms.

[28] There is no error in the judge's interpretation of the policy. The policy says (1) the death is "accidental" if it resulted "independently of all other causes" and "solely" from the bodily injury or drowning as described in the coverage, and (2) the death is excluded if it resulted "directly or indirectly from any of ... infirmity, illness or disease". If Mr. Mahoney's pre-existing heart condition was even a partial contributing cause of death, then the policy's unambiguous terms would deny coverage or exclude this claim.

[29] But an order declaring that interpretation exhausts the judge's power on this motion.

[30] Mr. Mahoney's cause of death - whether his fatal heart attack resulted solely from the motor vehicle accident or from a combination of the accident and Mr. Mahoney's prior medical condition - is a question of fact. It is not an issue of law to be determined under *Rule* 12. Neither is it an issue of fact "necessary to determine the question" of law under *Rule* 12.02(a). The judge may interpret the unambiguous words of the policy without finding cause of death. Cumis' Notice of Motion joined the factual and legal (interpretive) issues into a mixed question of fact and law by requesting an order that the death was "not an 'Accidental Death' as defined in [the] Policy". The applicant's drafting technique does not expand the judge's power under *Rule* 12.

[31] The ER physician who treated Mr. Mahoney at the Upper River Valley Hospital, Dr. Tooley, wrote that "the stress of the accident triggered the events that led to his death and ... without the car accident he would have arrived safely at his destination". The chambers judge weighed that statement and found that the ER physician's assessment "might not stand up under serious questioning" and "is

obviously the result of sheer speculation on her part". With respect, those comments do not belong in this chambers decision. That factual issue was not before the judge under *Rule* 12. Further, the judge had no sworn evidence from any physician. The so-called "medical evidence" was attached to the affidavit of Cumis' solicitor. Even on a summary judgment application, that presentation would not entitle the judge to predict a hypothetical cross-examination or make an evidential assessment on cause of death.

[32] The judge's order dismissed Ms. Mahoney's action. *Rule* 12 authorizes the determination of the point of law. It does not authorize a dismissal of the action. I repeat – this was not an application for summary judgment.

Conclusion

[33] I would grant leave to appeal and allow the appeal in part. The order (above para. 8), should be replaced by:

> It is ordered that, if it is determined that Mr. Mahoney's pre-existing heart condition even partially contributed to his death, then the terms of Cumis Credit Union Group Accidental Death policy # 0527278-1 would deny coverage or exclude Ms. Mahoney's claim.

[34] There should be no dismissal of Ms. Mahoney's action. As success was divided, the parties should bear their own costs of this appeal.

Fichaud, J.A.

Concurred: Saunders, J.A.

Hamilton, J.A.