**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***Ocean v. Economical Mutual Insurance Company***, 2011 NSCA 106

**Date:** 20111125
**Docket:** CA 351488
**Registry:** Halifax

**Between:**

May Ocean

Applicant

v.

The Economical Mutual Insurance Company
and Raymond Patrick Sullivan

Respondents

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|---|---|
| **Judge:** | The Honourable Madam Justice Linda L. Oland |
| **Motion Heard:** | November 17, 2011, in Halifax, Nova Scotia, in Chambers |
| **Held:** | Motions dismissed. |
| **Counsel:** | Appellant in Person<br>D. Geoffrey Machum, Q.C. and C. Patricia Mitchell for the Respondent, The Economical Mutual Insurance Company<br>Raymond Sullivan, Respondent in Person<br>Edward A. Gores, Q.C. for the Attorney General of Nova Scotia |

**Decision**:

[1] The appellant, May Ocean, has appealed the decision of Smith, A.C.J. dated May 31, 2011 and reported as 2011 NSSC 202. The respondent The Economical Mutual Insurance Company has filed a cross-appeal. Included in the appellant's motion to have the appeal set down for hearing was a motion for directions - she asked for waiver of compliance with the requirement for a transcript for the appeal. At the end of the hearing in Chambers, I reserved my decision.

[2] For the reasons which I will develop, I would dismiss the appellant's motion.

## Background

[3] In order to provide necessary context, I will begin by setting out the overview of the action and the parties contained in the decision under appeal:

> [1] This action arises as a result of a motor vehicle accident that occurred on the Prospect Bay Road, Prospect Bay, Nova Scotia on December 13th, 2000. The collision involved the Plaintiff, May Ocean, who was driving a 2000 Volkswagen Golf and the Defendant, Raymond Patrick Sullivan, who was driving a 1988 Honda Civic CRX. Ms. Ocean has brought an action against Mr. Sullivan alleging that he was driving in a negligent manner at the time of the accident and that his negligence caused her to suffer personal injury and damages. Mr. Sullivan denies that he was operating his vehicle in a negligent manner at the time of the accident and suggests that he was in the agony of collision. Alternatively, he submits that Ms. Ocean was contributorily negligent.
>
> [2] Mr. Sullivan was uninsured at the time of the accident. As a result, Ms. Ocean has also brought an action against her own insurer, the Economical Mutual Insurance Company (hereinafter referred to as "Economical"), pursuant to the uninsured motorist provisions of her own automobile insurance policy.
>
> [3] In July of 2008, Ms. Ocean applied to amend her pleadings to also bring a negligence and bad faith action against Economical. Leave was granted to amend her pleadings but the new claims brought against Economical were bifurcated from the original claims advanced by the Plaintiff and are to be heard by way of a separate trial.

> [4] In July of 2010, the proceedings were trifurcated so that the issue of damages will be dealt with after the motor vehicle accident trial and the negligence/bad faith claim against Economical (see 2010 NSSC 314). As a result, the issues before me in this proceeding are limited to liability for the motor vehicle accident and whether Economical is liable to Ms. Ocean pursuant to the uninsured motorist provisions of her own automobile policy.

[4] The appellant's action had been divided so that different issues would be heard in separate hearings. The issue in the decision under appeal was restricted to liability; that is, who was responsible for the accident?

[5] The trial lasted 25 days. The judge found that both Mr. Sullivan and the appellant bore some responsibility for the accident. She apportioned liability 80% against Mr. Sullivan and only 20% against the appellant. She also determined that Economical is liable to pay the appellant the amount that she is entitled to recover from Mr. Sullivan as damages for bodily injuries resulting from the accident up to a maximum of $200,000.00, and stated that costs would be decided at the conclusion of the entire action.

**The Appeal and Motion**

[6] The appellant represented herself at trial and is self-represented on her appeal. Her Notice of Appeal contains 20 grounds of appeal and seeks 28 items of relief. Later in my decision, I will refer to some of its grounds and the relief sought in more detail.

[7] The appellant brings her motion for directions pursuant to *Civil Procedure Rule 90.25:*

> **90.25 (1)** An appellant must make a motion to a judge of the Court of Appeal to set the time and date for the appeal to be heard and to provide directions for the appeal, including as to the appeal book and factums to be filed by the parties, and the judge may make such order as the judge considers just. (Emphasis added)

[8] Rule 90.26(1) requires an appellant to file a certificate of readiness before the motion for directions may be heard. That document must certify that the appellant has ordered the transcription of the lower court proceedings from a

certified court reporter: Rule 90.26(2)(d). An appellant who cannot file the requisite certificate must file an affidavit explaining her position: Rule 90.26(4).

[9] Pursuant to Rule 2.03, a single judge of this court has the discretion to waive compliance with Rule 90.26. Rule 2.03 states:

> **2.03 (1)** A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:
>
> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

[10] The appellant filed an affidavit in support of her motion for waiver of compliance with Rule 90.26(2) as it relates to a transcript. In it, she explained why she cannot comply and set out what materials, in her view, would suffice for her appeal:

> 8. THAT my reasons for not being able to comply as per #7 above is as follows:
>
> 1) Firstly, it is unnecessary to provide the Trial tapes/transcripts for this Appeal case given that my claims included in the Notice of Appeal can be proved by hard evidence as found in the Courts Record, ie:
>
> trial Exhibits;
> Oral and Written Decisions and Orders by the Associate Chief Justice Deborah K. Smith (herein "ACJ Smith") leading up to and during Trial concerning the Supreme Court case-Hfx No. 190673;
> points of law where ACJ Smith has obviously erred in her Decisions and Orders relating to this case.
>
> The documented evidence that is a matter of the Record and trial Exhibits that I intend to provide in the Book of Appeal amply prove contradictions, errors of law and unjust biases evident in Decisions and Orders made by ACJ Smith in relation to this case.
>
> 2) Although more damning evidence remains to be found in Trial recordings and their transcripts that I would otherwise use in my Appeal Book, it is not within my financial capability to meet the requirement as appears to be laid out in the Civil Procedure Rules. As is evident by Civil Procedure Rule 90.26 (2) (c)(d) as per #7

> above, it is the responsibility of the Appellant to order Court Recordings and Transcripts for the Appeal Book. It is also clear therefore that I, the Appellant would be fully expected to have the funds and to pay for their acquisition. I estimate this figure to be around $40,000 and likely more.
>
> Because I lack the resources to purchase Court Recordings and Transcripts in relation to this Appeal, I am left at a disadvantage and as such I am denied Justice.
>
> At present, I have no steady or reliable income. The last 10 + years of fighting this battle have drained me of energy and resources to the point that my company - OceanArt Pewter Canada Limited, that I started about 22 years ago has suffered profoundly. . . .
>
> Now, my business is suffering to the point that I have put OceanArt building and property up for sale in hopes that this move will pay off ever increasing debt, avert Bankruptcy and put me in a position where I am then able to draw an income. For many years now, I have continued to work in my business without garnering an income for the simple reason being that after paying bills, there has been nothing left over, just more unpaid bills.

[11] The appellant also deposed that because of the income of her common-law partner, she was ineligible for Nova Scotia Legal Aid; Dalhousie Legal Aid does not involve itself with civil trials; and she has unsuccessfully approached over a dozen legal firms to take on her case on a contingency basis. Her affidavit did not include any documentation which would substantiate a precarious financial position, such as bank statements, business records, or copies of personal or corporate tax returns, or that would support her estimate of $40,000 for the preparation of the transcript.

[12] The appellant's affidavit concluded:

> 4) Regardless of my disadvantage in not being able provide Court Recordings and Transcripts, I believe that it is my right to present my case using evidence that is readily available at a much more affordable cost In fact, this evidence by far, more substantial and irrefutable given that they are a matter of the Court Record-Trial Exhibits, hard evidence such as RCMP photographs taken at the

> scene of the accident as well as other photo's taken the next day and then again, a few months later. The evidence found in Exhibits expose perjury committed by certain witness', most of whom being Affiliates of the Economical Mutual Insurance Company. That ACJ Smith turned a blind eye to hard evidence will be obvious as the Appeal Court view these documents which in turn reveal contradictions with her Written Decision and Order as pertaining to this case and as per the first trial.

[13] In Chambers, the appellant confirmed that she is prepared to proceed based on the "hard evidence" in the court record, such as the trial exhibits. Prior to the hearing in Chambers, I obtained a copy of the exhibit log sheet for the trial. It lists over 70 items, including photographs, drawings, diagrams, records, statements, reports including accident reconstruction reports, appraisals, and correspondence.

[14] In her Notice of Appeal, the appellant claims that, in determining that she was 20% liable for the accident, the trial judge:

- wrongly relied upon "false evidence" presented by witnesses and failed to give proper consideration to "irrefutable evidence" in the appellant's favour
- held an "unfair prejudice" or bias against her and in favour of Economical and "a corrupt Insurance System"
- had a "biased relationship" with individuals and organizations (including certain experts, legal counsel, the "minister of Insurance" in 2002, a journalist and another judge) who constitute "a wider web of conglomerate activity" in order to uphold a system which attacks victims of motor vehicle accidents
- refused her requests to bring forward certain evidence, to allow evidence in relation to "conglomerate activity" within the insurance system and otherwise, and to reschedule the hearing
- denied her "Abuse of Process application" pertaining to the accident reconstruction expert

She also alleged that another judge was biased in allowing a motion by Economical to amend its defence.

[15] In the "Order requested" portion of the Notice of Appeal, the appellant repeats many of these grounds although in different wording. Among other things, she asks that this court:

- determine that Economical "and affiliates" acted to harm her case and person and its actions constituted an abuse of process and violated her civil rights and freedoms
- find negligence and bad faith on the part of Economical
- order or recommend a judicial inquiry
- recognize and deem that Section D of insurance policies "is a wide open door for abuse" which constitutes a violation of her constitutional civil rights and freedoms
- order delivery of certain documents by the Superintendent of Insurance directly to this court
- remove the trial judge as trial judge in relation to this case, and charge her for offenses relating to "Abuse of Process, offences that are wholly against the law and a violation of my civil rights and freedoms."

[16] The appellant gave notice to the Attorney General that her appeal included "a Constitutional Question." Thus it was that counsel for the Attorney General appeared in Chambers on her motion for waiver of compliance regarding the preparation and provision of a transcript of the trial proceedings for the appeal.

[17] The respondent, Mr. Sullivan, who is self-represented on appeal, took no position on the appellant's motion.

[18] The respondent Economical emphasized that the appellant was not defending, but rather bringing actions and appeals and, moreover, is appealing a decision that found her substantially successful, that is, 80% not at fault for the motor vehicle accident. It described the appeal as a "scatter gun", one which alleges conspiracy and attacks everyone involved in the matter. Economical also referred to comments by the trial judge in her decision regarding the duration and conduct of the trial:

> [123] Counsel for both of the Defendants have expressed concern about the length of time that it took to hear this trial and the significant costs that have been incurred as a result. A trial which, in my view, would have taken no more than 5 days to hear with experienced counsel ended up being heard over approximately 25 days.
>
> [124] As a self-represented litigant, Ms. Ocean cannot be expected to conduct her case as effectively as an experienced lawyer. The difficulty in this case, however, went far beyond inexperience. Ms. Ocean appeared to be unable or

> unwilling to focus effectively on the matters that were in issue and seemed intent on subpoenaing witnesses and introducing evidence that was not relevant to this proceeding. In addition, she made serious allegations against both of the Defendants (such as allegations of threats) that were not supported by the evidence.

[19] According to Economical, the appellant is the author of her current situation. It argues that she turned a five day trial into a 25 day marathon by, among other things, not confining herself to the liability issue and continuing to allege abuse and conspiracy, issues that had been set aside for other hearings. It questions her estimate of $40,000 for the cost of the transcript. Economical maintains that an appeal panel would not be able to consider even the grounds of appeal which directly relate to the trial judge's liability decision without a full transcript. It submits that that decision rests on evidence such as that of the accident reconstructionist who was heavily questioned by the appellant. It says that the allegations of bias on the part of the trial judge also make a transcript essential.

[20] As mentioned earlier, the Attorney General had been given notice of a constitutional question on this appeal and appeared on the appellant's motion in Chambers before me. Although none of the appellant's grounds in her Notice of Appeal refer to constitutional matters, sections 7, 9, 11, 12, 13, 14, 15 and 24(1) & (2) of the *Charter* are noted as authorities for the appeal. As well, the orders requested include the following:

> 26. THAT the Appeal Court deem that the requirements of this Appeal Court which states that I must personally pay the enormous burden for transcripts of trial and court hearings does not take into consideration that I, as a lay litigant with limited resources which has been further compromised by abusive undertakings and leaving me without the resources to meet this demand, is a violation of my civil rights and freedoms and unlawful in that it encourages and furthers illegal activity of the conglomerate web who is then able to use their own abundant resources, much of which is tax payers dollars, in which to beat me down and deny me justice.
>
> 27. THAT the Appeal Court fully recognizes that a serious Constitutional Question is indeed raised in relation to my case Hfx. No 190673 and that the abuses I claim within the insurance, legal and judicial system and which constitutes as an illegally conglomerate network has infiltrated and extended into the Appeal Court as can be ascertained by requirements as noted in 26 above and as well that the Appeal Court decision **Citation: *Ocean v.***

> ***Economical Mutual Insurance Co.***, 2009 NSCA 81) which although having allowed my Appeal had NOT then ordered that I be reimbursed for the entire cash outlay towards all costs related to the appeal and in relation to the Supreme Court Hearing and order of the Application which led to the appeal.
>
> 28. THAT in light of 27 above, the Appeal Court itself holds to a bias in a systemic fashion as per cognitive and confirmation bias (Emphasis Added) and although this is a much lesser violation in nature than outright blatant biases, it is none the less just another arm of abuse whereby the likes of Economical and the monopoly of vehicle insurers are well versed and so can then rely on for the purpose of prey driving innocent victims of motor vehicle accident so that by the end of the day, they and I, then lack the sufficient resources in which to properly bring our case to trial. THAT this bias of the Appeal Court that I claim is in direct violation of my Civil Rights and Freedoms that warrants the raising of a Constitutional Question.

[21] It was apparent from discussions in Chambers that, despite recent communications between the appellant and counsel for the Attorney General, the Attorney General was still unclear as to precisely what constitutional questions the appellant was claiming. At my request, counsel for the Attorney General supplied me with a copy of the Notice of Constitutional Issue the appellant had sent him. It reads in part:

> **Notice to Crown**
>
> This notice is . . . to notify the Attorney General that the appellant May Ocean asserts in this proceeding that a statute of the Law regarding the Motor Vehicle Insurance Act is unconstitutional.
>
> **Legislation in issue**
>
> The Legislation that enables the Motor Vehicle Insurance Industry and the Facility Insurance as is, to conduct business in Nova Scotia and Canada
>
> The Legislation that enables the Justice System as is in Nova Scotia and Canada.

[22] The Attorney General did not receive any notice of any constitutional question in relation to the trial, was not aware of the trial, and had not participated. It submits that whatever the appellant's claims in regard to a constitutional

question may be, the Attorney General has no facts, no familiarity and no evidence with respect to any constitutional question. It still had not received particulars as to which legislation is being impugned. According to the Attorney General, it will have been prejudiced by not having been granted any opportunity at trial to deal with the constitutional question and to present evidence. It argues that dispensing with a transcript would eliminate any possibility of understanding what had happened in the trial hearing and would clearly prejudice its ability to respond on appeal to the appellant's claims of constitutional issues.

[23] The appellant did not suggest that she could provide extracts of the portions of the transcript relevant to her grounds of appeal. Nor was there any indication of consensus between the parties that the appeal could proceed on the basis of extracts agreed to by all of them.

**Analysis**

[24] Appellate courts have refused to proceed without transcripts in several cases, including: *Travaglione v. Wawanesa Mutual Insurance*, 2011 ABQB 604; *McDowell v. Barker*, 2011 CarswellOnt 1130 (CA); *Pavlis v. HSBC Bank Canada*, 2009 BCCA 309; *Versluce Estate v. Knol*, 2008 YKCA 3, leave to appeal to SCC refused, [2008] S.C.C.A. No. 169; *Clark v. Pettit*, 2005 BCCA 443; and *R. c. Fréchette*, [1996] O.J. No. 3233 (CA).

[25] In each of *Travaglione, McDowell, Clark*, and *Fréchette* it was held that the issues were such that the Court of Appeal would not be able to reach a decision without a transcript. For example, in *McDowell* the trial judge had dismissed the appellant's action against his former solicitor in negligence, breach of contract and breach of fiduciary duty, after a 12 day trial. The appellant claimed that he could not afford the cost of the transcript. Watt, J.A. in Chambers refused to vary the usual filing rules. He pointed out that the allegations of judicial error are "largely, if not, exclusively, fact-driven" and continued:

> . . . Putting to one side the significant difficulty an appellant encounters in overturning factual findings on appeal, an appellate court is in no position to determine the validity of the claim nor, I might add, is an appellant in any position to advance it, in the absence of the evidentiary record on which the findings were made.

[26] Impecuniosity was not accepted as a sufficient basis for relieving the appellant of the obligation to provide a full transcript in *Pavlis* and *Versluce Estate.* In *Pavlis,* the appellant who was appealing dismissal of her claims against her former employer had obtained a declaration of "indigent status" for the appeal, which exempted her from paying certain filing fees. However, it was held that this status did not relieve her of the obligation to compile her appeal materials, including a full transcript. There were allegations of trial unfairness and Kirkpatrick, J.A. in Chambers stated that "in all likelihood that would require a full transcript for this Court to properly assess that allegation."

[27] In *Versluce Estate*, the appellant also alleged impecuniosity but had been denied indigent status. He claimed that the Court of Appeal Rule requiring a transcript was inconsistent with the *Canadian Charter of Rights and Freedoms* and certain other documents, and that the motions judge was wrong in requiring him to pay all relevant fees. The Yukon Territory Court of Appeal disagreed, stating:

> . . . It must be remembered that this is litigation between two private parties. I fail to see how it engages any of the provisions of the ***Charter*** or any international covenant or declaration relating to human rights. All litigants who are engaged in private litigation are required to follow the Rules of Court. Mr. Justice Veale found that the appellant was not indigent and should not be excused from paying fees. The assessment of the financial situation of an applicant is a largely fact-driven conclusion in an individual case. I do not consider we ought to interfere with the decision of the judge on this subject. It also appears to me that the decision to refuse indigent status because of the lack of substance in the appeal is supportable.

[28] In appealing an earlier decision by the trial judge related to her competence to represent herself, this same appellant, May Ocean, unsuccessfully sought to have the Court rely on a partial transcript and other material. After a Chambers judge had held that a transcript typed by the appellant herself was unacceptable and she could not tender any that were not prepared by an official court reporter, the appellant had certain parts of the proceedings transcribed by an official court reporter and attached those transcripts, along with the CDs of the entire proceedings, to an affidavit. She suggested that the Court could "listen to the CDs" if members of the panel had questions about what happened during the parts of the proceedings that were not transcribed.

[29] However, in her decision reported as 2009 NSCA 33, Hamilton, J.A. in Chambers found that the partial transcripts and the CDs would not suffice for the efficient and just conduct of the appeal, and directed the appellant to provide transcripts of the entire proceeding:

> 13 While I am mindful of the cost of transcripts, an issue in many appeals, I am not satisfied that proceeding with Ms. Ocean's appeal on the basis of partial transcripts and CDs as proposed by Ms. Ocean would result in the efficient conduct of her appeal. The reason transcripts are routinely required is because they afford efficient, precise and reliable access to prior proceedings both in preparation for and at the hearing of the appeal. Often what is said in one part of a proceeding is explained or expanded by the context of the whole proceeding. Ms. Ocean has not satisfied me that her proposal would result in an efficient and just conduct of her appeal. I direct that if Ms. Ocean determines that reference to what was said in other proceedings is relevant to her appeal, transcripts of the whole of those proceedings prepared by an official court reporter will be required. . . .

[30] The requirement for a full transcript has been waived, but in circumstances far different from those before me. For example, in *Brouwer v. British Columbia (Minister of Energy, Mines and Petroleum Resources)*, 2002 BCCA 511, the petitioners sought to challenge a Chambers decision pertaining to a provincial permit for the operation of a gravel quarry. Most were retired and of limited means. Their request that the Supreme Court file be used as the appeal record was partially successful. While certain requirements were waived, they still had to file an appeal book with extracts of the evidence. It is noteworthy that the proceeding under appeal was not a trial but a Chambers hearing, the only transcript required from that hearing was of oral testimony of some two hours duration, and the respondent Crown did not oppose the use of the Supreme Court file on appeal.

[31] See also *LeBrun (c.o.b. as LeBrun Construction) v. Woodward*, 2001 NSCA 9, where the appellant appealed a Chambers decision. She applied for an order directing the Department of Justice to pay for the transcript because, according to the appellant, she could not afford to do so. Cromwell, J.A. (as he then was) found that no transcript at all was required because there had been no oral testimony given before the Chambers judge

[32] In the particular circumstances of this appeal, I would dismiss the motion for waiver of the requirement for a transcript.

[33] The appellant's affidavit failed to provide particulars or materials in regard to her financial situation and the cost of a transcript. As a result, I am unable to determine whether or not she is impecunious and unable to afford the transcript.

[34] In any event, it is my view that this appeal could not be properly heard or determined without a full transcript of the trial. The appellant's suggestion that the appeal panel could simply rely on the trial exhibits, decision and order, so-called "hard evidence" in the court record, does not allow an efficient and just conduct of the appeal and cross-appeal. The appellant's grounds claim that witnesses gave false testimony and the trial judge erred in her consideration and acceptance of evidence. This "hard evidence" without more, will not substantiate or refute perjury and may not serve to show the contradictions the appellant says the trial judge should have recognized. It would be difficult, if not impossible, for the panel to assess arguments regarding the reliability of evidence and findings of fact or inferences without a transcript of the testimony of witnesses given under direct and cross-examination.

[35] In Chambers, I explained the reviewing role of this court and the usefulness of testimony to explain the exhibits, such as photographs relating to a motor vehicle accident. The appellant rejected my suggestion that a transcript of the evidence surrounding the image depicted in a photograph would assist the panel of this court. She responded that "all the photographs contain enough evidence for a general person on the street to be able to comprehend what transpired. . ." With respect, I cannot agree that a photograph is so unambiguous. I agree with Watt, J.A. in *McDowell* that allegations of judicial error which are fact-driven support the requirement for a transcript.

[36] A transcript is essential in order for the panel to fully appreciate the arguments on the grounds relating to the trial judge's dismissal of the appellant's requests for matters such as the admission of evidence and rescheduling of the hearing and her abuse of process application. Otherwise the panel would not have before it the submissions made on the requests which the judge denied, nor her reasons.

[37] Moreover, the exhibits and written decision and order of the trial judge only deal with the issue of liability for the accident. The decision is silent as to any constitutional issue. It may be that none was raised or raised specifically. It is also

possible that whether the alleged constitutional issues are indeed constitutional issues or, if they are, whether they will be heard on appeal if the Attorney General was not given notice prior to trial, will be matters that will need to be determined. In any event, the exhibits, decision and order do not form a sufficient record to permit the appellant to put forward her arguments on these grounds. Nor do they allow the Attorney General to prepare for or to respond to any such issues.

[38] Finally, the appellant's Notice of Appeal includes several grounds that allege bias on the part of the trial judge. An appeal panel needs a complete record of the conduct of the trial and exchanges between the judge and the parties or their counsel throughout the trial, in order to give proper consideration to these serious claims.

[39] For all these reasons, I am of the view that the appellant's proposal to proceed without a transcript of the trial would not result in the efficient and just conduct of the appeal or the cross-appeal.

**Disposition**

[40] I would dismiss the motion for waiver of compliance with Rule 90.26 (2)(d). There will be no award of costs. The motion to set down the appeal for hearing is also dismissed.

Oland, J.A.