NOVA SCOTIA COURT OF APPEAL

Citation: *Poulain v. Iannetti*, 2013 NSCA 10

Date: 20130123
Docket: CA 353440
Registry: Halifax

Between:

George Poulain
Appellant/Respondent by Cross-Appeal

v.

David J. Iannetti
Respondent/Appellant by Cross-Appeal

Judges: Hamilton, Beveridge and Farrar, JJ.A.

Appeal Heard: November 13, 2012, in Halifax, Nova Scotia

Held: Appeal allowed, matter remitted for new trial, trial costs vitiated, costs ordered payable forthwith by Mr. Iannetti to Mr. Poulain in the amount of $3,000, inclusive of appeal disbursements, per reasons for judgment of Hamilton, J.A., Beveridge and Farrar, JJ.A. concurring.

Counsel: Janus Siebrits, for the appellant and respondent by cross-appeal
Ralph W. Ripley, for the respondent and appellant by cross-appeal

Reasons for judgment:

[1] The appellant, George Poulain, appeals Justice Arthur W.D. Pickup's April 24, 2012 order granting the respondent's, David J. Iannetti, non-suit motion and dismissing Mr. Poulain's negligence claim against the respondent lawyer. Mr. Iannetti cross-appeals the judge's costs decision.

Background

[2] Mr. Poulain alleges he sustained injuries when the vehicle in which he was a passenger was in an accident with another vehicle in June 2001. There appears to be no dispute that the owner of the vehicle in which Mr. Poulain was driving was covered by a standard Nova Scotia policy of automobile insurance containing the mandatory Section B - Accident Benefits coverage required by s. 140 of the **Insurance Act**, R.S.N.S. 1989, c. 231, providing, among other things, for limited wage replacement benefits regardless of liability. There is also no dispute that Mr. Poulain made a claim, including a claim for wage replacement benefits, under Section B ("Section B claim") and a claim against the driver and owner of the other vehicle, Adrian G. Kloet and Glendale Services (Ancaster) Limited, (the Section "A" claim).

[3] It is not disputed that Mr. Poulain received Section B wage replacement benefits periodically in the amount of $140 per week from the date of the accident until he settled his Section B claim on September 23, 2002, receiving a lump sum settlement of $7,250 with respect to his entitlement to wage replacement benefits. The consequence of this is that he received approximately two years of wage replacement benefits pursuant to Section B.

[4] After he settled his Section B claim, Mr. Poulain dismissed Mr. Iannetti, settled the Schedule A claim and sued Mr. Iannetti. He claims damages equal to the value of wage replacement benefits under Section B retroactive to the date he settled his Section B claim, the present value of future wage replacement benefits under Section B to age 65, and prejudgment interest.

[5] In his defence, Mr. Iannetti denied liability, alleging he never represented or advised Mr. Poulain with respect to his Section B claim. Alternatively, he says that Mr. Poulain suffered no damages as a result of settling his Section B claim

because he (1) was never entitled to wage replacement benefits under Section B because he was not employed at the time of the accident as required to qualify for wage replacement benefits under Section B, (2) was never qualified to receive wage replacement benefits under Section B because his injuries did not render him totally unable to work and (3) is receiving disability benefits under the Canada Pension Plan which eliminates or substantially reduces any Section B wage replacement benefits to which Mr. Poulain may have been entitled.

[6] At the trial which gave rise to the non-suit motion, Mr. Poulain testified along with Tricia Lynne Avery, one of the lawyers who represented the Section A insurer in the negotiations that resulted in the settlement of Mr. Poulain's claim against them.

[7] Mr. Poulain testified as to his employment history. He described the injuries he suffered as a passenger in the motor vehicle accident that prevent him from working in any capacity. He testified that he engaged Mr. Iannetti to represent him on his Section B claim and on his Section A claim.

[8] He gave evidence of the periodic payments of wage replacement benefits he received pursuant to Section B. He testified that he sought Mr. Iannetti's advice with respect to whether he should accept the Section B settlement offer, including settlement of his entitlement to wage replacement benefits, prior to doing so. His evidence was that Mr. Iannetti simply told him to take the settlement offer if he needed the money without any advice about what he was giving up by doing so:

> ...[Mr. Iannetti] said, "Well, you need the money", and that sort of thing, and he - - I said, "Well, I'd like to talk with you", so he said, "George", he says, "you need the money." He says, "Take it." I said, "Well, what am I entitled to here? Like, is there anything else that I'm entitled to here besides - - once I sign my name on something that puts an end to it." And he knew the financial position I was in at the time, and perhaps he thought, "Well, here, George, you need some money. Take it."
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> ...I said,"What about this Section B?" I said, "Are you sure this is all I'm entitled to, because once I sign it" - - he said, "Look, George, you need the money." He says, "Take it." And, so, that's why I signed it.

[9] Ms. Avery testified as a factual, not as an expert, witness. She gave evidence that Mr. Poulain settled the Section A claim in 2006 for $160,000. She

testified about the negotiations that led to the settlement with the insurer, indicating her client's position throughout was that if Mr. Poulain was totally unable to work, which they disputed, the amount he would be entitled to receive from them with respect to lost income would be reduced by all amounts he did, could or should have received under Section B. She confirmed that the August 28, 2006 letter of her co-counsel, D. Geoffrey Machum, Q.C., that was in evidence before the judge, encapsulated this argument:

> It is the Defendant's position that your client's maximum entitlement to loss of future wages would be $5,000 per year because our client is entitled to deduct the additional $7,250 the Plaintiff would have received from Section B had he not decided to settle his claim. This is in part the basis of our offer of $160,000.

[10] Following the testimony of these two witnesses and the close of Mr. Poulain's case, the respondent moved for non-suit. During submissions, the judge stated that there was no question Mr. Poulain had provided evidence of a duty of care:

> Was there a duty of care? No question about that in this case. ...

[11] With respect to the standard of care, with respect to which Mr. Iannetti argued, there was no expert evidence, the judge stated:

> ...The law is not that clear. The law is, in my opinion anyway the law is that in cases of professional negligence you have to call evidence of the standard and the duty except in certain circumstances.
>
> And an example of certain circumstances would be if it's so obvious to anybody that the - - for example a lawyer was negligent then you don't have to call expert evidence. Or if it's so egregious conduct, I think that's another. I'm thinking of some cases I read.
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> ...
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> But I think it's - - and especially in the case of a solicitor I think it's – it goes on the facts whether or not that type of evidence is necessary or not. But I know Justice MacAdam did a case where an adjuster - - he held that - - he non-suited it because there was no evidence of the standard from an adjuster.

> And there's many other cases like that. Medical malpractice case[s] you never think of not calling evidence on the standard so I guess to give you a long winded version of my view is that you know in the case of a solicitor it's all over the place on it and I think it depends on the facts whether you need expert evidence or not.

[12] Immediately before retiring to consider his decision, the judge stated:

> ...What we're really dealing with I think is causation.

[13] The judge granted Mr. Iannetti's non-suit motion on the basis there was no evidence to establish that the advice Mr. Poulain testified he received from Mr. Iannetti caused Mr. Poulain any damages or the amount of those damages. His reasons are very brief. He referred to **Civil Procedure Rule 51.06** which provides for non-suit motions, the test for such a motion set out in **Wentzell v. Spidle** (1987), 81 N.S.R. (2d) 200 (N.S.C.A.), and concluded:

> ...The Defendant's position is that there's no proof of any loss. They say that there is no evidence whatsoever to prove the actions of Mr. Iannetti caused any loss to Mr. Poulain.
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> Frankly after reviewing the evidence presented by the Plaintiff I agree and for the reasons articulated by counsel for the Defendant in his submission on the issue the motion for non-suit is granted.

Issues

[14] The only issue that needs to be resolved to decide this appeal is whether the judge erred, in applying the principles that govern a non-suit claim in a negligence action against a lawyer, by ruling that there was no evidence from which a properly instructed jury could (1) infer that Mr. Iannetti's advice, as described by Mr. Poulain, caused damages to Mr. Poulain or (2) determine the amount of those damages.

Standard of Review

[15] As both parties acknowledge, the issue here is one of law to which we apply the correctness standard; **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, ¶ 8 and 9.

This was recently confirmed by this Court in **Johansson v. General Motors of Canada Ltd.**, 2012 NSCA 120:

> [19] The issue here is legal. *In MacDonell v. M & M Developments Ltd.*, [1998] N.S.J. No. 49 (Q.L.) (C.A.), Justice Hallett said:
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> > 40 In Wentzell v. Spidle (1987), 81 N.S.R. (2d) 200 this Court implicitly accepted the opinion expressed in Sopinka, The Law of Evidence, that the assessment of the sufficiency of the evidence before a trial judge on a non-suit motion is a question of law and it is, therefore, subject to appellate review.
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> [20] In *Herman v. Woodworth*, [1998] N.S.J. No. 38 (Q.L.) (C.A.), Justice Flinn elaborated:
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> > **4** In an application for a non-suit, following the close of the plaintiff's case at trial, the question as to whether the plaintiff has established a prima facie case is a question of law. As such, it is reviewable by this Court. The following passage from The Law of Evidence in Civil Cases, Sopinka and Lederman, 1974 at p. 521 has been cited with approval by this Court ...
> >
> > ...<u>This decision of the judge on the sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence which is a question of fact.</u> Because it is a question of law, the judge's assessment of the probative sufficiency of the plaintiff's evidence, or the defendant's evidence on a counterclaim for that matter, is <u>subject to review by the Court of Appeal</u>. [Justice Flinn's emphasis]

Analysis

[16] Mr. Iannetti's non-suit motion was made pursuant to **Rule 51.06** which provides:

> 51.06 (1) At the close of the plaintiff's case and before the defendant elects whether to open the defendant's case and present evidence, the defendant may make a motion for dismissal of the proceeding, or a claim in the proceeding, on the ground that there is no evidence on which a properly instructed jury could find for the plaintiff.

[17] Justice Fichaud in **Johansson** sets out the law applicable to non-suit motions in Nova Scotia:

> [26] In *MacDonell v. M & M Developments Ltd.*, Justice Hallett described the approach:
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> > The Law Applicable to Non-Suit Motions
> >
> > **38** On a non-suit motion, the trial judge has to consider all of the circumstances, including the issues of fact and law raised by the pleadings (J.W. Cowie Enrg. Ltd. v. Allen (1982), 52 N.S.R. (2d) 321).
> >
> > **39** The general test for a non-suit motion is whether or not a prima facie case was made out by the plaintiffs. It is sometimes expressed as whether a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff. If not, the motion will succeed. (Turner-Lienaux v. Nova Scotia A.G. (1993), 122 N.S.R. (2d) 119).
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> [27] In *Herman v. Woodworth*, Justice Flinn (para 4), more expansively, adopted the following from Sopinka's *The Law of Evidence in Civil Cases*:
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> > ...If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. <u>He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it.</u> [Justice Flinn's emphasis]
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> [28] The seminal statement of the demarcation between the functions of judge and jury is Lord Cairns' passage in *Metropolitan Railway Co. v. Jackson* (1877), 3 App. Cas. 193 (H.L.), at p. 197:
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> > The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred; the jurors have to say whether, from those facts, when submitted

> to them, negligence *ought* to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. [Lord Cairns' emphasis]

The Supreme Court of Canada repeatedly has adopted Lord Cairns' statement: The *King v. Morabito*, [1949] S.C.R. 172, at p. 174; *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at para 54, per McIntyre, J. for the majority; *R. v. Arcuri*, [2001] 2 S.C.R. 828, at para 24, per McLachlin, C.J.C. for the Court.

[29] As to other provinces, in *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, [2007] O.J. No. 2297 (Q.L.) (C.A.), Justice Laskin for the Court said:

> **35** On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences. This court discussed this latter principle in *Hall et al. v. Pemberton* (1974), 5 O.R. (2d) 438, at 438-9, quoting *Parfitt v. Lawless* (1872), 41 L.J.P. and M. 68 at 71-72:
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>> I conceive, therefore, that in judging whether there is in any case evidence for a jury the Judge must weigh the evidence given, must assign what he conceives to be the most favourable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.
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>> ...
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>> From every fact that is proved, legitimate and reasonable inferences may of course be drawn, and all that is fairly deducible from the evidence is as much proved, for the purpose of a *prima facie* case, as if it had been proved directly. I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the

> jury would be warranted in drawing from it, there is sufficient to support the issue.
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> **36** In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's *prima facie* case. The trial judge should make that determination at the end of the trial, not on the non-suit motion. See John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths Canada, 1999) at 139.
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> [30] In *Capital Estate Planning Corp. v. Lynch*, [2011] A.J. No. 820, para. 19, the Alberta Court of Appeal described Justice Laskin's statement from *Prudential Securities* as "[t]he definitive test on a non-suit motion".
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> [31] In my view, all the above statements are consistent and authoritative, and vary only in the nuances of expressing the governing principle.

[18] The issue before the judge on the motion for non-suit was whether there was evidence of:

(a) a duty of care owed by Mr. Iannetti to Mr. Poulain;

(b) a breach of the standard of care; and

(c) whether the breach caused Mr. Poulain to suffer damage.

[19] The standard of care is that expected of a reasonably competent solicitor. If Mr. Poulain presented evidence from which inferences could be drawn that there was a duty of care, the standard of care had been breached and the breach caused damages, the motion should have been dismissed. Assuming, as required, that the evidence before the judge is true and assigning "the most favourable meaning" to that evidence capable of giving rise to competing inferences, the record satisfies me that Mr. Poulain presented sufficient evidence that the judge was required to dismiss the non-suit motion.

[20] Mr. Poulain's testimony that he retained Mr. Iannetti to represent him on his Section B claim gave rise to a duty of care, as the judge recognized. Mr. Poulain's evidence that the only advice he received from Mr. Iannetti with respect to whether he should accept the settlement offer with respect to his entitlement to

wage replacement benefits under Section B was that he should take it if he needed the money, allows an inference to be drawn that the standard was breached. There was nothing technical in this situation. Such advice would not inform Mr. Poulain of what he was giving up – the possibility of receiving fourteen years, as opposed to two years, of wage loss replacement benefits under Section B if his evidence that he is totally unable to work as a result of the injuries he sustained in the accident is accepted. An ordinary person without particular expertise could draw an inference that this frugal advice, if it was the advice given by Mr. Iannetti, was negligent without the need for expert evidence.

[21] With respect to causation, the judge had before him Mr. Poulain's evidence that he could not work again because of the injuries he suffered in the accident. He also had Dr. J.A. Collicutt's July 23, 2002 medical report which states:

> I am afraid to say that this man's prognosis is exceptionally guarded.
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> ...
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> I do believe that the length of treatment would be in the range of 2-3 months. It is my own personal belief that this is not likely to be successful, however, it is the only possible way that this fellow could be rehabilitated to the work force.
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> ...
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> I do believe that any return to work date for this man remains indefinite.

[22] There was evidence Mr. Poulain settled his Section B claim for two years of wage loss replacement benefits. The combined provisions of s. 140 of the **Act** and the regulations thereto provide that he may have been entitled to fourteen years of payments if he was unable to work in any capacity as a result of his injuries. There was also Mr. Poulain's evidence that the only advice Mr. Iannetti gave him in connection with the settlement of his Section B claim was that he should accept it if he needed the money (with no indication of what he would give up by doing so), that he needed the money and, therefore, accepted the offer. A reasonable inference can be drawn from this evidence that Mr. Iannetti's advice caused Mr. Poulain to suffer damage.

[23] The same evidence and law provides a basis on which the damages Mr. Poulain claims he suffered can be calculated, namely, the value of wage replacement benefits under Section B retroactive to the date he settled his Section B claim and the present value of future wage replacement benefits under Section B to age 65.

[24] Thus I am satisfied the judge erred when he found there was no evidence of causation or the amount of damages. That being the case, there is no need for me to consider Mr. Iannetti's cross-appeal on costs.

[25] I would allow the appeal, overturn the judge's dismissal of Mr. Poulain's claim and dismiss Mr. Iannetti's motion for a non-suit. I would remit the matter to the Supreme Court for a new trial before a different judge.

[26] The judge ordered Mr. Poulain to pay Mr. Iannetti costs of $16,250 plus disbursements of $1,495.56. I would vitiate this order and direct that any amount paid in compliance be returned to Mr. Poulain. Regarding costs on appeal, I would order Mr. Iannetti to pay forthwith to the appellant $3,000 inclusive of appeal disbursements as costs for the appeal, in any event of the eventual outcome of the new trial. The entitlement and amount of costs of the first trial will be for the consideration of the trial judge after the new trial.

Hamilton, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.