C.A. No. 116031

NOVA SCOTIA COURT OF APPEAL

Cite as: Brown v. Dalhousie University, 1995 NSCA 129
Chipman, Roscoe and Bateman, JJ.A.

BETWEEN:

DAVID L. BROWN	)	
	Tim Hill	
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	David A. Miller, Q.C.
	)	for the Respondent
BOARD OF GOVERNORS OF DALHOUSIE UNIVERSITY	)	
	)	
Respondent	)	Appeal Heard: May 16, 1995
	)	
	)	Judgment Delivered: June 1, 1995
	)	

THE COURT: Appeal allowed with no costs to either party per reasons for judgment of Bateman, J.A.; Chipman and Roscoe, JJ.A. concurring.

BATEMAN, J.A.:

The appellant, David L. Brown, a messenger, was injured on the premises of Dalhousie University, while in the course of his employment. He commenced action against the respondent Dalhousie. Dalhousie pleads, *inter alia*, that Mr. Brown's action is statute barred by sections 17 and 18 of the **Worker's Compensation Act**, R.S.N.S. 1989, c.508.

Mr. Brown made application to a chambers judge of the Supreme Court "pursuant to Civil Procedure Rules 25.01(a) and 27.01 for the adjudication of a question of law prior to trial upon an agreed statement of facts."

The question to be answered by the learned chambers judge was:

> On the facts as agreed by the parties for the purpose of this application, is the right of action of the Plaintiff against the Defendant barred by the provisions of the **Worker's Compensation Act**, R.S.N.S., 1989, c.508, and particularly sections 17 and 18 thereof.

The learned Chambers judge answered the question in the affirmative. Mr. Brown appeals on the basis that the learned Chambers judge erred in law and asks that this Court, in allowing the appeal, answer the question in the negative.

The Agreed Statement of Facts is as follows:

1. On November 1, 1993 the Plaintiff, David L. Brown ("Brown"), was delivering a package to the Dalhousie School of Business Administration (the "School"); located at 6052 Coburg Road, Halifax (the "Premises"). Brown was in the course of his employment as a courier with Action Delivery and Messenger Service Limited ("Action").

2. The School is a department of the Defendant, Dalhousie University (the "University"), and the Premises are part of the University campus occupied by the University.

3. While attempting to enter the Premises by means of the concrete entry steps, Brown alleges that he tripped and fell and suffered bodily injury as a

result.

4. Brown alleges that the fall was caused by him tripping on a steel reinforcing rod protruding from the concrete steps by reason of the poor condition of the steps.

5. Action provides Workers' Compensation coverage to its employees pursuant to the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508 (the **"**Act**"**). Brown made a claim to the Workers' Compensation Board for payment of benefits as a result of this accident. Brown's claim was accepted by the Board and benefits were paid in accordance with the Act and Regulations.

6. The University is not required to provide Workers' Compensation coverage to its employees under the Act. However, it has elected to provide and does provide Workers' Compensation coverage, pursuant to the Act, to certain employees who are not covered by the University's Long Term Disability Insurance Plan. These employees include CAPE and A temporaries consisting of temporary employees in the Physical Plant who are essentially janitorial and maintenance staff. In 1993 a total of 66 employees were provided Workers' Compensation coverage in this manner. There are a total of approximately 4,450 employees on the University's payroll.

7. None of the workers covered under the University's **Workers' Compensation Act** coverage had responsibility for maintenance of the stairs in question. Actual repair work is carried out by outside contractors.

8. The Workers' Compensation Board has consented to Brown engaging counsel to pursue this action.

9. The University has filed a defence to the action of Brown which raises, **inter alia**, sections 17 and 18 of the Act as a bar to this proceeding.

10. On the facts as agreed upon by the parties for the purpose of this application, is the right of action of the plaintiff against the defendant barred by the provisions of the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508, and particularly sections 17 and 18 thereof.

Under the scheme established by the **Worker's Compensation Act**, certain industries or undertakings are covered by a compensation system, assessments are payable in respect of workers in such industries, and compensation is payable to those workers. The **Act** applies automatically and the coverage is compulsory for most employment.

Only businesses scheduled in the **Act** are required to provide worker's compensation coverage for employees. An employer in an unscheduled

business may, however, apply to the Worker's Compensation Board to be admitted within the scope of the **Act**. As set out in paragraph 6 of the Agreed Statement of Facts, Dalhousie did elect to provide worker's compensation coverage to certain of its employees.

The relevant sections of the **Act** are:

> 2(j) "industry" includes any establishment, undertaking, work, operation, trade or business included in Schedule B to this Act or otherwise coming within the scope of this Act;
>
> 6(1) Any industry or worker to which this Part does not apply by virtue of Section 4 and Schedule B to this Act may, on the application of the employer, be admitted by the Board as being within the scope of this Part on such terms and conditions and for such period and from time to time as the Board may prescribe, and from and after such admission and during the period of such admission such industry or worker shall be deemed to be within the scope of this Part.
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> 17(1) Where an accident happens to a worker in the course of his employment in such circumstances as entitle him or his dependants to an action against some person other than his employer, the worker or his dependants if entitled to compensation under this Part may claim such compensation or may bring such action, provided a written notice of election to bring such action or to claim compensation shall be made to the Board within six months from the date of the accident.
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> 18 In any case within the provisions of subsection (1) of Section 17, neither the worker nor his dependants nor the employer of such worker shall have any right of action in respect of such accident against an employer, his servants or agents, in an industry to which this Part applies, and in any such case where it appears to the satisfaction of the Board that a worker of an employer in any class is injured or killed owing to the negligence of an employer or of the worker of an employer in another class to which this part applies, the

> Board may direct that the compensation awarded in such case shall be charged against the last mentioned class.

As argued before the learned Chambers judge, the significant issue was whether Dalhousie, by providing coverage to only 1.5% of its workers, should have the protection from suit afforded by s. 18 of the **Act**. This was, as well, the issue to which the learned Chambers judge directed himself, as is evident from his decision.

On appeal, counsel for Mr. Brown raised, for the first time, the question as to whether Dalhousie was, within the meaning of s.18, "an employer ... in an industry to which this Part applies". The effect of s. 17 of the **Act** was not an issue on this appeal.

Pursuant to s. 6(1) "any **industry or worker**" may be admitted to the scheme on the application of an employer. Dalhousie provides coverage to certain workers but is not an industry under the **Act** required to do so. It must, then, have made an application pursuant to s.6(1). The Agreed Statement of Facts contains no information about Dalhousie's application to the Board. Dalhousie may have applied to be admitted as an "industry" or applied simply to admit the select group of "workers". In either case terms and conditions may have been attached by the Board, as contemplated in s. 6(1). Mr. Brown submits that only if "the industry" was admitted pursuant to s.6(1), does Dalhousie have the possible benefit of the s. 18 bar, which extends the protection only to an employer in an "industry", not to an employer of a "worker". I reiterate, this important point was not raised by counsel before the learned Chambers judge and both parties apparently proceeded on the unstated assumption that Dalhousie was admitted under s.6(1) as an "industry". Counsel do not know the particulars of Dalhousie's s.6(1) application nor of the Board's

ruling.

Civil Procedure Rules 25.01(a), 27.01 and 27.04 provide:

> 25.01(1) The court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,
>
> > (a) determine any relevant question or issue of law or fact, or both;
>
> 27.01 The parties may state any question of law or fact in the form of a special case for adjudication by the court before a trial or hearing.
>
> 27.04 Upon the hearing of a stated case the court and the parties may refer to the contents of any document referred to in the special case, and the court may draw from the stated facts and documents any inference, whether of fact or law, that might have been drawn therefrom if proved at trial or hearing.

In **Hebb v. Family and Children's Services of Lunenburg County et al** (1982), 51 N.S.R. (2d) 447 (N.S.S.C.A.D.), the Court considered the requirements of a stated case. Macdonald, J.A., writing for the Court, said at p. 450:

> In **Re: Railway Association of Canada et al.** (1958), 13 D.L.R. (2d) 154, Mr. Justice Locke of the Supreme Court of Canada in Chambers refused to grant leave to appeal on certain questions of law whose determination would, in his opinion, serve no useful purpose. **Murphy v. Lindzon**, [1969] 2 O.R. 704 (C.A.), involved an application for determination of the parties' rights under an agreed statement of facts. The Court of Appeal held that the questions should not be answered as they are more in the nature of hypothetical questions than necessary elements in a litigated dispute.
>
> In my opinion a stated case or similar proceeding in civil matters must state all the relevant facts and must indicate the question, or questions, of law to be determined by the court. The questions must be responsive to the facts and

> findings and must not be of a moot, hypothetical, purposeless, speculative or academic nature.(emphasis added)

The Court held in **Murphy v. Lindzon**, **supra,** that on a motion for directions on an Agreed Statement of Facts, where the Agreed Statement of Facts does not include all of the facts relevant to the issues between the parties, the Court ought not to answer the questions put to it as when all the facts are ultimately before the Court, the trial judge may or may not find it necessary to answer the question.

In **Re Hamm and Stagman** (1984), 12 D.L.R. (4th) 25 (Sask.C.A.) the Saskatchewan Court considered analogous rules contained in Part 7 of the Queen's Bench Rules:

> 188. By consent or upon the application of either party the court may, if it appears that the result of the action or of any distinct issue therein may be settled by the determination of any point of law, direct that such point of law shall be set down for hearing and disposal in chambers before the trial of the action.
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> 264. If it appear to the court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given, or any question or issue of fact is tried, or before any reference is made to a referee, the court may make an order accordingly, and may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as the court may deem expedient; and all such further proceedings, as the decision of such question of law may render unnecessary, may thereupon by stayed.

Cameron, J.A., in **Stagman**, **supra**, although dissenting in the result, emphasized that these Rules, originating in the now abolished practice of 'demurrer', must be "applied with reference to the purpose and the principles governing their exercise, and then only with the greatest care". Preliminary

points of law, it was held, are to be determined only where the facts are not in issue.

In **Govan School Board v. Last Mountain School Division No. 29 of Saskatchewan** (1992), 88 D.L.R. (4th) 658 (Sask. C.A.), Bayda, C.J.S., writing for the court, says at p. 672:

> If the facts relied upon are contained in an agreed statement of facts it is important that the facts be confined to those facts which are found in, or may be inferred from, the applicant's and his opponent's pleadings (this does not preclude the giving of particulars of facts that are pleaded). If they are not so confined a serious doubt may arise about whether the case is real. If the case is not real but hypothetical the court ought not to decide the point of law: see **Avon County Council v. Howlett**, [1983] 1 All E.R. 1073, [1983] 1 W.L.R. 605 (C.A), applying **Adams v. Naylor**, [1946] A.C. 543 at p 555, [1946] 2 All.E.R. 241 at p. 247 (H.L.)

In **Dawnstar Developments Inc. v. Ross and Ross** (1989), 85 N.S.R. (2d) 265 (N.S.S.C.A.D.), counsel appealed the Order of the trial judge on an application pursuant to **Civil Procedure Rule** 25.01(1)(a). On appeal the court, although commenting that the facts placed before the trial judge were vague and uncertain, held that the trial judge had not erred in his determination. Here, however, the facts are not simply vague and uncertain, but incomplete.

It is not clear whether the matter proceeded before the learned Chambers judge under Rule 25 or Rule 27. In either case, however, the law is clear. A question is only to be answered under such a procedure if all essential facts are agreed.

The status of Dalhousie under the s. 6(1) application is not an agreed fact, and, indeed, may be an issue upon which evidence must be called. This was not, then, an appropriate case for application pursuant to either Rule 25 or

27. The question posed in paragraph 10 of the Agreed Statement of Facts is, at this stage, hypothetical. The learned Chambers judge should have declined to answer the question.

In answering the question without all of the necessary facts the learned Chambers judge erred at law.

In the result, I would allow the appeal but would decline to answer the question.

In these circumstances, I would order no costs to either party, on the appeal nor on the application.

J.A.

Concurred in:

Chipman, J.A.

Roscoe, J.A.

C.A. No. 116031

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BETWEEN:

DAVID L. BROWN

Appellant

- and -

BOARD OF GOVERNORS OF DALHOUSIE UNIVERSITY

Respondent

REASONS FOR JUDGMENT BY:

BATEMAN, J.A.