

**NOVA SCOTIA COURT OF APPEAL**  
**Cite as: Moore v. Higgins, 1995 NSCA 104**

**Clarke, C.J.N.S.; Matthews and Bateman, JJ.A.**

**BETWEEN:**

MICHAEL MOORE

Appellant

) John P. Merrick, Q.C.  
) for the Appellant

- and -

) Jason P. Gavras  
) Eric K. Slone  
) for the Respondent

TERRANCE HIGGINS

Respondent

)  
) Appeal Heard:  
) May 30, 1995

)  
) Judgment Delivered:  
) May 30, 1995

**THE COURT:** Appeal dismissed per oral reasons for judgment of Clarke, C.J.N.S.; Matthews and Bateman, JJ.A. concurring.



The reasons for judgment of the Court were delivered orally by

**CLARKE, C.J.N.S.:**

This appeal arises from the venture of two friends, Mr. Higgins and Mr. Naugler, in the video business and their retainer of Mr. Moore, a lawyer, who acted for each of them.

Upon the failure of the venture, Mr. Higgins brought action for damages under a variety of heads against Mr. Naugler and their company, Video Adventures Limited and also against Mr. Moore for damages arising from his alleged negligence and breach of retainer in the performance of his professional duties.

Following trial, Justice Nathanson delivered a lengthy and considered judgment which is reported in (1995), 133 N.S.R. (2d) 167 and indexed **Higgins v. Naugler et al.** Resort should be made to his decision for a review of the complex and at times uncertain evidence adduced at trial. Significant as well are the numerous findings of facts made by Justice Nathanson which are not now in issue.

Justice Nathanson dismissed Mr. Higgins' claims against Mr. Naugler and the corporate entity. He found Mr. Moore liable to Mr. Higgins in tort and contract for negligence and breach of retainer. He awarded Mr. Higgins special and general damages and prejudgment interest.

Mr. Moore appealed. In a judgment delivered by this Court on April 10, 1995 (C.A. No. 112141) the notice of appeal against Mr. Naugler and Video Adventures Limited was quashed.

Counsel for the appellant contends that the trial judge erred in the extent to which he found Mr. Moore negligent. In addition he submits the trial judge erred in the manner by which he assessed damages and their quantum.

It is our unanimous opinion the appeal fails for the following principal reasons.

- 1) There is no cause for this Court to interfere with the conclusions reached by the trial judge. We refer to the words of McLachlin J. in **Toneguzzo-Norvel (Guardian Ad Litem of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at p. 121.
- 2) Upon concluding that the appellant Moore breached both his retainer and his duty of care to the respondent Higgins the trial judge, as was the Court in **Wilson et al. v. Rowswell** (1970), 11 D.L.R. (3d) 737, confronted with the "practical difficulty of assessing damages".

According to the Judicial Committee of the Privy Council in **Nance v. British Columbia Electric Railway Company Ltd.**, [1951] A.C. 601, the principles to be followed by this Court are not in doubt. At p. 613 Viscount Simon wrote:

Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. ...

While we do not endorse the methodology adopted by the trial judge in his assessment of damages, Justice Nathanson did not arrive at a wholly erroneous estimate.

We dismiss the appeal. We dismiss the cross appeal on damages. We award the respondent Higgins costs of \$5,000.00, including his disbursements, being an amount agreed upon by counsel.

C.J.N.S.

Concurred in:

Matthews, J.A.

Bateman, J.A.