IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Connolly v. Royal Bank of Canada, 2007 NSSC 375

Date: 20071012
Docket: SK 183752
Registry: Kentville

Between:

Gary Connolly, in his personal capacity and
as representative of the Estate of Margaret Connolly

Plaintiff

v.

Royal Bank of Canada, a body corporate
and Terrance Hebb

Defendants

Judge:	The Honourable Justice John D. Murphy
Heard:	March 6-9, 2007, in Kentville, Nova Scotia
Final Written Submissions:	April 5, 2007
Written Decision:	February 7, 2008 *{Oral decision rendered October 12, 2007}*
Counsel:	Michael R. Brooker, Q.C., for the Plaintiff Michael V. Coyle and Thomas R. MacEwan, for the Defendants

By the Court:

[1] The Court must determine whether Mr. Hebb and the Royal Bank of Canada are liable in negligence because they did not add Margaret Connolly as mortgagor with

her husband, Gary, on their home/business property, and did not provide mortgage disability and life insurance for her. Tragic circumstances developed when, following discussions during 2001 between Mr. Connolly and Mr. Hebb concerning Margaret's becoming an insured mortgagor, she was diagnosed with a fatal brain tumor in January 2002 and became uninsurable before mortgage and insurance arrangements were made. Gary Connolly claims in his personal capacity and as representative of the estate of Margaret, who passed away after a period of disability in 2004.

FACTS

(a) Background and Parties

[2] Mr. Connolly became a Royal Bank client in 1998. He was experiencing financial difficulties after a difficult marital breakup, and the Bank loaned him money when other institutions declined to do so. Mr. Connolly's initial contact was with Mr. Hebb, whom he had known outside the banking relationship, and who held a management position at the New Minas branch. From 1998 onwards, Mr. Connolly developed a strong relationship with Mr. Hebb, and his most frequent dealings at the Bank were with him. Mr. Connolly's affairs with the Bank's New Minas branch included obtaining a Visa card, which Mr. Hebb facilitated, subsequently increasing his credit limit, making R.R.S.P. investments, and general banking services. He also dealt with Joan MacKinnon at that branch, who arranged transfer in December 1998 of the mortgage on his residence/business premises (the "Property") from C.I.B.C.

[3] Mr. and Mrs. Connolly began to live together in October 1997, and they were married in December 2000. Margaret had difficulties resulting from previous financial activities, and Gary introduced her to Mr. Hebb, who assisted in early 2000 by arranging a Royal Bank consolidation loan to address her outstanding obligations.

[4] Mr. Connolly maintained life insurance from the Royal Bank for his mortgage obligation, and he and Margaret both carried insurance through the Bank for their loans.

[5] As Gary and Margaret's relationship developed, they coordinated and eventually joined their financial affairs. When they were married they had joint bank accounts. In late 2000 when Mr. Connolly obtained a business development loan, he considered adding Margaret to the deed and mortgage for the Property. Arrangements

were made with Rick Johnson, who was Gary's lawyer at that time, to add her to the deed, but no steps were taken then with the Royal Bank to make Margaret a mortgagor.

[6] Mr. Hebb spent his entire career of more than 30 years with the Royal Bank. He retired in March of 2002, very soon after the events which are the subject of this lawsuit. As a manager in the New Minas branch between 2000 and 2002, Mr. Hebb was responsible for providing service to approximately 110 clients who had assets exceeding $250,000.00. Those clients compromised 10 to 15 per cent of the branch's clientele and Mr. Hebb was expected to communicate with each of them about four times a year. Other Bank customers received what Mr. Hebb described in his evidence as "reactive" service. Mr. Connolly was in that client category, along with about 85 to 90 per cent of the branch's other customers. The general practice of Mr. Hebb and others in the branch was to respond to those reactive clients when they contacted the Bank.

[7] The dealings among the parties which led to this litigation began in 2001, when Gary was approximately 46 years old, and had been a self-employed businessman for many years. For a large part of his working life he operated a television and electronic service business, and he had also owned some smaller apartment buildings which were liquidated before the events which give rise to this lawsuit.

[8] Margaret had been employed with President's Choice since June 1999, and her duties included work in the financial section as a customer associate. By October of 2000, her role was to encourage customers to take their banking affairs to President's Choice, and some of her work involved entering loan applications and R.R.S.P. information into the computer.

[9] Until 2001 Mr. Connolly was very satisfied with the banking service he received from Mr. Hebb and others at the Royal's New Minas branch. He felt he was building a very satisfactory and valuable relationship with Mr. Hebb and the Bank.

[10] Mr. Connolly testified that early in 2001 he and Margaret decided to make the mortgage on the Property joint and to obtain mortgage insurance on her life. A series of contacts with the Bank followed.

(b) Events During 2001

[11] During February of 2001, Mr. Connolly approached the Bank by email concerning making the mortgage joint and obtaining life insurance, and the Bank responded by advising that he should deal with the branch where he did business. Thereafter, the issue arose on three occasions when Mr. Connolly and Mr. Hebb met, and was also the reason for telephone calls and voicemail messages between the parties. The outcome of this case depends upon what transpired during those contacts. These reasons will provide an initial assessment of the events which will determine whether they may be able to support any of the causes of action advanced by the Plaintiff; the circumstances will then be examined in more detail in the context of any specific types of claim which could have arisen from the contact between the parties.

[12] On March 1, 2001, Mr. and Mrs. Connolly met with Mr. Hebb to make their annual R.R.S.P. contribution. An appointment at the Bank's New Minas Branch had been pre-arranged, and at the end of the meeting, which lasted about one hour, Mr. Connolly inquired about making the mortgage joint and Margaret's being insured.

[13] In June of 2001, Gary Connolly met with Mr. Hebb in connection with his daughter's financial affairs, and Mr. Connolly again inquired about the joint mortgage and insurance for Margaret.

[14] In September of 2001, Mr. Connolly and Mr. Hebb met in the lobby or mall entrance of the branch. On that occasion, Mr. Hebb approached Mr. Connolly and raised the issue.

[15] Although there is some suggestion in the Defendants' records that Mr. Hebb addressed Mr. Connolly's affairs on August 31 and November 29, 2001, the evidence does not establish that the mortgage or insurance were in issue on those occasions.

[16] On December 3, 2001, Mr. Connolly left a voicemail about mortgage insurance for Margaret on Mr. Hebb's telephone line at the Bank. The parties provided different versions of efforts to continue discussion, describing unsuccessful attempts to speak by telephone and voicemail messaging after December 3rd. No direct contact was made until the parties spoke by telephone January 12, 2002. Margaret had been diagnosed with a brain tumor the previous day, and was no longer eligible to have an insured mortgage.

[17] Mr. Connolly and Mr. Hebb have conflicting recollections and interpretations of what transpired during the course of their communications. Mr. Connolly's view is that the message which he transmitted to Mr. Hebb was a clear direction to the Bank to make the mortgage on the Property joint, and to arrange mortgage disability and life insurance for Margaret. Mr. Hebb testified that the parties' discussions were in the nature of preliminary inquiries about something Mr. Connolly might wish to arrange in the future.

[18] Gary Connolly alleges that the Defendants were negligent - that Mr. Hebb and the Bank owed a duty of care to him, which was breached by Mr. Hebb, causing the Plaintiff's loss. Mr. Connolly says that because neither the joint mortgage nor insurance was arranged before the diagnosis which rendered Margaret uninsurable, the Bank is liable to pay disability benefits from the date of her diagnosis. The Plaintiff also claims that as a result of Margaret's death the Bank is required to pay out the mortgage together with other amounts which would have been payable pursuant to the terms of a mortgage insurance policy for Margaret.

[19] The parties reached the following agreements prior to trial.

(a) As a result of her diagnosis, Margaret was totally disabled from January 3, 2002 until her death on August 5, 2004. She had no pre-existing condition, and had the application for mortgage life and disability insurance been in place prior to January 3, 2002, she would have received disability benefits for a period of 24 months following the onset of her disability, and upon her death the mortgage would have been paid out.

(b) At all material times Mr. Hebb was acting in the course of his employment, and the Royal Bank is vicariously liable for any liability Mr. Hebb may have to the Plaintiff.

(c) Quantum of the Plaintiff's loss is not in dispute, and only the issue of liability was addressed at trial.

ANALYSIS OF CLAIM

[20] Mr. Connolly maintains, and the Defendants dispute, that Mr. Hebb and the Bank are liable pursuant to the following principles:

(1) Negligence simpliciter.

(2) Application of an exception to the rule against recovery of pure economic loss in negligence:

(a) Negligent misrepresentation - the **Hedley Byrne** doctrine;

(b) Another established category of compensable economic loss.

[21] I will first address whether the version of events which the Plaintiff urges the Court to accept could give rise to Defendants' liability by application of the negligence principles upon which Mr. Connolly relies.

Negligence Simpliciter

[22] It is not necessary to review the evidence in further detail to assess this aspect of the Plaintiff's claim. Until 1963, Commonwealth Courts refused to recognize virtually any claim for pure economic loss in negligence, (B. Feldthusen, Economic Negligence, 4th Edition (2000) pp.1-7), and Canadian Courts continue to be cautious about doing so, except in limited circumstances where an exception to the traditional rule has been established. (See **Martel Building Ltd. v. Canada**, [2000] 2 S.C.R. 860.) Nothing in the evidence or the submissions advanced by the Plaintiff suggests that this claim is for anything other than pure economic loss. Mr. Connolly's loss is confined to financial detriment, unaccompanied by personal injury or property damage. The Plaintiff is unable to recover based upon traditional negligence principles or "negligence simpliciter."

Negligent Misrepresentation

[23] Recovery for economic loss absent physical damage, and in particular the cause of action for negligent misrepresentation, was first acknowledged by the House of Lords in **Hedley Byrne and Co. v. Heller & Partners Ltd.**, [1964] A.C. 465 (H.L.).

[24] In **Queen v. Cognos Inc.**, [1993] 1 S.C.R. 87, the Supreme Court of Canada directed that all of the following are required elements of a successful **Hedley Byrne** claim:

1. There must be a duty of care based upon a 'special relationship' between the representor and the representee;

2. The representation must be untrue, inaccurate or misleading;

3. The representor must have acted negligently in making the misrepresentation;

4. The representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

5. The reliance must have been detrimental to the representee in the sense that damage resulted.

[25] I find that the client-banker relationship existing between the parties was a "special relationship" which could support a claim for negligent misrepresentation, if the other necessary elements were present. In the circumstances of this case, there was a sufficiently-close relationship between the parties that, in the reasonable contemplation of the Defendants, carelessness on their part might damage the Plaintiff, and there are no policy considerations which ought to limit that *prima facie* duty of care. (See **Anns v. Meerton London Borough Council**, [1978] A.C. 728 (H.L.); **Hercules Management Limited v. Ernst & Young**, [1997] 2 S.C.R. 165; **Queen v. Cognos Inc.**, (*supra).*)

[26] Nova Scotia law acknowledges that the relationship between bankers and clients is a "special" one which can give rise to the duty of care essential to support a negligent misrepresentation action. (**Barrett v. Reynolds**, [1998] N.S.J. No.344 (C.A.), paras.151-154)

[27] Once the "special relationship" between the parties is established, the plaintiff seeking application of the **Hedley Byrne** doctrine must establish that an untrue, inaccurate, or misleading representation was made. Mr. Connolly takes the position that Mr. Hebb's negligent misrepresentation arises not only from his actions, but through inaction by consistent failure to divulge pertinent information. The Plaintiff claims that he is entitled to recovery because the Defendants either provided something which was not correct, or failed to provide something which they should have.

[28] The Defendants submit that no representation was ever made upon which a claim for negligent misrepresentation could be based. They rely upon the following summary of the law in Nova Scotia set out in **Northern Petroleum v. Sydney Steel Corporation** (1999), 180 N.S.R.(2d) 141 at para.65:

> In Nova Scotia, the tort of negligent misrepresentation is restricted, absent fraud, to statements of existing fact or statements that although containing references to the future are, at least, in part untrue, inaccurate or misleading in respect to an existing fact. The statements by the defendant as to the approximate quantities of bunker "6C" it would be using in the future were not such statements of existing fact and as such, cannot form the foundation for a claim in tort on the basis of negligent misrepresentation.

[29] Mr. Connolly does not allege fraud, and his claim can only succeed if the Defendants misrepresented an existing fact, or with reference to the future made a statement which was at least in part untrue, inaccurate or misleading in respect of an existing fact. The contacts between the parties during 2001 must be examined to determine whether the Defendants made a statement about having Margaret added to the mortgage and insured that was inaccurate or misleading in respect to any existing fact.

[30] Mr. Hebb denies making any representation at the March meeting beyond indicating that he would "look into" what needed to be done to enable Margaret to be mortgage life and disability insured, and he testified that at the June and September meetings his only advice was that those things could be done whenever the Connolly's were ready. Although Mr. Hebb received a voicemail from Mr. Connolly in December, he did not speak to him about the issue again until after Margaret's diagnosis. Mr. Hebb's version of the discussions, despite vigorous cross examination, reveals no misrepresentation.

[31] Mr. Connolly's account of the parties' conversations differs from the Defendants', but I find that his evidence does not establish that Mr. Hebb made any statement which can form the foundation for a claim.

[32] Mr. Connolly's evidence concerning the March 2001 meeting, while varying from Mr. Hebb's with respect to time allotted to the different subjects discussed and other details, does not disclose any misrepresentation. He testified that during the latter part of the meeting, when the parties discussed adding Margaret to the mortgage and obtaining life and disability insurance for her through the Bank, Mr. Hebb indicated he would have to "look into it." Mr. Connolly testified that at the conclusion of the next meeting in June, after dealing with his daughter's student loan application, when Mr. Connolly advised that they still wanted Margaret on the mortgage, Mr. Hebb again indicated he would "look into it." The Plaintiff's testimony concerning the September meeting was to the same effect - he said that when the mortgage/insurance issue was discussed in the Bank lobby, Mr Hebb said, "I will have to look into that." Mr. Connolly's evidence does not establish that Mr. Hebb made any statement following the September 2001 meeting until after Margaret's diagnosis in January.

[33] Gary Connolly's testimony reveals no representation by Mr. Hebb about mortgage insurance other than a commitment "to look into it." That statement was not

a misrepresentation about having Margaret Connolly added to the mortgage that had to do with an existing fact, nor was it an assertion which was at least in part untrue, inaccurate or misleading in respect to an existing fact. At no time was Mr. Connolly advised that the insurance was in place, or that it would be in effect at a particular time. Mr. Connolly was not given any wrong information by the Bank.

[34] Because there was no untrue, inaccurate or misleading statement, it is unnecessary to consider the other elements of a **Hedley Byrne** claim. Absent misrepresentation, the Bank cannot have acted negligently in making a statement. The evidence shows that Mr. Connolly knew, throughout any discussions with the Bank, that the mortgage had not been made joint, and insurance was not in place. No commitment to do so was made. Accordingly, the Plaintiff could not have reasonably relied on any misstatement by the Defendants.

[35] The Plaintiff does not have a claim based upon the **Hedley Byrne** doctrine - there is no basis to find that the Defendants made any negligent misstatement or misrepresentation according to Nova Scotia law.

Other Bases for Compensable Economic Loss

[36] The Defendants maintain that absent physical damages and negligent misrepresentation, Mr. Connolly has no basis upon which to claim recovery for economic loss. The crux of the Defendants' position is that even if all of the facts as advanced by Mr. Connolly were accepted, without proof of negligent misrepresentation, the Bank could never be liable because any loss the Plaintiff suffered is purely economic. The Defendants argue that the case cannot fit into any category of economic loss recognized by the Supreme Court of Canada, and says this Court should not enlarge the categories or identify a new duty of care. With respect, I do not agree with this aspect of the Defendants' argument. In addition to negligent misrepresentation, the Supreme Court of Canada in **Winnipeg in Condominium Corporation No. 36 v. Bird Construction Co. Ltd.**, [1995] 1 S.C.R. 85, at Paragraph 12ff, has recognized four other categories of economic loss:

1. Negligent performance of a service;

2. The independent liability of statutory public authorities;

3. Negligent supply of shoddy goods or structures; and

4. Relational economic loss.

[37] Of those categories, only "negligent performance of a service" could support Mr. Connolly's claim.

Negligent Performance of a Service

[38] Professor Feldthusen in Economic Negligence (*supra*) describes as follows at p.120 what a plaintiff must show to establish negligent performance of a service:

> There is a general agreement among courts in all common law jurisdictions that the defendant will be held liable for the plaintiff's economic loss if (1) the defendant voluntarily undertakes to perform a specific service for the plaintiff's benefit; (2) the plaintiff relies on the defendant to perform the undertaking; and (3) the negligent performance of the service injures the plaintiff.

The duty of a defendant who provides a service and the similarity between this category of economic loss and negligent misrepresentation are summarized as follows by Feldthusen at pp.120-21:

> Insofar as recognition of the defendant's duty is concerned, these cases are directly analogous to actions in negligent misrepresentation. This is not surprising when one considers that many negligent misrepresentation cases concern negligence in the performance of an underlying service, not negligence in the representation itself. Here, the duty of care is based on the defendant's voluntary undertaking to perform the service in question. The undertaking, although often expressed, may be inferred from the circumstances. To date,..the decisions have involved the negligent performance of a business or a professional service rendered in the ordinary course of the defendant's business.

[39] Liability for negligent performance of service has been imposed upon lawyers (**Midland Bank Trust Company v. Hett, Stubbs and Kemp**, [1979] Ch. 384), and upon an insurance agent. (**Fine's Flowers Limited v. General Accident Assurance Co. of Canada** (1977), 81 D.L.R. (3d) 139 (Ont.C.A.)) In the latter case, Estey C.J.O. at page 143 found a duty of care and imposed liability for negligent service, based on an insurance agent's "undertaking" to obtain full coverage and subsequent failure to inform the plaintiff about a gap in coverage concerning the very risk which eventually

materialized. As Professor Feldthusen notes (para.38 above), the duty of care imposed upon a service provider is similar to that assumed by a party who makes a representation. In negligent misrepresentation cases, Canadian Courts have found that there can be a special relationship between financial institutions and clients which gives rise to a duty of care. (**Green v. Royal Bank of Canada**, [1996] O.J. No.1454, (Ont. H.C.J.) **Milroy v. Toronto-Dominion Bank**, [1997] O.J. No.1495, (Ont. H.C.J.) and **Noseworthy v. Newfoundland and Labrador Credit Union**, [1999] Nfld. and P.E.I. R. 341(NFTD). In my view, a similar relationship and duty of care can arise when banks hold themselves out as providing services.

[40] I find that the Bank's relationship with Mr. Connolly was that of a service provider. At trial and in written submissions, the Defendants stated that "services" were made available by the Bank, and repeatedly referred to Mr. Hebb as providing a retail or reactive banking "service" to Mr. Connolly. In such circumstances a duty of care can arise when a bank voluntarily undertakes to perform the service, and if it is negligent in doing so, there may be recovery for pure economic loss. If Mr. Connolly's version of the facts is accepted and this Court finds that he has established that Mr. Hebb was negligent in providing a service that the Bank voluntarily undertook to provide, the Plaintiff may be able to recover financial loss under the "service exception" without establishing any other damages.

[41] Mr. Connolly seeks recovery on the basis that the Bank was negligent performing the specific service of adding Margaret to the mortgage and providing insurance for her; the Defendants maintain there was never agreement to perform any service to mortgage insure Mrs. Connolly, but only to look into the matter, which the Defendants say was done without assuming any obligation.

[42] In this case, the Plaintiff can only succeed under the "negligent service performance" exception if he can establish that:

(a) Mr. Hebb should reasonably have known that Mr. and Mrs. Connolly wanted the Defendants to arrange mortgage insurance;

(b) the Defendants failed to take reasonable steps to perform that service after voluntarily undertaking to do so, or failed to advise that it could not be accomplished; and

(c) the Plaintiff was relying on the Defendants to perform the undertaking or to advise that it could not be fulfilled.

[43] Evidence respecting the contact between the parties during 2001 must be considered in the context of their established relationship to determine whether the Defendants were negligent in the manner in which they responded to communications from Mr. Connolly. The Bank's conduct should be judged with respect to the particular service in issue. Nevertheless, the parties' continuing banker-client relationship may be relevant when assessing the nature and performance of the Defendants' duty. Mr. Connolly had operated a small business for most of his working life, and had modest investment affairs. Mrs. Connolly had some experience dealing with banks and prior borrowings, and was employed in a limited way in the financial services industry. Although Mr. Hebb was not the person who had originally dealt with Mr. Connolly's mortgage, he was very familiar with the Connolly's financial affairs and had a lifetime of banking experience. Gary Connolly was the primary contact and spokesperson during the dealings he and Margaret had with the Bank. The history of activities between the parties showed that when Mr. Connolly wanted a banking service, he would usually contact the Bank and arrange an appointment to meet with Mr. Hebb.

[44] Interaction concerning Margaret's mortgage insurance took place during contact between Mr. Connolly and Mr. Hebb which began in March 2001. Each encounter where the subject was raised must be examined to determine whether the Defendants undertook to perform a service for Mr. and Mrs. Connolly, and if so, whether the Defendants were negligent in performing an undertaking which the Plaintiff relied upon them to complete.

[45] On March 1, 2001, Mr. and Mrs. Connolly attended a meeting with Mr. Hebb which had been pre-arranged to process their R.R.S.P. contribution. The first occasion on which Mr. Connolly raised Margaret's mortgage insurance issue with the Bank was at the close of that meeting. After considering both parties' testimony, I find that there was only incidental discussion of the topic.

[46] Mr. Connolly testified that he told Mr. Hebb he wanted Margaret on the mortgage for insurance purposes, and that when Mr. Hebb said on March 1st that he would look into it, the Connolly's expected to hear from him. Mr. Hebb recalled saying he would "look into it", but based on previous dealings, he expected Mr. Connolly would call him if he wanted to proceed. Given the circumstances in

which the discussion took place, I accept Mr. Hebb's version of the event and find that the Connolly's gave no firm instruction, and that Mr. Hebb made no commitment or undertaking to perform any service. Mr. Connolly knew that March 1st was a busy banking day when many R.R.S.P. applications were processed and the mortgage issue was not raised when the appointment was scheduled. The time shown on the documents produced in connection with the Connolly's R.R.S.P. investment show that the R.R.S.P. portion of the 11:00 o'clock appointment occupied the larger part of the allotted hour. The absence of any followup inquiry by Mr. Connolly after the meeting suggests the discussion was in general terms, as Mr. Hebb recalled.

[47] The next relevant event was a meeting at the Bank three months later, in June of 2001. This time Mr. Connolly's daughter's financial affairs were the primary focus of his the visit to Mr. Hebb. Mr. Connolly's evidence is that on this occasion he gave a more firm direction, and that Mr. Hebb undertook "to look into it and get back to him" - a response which describes Mr. Connolly's expectation after the March meeting. Mr. Hebb's recollection was that he said he would address the mortgage issue when Mr. Connolly was ready, and that he expected that when he wanted the work done, Mr. Connolly would make an appointment which Margaret would attend.

[48] I find it significant that Mr. Connolly did not pursue the matter further or follow up when Mr. Hebb did not get back to him. As on the previous occasion, mortgage insurance was not the focus of the meeting. It was again only an incidental issue raised at the end of a meeting, and I conclude that no instruction was given to the Bank and Mr. Hebb did not undertake to perform any service.

[49] The evidence does not disclose any more contact until a more casual encounter occurred in the Bank lobby on September 4, 2001. The meeting was unscheduled and Mr. Hebb said that when he initiated discussion about the mortgage, he received the impression it was something Gary and Margaret wanted to do in the future. Mr. Hebb testified that he again expected Mr. Connolly to make an appointment when he wanted to address the issue, and he didn't feel he was being asked to do anything at that time.

[50] Mr. Connolly testified that his daughter's student loan was discussed when the parties met in September, and he also understood Mr. Hebb to indicate he'd look into the mortgage and get back to Mr. Connolly. He said his impression in September was that Mr. Hebb hadn't done anything yet and would look into it and get back to the Connolly's. He raised no objection at that time, and cannot now claim he had previously relied on the Defendants to provide the service. Despite the conflicting

evidence, I find no concrete instruction was given by Mr. Connolly or undertaking made by the Defendants when the parties made contact in September. Mr. Hebb offered more specific recollection of the September event, while Mr. Connolly's evidence does not suggest any material distinctions among the messages which he says were communicated at the three meetings.

[51] Mr. Hebb and Mr. Connolly have different versions of what happened at the meetings in March, June and September. I find there was miscommunication. Mr. Connolly may have thought he was giving Mr. Hebb more direction than Mr. Hebb understood he was receiving, but in my view no message or communication was given to Mr. Hebb which was sufficiently concrete to give rise to a duty to carry out any instruction. The Plaintiff has not established that by September 2001 the Defendants should have known the Plaintiff wanted mortgage insurance put in place; the Defendants did not at any time during the three meetings with Mr. Connolly undertake to perform a service concerning mortgage insurance. There is no basis to conclude the Defendants were negligent in providing a service to the Plaintiff prior to December 2001.

[52] The next communication which the Plaintiff has established he had with the Bank about mortgage insurance took place on December 3, 2003 when Mr. Connolly telephoned the Bank, and left a voicemail message on Mr. Hebb's line. The parties' recollections concerning the tone of Mr. Connolly's message are similar. Mr. Connolly testified that Margaret was getting sick at the time, and although he did not advise Mr. Hebb of that, the message he left was more aggressive than their previous discussions, indicated the Connolly's wanted the mortgage insurance work done, and requested Mr. Hebb to call him back. Mr. Hebb recalled receiving the December 3rd voicemail message with an inquiry from Mr. Connolly concerning "what's happening about mortgage insurance; what are we going to do about it" or words to that effect.

[53] Although the parties have different memories of the nuances in Mr. Connolly's December 3rd message, I am satisfied that he made it clear that he wished to have Mr. Hebb take steps, following upon their previous discussions, to make the mortgage joint and insure Margaret. The December 3rd call conveyed what I find to be the first instruction to initiate activity, and I must now determine whether the Plaintiff's claim should succeed because the Defendants failed to undertake reasonable steps to perform the service after voluntarily undertaking to do so, or failed to advise that it could not be accomplished. The issue becomes whether the Defendants properly

responded to the direction in Mr. Connolly's December 3rd voicemail message, or whether they were negligent in performing a service for the Plaintiff.

[54] Mr. Hebb testified that he made several efforts to telephone the Plaintiff in answer to the voicemail message. He says that he attempted to return the call the same day, but was unable to reach Mr. Connolly, and that he also called three more times - on the 11th, 12th and 14th of December. He didn't reach Mr. Connolly on any of those attempts, and he testified that he didn't leave any voicemail message because it was not his practice to do so. Mr. Hebb's diary shows Mr. Connolly's name entered with a check mark on each of those dates. Mr. Hebb testified that he didn't remember actually making the phone calls, but because the name entries with check marks were in the diary, he was certain he did phone Gary Connolly on those days but did not reach him.

[55] Mr. Connolly's position is that Mr. Hebb made no calls to him during December; he says that they didn't appear on his call minder and he has no record of receiving them.

[56] The parties gave evidence concerning additional unsuccessful attempts to make telephone contact on January 7 and 9, 2002. Mr. Connolly testified that he left a voicemail message at Mr. Hebb's office on January 7th. Mr. Hebb stated that he "remembers vividly" calling Mr. Connolly on January 9th, and for the first time he left a voicemail message on Mr. Connolly's telephone to prompt him to address the mortgage issue. Mr. Hebb indicated he varied from his previous practice and left a voicemail on this occasion because he knew that he would be retiring in March 2002, and if he were going to assist Mr. Connolly in having Margaret added to the mortgage, the process had to be started soon. Mr. Hebb testified that Margaret's credit rating might have affected her being added to the mortgage unless he dealt with the matter personally. The Bank's Client Sales and Service Platform (Exhibit #1, Document 59) contains an entry showing a telephone call to Mr. Connolly on January 9, 2002. Mr. Connolly denies receiving a voicemail from Mr. Hebb on that day.

[57] The Court must weigh the conflicting evidence concerning what happened after December 3rd. The best scenario for the Plaintiff and the worst for the Defendants would be if I were to conclude that Mr. Hebb did nothing - made no attempt to contact Mr. Connolly - between December 3, 2001 and January 12, 2002, when Mr. Connolly reached Mr. Hebb by telephone at home after Margaret's diagnosis. If I were to determine that Mr. Hebb made no effort to reach Mr. Connolly during that period,

would the Plaintiff have established that the Defendants were negligent in failing to provide a service they undertook to perform? In my view, even if Mr. Hebb had done nothing for a period of about five weeks over the Christmas-New Year holiday, the Defendants would have a reasonable argument that a failure to respond to Mr. Connolly during that time did not constitute negligence. Prior to Mr. Connolly's message on January 7th, the Defendants were not given any indication that adding Margaret to the mortgage and arranging insurance was a matter of urgency or special significance which had to be accomplished by a deadline. There was no suggestion to the Defendants that Margaret was facing any health issue. Mortgage insurance had been in Mr. Connolly's consideration for about nine months previously, but there was no immediacy to the December 3rd voicemail instruction, and Mr. Connolly did not follow up until January 7th. The Plaintiff's previous experience and the history of dealings among the parties suggest that Mr. and Mrs. Connolly would both have known that a meeting to finalize documents would be necessary, but they did not request an appointment.

[58] It is unlikely the Plaintiff would be able to establish liability, even if the Defendants had not tried to respond to the December 3rd call until Mr. Hebb's call on January 9th or until the parties spoke on January 12th. However, I do not find that to be the scenario which transpired. I find that Mr. Hebb took steps to address the matter. I accept his evidence that the entries in his diary show that he made four attempts to phone Mr. Connolly between December 3rd and 14th. He didn't leave messages on those occasions, and in hindsight that may not have been the best practice for him to follow, but adopting a practice of not leaving voicemail messages concerning personal financial affairs does not constitute negligence. His recollection of those calls is not perfect, and he candidly admitted that without his notes he is not able to specifically remember that they were made; however, there is no suggestion that there is anything inappropriate about his notes or that they were not written at the time. I also accept Mr. Hebb's evidence, supported by the entry in the Bank's record, that he did make another call to Mr. Connolly and leave a voicemail message on January 9, 2002.

[59] The earliest time at which the Defendants could have undertaken to perform a service for the Plaintiff was upon receipt of the December 3, 2001 telephone instruction. I have concluded that Mr. Hebb took reasonable steps to respond to that instruction, and fulfilled any duty assumed by the Bank, when he attempted on four occasions to return the call. He also made a reasonable effort to reach Mr. Connolly on January 9th, after Mr. Connolly left another message on January 7th.

[60] Margaret Connolly's diagnosis was received so soon after the parties' voicemail exchanges on January 7th and 9th that even if an additional instruction were given or an undertaking made at that time, the Defendants would not be negligent because they did not finalize the service in the short time which elapsed before the diagnosis, which the evidence indicates was January 11th, or possibly Saturday, January 12th at the latest.

[61] The first time that the parties spoke directly to each other after their September 4, 2001 meeting was when Mr. Connolly reached Mr. Hebb by telephone at his home on Saturday, January 12th. At that time they scheduled a meeting which they attended on January 14th. The parties provided evidence concerning that meeting and correspondence and memoranda which were prepared subsequently. Those developments occurred after Margaret Connolly's diagnosis and they are not relevant to determination whether the Defendants were negligent.

CONCLUSION

[62] Margaret Connolly did not become an insured mortgagor prior to the diagnosis which rendered her uninsurable. The unfortunate position in which that left the Plaintiff did not arise as a result of the Defendants' negligence. The Plaintiff has not established that Mr. Connolly or the Bank were negligent in performing a service which they undertook to provide to the Plaintiff. The Defendants are not liable for the Plaintiff's loss pursuant to principles of negligence simpliciter, negligent misrepresentation or negligent performance of a service, and the claim is dismissed.

[63] If the parties are unable to reach agreement concerning costs, they may provide written representations within 30 days.

J.