SUPREME COURT OF NOVA SCOTIA
Citation: Vaughn v. Hayden, 2009 NSSC 235

Date: 20090717
Docket: Bwt No. 212166
Registry: Bridgewater

Between:

Donald Max Vaughn

Plaintiff

v.

Dr. David S. Hayden and Dr. David S. Hayden Inc., a body corporate, incorporated under the laws of the Province of Nova Scotia

Defendants

Judge: The Honourable Justice Glen G. McDougall

Heard: June 11, 2009, in Bridgewater, Nova Scotia

Written Decision: August 6, 2009

Counsel: Colin J. Clarke, Ll.B., on behalf of the movers/defendants
J.C. Reddy, Ll.B., on behalf the respondent/plaintiff

By the Court:

[1] This is a motion for summary judgment brought by the Defendants under **Civil Procedure Rule** 13.

[2] **Rule** 13.01 "allows a party to move for summary judgment on the pleadings that are clearly unsustainable and to move for summary judgment on evidence establishing that there is no genuine issue for trial."

[3] The defendants bring their motion for summary judgment on evidence which is governed by **Rule** 13.04. **Rule** 13.04 provides:

Summary judgment on evidence

13.04 (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

(2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.

(4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.

(6) The motion may be made after pleadings close.

[4] It is clear from sub-section (3) of **Rule** 13.04 that:

(i) the pleadings "serve only to indicate the laws and facts in issue"; and

(ii) the question of a genuine issue for trial depends on the evidence presented.

[5] Furthermore, sub-section (4)of the **Rule** challenges a party "who wishes to contest the motion" to "provide evidence in favour of the party's claim or defence by:

(i) affidavit filed by the contesting party;

(ii) affidavit filed by another party;

(iii) cross-examination; or

(iv) other means permitted by a judge.

[6] The initial burden is on the party advancing the motion to show there is no genuine issue for trial. It then falls to the opposing party to establish, on the facts that are not in dispute, that his claim has a real chance of success.

[7] The new rule governing summary judgment motions tracks the existing jurisprudence. It does not alter the applicable test in any appreciable way. In **Selig** v. **Cooks Oil Company Limited**, [2005] N.S.J. No. 69 at para. 10, the Nova Scotia Court of Appeal framed the two-part test under the old **Rule** 13.01 as follows:

> .... First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[8] To use a tennis analogy, once the ball is served over the net and provided it has landed in-bounds, it is then up to the opposing side to return it. The return need not be a passing shot but it must, at least, have the potential to be a winner.

PLEADINGS:

[9] I will begin by providing a brief summary of the pleadings but keeping in mind that the pleadings themselves are not evidence.

[10] The plaintiff, Donald Max Vaughn, (henceforth "the plaintiff") underwent left carpal tunnel release surgery. The surgery was performed by the defendant, Dr. David S. Hayden (henceforth "the defendant") on April 6, 2000. The plaintiff was released from the hospital after surgery. He was not required to remain overnight.

[11] The plaintiff was seen by the defendant in follow-up some eight days after surgery. The plaintiff's splint was removed and some sutures were trimmed. A further follow-up examination was recommended for approximately one month's time.

[12] Before this happened the plaintiff was admitted to Queen's General Hospital in Liverpool, Queen's County on May 6, 2000. He was later transferred to the QEII Health Sciences Centre in Halifax. His symptoms included weakness in his right side.

He attributes this and a cerebral infection to the defendant's negligent operative and post-operative care. He also faults the defendant for his alleged failure to properly inform the patient as to the risks and /or side effects of the surgical procedure.

[13] As previously indicated this summary is taken from the pleadings. Once again, the pleadings are not evidence.

REVIEW OF THE EVIDENCE:

[14] In support of the motion, the defendant filed an affidavit of Terri Campbell, a legal assistant in the office of his legal counsel. Attached to the affidavit are:

(i) An expert report of Dr. David McNeely, an internist and a consultant in infectious diseases at the Toronto Western Hospital, University Health Network and an Associate Professor of Medicine in the Faculty of Medicine at the University of Toronto. As a consultant in Infectious Diseases, Dr. McNeely has over thirty years experience.

(ii) An expert report of Dr. Michael B. Brennan who completed a residency in plastic surgery at Dalhousie University in 9195 and who has since carried on a Plastic and Reconstructive surgery practice at St. Martha's Hospital in Antigonish.

[15] Dr. Brennan, after reviewing the extensive file materials including the plaintiff's charts prepared a report on December 10, 2008. In it he states:

> ... In my estimation, based upon my experience and review of the file, Dr. Hayden did meet the required standard of care respecting the carpal tunnel release of April 6, 2000.

He goes on to say:

> I therefore feel that Dr. Hayden met the required standard of care during the pre, intra and post operative period.

[16] In addition to addressing the issue of standard of care, Dr. Brennan had this to say about causation:

> The only culture that was positive throughout Mr. Vaughn's hospitalization was that of a nasopharyngeal aspirate growing Bordetella Pertussis/parapertusis, a respiratory organism entirely unrelated to any surgical site of the hand.

He later adds:

> ...., as the carpal tunnel site was never implicated as a possible associative factor in any of the many extensive consultation notes at the QEII, as the likelihood of such a source is phenomenally low, in my estimation.

[17] The expert opinion of Dr. McNeely, dated November 11, 2008, concludes with the following:

> In summary then, I think it is likely that this patient did indeed suffer from a bacterial infection of the brain, specifically a cerebritis. I can see little evidence in this record to support a diagnosis of a serious post operative wound infection that resulted in a blood stream infection that carried bacteria to the brain. I think the more likely explanation for this man's cerebritis is that he had concomitant sinusitis. I would conclude that the carpal tunnel procedure performed by Dr. Hayden on the 6th of April 2000 was in no way causally related to the patient's subsequent neurological illness.

[18] It should be noted that neither of these experts were requested to make themselves available for purposes of cross-examination.

[19] In response the plaintiff filed his own affidavit in which he maintains "that the circumstances enumerated in" the "Statement of Claim are a correct factual statement of events as of the date of filing..."

[20] He further indicates that neither of the defendant's experts have examined him nor have they had any personal contact with him. He disputes their findings and maintains that "the grounds of " his "claim are valid".

DISCUSSION AND ANALYSIS:

[21] For the plaintiff to succeed in his action he must establish first of all a duty of care. The fact that the defendant owed the plaintiff a duty is not really in issue.

[22] But it does not end there. The plaintiff, in order to succeed, must also lead evidence to establish a standard of care, a breach of the standard of care and finally that the breach caused the injuries complained of.

[23] In a motion for summary judgment brought by a defendant it rests on ths defendant's shoulders to "show that there is no genuine issue of fact to be determined at trial". [Reference: **Selig** v. **Cooks Oil Company Limited**, *supra*]. And, if successful, the onus shifts to the plaintiff to establish "that his claim has a real chance of success." [Reference: **Selig** v. **Cooks Oil Company Limited**, *supra*].

[24] Based on the evidence of the two experts I am satisfied that the defendant has met the burden to show that there is no genuine issue of fact to be determined at trial. Both experts concluded that there was no causal relationship between the plaintiff's condition and the surgical procedure performed by the defendant.

[25] Furthermore, Dr. Brennan, based on his review of the plaintiff's medical records and other file materials, was satisfied that the defendant "... met the required standard of care during the pre, intra and post operative period."

[26] To continue the tennis analogy, the defendant's volley has landed squarely on the plaintiff's side of the net and totally within bounds.

[27] Unfortunately for the plaintiff, he has not offered any evidence to refute the evidence presented on behalf of the defendant. It is simply not enough for the plaintiff to disagree with or to dispute the opinions expressed by the two qualified experts.

[28] In the case of **MacNeil** v. **Bethune**, 2006 N.S.C.A. No. 21, Justice Roscoe at para 33 wrote:

> [33] Of course, at the second step of the test, there is an evidential burden on the responding party to put its best foot forward or risk losing.

[29] Justice Roscoe goes on to adopt the statement of Green, J. (as he then was), in **Marco Ltd.** v. **Newfoundland Processing Ltd.**, [1995] N.J. No. 168 (Nfld & Labrador Supreme Court, T.D.):

> ¶7 Counsel for Marco subsequently indicated his client did wish to proceed, notwithstanding the limitations imposed by the former ruling. Counsel for NPL also

> indicated his willingness to proceed but expressed concern as to whether the court, from a jurisdictional point of view, had authority to bifurcate the issues in this way. He also expressed the view, however, that if the court felt that the quantum of a mechanics lien claimant's claim was made out, judgment could be entered, but stayed until all other lien claimants could be present and heard, before the results were embodied in a mechanics lien judgment against the land.

[30] The plaintiff's failure to present any evidence, leaving aside the need for expert evidence for the moment, can hardly be considered putting his best foot forward.

[31] Furthermore, it would be a rare medical malpractice case that would have any real chance of success without some kind of supporting expert evidence establishing the breach of a standard of care and the causal connection between the negligent treatment and the resulting harm suffered.

[32] Based on the evidence before me I am not persuaded that the plaintiff's cause of action has a real chance of success. At the risk of appearing unsympathetic to the plaintiff's situation, the result is game, set and match for the defendant.

[33] The defendant's motion for summary judgment is granted and the plaintiff's action is therefore dismissed against both the attending physician and the corporate entity he practices under.

Justice Glen G. McDougall