<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: Meister v. Coyle, 2010 NSSC 125

Date: (20100404)
Docket: Hfx. No. 177464
Registry: Halifax

Between:

Charles Benjamin Meister
Plaintiff

v.

Michael Vaughan Coyle
Defendant

Judge	The Honourable Associate Chief Justice Deborah K. Smith	
Heard	July 13, 14, 15 and 16, 2009 in Halifax, Nova Scotia	
Final Written Submissions	Plaintiff's final submissions: Defendant's final submissions:	September 28th, 2009 October 6th, 2009
Counsel	David S. Green, Esq., for the Plaintiff Michael J. Wood, Q.C. and Jason T. Cooke, Esq. for the Defendant	

By the Court:

[1] This is an action for negligence and breach of contract brought by the Plaintiff, Charles Benjamin Meister, against the Defendant, Michael Vaughan Coyle. Mr. Meister, who is presently 76 years of age, is retired. On March 1st, 1994, he was working as a bus driver for a company known as Bluenose Transit Inc. when he was involved in a serious motor vehicle accident in which two people were killed. As a result of that accident, Mr. Meister was charged with two counts of dangerous driving causing death pursuant to s. 249(4) of the ***Criminal Code*** of Canada.

[2] Following the laying of criminal charges, Mr. Meister's employer suspended him from work without pay. They offered, however, at their expense, the use of their legal counsel to defend him in relation to the criminal charges. In correspondence forwarded to Mr. Meister by Bluenose Transit Inc. dated May 16th, 1994 they explained that the Plaintiff may wish to decline their offer and retain his own lawyer or consult his own solicitor "along the way" for second opinions - but if he decided to obtain his own counsel it would be at his expense.

[3] Mr. Meister decided to take Bluenose Transit Inc. up on their offer of legal counsel and he contacted their lawyer, R. Peter Muttart, Q.C. Mr. Muttart attended with Mr. Meister at his election and plea (an election was made for trial by a judge and jury) and then transferred carriage of the file to the Defendant, Michael V. Coyle. Mr. Coyle is a barrister and solicitor who was admitted to the Nova Scotia Bar in 1988.

[4] A preliminary inquiry was held before Judge Anne E. Crawford on September 20th, 1994. Mr. Coyle was counsel for the Plaintiff at the preliminary inquiry. By decision dated November 24th, 1994, Mr. Meister was committed to stand trial.

[5] The trial took place before a judge and jury in Bridgewater, Nova Scotia, September 5th - 8th, 1995. During the course of the trial the Crown called Cst. Joseph Thivierge as an expert witness. Cst. Thivierge is a Traffic Analyst with the R.C.M.P. He was called to the scene on the day of the collision. The accident itself had occurred at approximately 6:10 a.m. (before the sun rose). Cst. Thivierge arrived at the accidence scene at approximately 8:25 a.m. (after the sun had risen). Upon arrival the Constable videotaped the scene with a camcorder and took various measurements and photographs.

[6] The accident itself involved a number of vehicles. The focus of the criminal trial and of Cst. Thivierge's investigation was the contact between the bus that the Plaintiff was driving and a 1985 Chrysler New Yorker (hereinafter referred to as the "Chrysler") that the bus hit. The two people who died in the accident were seated in the Chrysler.

[7] Cst. Thivierge wanted to determine how the accident had happened. In particular, he wanted to determine when various vehicles would have been visible to the Plaintiff (in the bus) and whether there was enough time for the Plaintiff to stop the bus prior to the collision. In order to determine this, Cst. Thivierge returned to the area of the accident six weeks after the collision and attempted to "reconstruct" or "re-enact" the accident scene. In particular, he placed some vehicles in the general area

where some of the vehicles involved in the accident had been located. Further, he arranged for an experienced bus driver to drive a school bus (similar to that which had been operated by the Plaintiff) in the same direction as the Plaintiff had been travelling just prior to the collision. He had the driver travel at a speed of 90 kilometres per hour and had a video camera next to the driver's head taping what could be seen. Still photographs were taken which purported to portray the distance from which the driver of the school bus could see the vehicles which had been placed in the area of the accident. The Constable then calculated how much time the driver would have had from the point of visibility to stopping without causing a collision. He determined that in his "reconstruction" the bus driver could see the Chrysler from a distance of 300 metres. He calculated that at a speed of 90 kilometres per hour the bus could travel for 8.6 seconds and still have time to stop without colliding with the Chrysler. He further calculated that if the bus was travelling at only 59 kilometres per hour, it could travel for 15.7 seconds and still have time to stop without coming into contact with the Chrysler. The inference that the Crown wanted to be drawn from these calculations was that the Plaintiff had plenty of time to see the Chrysler and respond to its presence if he had been paying proper attention.

[8] There were a number of problems with Cst. Thivierge's "re-enactment" and calculations. First, all of the Constable's calculations assumed that the Chrysler was stopped prior to the collision. There was no factual foundation for this assumption. No one was able to testify at trial where the Chrysler had come from or whether it was stopped or moving at the time of the collision.

[9] Further, the re-enactment was done in bright sunshine at approximately 3 o'clock in the afternoon whereas the accident occurred at approximately 6:10 in the morning before the sun rose. In addition, the re-enactment did not portray all of the vehicles and individuals that were involved in the collision. Despite these problems the Defendant did not object to the admission of the videotape re-enactment, the still photographs of the re-enactment or to the opinions given by Cst. Thivierge concerning the amount of time that someone would have had to see the Chrysler and stop their vehicle. Rather than object to these matters, the Defendant elected to establish through cross-examination the obvious flaws in Cst. Thivierge's evidence and in the Crown's case.

[10] At the conclusion of the trial, the Plaintiff was found guilty by the jury of both counts of dangerous driving under s. 249(4) of the ***Criminal Code***.

[11] Shortly after his conviction, Mr. Meister retained new counsel, Duncan R. Beveridge (as he then was) to represent him in relation to his criminal charges. Mr. Beveridge represented the Plaintiff at the time of sentencing. On January 31st, 1996, sentence was suspended, Mr. Meister was placed on probation for three years, was ordered to perform 300 hours of community service work and, as well, was prohibited from operating a motor vehicle for two years.

[12] Duncan R. Beveridge filed a Notice of Appeal and Factum on behalf of the Plaintiff but before the appeal was heard, Mr. Meister changed counsel again. Robert Murrant represented the Plaintiff at the appeal which was heard on January 28th, 1997.

[13] By Order issued the 27th day of February, 1997 the Plaintiff's appeal was allowed, his conviction was quashed and a new trial was ordered. Central to the appeal was the decision by the Court that the trial judge had erred in admitting into evidence the video re-enactment of the accident that had been prepared by Cst. Thivierge and, in allowing into evidence, the opinion of the said individual when there was an insufficient factual basis established for his opinion. Further, the Court found that the still photographs taken during the shooting of the video re-enactment should not have been admitted into evidence. Included in the Court of Appeal's decision (reported at 1997 NSCA 48) is the following at p. 12:

> The Crown's theory was simply not responsive to the facts developed by the Crown. The theory, and the demonstrative evidence supporting it, were misleading. It must have distracted the jury from the real issues in the case.
>
> The evidence should not have been introduced by the Crown, nor should counsel have referred to the theory in summation.
>
> Defence counsel should have raised a timely objection.
>
> With respect, the trial judge erred when he failed to strike the offending evidence, and further erred when he failed to direct the jury to ignore the evidence completely.

[14] The Court went on to comment on the use of the videotape. It stated at p. 14:

> This case illustrates some of the dangers that may arise when video taped re-enactments are introduced before a jury. Although only two minutes in length, the video distorted the actual events, as disclosed by the evidence, so dramatically that it should not have been accepted in evidence. I come to this conclusion quite apart from the Crown's failure to establish the Chrysler was stationary on the highway.

> Visual images, for many people, are more easily retained and recalled, than *viva voce* evidence. It is, therefore, critical that a video re-enactment accurately represent the facts, and fairly portray the scene, without any intention to mislead ....

[15] The Plaintiff's new criminal trial commenced on May 27th, 1997. At that time, the Crown requested that the Indictment be withdrawn and all charges against the Plaintiff were dismissed. That concluded the criminal proceeding.

[16] On February 21st, 2002, Mr. Meister commenced an action against the Defendant alleging, *inter alia*, that the Defendant failed to meet the standard of care expected of a reasonably competent barrister and solicitor. The Plaintiff's specific complaints against the Defendant are set out in his Statement of Claim as follows:

> 13. The Plaintiff states that the decision of the Court of Appeal specifies that the Defendant should have objected to the admission into evidence of the opinion of the RCMP traffic analyst and the videotape re-enactment.
>
> 14. The Plaintiff states that the Defendant convinced him not to take the stand in his own Defence and that there was a clear conflict of interest between the Plaintiff and his employers.
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> 15. The Plaintiff states that the Defendant failed to:
>
>   a. Disclose the conflict of interest to the Plaintiff; and
>
>   b. Obtain the Plaintiff's informed consent or remove himself as counsel for the Plaintiff.
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> 16. The Plaintiff states that Brian Haase was an eyewitness to the accident of March 1, 1994 and that he was prepared to testify on behalf of the Plaintiff. The Defendant did not call Brian Haase to testify.

17. The Plaintiff states that he was convicted by the jury because of the Defendant's negligent advice and actions and the Defendant's breaches of the implied contract which include:

    a. Failing to object to the admission into evidence of the opinion of an RCMP traffic analyst and a videotape reenactment, both of which were totally without factual foundation;

    b. Convincing the Plaintiff not to take the stand in his own Defence; and

    c. Failing to call relevant eyewitnesses.

[17] At the time of trial, counsel for the Plaintiff raised additional concerns such as the fact that the Defendant did not recommend to the Plaintiff that he re-elect to a judge alone trial. In summation, counsel for the Plaintiff confirmed that while he has raised a number of issues concerning the Defendant's handling of the Plaintiff's criminal case both in the Statement of Claim and at trial, the alleged negligence and breach of contract claim is based on the Defendant's failure to object to the admission into evidence of the opinion of the RCMP Traffic Analyst, the videotape re-enactment and the related still photographs all of which were found by the Court of Appeal to be inadmissible. In light of counsel's comments, I will deal only with those issues in this decision.

[18] In support of its case, the Plaintiff filed an expert's report prepared by Warren K. Zimmer. Mr. Zimmer, who has practised primarily in the field of criminal law for 31 years, was qualified to give expert opinion evidence on the conduct of a criminal proceeding by a lawyer in Nova Scotia.

[19] Mr. Zimmer noted that the Defendant knew prior to the trial that the Crown was going to attempt to prove that Mr. Meister had a sufficient period of time to stop his vehicle but that, as a result of a period of inattention, Mr. Meister failed to react to the situation on the highway on the day of the accident. The Defendant also knew that the Crown was going to attempt to prove this theory by way of the video re-enactment and the opinion of Cst. Thivierge. Mr. Zimmer testified that, in his opinion, the Defendant should have objected to the admission into evidence of the videotape re-enactment and the related photographs as well as the R.C.M.P. analyst's opinion and that the Defendant's failure to object to these matters constituted a breach of the appropriate standard of care.

[20] Mr. Zimmer pointed out that the video re-enactment and related photographs did not accurately represent the facts at the time of the collision and were not a fair portrayal of the accident scene. He noted, *inter alia*, that it was dark at the time of the collision but the video re-enactment was done in bright day light. He also noted that the number of vehicles in the video re-enactment did not properly reflect the number of vehicles on the highway at the time of the collision. As stated by the Court of Appeal in their decision relating to this case "The re-enactment reduces a complex scenario of vehicles (some stationary, some moving, two in collision providing smoke and fire) together with pedestrians (some walking, some running) on both the northern and southern traffic lanes and adjacent shoulders, to one of deceptive simplicity involving one truck on the northern shoulder, and one car on the southern shoulder" (p. 14). In Mr. Zimmer's view, there would be no reason from a defence point of view to have that video re-enactment before the jury during the course of the trial and the Defendant should have objected to the video re-enactment and related photographs

as being inadmissible. He said that to allow in these exhibits only created issues that would then have to be responded to by the Defence.

[21] Mr. Zimmer also noted that the R.C.M.P. analyst's opinion was based on a factual foundation that could not be proved (what was referred to at the time of trial as "the stationary Chrysler theory"). In his view, the Constable's opinion was highly prejudicial and it and the video re-enactment should have been objected to by way of a pre-trial motion and during the trial. In Mr. Zimmer's expert's report filed with the Court, he states at p. 9:

> It is my opinion that a reasonably competent counsel acting for Mr. Meister should have made these timely objections as noted by the Nova Scotia Court of Appeal. In failing to object to the admissibility of Cst. Thivierge's opinion evidence, the introduction of the re-enactment video and the Crown's reference to a theory not supported by the evidence and, lastly, not taking objection to any of the judge's charge to the jury in relation to weight, Mr. Coyle's representation of Mr. Meister fell below the standard of a reasonably competent criminal counsel.

[22] Mr. Zimmer testified that in his opinion, if the video re-enactment, the related photos and the Constable's opinion were "eliminated" the Crown would have had "virtually no case".

[23] A contrary expert's opinion was presented on behalf of the Defendant by Donald C. Murray, Q.C. Mr. Murray graduated from law school in 1984 and has done primarily criminal defence work throughout his career. Mr. Murray cautioned against looking at the various issues such as the videotape re-enactment in isolation and encouraged a "contextual assessment" of the case. He indicated that discreet elements of a case can seem unusual or "strange" if considered in isolation but if you consider such an issue in the context of the entire case it can be very logically explained. (He

also testified that there was nothing in this case that he thought might be considered unusual – even if considered out of context.)

[24] Mr. Murray noted that some of Cst. Thivierge's evidence was helpful to the Plaintiff. For example, the Constable had calculated a range of potential speeds for the Plaintiff's vehicle at between 59 and 71 kilometres per hour (well below the posted speed limit of 100 kilometres per hour). In addition, Cst. Thivierge gave evidence of a skid mark left by the bus which suggested a braking effort by the Plaintiff and would allow the Defence to talk about braking without requiring the Plaintiff to take the stand. Mr. Murray testified that in his view, there was a lot to be gained by having Cst. Thivierge's opinion in evidence and that any problems that the opinion presented could be and were properly dealt by the Defendant in cross-examination. At p. 13 of Mr. Murray's expert's report filed with the Court, he states:

> It is my view that a rational and justifiable choice was made to challenge the *unhelpful* conclusions in Cst. Thivierge's report through cross-examination, rather than through an effort to have the whole report excluded from evidence. I am particularly of this view given that certain portions of Cst. Thivierge's report would have been admissible in any event - his views as to the tail lights, his views as to the point of impact, and the length of skid, and direction of force. Cst. Thivierge's evidence as to the distance traveled at particular speeds would also have been admissible and relevant in any event.

[25] In relation to the videotape "re-enactment" Mr. Murray stated at p. 13 of his report:

> With respect to the videotape "reconstruction", it is my view that the context of the manner in which the video was used at the trial is that it was recognized by the trial participants as not a true "reconstruction" of the accident - even though that word was improperly used to describe the video. The video was a daylight motion picture

> of the scene and the approaches to the scene. This was a motion picture of the scene done at a speed different than that being alleged by the Crown or the Defence. That difference was made clear to the Jury. The location of the burning truck appeared on the video, as did the location of the Chrysler at impact, though depicted by a vehicle that would have been different in size. The video was taken at an entirely different time of day, and perhaps in different weather conditions, than those that pertained at the time of the accident. All of these differences were brought to the attention of the Jury either by the Crown or by the Defence.
>
> There was value for both Crown and Defence for the Jury to see the scene from the point of view of a vehicle approaching the accident scene - just as it was useful for the Jury to see photographs of the scene later on the day of the accident as to where the vehicles ended up. Certainly if the differences between the time of the accident and the time of the taking of the video were not brought home to the Jury, the videotape had the potential to be misleading. But those differences were put before the jury, together with the inference that Thivierge's methodology in creating the video had been unfair [*for example*, Trial, Evidence of Thivierge, Vol.III, Book 1, pp. 887 - 893].
>
> While objection could have been taken to the video by counsel for Mr. Meister, it is my view that it would have been a reasonable choice not to do so. The weaknesses of the video could be, and were, pointed out to the Jury. The video did give the Jury an opportunity to see what the scene would have looked like from a geographical or topographical perspective, with things appearing and then disappearing as the bus approached over the various undulations and curves in the road - just as "taking a view" would have provided to the Jury (at considerably more expense in terms of time and other resources under s. 652 of the *Criminal Code*).

[26] Mr. Murray also testified that, in his opinion, it would have been a reasonable exercise of judgment by the Defendant not to object to the admission of the still photographs taken at the time the video was shot. Mr. Murray testified that these photographs did not prove anything so it was not necessary for the Defendant to object to their admission.

[27] During his testimony Mr. Murray also suggested that, in his view, even if the Defendant had objected to the admission of Constable Thivierge's opinion he expects

that an argument could have been made by the Crown which would have satisfied the judge that it was admissible.

[28] The Defendant gave evidence at the time of trial. He has been a member of the Nova Scotia Bar since 1988 after graduating from law school in 1987. He testified that he had done "quite well" in law school, earning some scholarships and prizes.

[29] Following his call to the Bar the Defendant moved to Kentville (a rural community in Nova Scotia) and joined the firm which is now known as Muttart Tufts Dewolfe and Coyle. He was a partner with that firm at the time that he represented the Plaintiff in his criminal trial. He testified that his practice consisted solely of criminal and civil litigation and that 60% to 70% of his work involved criminal cases.

[30] The Defendant believes that he received a copy of the videotape in question at some time prior to the preliminary inquiry. He testified that his initial reaction when viewing the videotape was that it was "outrageous". It was not a proper re-enactment and it clearly did not depict "in any way, shape or form" the scene as it would have appeared to the Plaintiff on the day and time in question. However, the Defendant viewed the tape as a "wonderful illustration" of the Crown's stationary Chrysler theory.

[31] The Defendant testified that he knew that Cst. Thivierge had done his calculations based on the assumption that the Chrysler was stopped. After the preliminary inquiry the Defendant also knew that none of the Crown witnesses could say that the Chrysler was stopped. The Defendant testified that he wanted the Crown

to commit to this stationary Chrysler theory as he knew it was fatally flawed and that there was no factual foundation for that theory. He said that he did not want the Crown to move on to another more viable theory.

[32] As indicated, the Defendant saw the video re-enactment as an illustration of the Crown's flawed theory. The Defendant testified that as long as no one suggested that the video reflected what the Plaintiff saw at the time of the accident – and he was of the view that no one was suggesting this – he had no difficulty with the video being admitted into evidence. In fact, during the course of the proceeding, the Defendant had written to the Crown prosecutor indicating that in the event that the Crown elected not to introduce the videotape into evidence the Defendant may elect to do so. The Defendant also testified that the first indication that he had that someone was suggesting that the video reflected what the Plaintiff saw was when he read the Court of Appeal decision.

[33] The Defendant retained his own accident reconstructionist to assist him in challenging the Crown's theory and to put forth an alternate theory as to what had happened at the time of the collision. This defence expert (who was more experienced than Cst. Thivierge) was of the opinion that the Chrysler may have been moving ahead of the school bus and that upon being hit by the school bus or just prior to being hit by the school bus the Chrysler collided with another vehicle that was stopped on the travelled portion of the highway (the inference being that it may have been this other vehicle that caused the accident.) In addition, he testified that the Plaintiff would have had a much shorter reaction/response time than that suggested by Cst. Thivierge. The

Defendant was of the view that his expert had a much greater factual foundation for his theory of the accident than the Crown's stationary Chrysler theory.

[34] The Defendant testified that he did not challenge the admissibility of Cst. Thivierge's opinion on the stopping distance as this opinion was based on the stationary Chrysler theory and the Defendant knew that he could show that there was no factual foundation for this theory. Accordingly, he was not concerned about Cst. Thivierge's evidence in this regard. The Defendant also noted that some of Cst. Thivierge's evidence was helpful for the Plaintiff and he wanted it in.

[35] On cross examination the Defendant testified that he was of the view that Constable Thivierge's evidence, the video and the photographs in question were all admissible as long as they were not being introduced to suggest that this is what the Plaintiff saw at the time of the collision. In his view, they were not being introduced at the criminal trial for this purpose and accordingly, he did not object to their admission.

[36] In relation to the judge's charge to the jury - the Defendant testified that he was extremely pleased with the charge to the jury (during his charge the judge had indicated that, in his view, the Defence had given a very rational explanation as to how the accident had occurred). The Defendant said that he did give "quick" consideration to asking the judge to change his charge but he felt that overall the charge was so favourable towards the Defence that he decided to leave it alone. The Defendant testified that the Crown prosecutor was "furious" with the charge that the

judge gave to the jury and asked the justice in question to re-charge the jury. This request was denied.

[37] During the trial it was noted by the Defence that the issue of the Defendant's competency in representing the Plaintiff was not raised at the time of the criminal appeal. If it had been, the Defendant would have been given an opportunity to respond to the issues raised in the appeal and explain why he made the decisions that he did concerning the evidence in question. The way the matter proceeded the Appeal Court did not have the benefit of this information when arriving at their decision and in commenting as they did on the Defendant's failure to object to the admission of this evidence.

ANALYSIS AND CONCLUSIONS

[38] In **Demarco v. Ungaro et al** (1979), 21 O.R. (2d) 673 (Ont. H. Ct. J.) the court dealt with the fundamental issue of whether, in Ontario (as in England), a barrister is immune from action brought by his client for negligence in the conduct of the client's case. Krever J. stated at pp. 692-693:

> I have come to the conclusion that the public interest (another phrase used in the speeches in *Rondel v. Worsley)* in Ontario does not require that our Courts recognize an immunity of a lawyer from action for negligence at the suit of his or her former client by reason of the conduct of a civil case in Court. In has not been, is not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in Court work an immunity possessed by no other professional person. Public policy and the public interest do not exist in a vacuum. They must be examined against the background of a host of sociological facts of the society concerned. Nor are they lawyers' values as opposed to the values shared by the rest of the community. In the light of recent developments in the law of professional negligence and the rising incidence of "malpractice" actions against physicians (and

> especially surgeons who may be thought to be to physicians what barristers are to solicitors), I do not believe that enlightened, non-legally trained members of the community would agree with me if I were to hold that the public interest requires that litigation lawyers be immune from actions for negligence. I emphasize again that I am not concerned with the question whether the conduct complained about amounts to negligence. Indeed, I find it difficult to believe that a decision made by a lawyer in the conduct of a case will be held to be negligence as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a Court will conclude that it is negligence. The only issue I am addressing is whether the client is entitled to ask a Court to rule upon the matter.

[39] Since the decision in **Demarco v. Ungaro et al**, *supra,* a number of courts have dealt with the issue of when a decision made by a lawyer will be held to be negligence as compared to a mere error in judgment. Some cases have indicated that when it comes to the professional negligence of a lawyer there is a fairly high bar that must be reached in order to establish a breach of the standard of care. For example, in **Grand Anse Contracting Ltd. v MacKinnon** (1993), 121 N.S.R. (2d) 423 (N.S.S.C.) Richard J. stated at ¶ 15 "It is clear from the authorities that the lawyer's conduct in such circumstances must extend appreciably beyond the realm of an error of judgment and that the [sic] liability ought be imposed only in clear and exceptional cases ..." Similar type language was used in **Anastasakos v Allen** (1996), 16 O.T.C. 413 (Ont. Ct. J. Gen. Div.). In that case the court stated at ¶ 7:

> ... The law with respect to solicitor's negligence in the conduct of a trial is well settled. While the courts will not go so far as to grant absolute immunity to a barrister for the conduct of litigation, negligence will not be found on decisions based on the exercise of judgment, of which there are many during the course of a trial. There must be "egregious error". I agree with Mr. Justice Krever that it would be very rare to hold that a decision made by counsel during a trial was negligence as opposed to an error in judgment: **Demarco v. Ungaro** (1979), 21 O.R. (2d) 673 (H.C.)..........

[40] This language, which suggests that lawyers enjoy a more forgiving standard of care than that which is expected of other professionals, has been criticized in the more recent Court of Appeal decisions in **Henderson v. Hagblom**, [2003] 7 W.W.R. 590 (Sask. C.A.) (leave to appeal to the SCC dismissed: [2004] 1 S.C.R. ix) and **Folland v. Reardon** (2005), 74 O.R. (3d) 688 (Ont. C.A.). In **Henderson v. Hagblom**, *supra*, Jackson J.A. stated at ¶ 71:

> ... to determine whether a lawyer, in preparing for trial, has been negligent, the court does not ask whether the lawyer has committed an egregious error. The lawyer is required to bring reasonable care, skill and knowledge to the performance of the professional service which he or she has undertaken to perform.

[41] In **Folland v. Reardon**, *supra*, Doherty J.A. stated at ¶ 41:

> I see no justification for departing from the reasonableness standard. That standard has proven to be sufficiently flexible and fact-sensitive to be effectively applied to a myriad of situations in which allegations of negligence arise out of the delicate exercise of judgment by professionals. Without diminishing the difficulty of many judgments that counsel must make in the course of litigation, the judgment calls made by lawyers are no more difficult than those made by other professionals. The decisions of other professionals are routinely subjected to a reasonableness standard in negligence lawsuits. I see no reason why lawyers should not be subjected to the same standard: *Major v. Buchanan* (1975), 9 O.R. (2d) 491, 61 D.L.R. (3d) 46 (H.C.J.), at p. 510 O.R.

[42] Doherty J.A. went on to state at ¶ 43 - ¶ 45:

> An individual being defended in a criminal case is entitled to expect that his lawyer will perform as a reasonably competent defence counsel. Courts should avoid using phrases like “egregious error” and “clearest of cases” when describing the circumstances in which negligence allegations will succeed against lawyers. These phrases invite the application of an inappropriately low standard of care to the conduct of lawyers. At the very least, these phrases create the appearance that where an allegation of negligence is made against a lawyer, judges (former lawyers) will

> subject these claims to less vigorous scrutiny than claims made against others: see *Kitchen v. Royal Air Forces Association*, [1958] 2 All E.R. 241, [1958] 1 W.L.R. 563 (C.A.), at 245 All E.R. A lawyer defending an accused who fails to perform as a reasonably competent defence counsel would be expected to perform is negligent.
>
> In accepting the reasonably competent lawyer standard, I do not detract from the often repeated caution against characterizing errors in judgment as negligence. Lawyers make many decisions in the course of a lawsuit. Those decisions require the exercise of judgment. Inevitably, some of those decisions, when viewed with the benefit of hindsight, will be seen as unwise. The reasonable lawyer standard does not call for an assessment of the sagacity of the decision made by the lawyer. The standard demands that the lawyer bring to the exercise of his or her judgment the effort, knowledge and insight of the reasonably competent lawyer. If the lawyer has met that standard, his or her duty to the client is discharged, even if the decision proves to be disastrous.
>
> Plaintiffs who sue their lawyers should not be required to show their claims of negligence are any stronger than any other claims of negligence before they are allowed to proceed to trial. The motion judge's reference to "egregious errors" and "the clearest of cases" tells me that he erroneously demanded something more than a departure from the standard of a reasonably competent lawyer defending a criminal case.

[43] In my view, Strathy J. summed up the matter nicely in **Di Martino v. Delisio** (2008), 58 C.C.L.T. (3d) 218 (Ont. Sup. Ct. J.) where he stated at ¶ 54:

> ....barristers, like other professionals, will not be found negligent if they make the kind of judgment call that could reasonably have been made by a reasonably competent professional in similar circumstances, even if it is later proven that another decision would have produced a better result or that even the decision itself was a mistake. Recognizing that there is often no single correct decision, or that the circumstances sometimes do not allow time for reflection, the professional will not be held negligent unless the judgment he or she made was outside the range of reasonable choices that could have been made by a competent member of the profession.

[44] I conclude from the above authorities that the standard of care owed by a lawyer to his client is that of the reasonably competent lawyer – no more – no less. Lawyers

are not held to a standard of perfection nor are they responsible to ensure a certain result. They are, however, expected to represent their client in a reasonably competent manner making decisions and conducting a case within a range of reasonable, acceptable choices.

[45] Trial counsel are required to make strategic decisions and exercise judgment on a regular basis. It must be remembered that the practice of law and the conduct of a trial is not a science. Answers to issues that arise during the course of a proceeding are not always clear. Sometimes the decisions and judgment calls that counsel make will be correct – other times they will be in error. They will not be liable to their client in negligence, however, unless the decision that they have made is outside the realm of acceptable possibilities in the circumstances of the case. In other words, if an ordinary competent lawyer could reasonably have made the same decision, counsel will not be liable in negligence even if the decision proves to be wrong.

[46] In the case at bar the Defendant failed to object to evidence which has subsequently been found by the Court of Appeal to have been inadmissible. With the benefit of hindsight and, in particular, with the benefit of the Court of Appeal's comments, it is clear that the Defendant should have objected to Cst. Thivierge's opinion evidence concerning the time that the Plaintiff would have had to see the Chrysler and stop the bus without collision. It is also clear that the Defendant should have objected to the admission of the video re-enactment and the related still photographs. One must be careful, however, not to analyse this case with the benefit of hindsight. The Defendant did not have that benefit when considering how to

conduct the Plaintiff's criminal trial and it would, in my view, be improper to judge the Plaintiff's actions with the Court of Appeal's conclusions in mind.

[47] As indicated above, the Plaintiff's action against the Defendant is based on a failure to object to evidence. During the course of the trial, and in the post trial submissions filed by the Plaintiff, the suggestion was made that the Defendant believed that the evidence in question was inadmissible but that he wanted it introduced into evidence in any event so that he could try to prove it wrong. Mr. Zimmer, in his report filed with the Court, also suggests that the Defendant knew that the evidence in question was inadmissible. I am not prepared to make that finding based on the evidence before me.

[48] The testimony establishes that the Defendant felt that there were serious flaws in the evidence in question. As an example, the Defendant's initial reaction when he saw the videotape in question was that it was "outrageous". He concluded, however, that since the video was clearly not an actual re-enactment of the accident itself, it was not necessary to object to its admission and the problems that it raised could be dealt with through cross examination, etc. at the time of trial.

[49] The Defendant testified that he was of the view that all of the evidence complained of was admissible – albeit flawed. I accept his evidence in this regard. He was in error, however, in reaching this conclusion. This evidence (which did not reflect the facts or circumstances of the collision) may not have been introduced by the Crown to show what the Plaintiff actually saw just prior to the collision. In my view, however, the jury was invited to attach weight and draw conclusions on

visibility from it. It had the potential to be highly prejudicial and was of limited probative value. The evidence in question was inadmissible and should not have been before the jury. That, however, in my view, does not determine the matter of negligence.

[50] The admissibility of evidence is often unclear and is subject to debate. Reasonable professionals can and will arrive at different conclusions on whether certain evidence is admissible (one need only listen to the testimony of the two experts called in this trial for confirmation of this point.) As long as a lawyer's conclusion on the admissibility of evidence is within a range of reasonable, acceptable conclusions, he will not be found to be liable for reaching a conclusion that subsequently turns out to be wrong.

[51] The Plaintiff's expert, Warren K. Zimmer, has given the opinion that reasonable counsel acting for the Plaintiff should have made timely objections to the evidence in question as noted by the Court of Appeal. The Defendant's expert, Donald C. Murray, Q.C., gave the opinion that a rational and justifiable choice was made by the Defendant not to challenge the admissibility of the Constable's opinion, the videotape and the related still photographs. Unfortunately, I did not find either opinion particularly helpful.

[52] Mr. Zimmer is a specialist in the field of criminal law, and in my view, is much more knowledgeable in this area than your ordinary competent solicitor. I am fully satisfied that Mr. Zimmer would have objected to the evidence in question and would have handled the Plaintiff's case in a manner different than that chosen by the

Defendant. Mr. Zimmer has not satisfied me, however, that the ordinary competent solicitor (who is not a criminal law specialist) would have necessarily conducted the case in the manner suggested by him.

[53] Mr. Murray is also a criminal law specialist. With respect, I had difficulty with some of the opinions that he expressed at trial. For example, his suggestion during his *viva voce* evidence that counsel would want the videotape in evidence so that the jury could appreciate the location where the events occurred fails to recognize that this evidence had the potential to be highly prejudicial and was of limited probative value. Nevertheless, Mr. Murray testified that if he was approaching the trial he would want the videotape in.

[54] In addition, during the course of Mr. Murray's testimony, he questioned whether the opinion evidence that is being complained of was, in fact, inadmissible. This, despite the fact that the Court of Appeal has ruled otherwise.

[55] While I may disagree with some of Mr. Murray's opinions his testimony highlights the fact that reasonable, competent professionals can and do have different opinions on the admissibility of evidence. It also highlights the fact that there are often no "right" or "wrong" answers when it comes to evidentiary issues or the conduct of a trial. Judgment calls are made by counsel whether to object to evidence or tackle its flaws in some other manner. Sometimes errors are made when exercising that judgment. As indicated, counsel will only be held liable for an error in judgment if it is outside the realm of reasonable, acceptable choices.

[56] The burden is on the Plaintiff to satisfy me that the Defendant's conduct fell below the required standard of care. In the circumstances of this case he has not satisfied this burden.

[57] In arriving at this decision, I have taken into consideration the fact that a very experienced trial judge presided over the Plaintiff's criminal proceeding and he, too, did not raise the issue of the admissibility of the evidence in question. Judges obviously rely on counsel to make timely objections to inadmissible evidence and they are sometimes reluctant to raise issues that counsel have not raised themselves out of a desire not to interfere with counsel's trial strategy. Ultimately, however, they are the gatekeepers of the evidence and they will raise issues with counsel that are of particular concern. The fact remains that in the case at bar the trial judge did not raise any of the issues presently complained of. This suggests to me that the situation was not as clear as it now appears to Mr. Zimmer and that what seems obvious to him would not necessarily be obvious to others conducting the trial – including an experienced trial judge.

[58] I have also taken note of a comment contained in the Crown's appeal factum. At ¶ 13 of the said factum (dealing with the videotape in question) it is stated "It can not be seriously contended that evidence of the kind given by Cst. Thivierge was not admissible". While this comment is obviously made by a party seeking to support the admissibility of the evidence, the fact that the Crown states that it could not seriously be contended that this evidence was inadmissible emphasizes the fact that the question of whether evidence is admissible is often not clear. Obviously, it *can* be contended that the evidence in question was inadmissible – three Court of Appeal judges have

found that to be the case. The point is, however, that appeal counsel was of the view that the matter was beyond question – and she was wrong. I am satisfied that the matter was not as clear cut as it now appears with the benefit of hindsight and the Court of Appeal's decision.

[59] The suggestion was also made by the Plaintiff that the Defendant did not have a reasonable knowledge of the applicable or relevant law concerning the admissibility of the evidence in question. I have reviewed the transcript of the criminal trial as well as the *viva voce* evidence of the Defendant and I am satisfied, and I find, that the Defendant had a reasonable knowledge of the applicable law relating to these issues. He erred, however, in the application of that law to the facts of this case. That is something that can occur in any trial. Counsel cannot be expected to be correct in their analysis each time an evidentiary issue arises.

[60] In light of my conclusion that the Plaintiff has not satisfied me that the Defendant's conduct fell below the required standard of care, I need not go on to deal with the issue of causation.

[61] The Plaintiff's action will be dismissed.

[62] I encourage counsel to reach an agreement on the issue of costs. This has been an unfortunate case in many respects and I am hopeful that this final issue can be dealt with by consent. If not, I will receive written submissions on the issue of costs.

Deborah K. Smith
Associate Chief Justice