2000

Date: 20011018
Docket: S.H. No. 163174

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Joudrey v. Swissair Transport Company., 2001 NSSC 145]

BETWEEN:

LORNE P. JOUDREY

PLAINTIFF

-and-

SWISSAIR TRANSPORT COMPANY, a body corporate

DEFENDANT

DECISION

HEARD BEFORE: The Honourable Justice Robert W. Wright at Halifax, Nova Scotia in Chambers on October 3, 2001.

ORAL DECISION: October 3, 2001

WRITTEN RELEASE OF DECISION: October 18, 2001

COUNSEL: For the Plaintiff - Cathy Dalziel

For the Defendant - C.C. Robinson, Q.C. and Jane O'Neil

Wright J. (Orally)

[1] This is an application by the defendant, Swissair Transport Company under Civil Procedure Rule 14.25 (1)(a) for an Order that the plaintiff's Statement of Claim be struck out on the ground that it discloses no reasonable cause of action.

[2] The facts surrounding this matter are concisely summarized in the defendant's brief as follows:

> In September, 1998, Swiss Air flight 111 crashed into a bay near the village of Blandford, Nova Scotia. At that time, the plaintiff was a member of the Canadian Armed Forces and was deployed to work with the recovery team after the crash. In a Statement of Claim filed on April 14, 2000, the plaintiff claims that as a result of his deployment, he suffered severe mental and emotional distress which has rendered him unfit for further duties as a member of the Canadian Armed Forces. The plaintiff claims damages from the defendant on the basis that the defendant's negligence caused the crash of the aircraft and in turn, caused him to suffer psychiatric harm resulting in damages.

[3] For purposes of this application, those facts as pleaded in the Statement of Claim must be assumed to be true. The defendant submits that even with that assumption, the plaintiff's claim does not disclose a reasonable cause of action as it is plain and obvious that the claim cannot succeed in law.

[4] The test to be applied by a Chambers judge in applications of this sort has been enunciated many times. One of the leading examples is the decision of the Nova Scotia Court of Appeal in *Vladi Private Islands Ltd. v. Haase* (1990), 96 N.S.R. (2d) 323 where MacDonald, J.A. said (at p. 325):

> The proper test to be applied when considering an application to strike out a

> statement of claim has been considered by this Court on numerous occasions. It is clear from the authorities that a judge must proceed on the assumption that the facts contained in the statement of claim are true and, assuming those facts to be true, consider whether a claim is made out. An order to strike out a statement of claim will not be granted unless on the facts as pleaded the action is 'obviously unsustainable'....
>
> In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the statement of claim raises substantial issues it should not be struck out.

[5] The test therefore is not whether I, as the Chambers judge, discern that the claim has little likelihood of success. The test to be applied is whether or not the claim is, on the face of the pleadings alone, absolutely or obviously unsustainable with no justiciable issue having been raised.

[6] In considering the proper disposition of this application, I refer to the decision of the Court of Appeal in *Lamey v. Wentworth Valley Developments Ltd.* (1999) 175 N.S.R. (2d) 356. The application which had been before me in that case sought an amendment to the Statement of Claim adding a new cause of action. It was recognized by the Court of Appeal in its reasons for judgment that the test for whether a proposed amendment raises a justiciable issue is essentially the same as whether it discloses a reasonable cause of action under Rule 14.25 (1)(a). The court then reaffirmed the test above referred to, citing its earlier decision on a Rule 14.25 (1)(a) application in *Roulston v. Nova Scotia (Attorney General)* (1994) 130 N.S.R. (2d) 44.

[7] In the *Lamey* case, the Court of Appeal observed that I as the Chambers judge had engaged in an extensive examination of the merits of the proposed amendment by examining the differing case law. The court went on to say (at p. 360):

> The Chambers judge was presented with arguable and interesting interpretations of case law and statutes, which should have been left to a trial judge to reach a decision based on the full merits and argument of the case. There were clearly arguments for and against the proposed claim. This should have resulted in a bare finding, which is all that is necessary, that the proposed amendment raised a

justiciable issue.

[8] The question of law raised in the present case is whether or not the defendant owed a duty of care to this plaintiff in this fact situation. However novel the claim is in this case, as was ultimately decided in *Lamey* it cannot be said, solely on the face of the pleadings, to be obviously and absolutely unsustainable, especially where the tort law in respect of nervous shock/rescuer cases is in a continuing state of evolution and development.

[9] I am mindful of the decision of the Nova Scotia Court of Appeal in *Future Inns Canada Inc. v. Labour Relations Board (N.S.)* (1999) 179 N.S.R. (2d) 213 which ruled that questions of law are appropriate for determination under Rule 14.25 but only in cases where the law is clear, and provided no further extrinsic evidence is required to resolve the issues raised. In my view, this is not one of those cases. One need only look at the various case authorities cited to see how the courts have wrestled with the legal issues and policy considerations prescribing the scope of liability and recoverability of damages in this area of the law. I consider that there are competing arguments that can be made for and against the plaintiff's claim with the result that this action should be decided on the full merits and argument of the case, and not on the summary basis as sought by the defendant here.

[10] I can only add that where the pre-trial procedures involved in this action are enormous in terms of document production, discoveries and expert reports, the cost of which will be out of all proportion to the potential damages that might be recovered even if the claim is successful, I would encourage the parties to consider two other procedural options. First, the parties might try to reach an Agreed Statement of Facts, which would enable a Rule 25 application to be made for the preliminary determination of the question of law that has been raised, namely, whether or not Swissair owed a duty of care to the plaintiff on the

facts of this case. Failing such an agreement, counsel might consider making a Rule 28.04 application to sever that issue for an early determination. Either of these procedures could likely be invoked without first having to make the massive production of documents that would be necessary for the conduct of a full trial.

[11] The plaintiff shall be entitled to recover costs of this application in the amount of $1000 in any event of the cause.

J.