Date: 2001/11/15
Docket: S.H. No. 158460

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: *Frank W. Hogg Trucking Ltd. v. Ward* , 2001 NSSC 173]

BETWEEN:

FRANK W. HOGG TRUCKING LIMITED, a body corporate and FRANK W. HOGG

PLAINTIFFS

- and -

MICHAEL WARD, ROBERT WARD, R.B. PAVING COMPANY LTD., a body corporate, BRUCE CHEVROLET-OLDSMOBILE LTD., a body corporate and MACKAY'S TRUCK & TRAILER CENTRE LIMITED, a body corporate

DEFENDANTS

D E C I S I O N

HEARD BEFORE:	**The Honourable Justice David W. Gruchy (in chambers)**
PLACE HEARD:	**Halifax, Nova Scotia**
DATE HEARD:	**November 15, 2001**
DECISION:	**November 15, 2001 (Orally)**
WRITTEN RELEASE:	**November 27, 2001**
COUNSEL:	**Michelle C. Awad for Frank W. Hogg Trucking Limited**
	Christa M. Hellstrom and Peter Johnson for Michael Ward, Robert Ward and R.B. Paving Company Ltd.

GRUCHY, J. (Orally):

[1] This is an application by Frank W. Hogg Trucking Limited, one of the plaintiffs herein, for summary judgment against the defendants Michael Ward, Robert Ward and R.B. Paving Company Ltd. The applicant relies on *Civil Procedure Rule* 13.01 which provides as follows:

> 13.01 Where a defendant has filed a defence or appeared on a hearing under an originating notice, the plaintiff may, on the ground that the defendant has no defence to a claim in the originating notice or a part thereof except to the amount of any damages claimed, apply to the court for judgment against the defendant. [E. 14/1]

[2] The action arose from a motor vehicle accident the circumstances of which appear to be set forth in the applicant's affidavit evidence and are reflected by the discovery evidence of the defendant Michael Ward. Subject to certain comments I make below there appears to be little doubt based on the material supplied to me by the plaintiff that the accident was caused by the negligence of the defendant Michael Ward. There is what appears to be (based on the evidence now before me) a somewhat fanciful suggestion that a third unidentified vehicle may have been involved. Having said that, however, it is not my intention to reach a definitive position with respect to that matter. I do comment that the present evidence concerning that vehicle would not be sufficient to discharge any burden thrust upon the defendant arising from the factual material before me.

[3] Resulting liability to the applicant, however, may indeed be a difficult question. The statement of claim alleges that the applicant is a body corporate and the personal plaintiff Frank Hogg is or was the president of the applicant. The statement of claim alleges that Frank Hogg was seriously injured in the motor vehicle accident and I have no doubt that he was. Paragraphs 17, 18, 19, 20, 22(a), (b) and (c) set forth the claim of Frank W. Hogg Trucking Limited. These paragraphs read as follows:

> 17. As a result of the injuries caused by the collision referred to above, the Plaintiff company suffered from the inability of Frank W. Hogg to perform his administrative, sales and management functions in the business activities of the Plaintiff company on a full-time basis for a period of more than six months following the date of the accident, followed by a trial period of part-time return to manage the affairs of the business for a further period of several

months. Since September 1998, Frank W. Hogg has been able only to perform his functions in the activities of the Plaintiff company in a restricted and less effective manner than he did prior to receiving the injuries in the collision referred to above.

18. As a result of the inability of Frank W. Hogg to perform his activities on behalf of the Plaintiff company, the Plaintiff company was required to hire persons on an emergency basis to continue to operate its normal business activities for a temporary period of time immediately following the date the injuries were suffered by Frank W. Hogg. Further, as a result of the inability of Frank W. Hogg to perform his normal functions, the Plaintiff company was required to retain and hire other persons on a long term basis to perform the management and sales functions of the business of the Plaintiff company that formerly were performed by Frank W. Hogg.

19. As a result of the immediate requirement of the Plaintiff company to hire persons for both short term and longer term, the Plaintiff company incurred extra direct expenses all of which were incurred as a result of Frank W. Hogg being unable to perform his role in the administration and management, due to the injuries received by him in the collision referred to above.

20. Further, as a result of the injuries received by Frank W. Hogg and the resulting claim made under the provisions of the *Workers' Compensation Act*, Stats. N.S. 1994-95, c. 10, the Workers' Compensation Board has substantially increased the assessment made by the Workers' Compensation Board against the Plaintiff company, which assessment is calculated based on claim amounts required to be paid by the Workers' Compensation Board under the provisions of the Act. As a result of claims for both temporary earning replacement benefits and medical aid expenses paid by the Workers' Compensation Board, the employer assessment made by the Workers' Compensation Board against the Plaintiff company has substantially increased, resulting in a further expense to the Plaintiff company. The Plaintiff company claims the amount of such increased assessment as damages it has suffered as a result of the injuries suffered by Frank W. Hogg.

. . .

22. Therefore, the Plaintiffs claim against the Defendants as follows:

(a) General Damages for interruption in the operation of its business;

(b) Special Damages to compensate for additional expenses incurred by the Plaintiff in hiring and paying additional employees to carry on the business and to perform the functions of the business activities of Frank W. Hogg for the Plaintiff company;

(c) Damages in an amount equal to the increased assessment amounts determined by the Workers' Compensation Board as a result of injuries to Frank W. Hogg and required to be paid by the Defendant company;

[4] The law with respect to summary judgment applications is well-settled. The applicant has cited for my consideration *The Supreme Court Practice 1973*, vol. 1 at p. 132; *Royal Bank of Canada v. Malouf*, [1932] 2 W.W.R. 526 (Sask. C.A.) and the Nova Scotia case of *Hall v. Woodland* (1997), 164 N.S.R. (2d) 149 (S.C.). I have also been referred to the following: *Carl B. Potter Ltd. v. Antil Canada Ltd. and Mercantile Bank of Canada* (1976), 15 N.S.R. (2d) 408 (A.D.); *Bank of Nova Scotia and Robert Simpson Eastern Limited v. Dombrowski* (1977), 23 N.S.R. (2d) 532 (A.D.) and *Hardman Group Ltd. v. Alexander*, [2001] N.S.J. No. 406 (S.C.).

[5] With respect to the allegation of negligence (subject to possible development of evidence of an unidentified vehicle) there does not appear to be much doubt that the defendant Michael Ward acted in a negligent manner and that negligence caused the accident. But in order to succeed other elements must be shown; see Allen M. Linden, *Canadian Tort Law*, 5th ed. (1993) p.93:

> A cause of action for negligence arises if the following elements are present: (1) the claimant must suffer some damage; (2) the damage suffered must be caused by the conduct of the defendant; (3) the defendant's conduct must be negligent, that is, in breach of the standard of care set by the law; (4) there must be a duty recognized by the law to avoid this damage; (5) the conduct of the defendant must be a proximate cause of the loss or, stated in another way, the damage should not be too remote a result of the defendant's conduct; (6) the conduct of the plaintiff should not be such as to bar recovery, that is the plaintiff must not be guilty of contributory negligence and must not voluntarily assume the risk.

[6] Both parties acknowledge that this is an action *per quod servitium amisit* which I will describe as a *per quod* action. The applicant says that such an action is permissible and has cited *Her Majesty the Queen v. Anthony Buchinsky,* [1983] 1 S.C.R. 481 in support of the proposition. In that Supreme Court of Canada decision, Justice Ritchie said at p.486:

> The action *per quod* is born of the relationship of master and servant and though of very early origin in my opinion still persists in the common law provinces of Canada in one form or another. The action recognizes the right in the master to recover damages as against a wrongdoer who has injured his servant and thus deprived the master of his services. The measure of damages in such cases is the cost necessarily incurred by the master in respect of the loss of any services of his servant and includes the cost of medical and hospital expenses incurred on the servant's behalf as a result of such injury so suffered by him. As will hereinafter appear, the master's right of action in such a case is dependant on the servant in turn having a valid cause of action against the wrongdoer.

In a more recent case, *Schittone v. George Minkensky Ltd.* (1997), 36 O.R. (3d) 75 (Gen. Div.), Brennan, J. stated at p.79:

> The survival in Ontario of the "*per quod*" claim is demonstrated by a number of decisions, of which the most recent is that of Madam Justice Métivier in *Canada (Attorney General) v. Kerr*, unreported, Ontario Divisional Court, May 30, 1997 [now reported *ante* at p. 71]. In that appeal from a decision of the Honourable Judge Tierney, in the Small Claims Court, it was common ground that the injured party could not maintain an action by reason of the "threshold" provisions of s. 266. The learned judge concluded that the master's right of action was not barred along with that of the motor accident victim, the servant. The action *per quod servitium amisit* is a right of the master, although it has been held to be dependent upon the wrongful act being wrongful and "actionable" by his servant the victim: *Canada (Attorney General) v. Jackson*, [1946] S.C.R. 489, [1946] 2 D.L.R. 481.
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> . . .
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> In Canada, courts have adapted the ancient claim to more modern reality, so that "employers" and "employees" are now included in the scope of the claim. Canadian courts do not insist that the relationship between them be of the kind seen between masters and domestic servants or farm labourers in ancient times, when the cause of action took its name. The reasons of Kelly J.A. in *Genereux v. Peterson, Howell & Heather (Can.) Ltd.*, [1973] 2 O.R. 558, 34 D.L.R. (3d) 614 (C.A.), provide a useful history of this form of action and its application to modern reality.

[7] The defendants, however, have taken the position that *per quod* actions are an anomalous and antiquated form of action. It appears from the evidence submitted to me that Frank W. Hogg Trucking Limited went into bankruptcy some time after the accident in question. Accordingly, this is essentially an application by the trustee of the bankrupt company. According to the respondent the company had for some time relied heavily upon Mr. Hogg's daughter for the administration of the company and it would seem had become involved in a problematic courier contract. The applicant says that various losses were caused by the inability of Frank Hogg personally to supervise the company and caused extraordinary expenses to be incurred by the company in order to replace him. Based on the discovery evidence disclosed to me, however, it would seem the damages alleged due to remoteness may be in some doubt and may require evidence to substantiate them. Remoteness, of course, may negate liability.

[8] In addition, the defendants say that some of the losses may have been occasioned by the departure of Mr. Hogg's daughter from the business in July of 1998 as a result of another unrelated motor vehicle accident and this fact in turn may have caused losses as opposed to, or perhaps in addition to, any arising from Mr. Hogg's accident.

[9] At first blush it might appear that these matters could be determined in assessment of damages but assessment will only determine quantum for damages for which there is liability. It will not determine remoteness. That is, the damages must be considered with respect to Linden's element (2) and a finding made that damages suffered were caused by the conduct of the defendant.

[10] Additionally it must be determined whether *per quod* actions still exist in circumstances such as those now before me.

[11] The respondents cite Waddams, *Law of Damages* (Looseleaf Edition) para. 2.50, as authority for the proposition that *per quod* actions may not be available in the present circumstances:

> The action is widely regarded as antiquated and anomalous, resting, as it does, on the theory of the plaintiff's proprietary interest in the services of the injured person. As has often been pointed out, this theory is barely compatible with the general view of employment. Still less is the notion of the husband's proprietary interest in his wife's services easily compatible with modern views of family relationships.

> In *Island Revenue Com'rs v. Hambrook*, the English Court of Appeal very drastically reduced the scope of an employer's action by holding that it was available only in cases of injury to domestic servants. Some Canadian cases have followed *Hambrook*, but the weight of authority appears to be against acceptance of this restriction. Some uncertainty remains, however, about whether high level employees are included within the principle.

[12] Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell: 1996), describes an action *per quod servitium amisit* as follows beginning at p. 194:

> Much like parents, employers have long been able to sue *per quod servitium amisit* for injury to their employees. Historically premised on the notion of a master's proprietary interest in servants, this action too seems archaic as well as anomalous, and British Columbia and New Brunswick have both abolished it. Elsewhere the law is said to be in "a sorry state of dishevelment". No attempt is made in this book to unravel the current convolution. Suffice it to note the continuing controversy over such core questions as when exactly does the action lie and what specific losses are recoverable. On the first point, for example, one line of authority confines the action to cases of domestic servants while the other regards it as largely available in all instances of employer/employee. And on the second, some precedents limit compensation to "loss of the servant's services" while avowed precluding "loss of profit", without ever satisfactorily defining either.

[13] The defendants further say that this *per quod* action is one of pure economic loss and will raise the question of remoteness of damages. They cite *D'Amato v. Badger*, [1996] 2 S.C.R. 1071 as an example of the type of action in which a company's claim for pure economic loss was not successful and addressed the question of remoteness of damages in the peculiar circumstances of that case.

[14] In Nova Scotia, Justice Glube (as she then was) allowed a *per quod* action in *LeBlanc, Dawe, Dawe and Attorney General of Canada v. Fougere and Allstate Insurance Company (Third Party)* (1977), 24 N.S.R. (2d) 675 (T.D.) but that decision appears to be based largely upon certain federal legislation: the *Federal Court Act;* the *National Defence Act;* the *Queens Regulations and Orders*. Perhaps more generally in 1961 the respected late Illsley, C.J. addressed the status of *per quod* actions in *Swift Canadian Co. Ltd. v. Bolduc et al.* (1961), 29 D.L.R. (2d) 651 (N.S.S.C.) in which he carefully traced the history of such actions and underlying policy considerations and problems. He concluded such an action was limited to cases of domestic or household servants and members of the master's family

performing such services and perhaps the members of the armed forces in actions brought by the Crown.

[15] I return to the decision of Ritchie, J. in *Buchinsky* and comment that while he concluded that *per quod* actions still exist in common-law provinces he used the words "in one form or another". He did not specify where or in what form. It is therefore necessary to consider the cases referred to above – *LeBlanc et al. v. Fougere et al.* and *Swift Canadian Co. Ltd. v. Bolduc et al.* – to determine if *per quod* actions still exist in Nova Scotia in the manner of the particular facts now before me.

[16] It is interesting to note that it was the opinion of Hunt, J. in *Schwartz and Alex E. Schwartz Agencies Ltd. v. Hotel Corporation of America (Manitoba) Ltd.* (1970), 75 W.W.R.664 (Q.B.) in Manitoba in 1970 that a *per quod* action was confined to loss of services of domestic or household servants and members of the family performing such services or by the Crown for expenses in relation to injuries to members of the armed services, which opinion was echoed and adopted by Illsley, C.J. in *Swift Canadian Co*.

[17] The policy objection to *per quod* actions was clearly set forth in the minority (but concurring in the result) opinion of Dickson, J. (as he then was) in *Buchinsky* at p.490:

> Counsel in this case did not argue that the action *per quod servitium amisit* is no longer a valid cause of action. Whether it still should be recognized has been for some time the subject of debate in the cases and among academic commentators. The conceptual underpinnings of the action are the main reason its validity has been brought into question. The action is of ancient origin. At its inception, it was based on the precept that a master had a proprietary or quasi-proprietary interest in the services of his servant. In an indirect sense at least, it amounted to an assumption of a proprietary interest in the servant himself. The *per quod* action developed during an era in which the master/servant relationship was analyzed in status terms, whereas we have long since treated the employment relationship as a contractual one. The debate is not whether the original assumptions underlying the action can any longer be supported. That rationale is plainly offensive in today's society. The serious question is whether, despite its antiquated origins, the action can now find a different justification. Does it serve a useful purpose that would not otherwise be met? Is it consistent with general principles of tort law concerning collateral benefits and recovery for economic loss? Do employers, simply because they are employers, merit a special cause of action? Should the action *per quod servitium amisit* be abandoned, maintained or expanded? In a future case it may be appropriate to address these issues.

[18] I have concluded that the matter of *per quod* actions and the existence of a *per quod* action in Nova Scotia today based on the facts presented to me raises a serious issue of law. On a factual level, quite aside from the matter of the existence of a third vehicle which I largely discount, the defendants have raised the question of whether based on the discovery evidence of Frank Hogg the applicant suffered damages as alleged. The defendants submit that Frank Hogg received Workers' Compensation as a result of his injuries thereby freeing the applicant of the obligation to pay him a salary and allowing those funds to be available to pay his replacement. Without in any way deciding the issue, this is a question best left for determination at trial. It may be merely a question of an appropriate assessment of damages but similarly it may be so involved with matters of liability, remoteness and the question of *per quod* actions a full trial exploration seems to be required.

[19] MacDonald, J. said in *Hall v. Woodland* (1997), 164 N.S.R. (2d) 149 (S.C.):

> [13] In an application for summary judgment it is not the function of a judge to determine controversial matters of law and fact and, in the face of such controversy summary judgment I feel ought not to be granted. There are issues in contention between the plaintiff and defendant relative to liability. There are fairly arguable points which the defendant wants to argue before a trial judge. It is not for me to determine the facts and decide the matter in such a situation on a summary judgment application.
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> [14] In conclusion, on the matter of the summary judgment application, I am satisfied that although the plaintiff has shown a clear claim, that claim does involve contentious issues of fact and law.

[20] Much to the same effect was the decision of MacKeigan, C.J.N.S. in *Lunenburg County Press Limited v. Deamond* (1977), 18 N.S.R. (2d) 689. In the more recent cases of *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267 (C.A.), the Nova Scotia Court of Appeal said:

> [20] It was, with respect, not the function of the chambers judge, on an application for summary judgment, to determine matters of fact or law which were in dispute. Matters of controversy should be left for resolution at trial. (**Irving Oil Ltd. v. Jos. A. Likely Ltd.** (1982), 42 N.B.R. (2d) 624; 110 A.P.R. 624 (C.A.))

See also *Campbell v. Lienaux*, [1997] N.S.J. No. 341.

[21] Saunders, J. (as he then was) also addressed the matter of summary judgment applications in *Webber et al. v. Canadian Surety Co. (No. 4)*

(1992), 112 N.S.R. (2d) 284 (T.D.) in which it was once again affirmed that "contentious issues of fact or of law are left for resolution at trial."

[22] Accordingly on the facts as presented to me, the application for summary judgment herein is dismissed.

[23] Costs should be $750.00. The costs, however, will be in the cause and the successful party ultimately will have those costs.

J.