SUPREME COURT OF NOVA SCOTIA

Citation: MacKean v. Royal & Sun Alliance Insurance Company of Canada, 2014 NSSC 33

Date: 20140130
Docket: Pic No. 296867
Registry: Pictou

Between:

Cindy L. MacKean and Dalton Holley, an infant, through his Litigation Guardian Cindy L. MacKean

Plaintiffs

- and -

Royal & Sun Alliance Insurance Company of Canada

- and -

Joseph Allen Goodall

Defendants

Judge:	The Honourable Justice Michael J. Wood
Heard:	January 16, 2013 and January 8, 2014 (in Chambers), in Halifax, Nova Scotia
Final Written Submissions:	January 20, 2014
Written Decision:	January 30, 2014
Counsel:	C. Patricia Mitchell and Leah N. Grimmer, for the Plaintiff Defendant, Royal & Sun Alliance Insurance Company of Canada, not present as claim dismissed previously Defendant, Joseph Allen Goodall, unrepresented, not present

By the Court:

[1] When a defendant does not file a defence within the required time period following service of the notice of action and statement of claim, judgment may be entered against them. Unless the claim is for a debt or other liquidated demand, the assessment of the amount of damages for which the defendant will be liable must be carried out by a judge. This motion raises the question of whether the rules applicable to that assessment of damages should be different where the plaintiffs' claim is being advanced by their insurer who has reimbursed them for their losses under the terms of the insurance contract.

[2] The insurer for the plaintiffs in this case says that the question to be answered by the Court at the assessment hearing is whether their payment to the plaintiffs was reasonable and, if so, then judgment in that amount should be entered against the defaulting defendant. Normally an assessment hearing would require the plaintiff to prove their damages based upon admissible evidence on a balance of probabilities. The plaintiffs say that in the insurance context, that does not apply and the sole issue is the reasonableness of the payment to the insured.

[3] I interpret the position of the plaintiffs in this litigation to be that for a reimbursement claim by an insurer, the normal burden of proving damages on an assessment should be relaxed. For the reasons that follow, I have concluded that this position is wrong in law.

PROCEDURE FOR ASSESSMENT OF DAMAGES IN NOVA SCOTIA

[4] There are several procedural avenues which can lead to an assessment of damages in Nova Scotia. In this case, it was the result of the defendant, Joseph Allen Goodall, failing to file a defence after service of the originating notice (action) and statement of claim. Because the plaintiffs' claims were for unliquidated damages arising out of a motor vehicle accident, the assessment of damages is done by a judge.

[5] Civil Procedure Rule 70 applies to the assessment of damages. Rule 70.02(2) permits a party in a default situation to make a motion to a judge for the assessment. Rule 70.03 sets out the procedure for obtaining a date for the hearing. That rule provides as follows:

Obtaining date for assessment

70.03 (1) A party to a defended action or a contested application may have damages assessed at the trial or hearing.

(2) A party who is entitled to have damages assessed in any other circumstances may request that the prothonotary appoint a time, date, and place for the assessment.

(3) A prothonotary who receives a request for an appointment to assess damages may do either of the following:

(a) appoint a time, date, and place for the assessment to be heard as a motion;

(b) refer the request to a judge.

(4) A judge may provide for an assessment of damages in any of the following ways:

(a) appointing a time, date, and place for the assessment to be heard as a motion;

(b) directing that the assessment proceed as an application and providing for a motion for further directions under Rule 5.09, of Rule 5 - Application;

(c) directing that the assessment proceed to trial and providing further directions or ordering that Rules 4.13 to 4.17, of Rule 4 - Action, apply.

[6] As indicated by Rule 70.03(4), the assessment hearing may be dealt with as a motion, application or a trial. The main differences between these procedural options are the length of the hearing and whether evidence will be presented by way of affidavits or witness testimony. Which is appropriate in any given case will depend upon the circumstances, including the complexity of the issues and the anticipated length of the hearing.

[7] It is important to note that in the default scenario, the assessment process is to be initiated by way of motion. It will then be determined by the prothonotary or

a judge whether the matter should continue in that fashion or evolve into a more complex hearing.

[8] The procedure followed for the assessment process does not change the substance of the hearing. The burden of proof and the rules of evidence remain the same, whether the matter is determined on affidavits or with witness testimony.

PROCEDURAL HISTORY

[9] In order to provide context for this decision, I will review the procedural history of this matter.

[10] On June 3, 2008, Cindy MacKean and her son, Dalton Holley, commenced this proceeding against Royal & Sun Alliance Insurance Company of Canada ("RSA"). The statement of claim says that Ms. MacKean and Mr. Holley were injured in a motor vehicle accident in July, 2007, which was allegedly caused by Mr. Goodall who was driving without the required insurance. The basis of the action against RSA was an insurance policy issued in favour of Ms. MacKean which included the statutorily mandated Section D coverage for damages suffered as a result of the actions of an uninsured motorist. In accordance with the applicable regulations under the *Insurance Act*, R.S.N.S. 1989, c. 231 and the standard automobile policy in Nova Scotia, the limit of that insurance coverage is $500,000.00.

[11] In September, 2008, RSA filed a defence to the plaintiffs' claim.

[12] In September, 2008, the statement of claim was amended by consent to add Mr. Goodall as a defendant.

[13] In January, 2010, a consent order was issued reciting that the plaintiffs had settled their claim against RSA and dismissing the action against the insurer without costs. The order included a recital that the plaintiffs' claim against Mr. Goodall would continue. At the same time Ms. MacKean signed a release in favour of RSA and assigned the plaintiffs' claims to the insurer.

[14] In October, 2011, a notice of new counsel was filed indicating that the plaintiffs were now represented by the former counsel for RSA. That same month,

a motion was brought to renew the amended originating notice (action) which had never been served on Mr. Goodall. The renewal was granted and Mr. Goodall was served in November, 2011. He did not file a defence and default judgment was entered on December 6, 2011, with damages to be assessed.

[15] In September, 2012, the plaintiffs filed a notice of motion seeking an assessment of damages against Mr. Goodall in the total amount of $505,000.00. The notice set the matter for regular Chambers on November 8, 2012 at 9:30 a.m. Prior to that hearing, the judge presiding in Chambers determined that the hearing would likely require more time than would be available in general Chambers and directed that it proceed to special time Chambers.

[16] The hearing was scheduled for January 16, 2013 before me. At that time, I raised with counsel for the plaintiffs a number of concerns with respect to the motion. The evidence which had been filed in support of the assessment consisted of two affidavits. The first was deposed to by C. Patricia Mitchell, who was solicitor for the plaintiffs and had previously acted on behalf of RSA in the litigation. Her affidavit simply summarized the procedural steps which had been taken and confirmed that RSA had settled the Section D insurance claim with the plaintiffs and taken an assignment of their action.

[17] The substantive affidavit was deposed to by Monica Warriner, who identified herself as a claims examiner for RSA. She described the procedural history of the matter and confirmed that RSA had settled the plaintiffs' Section D claims based upon a payment of $500,000.00 to Ms. MacKean and $5,000.00 to Mr. Holley. Based upon her file review, she provided some information concerning Ms. MacKean and Mr. Holley, and the extent of their injuries. She also provided employment information with respect to Ms. MacKean. Attached as exhibits to her affidavit were various medical documents, including reports of several physicians. Also attached were reports dealing with cost of future care and valuable services for Ms. MacKean, an economic report setting out the potential loss of income and cost of future care, as well as a rebuttal economic report. All of the information and documentation in Ms. Warriner's affidavit predates the insurance settlement which occurred in late 2009.

[18] The brief filed in support of the plaintiffs' motion for assessment of damages stated that the only question to be determined on the motion was whether

the agreement between RSA and the plaintiffs to settle their Section D claims for a total of $505,000.00 was reasonable. At the time of the hearing in January, 2013, I indicated to counsel that I was not satisfied based upon the authorities in the brief that the proper test was assessment of the reasonableness of the settlement. I suggested that it might be necessary for the plaintiffs to prove their damages as they would have to in any case. If it was necessary for the plaintiffs to prove their damages, I asked counsel to consider the sufficiency of the evidence which had been filed. In particular, I noted the absence of any direct evidence from the plaintiffs or information with respect to their employment or health status for the three years prior to the assessment hearing.

[19] In light of the concerns which I had raised, I adjourned the assessment of damages without day in order to give counsel an opportunity to consider how they wished to proceed.

[20] On November 4, 2013, the plaintiffs filed an amended notice of motion, reducing the total damages claimed to $405,000.00 and setting the hearing for January 8, 2014 before me. The plaintiffs filed a supplemental brief and an additional affidavit from Leah N. Grimmer. The affidavit indicated that Ms. Grimmer was assisting Ms. Mitchell in representing the plaintiffs and attached a copy of the transcript of the plaintiffs' discovery examination which had taken place in February, 2009.

NATURE OF THE ASSESSMENT OF DAMAGES IN A SUBROGATED ACTION

[21] At a hearing for assessment of damages, a party must prove their losses on a balance of probabilities using admissible evidence. It does not matter whether the assessment takes place by way of motion, application or a trial. In this case the plaintiffs do not seriously contest this proposition but say that the facts to be proven to these standards relate to the reasonableness of the payment by RSA to the plaintiffs. The logical extension of that position is that if Ms. MacKean and Mr. Holley have not been paid by RSA, they would have to prove their actual damages, but because of the payment they need only prove that their insurer was reasonable in coming up with the amount to be advanced under the insurance contract. If this is correct, then the case which Mr. Goodall would have to meet if he wished to oppose the assessment differs depending upon whether it is a

subrogated claim after compensation by an insurer or not. Logically this makes no sense and I have not seen any legal authorities which support such an approach.

[22] The legal basis for the plaintiffs' submission starts with the English Court of Appeal decision in *Biggin & Co. Ltd. v. Permanite Ltd.*, [1951] 2 K.B. 314. That case involved a contract claim arising out of the sale of defective goods. The plaintiffs had bought goods from the defendant for resale to the Dutch government. When they were determined to be defective and the Dutch government sued for damages, the plaintiffs settled the claim and started legal proceedings against the defendant for the settlement amount. The Court of Appeal concluded that it was sufficient for the plaintiffs to establish that the settlement with the third party was reasonable in order to claim that amount as damages. The rationale of the Court is found in the following passage from p. 5 of the decision:

> I think that the judge here was wrong in regarding the settlement as wholly irrelevant. I think, though it is not conclusive, that the fact that it is admittedly an upper limit would lead to the conclusion that, if reasonable, it should be taken as the measure. The result of the judge's conclusion is that the plaintiffs must prove their damages strictly to an extent to show that they equal or exceed 43,000; and that if that involves, as it would here, a very complicated and expensive inquiry, still that has to be done. The law, in my opinion, encourages reasonable settlements, particularly where, as here, strict proof would be a very expensive matter. The question, in my opinion, is: what evidence is necessary to establish reasonableness? I think it relevant to prove that the settlement was made under advice legally taken. The client himself could do that, but I do not think that the advisers would normally be relevant or admissible witnesses. I say "normally". It may be that in special cases they might be. The plaintiff must, I think, lead evidence, which can be cross-examined to, as to facts which the witnesses themselves prove and as to what would probably be proved if, as here, the arbitration had proceeded, so that the court can come to a conclusion whether or not the sum paid was reasonable. The defendant may, by cross-examination, as was done here, seek to show - and perhaps successfully show - that it was not reasonable. He may do so, or call evidence which leads to the same conclusion. He might in some cases show that some vital matter had been overlooked. In the present case, of course, Sir Walter Monckton relies, rightly, on the judge's finding with regard to the first head of damages, on the fact that the evidence showed that too much was bought, and so on; but if there is evidence at the end of the matter of the kind which I have indicated, on which the court can come to the conclusion that this was a reasonable settlement in the circumstances, then I think that it should be the measure. Parties, Bowen, L.J., said, have been held to contemplate litigation in the sort of circumstances which have arisen here. It would, I think, be

> unfortunate if they were not also held to contemplate reasonable settlements in the type of circumstances which have arisen here.

[23] I would distinguish this case on the basis that it does not involve a subrogated or assigned insurance claim. In my view, such a claim is completely different from the third party indemnity situation addressed in the *Biggin* decision. Here, the plaintiffs, Ms. MacKean and Mr. Holley, did not settle a claim against them by a third party for which they sought reimbursement from the defendant, Mr. Goodall. What is claimed from him are the actual damages suffered by the plaintiffs as a result of his allegedly negligent conduct.

[24] Civil litigation often includes subrogated insurance claims and rarely is the existence of an insurer disclosed. That information is completely irrelevant to the merits of the action. In a civil jury trial, it would be improper for the jury to be advised of the existence of any insurance and, in particular, whether the plaintiff had already been paid by their insurer.

[25] The plaintiffs have referred me to no cases where the assessment of damages for a subrogated claim is based upon the reasonableness of the settlement between the insurer and the insured. They have cited a number of Canadian cases which adopt the principles in *Biggin*. All of these are third party indemnity cases and, in my view, not relevant to the issue in this case.

[26] Following the hearing, counsel for the plaintiffs requested the opportunity to file additional written submissions, and I gave them permission to do so. The submissions included three additional cases which were said to support the plaintiff's position that the test for damages was the reasonableness of the settlement.

[27] The first case was *Family Trust Corporation v. Harrision*, 1986 CarswellOnt 536. That case involved a third party indemnity claim and is, therefore, consistent with *Biggin*. It did not consider an insurer's subrogated action.

[28] The other two cases arose out of jurisdictions with no fault insurance plans. They were *Insurance Corp. of British Colubia v. Filippelli*, 1996 CarswellBC 2552 and *Saskatchewan Government Insurance Office v. Harasyn*, 1957 CarswellSask 34. In both cases, the government insurer had paid the insured party

and was seeking recovery of the amount of that payment from a driver who had caused the accident and was disqualified from coverage under the legislation. The basis of the claim was a statutory provision which authorized the insurer to seek reimbursement in their own name. The statutory cause of action was found to not be an action in tort seeking recovery of damages. These decisions involve a distinct insurance regime and have no application to Nova Scotia, where an insurer is pursuing a negligence claim in the name of the plaintiff which it acquired by subrogation or assignment.

[29] My own research identified two decisions which I believe are helpful. In *General Accident Assurance Co. of Canada et al. v. KLOC*, (1985) 53 O.R. (2d) 353, the Ontario District Court was considering a situation identical to that here. It involved a payment to an injured party under the uninsured motorist coverage found in her insurance contract. After settlement of her claim, the insurer brought a subrogated action to recover from the allegedly negligent defendant. The matter went to trial, but was not defended. The plaintiff alleged that the measure of damages was the reasonableness of the amount paid by the insurer, together with an additional $440.00 for which the plaintiff had not yet been indemnified. The Court rejected that approach for the following reasons:

> 6 At the trial of this action, counsel for the plaintiffs attempted to establish that the settlement reached as between the plaintiffs was fair and reasonable. Apart from the formal affidavit evidence filed, viva voce evidence was presented from the representative of the personal plaintiff's insurer which described the information made available to the insurer from various sources which led it to agree to the ultimate settlement. As well, there was further evidence adduced to support the personal plaintiff's relatively minor remaining claim.
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> 7 I am satisfied that, from the standpoint of both plaintiffs, the settlement made by them was fair and reasonable. However, in my view, it does not inevitably follow that the amount of that settlement should necessarily form the quantum of the judgment against the defendant.
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> 8 From the defendant's point of view, even though the action is undefended, he is still entitled to have the plaintiffs prove the damages of the personal plaintiff in exactly the same way as if there were no insurance element in this case. In other words, the defendant should be quite unaffected by the settlement made by the plaintiffs. The plaintiffs still have to meet the burden of proving the damages of the personal plaintiff and those damages must be proved in the conventional manner.

> 9 This means that it is not sufficient just to establish that the settlement was fair and reasonable. Instead, properly admissible evidence must be adduced with respect to the personal plaintiff's injuries, loss and damage and her total damages must then be assessed by me as the trial Judge. The amount at which I ultimately assess the personal plaintiff's damages will not necessarily be the same as the amount of the plaintiff's settlement plus $440.

[30] Counsel for the plaintiffs attempted to distinguish this case on the basis that the judge had not considered the *Biggin* analysis. In light of my conclusion that *Biggin* involves a third party indemnity claim, which is different than a subrogated claim, I do not think the absence of a reference to that case undermines the weight of the Ontario District Court's opinion.

[31] The Saskatchewan Court of Appeal considered a somewhat similar issue in *Terrie's Plumbing & Heating Ltd. v. Grosvenor Fine Furniture (1982) Ltd.*, [1993] S.J. No. 439. In that case the plaintiff was a retail furniture merchant who sued for damages to its premises and stock resulting from soot which contaminated the premises as a result of the defendant's work on its boiler. The plaintiff's insurer had paid $257,842.73 to the plaintiff and commenced subrogated proceedings against the defendant. The trial judge awarded damages in the amount claimed and his reasons included the following passage:

> [7] The plaintiff submits that the same approach be taken in subrogation cases. The insurer should simply be required to show that it acted reasonably in the circumstances and in good faith and if so, the measure of damages should be the amount actually paid by the insurer in settlement of the claim made against it. This appears to be particularly applicable where the defendant is also represented by an insurer and the action in reality is a battle between two insurance companies, being the plaintiff's property insurer and the defendant's liability insurer as in the case at bar. Here, the loss addressed by the insurance adjuster Sheard and his principal was the actual loss to the plaintiff. Meticulous care was taken by the plaintiff's insurers in assessing the actual loss (bids were taken from competing people). The adjuster consulted Copeland to obtain an independent expert evaluation of the actual business interruption loss suffered. I see no reason to disagree with the amount of the loss that was determined and paid for by the plaintiff's insurers.

[32] The defendant appealed on the basis that the trial judge erred by giving deference to the amount negotiated between the insurer and the plaintiff, and that

he should have required proof to the same degree as any plaintiff would in a claim for damages.

[33] All three judges on the panel agreed that the plaintiff was required to prove its damages based upon evidence and that the amount of the insurance settlement was irrelevant. The appeal was ultimately dismissed on the basis that the evidentiary record was sufficient to support damages in the amount awarded in any event. Two of the three judges specifically rejected the trial judge's analysis found in para. 7 of the trial decision. The concurring judgment of Lane, J.A. includes the following applicable comments:

> **77** The rules with respect to the proof of damages are designed for the mutual benefit of the plaintiff and the defendant. To take the insurance adjuster's claim as gospel is to acknowledge the insurance policy assessment rules as those of the Court, and thus deprive the defendant of his right to proof of loss.
>
> **78** I have a second concern with regard to the determination by the trial judge that "the amount actually paid by the insurer should be regarded as prima facie proof of the amount that should be paid by the wrongdoer". Taking this statement at face value means the assessment of damages has been delegated by the court to the insurer. The assessment of damages may be extremely complicated but the trial judge must do his or her best on the information available. "... the evidence of accountants, while admissible, and useful in many cases cannot be conclusive. Assessment of damages is a task for the court, not for accountants" (Waddams, the Law of Damages (2nd ed.) p. 13-3). For these reasons I am of the view the trial judge committed an error in law.

[34] I agree that the assessment of damages ought to be carried out by the judge based upon the evidence presented. No deference should be given to the amount that the insurance adjuster has decided should be paid in settlement of their insured's claim on the insurance contract. There may be contractual terms that entitle the party to money which could not be recoverable damages and there may be economic factors, such as risk assessment and litigation costs, which may factor into the adjuster's analysis. The defendant who may be called upon to reimburse the insurer through the subrogated action should be entitled to insist on strict proof of actual damages caused by his negligence, and not have the onus of establishing that the insurer's decision was not reasonable.

[35] In this case the plaintiffs' claims were assigned to RSA. This does not alter the nature of the cause of action against Mr. Goodall, it is still the plaintiffs' proven damages that are being sought. The only significance of the assignment is where damages in excess of the insurance payment are established. In that case, RSA would be entitled to the surplus where there is an assignment, but the plaintiffs would receive it if there is not.

[36] Having concluded that the agreement by RSA to settle the plaintiffs' Section D claims is irrelevant, I want to comment briefly on the significance of the fact that Mr. Goodall had a default judgment entered against him as a result of his failure to defend the proceeding. Counsel for the plaintiffs argued he should not be entitled to "a full trial" on damages requiring strict proof of the plaintiffs' losses. Despite his failure to defend, Mr. Goodall was entitled to notice of the assessment motion pursuant to Rule 70.04(2). Whether the motion is ultimately converted to a trial or application in court will depend upon the complexity of the case and the extent to which Mr. Goodall chooses to participate. None of this has anything to do with the standard of proof required upon the assessment hearing.

DISPOSITION OF THE MOTION

[37] Since I have determined that the test to be applied is whether the plaintiffs' have proven their damages on a balance of probability, I must consider the evidentiary record. While the documentation attached to Ms. Warriner's affidavit might be admitted for purposes of assessing the reasonableness of the RSA decision to settle, much of it likely cannot be used to prove the truth of its contents. The evidence in the plaintiffs' discovery transcript is inadmissible because a party cannot use their own discovery evidence at the hearing. The only potential exception might be where they are not available because of illness, health or other circumstances; however, there was no evidence or argument before me to suggest this was the case. In addition, I note that Mr. Goodall did not receive notice of the discovery and, in fact, had not been served with the statement of claim at the time the examination took place. This is likely a bar to using the transcript in any event in light of Rule 18.20(4).

[38] As a result of the plaintiffs' interpretation of the test to be applied, the evidence which they have filed is not sufficient to engage in any meaningful analysis of the plaintiffs' actual damages. I would also note Civil Procedure Rule

70.05 which requires that the assessment of damages be done as of the date of the hearing. None of the information in the record indicates anything about the plaintiffs' circumstances over the last four years.

[39] Since this is the second time the motion has come before me and the plaintiffs were given an opportunity to reconsider the motion and the evidence to be filed, I do not think that I should necessarily give them a further opportunity to correct the problems. I will, therefore, dismiss the motion on the basis that I do not have sufficient evidence to quantify the plaintiffs' damages. This dismissal will, however, be without prejudice to the plaintiffs' right to bring a further motion for assessment of damages relying on whatever admissible evidence they choose to file at that time. Should this occur, I do not believe that I am seized with the issue and the hearing can simply be scheduled in accordance with the provisions of Civil Procedure Rule 70.

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Wood, J.