SUPREME COURT OF NOVA SCOTIA

Citation: *Pettipas v. Bell Aliant Regional Communications Inc.*, 2014 NSSC 25

Date: 20140127
Docket: Ant No. 369959
Registry: Antigonish

Between:

Marshall Pettipas and Edna Pettipas

Plaintiffs

v.

Bell Aliant Regional Communications Inc.

Defendant

Judge: The Honourable Justice Joshua M. Arnold

Heard: December 12, 2013, in Halifax, Nova Scotia

Counsel: Jamie MacGillivray, for the Plaintiffs
Michelle Kelly and Peter LeCain, for the Defendant

By the Court:

Overview

[1] In February 2002, MT&T, now Bell Aliant Regional Communications Inc. ("Bell Aliant"), the defendant, leased property owned by Marshall Pettipas and Edna Pettipas, the plaintiffs. The land was leased by Bell Aliant for the purpose of constructing a cell phone tower. The plaintiffs commenced an action in 2011 and allege breach of contract due to fraudulent and negligent misrepresentation as well as a breach of implied condition and warranty. The plaintiffs allege that they have suffered a loss as a result of construction of the cell phone tower on their land. They seek remedies including, among other things, rescission of the lease and removal of the cell phone tower, damages relating to their property and damages for personal injuries.

[2] Bell Aliant has filed a Motion for Summary Judgment on Evidence. I will start by offering a brief summary of the background to this summary judgment proceeding in order to provide context for the analysis that follows.

The Evidence

[3] In support of their application, Bell Aliant filed the affidavit of Peter LeCain, a lawyer working for Bell Aliant. The affidavit has numerous attachments including: the Notice of Action and Statement of Claim; the Notice of Defence and Statement of Defence; the lease agreement entered into February 28, 2002, between the plaintiffs and MT&T (Bell Aliant); the lease amendment dated May 24, 2002; general correspondence regarding negotiations over the lease and its terms; the plaintiff's expert report prepared by Dr. Magda Havas dated June 29, 2009; the EMF Home Survey Report prepared by Patrick Last dated October 8, 2011; the two reports of Dr. Jonathan Fox dated January 28, 2013 and May 31, 2013 as well as two other exhibits. Bell Aliant also filed a Brief and a Book of Authorities and a Reply Brief.

[4] In response to Bell Aliant's application for summary judgment, the plaintiffs filed: the affidavit of Edna Pettipas with exhibits that include photographs of the home and the cell tower; the report of Dr. C.B. Boucher and; an email from Dr. Havas. The plaintiffs also filed the affidavit of Dr. Magda Havas with exhibits that include an article entitled *"Biological effects from exposure to electromagnetic*

radiation emitted by cell tower base stations and other antenna arrays", a World Health Organization Backgrounder dated March 2000, entitled "*Electromagnetic Fields and Public Health Cautionary Policies"* and a World Health Organization International Agency for Research on Cancer press release dated May 31, 2011, entitled *"IARC Classifies Radiofrequency Electromagnetic Fields As Possibly Carcinogenic To Humans"*, as well as their Brief and Book of Authorities.

[5] All evidence on the summary judgment application for the plaintiffs and for Bell Aliant was tendered by way of affidavit although Bell Aliant did request to cross examine one of the plaintiffs' witnesses, Dr. Magda Havas. Dr. Havas was therefore cross examined during the summary judgment application via video link.

Facts

[6] For the purpose of the summary judgment application, I have had certain facts presented to me by both parties.

[7] The plaintiffs, Marshall Pettipas and Edna Pettipas, are owners of a 16.3 acre parcel of land located on the Old Antigonish Road in Afton, Nova Scotia.

[8] The defendant, Bell Aliant, was created following an amalgamation that included MT&T Mobility Incorporated and Bell Aliant Regional Communications Holding Inc.

[9] According to the affidavit of Edna Pettipas, in October 2001, Frank Harland, an employee of MT&T (Bell Aliant), approached the plaintiffs to discuss leasing their land to MT&T to allow the defendants to install a cell tower. At that time the plaintiffs asked Mr. Harland directly whether the cell tower posed any health risk since they were intending to build a home on the land as soon as they had the requisite funds.

[10] Mr. Harland advised the plaintiffs that the cell tower would pose no health risk with the exception of posing a risk for falling ice within 300 feet of the cell tower.

[11] At the time of their meeting with Mr. Harland in 2001, the plaintiffs were living in a home located at 484 Old Antigonish Road ("the original home").

[12] In 2002, a lease agreement was signed by the parties and the cell tower was installed on the plaintiffs' land.

[13] In 2007, the plaintiffs built a home at 394 Old Antigonish Road ("the new home"). As a result of Mr. Harland's suggestion, the new home was built approximately 600 feet from the cell tower to avoid any risk of falling ice. The plaintiffs moved into the new home in December 2007.

[14] Edna Pettipas states that prior to moving into the new home she suffered from something described as Multiple Chemical Sensitivity that apparently includes symptoms of burning eyes, headaches, sinus irritation, muscle weakness, fatigue, dizziness, sore throat, nausea and blurred vision.

[15] The plaintiffs allege that once they moved into the new home, Ms. Pettipas' symptoms were "triggered" and worsened. Additionally, the plaintiffs advise that Edna Pettipas experienced new health problems including burning skin and tinnitus. The plaintiffs allege that Ms. Pettipas' symptoms worsened the longer they resided in the new home. The plaintiffs would periodically return to the original home and Ms. Pettipas would then feel less symptomatic. Initially, Ms. Pettipas felt that new home construction may have been triggering her multiple chemical sensitivity.

[16] During the relevant time periods Ms. Pettipas has been treated by a family doctor, Dr. C. D. Boucher, and Dr. Jonathan Fox, who works at the Integrated Chronic Care Service through Capital Health.

[17] In 2009, Audrey Barrett, a nurse representing the Nova Scotia Environmental Health Center, visited the new home and reportedly could not find any environmental problems inside the house. Edna Pettipas then became concerned that there may be a causal link between the cell tower and her ill health.

[18] As a result of those concerns, Edna Pettipas contacted the lease manager for Bell Aliant to inquire as to the possibility of having the cell tower removed from the property. That request was unsuccessful.

[19] In June 2009, Dr. Magda Havas, an Associate Professor of Environmental and Resource Studies at Trent University, was retained by the plaintiffs to attend at the original home and the new home to conduct an investigation. Dr. Havas prepared a report of her findings, prepared a follow up email, prepared an affidavit and was then cross examined at the summary judgment application hearing.

[20] Some abbreviations are referred to frequently by Dr. Havas in her report, affidavit and testimony:

> Radio Frequency Radiation [RFR]
> Magnetic Field [MF]
> Dirty Electricity [DE]
> Electromagnetic Radiation [EMR]
> Electromagnetic Field Survey [EMF]
> ElectroHyperSensitivity [EHS]

[21] According to her report (attached to Bell Aliant's affidavit), Dr. Havas monitored the original home and the new home for MF, DE and RFR. She also tested the heart rate variability of Marshall, Edna and Katlyn Pettipas (daughter of Marshall and Edna) by approaching them in a blinded fashion with a portable telephone base and recorded any possible variations in their heart rates. Heart rate variations were noted.

[22] Dr. Havas advises in her report that people who have ElectroHyperSensitivity ("EHS") complain of symptoms including: cognitive dysfunction (memory concentration), problem-solving, balance, dizziness and vertigo, facial flushing, skin rash, chest pressure, rapid heart rate, depression, anxiety, irritability, frustration, temper, fatigue, poor sleep, body aches, headaches, ringing in the ear (tinnitus) and are consistent with symptoms of chronic fatigue and fibromyalgia.

[23] According to Dr. Havas' report, approximately 3% of the population have EHS and an additional 35% of the population may have moderate sensitivity to EMR at various frequencies.

[24] Dr. Havas used appropriate scientific instruments to measure RFR and electromagnetic levels at the original home and the new home.

[25] In an email dated October 19, 2011, Dr. Havas states:

> I have had a look at the report you commissioned (Patrick Last, EMFATIK, 8/10/2011) and there are a few differences since I measured the Pettipas homes June 9, 2009.
>
> Note: in my report, units were expressed as micro W/cm^2 and in the EMFATIK report they are expressed as micro W/m^2. I converted my units so they can be directly comparable (see below).

> At 484 Old Antigonish Road (original home), my readings were slightly higher inside the home at 20 micro W/m^2 vs 4.4 (EMFATIK report).
>
> At 394 Old Antigonish Road (new home, near tower), readings inside the house were similar on the main floor (8 vs range of 3 to 10 micro W/m^2) but my readings were much lower than EMFATIK on the second floor (8 vs 26 to 125 micro W/m^2). My outside readings were also much lower than the EMFATIK readings (8 vs 180 max micro W/m^2).
>
> I would expect that when I took the measurements the antennas had been turned off as there were men working on the tower and the antennas were operational when EMFATK took the readings.
>
> All readings are low compared with Health Canada's Safety Code 6 Guidelines but are within the range that affects people who have developed a sensitivity to this radiation as mentioned in my report.

[26] Dr. Havas' email refers to a report prepared on July 30, 2011, by an individual named Patrick Last who was working for a company called EMFatik. Mr. Last conducted an EMF home survey at Pettipas' homes in an effort to identify sources of EMR. At pg. 3 of his report, Mr. Last notes:

> Summary of findings at: 484 Old Antigonish Rd:
>
> Outside:
> Without being able to physically see the tower, I noted average peak readings of 0.8 $\mu W/m^2$ all around the house with the exception of the one location that I could physically see the tower I noted a peak reading of 3.5 $\mu W/m^2$.
> I did not detect any RF coming from the neighbor's house.
>
> Inside:
> I noted average peak readings of 4.4 $\mu W/m^2$ inside the house. I also took A/C magnetic field and A/C voltage field readings. Please see the three attached drawing for the findings.

[27] At pg. 4 of his report, Mr. Last notes:

> Summary of the findings at 394 Old Antigonish Rd:
> Outside:
> Outside at the back of the house in front of the garage door facing the tower I noted a reading of 180 $\mu W/m^2$.
>
> Inside:

Main Floor:
Kitchen: 5 µW/m^2.
Living Room: 10 µW/m^2.
Kitchen Nook: 8 µW/m^2.
Dining Room: 3 µW/m^2.

Second Floor:
Spare bedroom: 55 µW/m^2.
Katlyn's Bedroom: 52 µW/m^2.
Master Bedroom: 26 µW/m^2, 20 V/m, 7 nT (bed area)
Bonus Room: 125 µW/m^2, 7 V/m, 8 nT (couch area)

Basement: 5 µW/m^2.
Garage: 40 uW/m^2.

[28] At page 5 of his report Patrick last concludes:

> After reviewing my findings of the EMF home surveys I can conclude that at the time of my testing the RF levels inside and outside the home at 394 old Antigonish Road were substantially higher than the levels inside and outside of the home located at 484 old Antigonish Road.

[29] As referenced above, in addition to the surveys conducted by Dr. Havas and Patrick Last, Ms. Pettipas was treated by two physicians. In a report prepared by Dr. Jonathan Fox dated February 11, 2013, Dr. Fox states:

> Visit Date: 2013-Jan-28
>
> Dear Mr. MacGillivray:
>
> Thank you for your letter regarding Edna Marshall Pettipas. I first met with Edna in consultation on the 15th of November 2005. She was referred to the Environmental Health Clinic by her family physician, Dr. John Hickey. She has also seen a Dr. Ben Boucher. At that time, Edna had a long history of fatigue, chemical intolerance, cognitive dysfunction and significant body pain. She was diagnosed with fibromyalgia and multiple chemical sensitivities. The new home which was built at 394 Old Antigonish Road was built in approximately late 2007/early 2008. Therefore the home or proximity to the cell tower were not causative for her condition of environmental sensitivity.
>
> The testing results from the EMF home survey report prepared by Patrick Last of EmfATIC do show elevated levels of radiofrequency radiation in this home. Whereas the average levels in their original home of 484 Old Antigonish Road were on the order of 4.4 uW/m^2; the levels in the newer home were much higher; for example 180 uW/m^2

outside the back of the house, 26 uW/-m^2 in the master bedroom and 125 uW/m^2 in the bonus room.

The testing done by Dr. Magda Havas on the 29th of June, 2009 does show that Edna reacts physically to microwave exposure generated by a cordless DECT phone at an intensity between 8.3 and 12.7 uW/cm^2. This was shown by heart rate variability and was done in a double blinded fashion. The microwave field generated by the cordless phone is the same type of EMF radiation produced by the cell tower.

Looking back at Edna's medical chart, there was a nursing note from the 19th of May 2009. One of our environmental nurses did meet with Edna and her husband at the new home which they had built 18 months earlier and had been unable to live in. At that time, Edna was experiencing symptoms of eye irritation, burning of her skin, difficulty with cognitive function, palpitations, and nausea. This nurse did a thorough evaluation of the physical chemical factors in the home and was unable to find any obvious source that could be causing these symptoms. At that time she was unaware of the existence of the cell tower.

An essential aspect of environmental or chemical sensitivities is the fact that the sensitivity involves more than simply an intolerance to chemicals. Most patients who are seen report some combination of light sensitivity or noise sensitivity. This occurs because of the fundamental change in the central nervous system. The central nervous system has become sensitized such that the level of around or alert is elevated. In other words, the nervous system is taking in more information from the environment, responding to lower levels of stimulation. Because of her pre-existing environmental sensitivity, Edna would likely be more vulnerable to health effects from proximity to the cell tower. In other words, she would likely develop symptoms more quickly that would an individual who is not environmentally sensitive. This is not to say that the level of EMF radiation was safe but that it would likely require longer for a non-environmentally sensitive individual to display symptoms.

Having said this, the condition of electromagnetic sensitivity has been described. There are case reports in the medical literature and fairly extensive writings from Europe. In the population of patients that we see, predominantly with chemical sensitivities, a small percentage do also display EMF sensitivity. Once an individual is sensitized to a particular environmental trigger, then they, of course, will respond to such exposures in other locations, apart from the original triggering location. In this case, it is more challenging to treat this aspect of the person's sensitivities as the only course of action is to avoid the exposure.

[30] In a follow-up report prepared by Dr. Jonathan Fox dated June 19, 2013, he states:

Visit Date: 2013-May-31

Dear Mr. MacGillivray:

Thank you for your letter of May 22. In it you reference a report I had written January 28, 2013, and seek clarification on my opinion. I state in the first paragraph of my report that "therefore the home or proximity to the cell tower were not causative for her condition of environmental sensitivity." What I am saying here is that prior to her move to 394 Old Antigonish Road in 2008, Ms. Pettipas was already environmentally sensitive. Therefore, the fact that she was in this home did not in and of itself cause her environmental sensitivities. However, as I said in the latter part of the letter, because of her environmental sensitivities, her ability to deal with this form of environmental stress, i.e. elevated radiofrequency radiation would have been lower than the average person. She would have been more easily adversely affected and, therefore, her living in this home with the elevated radiofrequency radiation was exacerbating her condition of environmental sensitivities.

To answer your question, "do you believe from a medical perspective that Ms. Pettipas' decision to move from her home located near the cell tower was reasonable and consistent with your findings?". Yes, I do believe that her decision to move from the home was reasonable and consistent with my findings. Secondly, "on the balance of probabilities, do you believe it is more likely than not that Ms. Pettipas' health condition was aggravated or exacerbated by living near the cell tower?". Yes, her condition was clearly exacerbated by living near the cell tower. As I made note, Dr. Magda Havas clearly showed in a blinded fashion that there was heart rate variability change when Edna was exposed to this type of radiation. Heart rate variability change indicates effects on the autonomic nervous system. As I also stated, at the time after the house had been built, she was much more symptomatic than she had been, to the point that I had gone over things with her and it was not clear why her symptoms were being made worse. I could not glean any unusual physical factors in the home from her history. Therefore, one of our experienced nurses actually visited her home and thoroughly went through the building materials etc. and was unable to identify any unusual factors. At that time, she did not take into account nor was she aware of the proximity to the cell tower.

[31] Ms. Pettipas had also been treated by Dr. C. Benjamin Boucher, Bsc, MD, who prepared a report dated July 13, 2010, that states:

To Whom It May Concern,

Re: Edna Pettipas
Katlyn Pettipas

Please be advised that I have seen the above patients on numerous visits regarding various ill-health symptoms and complaints while living or attempting to live at their property near a cell phone tower (394 Old Antigonish Road). Based on their files and collected medical information, I strongly feel there is a positive correlation between their

> ill-health and medical symptoms and living in close proximity to this cell tower. I understand from Ms. Pettipas this matter is currently being pursued legally. If you require further information or evidence, I will provide upon Ms. Pettipas' request and permission.
>
> I would also refer you to Dr. Magda Havas medical report on Edna and Katlyn which supports the cell tower emissions, radio frequency radiation (RF) indeed have a negative impact on their health. As well, to the vast quantity scientific information available.
>
> I strongly advise Ms. Pettipas and Katlyn medically to avoid anything or anywhere that could result in further medical harm.

[32] The plaintiffs eventually abandoned the new home and it now sits vacant.

Summary Judgment Application

[33] Civil Procedure Rule 13.04 states:

> Summary judgment on evidence
>
> 13.04(1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
>
> (6) The motion may be made after pleadings close.

[34] In August 2013, a five-member panel of the Nova Scotia Court of Appeal reviewed the law regarding summary judgment applications and provided clear instructions as to the law in this area in **Burton Canada Company v. Coady**, 2013 NSCA 95. Speaking for the majority, Saunders J.A. stated:

> Preliminary Matter – The Purpose of Summary Judgment
>
> [22] In my respectful opinion this process has become needlessly complicated and cumbersome. Summary judgment should be just that. Summary. "Summary" is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as being doomed to fail. These matters are weeded out to free the system for other cases that deserve to be heard on their merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.

[35] Justice Saunders went on to state at para. 31:

> [31] The test for summary judgment established in **Guarantee** almost 15 years ago and applied consistently ever since is that any defendant (in this case Wentworth and Burton) who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue <u>of material fact</u> requiring trial". (Underlining mine). The words I have underlined "of material fact" were not repeated in the Rule. As we have seen, CPR 13.04(1) reads:
>
> (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a <u>genuine issue for trial</u> must grant summary judgment. (Underlining mine)
>
> The critical words "of material fact" have been dropped. I think this is unfortunate and may have led to some confusion in both the application of the test and the steps or stages that are triggered during that application.

[36] Justice Saunders then clarified the analytical framework that should be used in order to apply the appropriate test on a summary judgment application:

> **The Proper Analytical Framework**
>
> [37] I will deal first with the burden, and then with the sequence of steps that occur when applying the test.
>
> [38] This was Burton's motion for summary judgment. Burton had the burden of satisfying Justice Warner that there were no genuine issues of material fact requiring a

> trial. That is stage 1 in the analysis. During this stage there was no burden upon Mr. Coady to do anything. Burton had the onus of satisfying the Chambers judge that summary judgment was a proper question for consideration. In order to do that Burton bore the evidentiary burden of showing that there was no genuine issue of material fact which would necessitate a trial. It failed to do so.
>
> [39] Once Justice Warner concluded that Burton had failed to meet its burden, his finding ought to have ended the analysis. He did not have to enter into an inquiry, tangentially or otherwise, into the merits of Mr. Coady's claim or his chances of success. That is stage 2 in the analysis and only arises if the moving party has met the first stage which is to satisfy the court that there are no genuine issues of material fact requiring a trial.
>
> [40] It would only be if Burton had met its initial burden, that the responding party (here Mr. Coady) would be required to show he had a real chance of success with his claim (**AMCI, supra**). This would then engage the second stage of the inquiry.

[37] Justice Saunders went on to point out at para. 47:

> [47] In my respectful opinion, he did not. As I see it, there were a variety of significant contested questions of fact, mixed law and fact, or inferences to be drawn from disputed facts which were – as the judge found - ill-suited to a summary judgment proceeding. . . .

[38] At para. 87 of **Burton,** *supra*, Justice Saunders provides a helpful summary of the law as it presently stands in Nova Scotia concerning summary judgment litigation.

> [87] Before turning to the final issue raised on appeal, I wish to provide a quick summary of the law as it presently stands in Nova Scotia concerning summary judgment litigation. From the jurisprudence to which I have referred as well as the case law cited therein, a series of well-established legal principles have emerged. I will list these principles in the hope that their enumeration will serve as a helpful checklist or template to guide counsel and judges in their application. In Nova Scotia:
>
> 1. Summary judgment engages a two-stage analysis.
>
> 2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.

3. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.

4. The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".

5. If the responding party satisfies its burden by proving that its claim (or defence) has a real chance of success, the motion for summary judgment is dismissed. If, however, the responding party fails to meet its evidentiary burden and cannot manage to prove that its claim (or defence) has a real chance of success, the judge must grant summary judgment.

6. Proof at either stage one or stage two of the inquiry requires evidence. The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.

7. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.

8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or defence. A "genuine issue" is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.

9. In Nova Scotia, CPR 13.04, as presently worded, does not create or retain any kind of residual inherent jurisdiction which might enable a judge to refuse to grant summary judgment on the basis that the motion is premature or that some other juridical reason ought to defeat its being granted. The Justices of the Nova Scotia Supreme Court have seen fit to relinquish such an inherent jurisdiction by adopting the Rule as written. If those Justices were to conclude that they ought to re-acquire such a broad discretion, their Rule should be rewritten to provide for it explicitly.

10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.

> 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.
>
> 12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

Are there material facts in issue?

[39] The stage one analysis requires the judge on a summary judgment application to determine if there is a material fact in dispute.

[40] In the recent decision of **Sinclair v. Fierro,** 2014 NSCA 5 Fichaud J.A., clarified at paras. 24-28:

> [24] This appeal turns on the test's first stage. Did the judge err in law by ruling that Mr. Fierro had met his burden of showing there was no dispute of material fact?
>
> [25] What is a dispute of material fact?
>
> [26] In *2420188 Nova Scotia Ltd. v. Hiltz,* 2011 NSCA 74, the majority said:
>
> > [27] The disputed fact under Stage 1 must be "material", *ie.* essential to the claim or defence. A dispute over an incidental fact will not derail a summary judgment motion at Stage 1.
>
> [27] In *Hiltz* (see para 30) the parties disputed whether Mr. Alex had even voiced the alleged representation. The existence of that representation was the basis of Mr. Hiltz' claim. If the representation had not been made, his claim would fail. But if the representation had been made, his claim possibly could succeed, depending on the trial judge's determination of other issues. The outcome potentially pivoted on the disputed fact. So the disputed fact was material, not incidental. Accordingly, the majority held that the first branch of the summary judgment test was not satisfied, meaning the second branch was irrelevant, summary judgment was not available, and the matter should go to trial.
>
> [28] Similarly, in *Burton*, para 42, Justice Saunders spoke of material facts as "important factual matters that anchor the cause of action or defence".

Causation

[41] Bell Aliant argues that the cell tower has not created any health issues for Ms. Pettipas. Bell Aliant alleges that the plaintiffs cannot prove causation in relation to this case.

[42] Edna Pettipas claims that the RFR/cell tower emissions created by the cell tower triggered and worsened the symptoms she previously suffered from Multiple Chemical Sensitivity. She also alleges new symptoms caused by RFR/cell tower emissions that include burning skin and tinnitus. As a result, Ms. Pettipas advises that she can no longer live in the new home. Three experts for the plaintiffs, including Dr. Havas, believe that the cell tower emissions have caused Edna Pettipas' health issues.

1) Was the cell tower operational on the date of Dr. Havas' testing?

[43] Bell Aliant points out that the RFR levels detected by Dr. Havas at the new home were lower than the RFR levels detected by Dr. Havas at the original home. Dr. Havas explains this at paragraph 22 of her affidavit:

> It is my belief that when I attended at Ms. Pettipas' new home that the cell tower was not operational that day as there were people working on the tower.

[44] Bell Aliant cross-examined Dr. Havas on this point during the course of the summary judgment application; however, Dr. Havas maintained her position that the cell tower must not have been operational on the day she conducted testing. Dr. Havas reiterated that cell towers are normally turned off or emissions reduced when workers are on the towers. Dr. Havas further testified that the cell tower emissions on the testing date were too low for an operational cell tower and that those low readings support her position that the cell tower was not fully operational on the testing date.

[45] Bell Aliant asks this court to question the weight to be given to Dr. Havas' testimony regarding the operation of the cell tower on the date in question. Bell Aliant argues that the plaintiffs should have called more evidence regarding the operation (or lack thereof) of the cell tower on the date of testing.

[46] It must be kept in mind that Dr. Havas opines that Edna Pettipas' illness is related to cell tower emissions, that Dr. Havas detected lower emissions at the new home than at the original home, that Dr. Havas believes that the unusually low emission levels detected at the new home on the date of testing are directly related to the "fact" that the cell tower was not operational on the date of the testing. Dr. Bouchard and Dr. Fox both rely in part on Dr. Havas' conclusions in providing their opinions.

[47] Bell Aliant alleges that if Dr. Havas is wrong, and the cell tower was fully operational on the date of testing, then Edna Pettipas' claim that she feels sick in the new home but not at the original home cannot be related to cell tower emissions.

[48] Whether the cell tower was operational on the date and time of Dr. Havas' testing is therefore a material fact that is clearly in issue. The level of emissions detected at the new home attributable to the cell tower is also a material fact in issue.

[49] If a summary judgment application is not the appropriate forum to weigh evidence or test credibility then the issue of whether the cell tower was operational on the date of Dr. Havas' testing, the level of RFR emitted from the cell tower on a regular basis, the weight to be given to Dr. Havas' opinion regarding the operation of the cell tower and the cause of Edna Pettipas' illness are all material facts and issues that must be left for a trial judge to determine.

[50] Considering the test outlined by our Court of Appeal in **Burton**, *supra*, I could end my analysis there; however, I will point to several other material facts in issue that should be left for trial. There are likely many others.

2) Dr. Havas' Calculations

[51] Bell Aliant argues that Dr. Havas' erroneously converted Patrick Last's results as noted in the EMF Home Survey Report; therefore, Bell Aliant alleges that Dr. Havas' conclusions, based on her erroneous conversion of the frequency levels found in in Patrick Last's report, are flawed.

[52] On cross examination, Dr. Havas agreed that her calculations regarding Mr. Last's findings were wrong; however, she maintained her conclusion that cell tower emissions have been causing damage to Edna Pettipas and pointed to many other

reasons in support of her opinion on that point, separate and aside from the conversion miscalculations.

[53] Although Dr. Havas' calculations showed lower readings at the new home than at the original home (and explains this by alleging that the cell tower was not fully operational on the date of testing) it must be kept in mind that the testing by Patrick Last did show higher emission readings at the new home than at the original home. So there is conflicting evidence on the emission levels detected at each home, no matter what conversion method was used, and the emission levels detected at each home again, will be a material fact. That material fact is in issue.

Cordless Telephone Base

[54] Dr. Havas used a cordless telephone base to conduct the heart rate variability test on Edna Pettipas. When Dr. Havas approached Edna Pettipas with the cordless telephone base in a blinded fashion she detected and recorded any possible heart rate variation. Dr. Havas did note a heart rate fluctuation in Edna Pettipas during the cordless telephone base testing (Dr. Havas noted an irregular heartbeat in Edna Pettipas on one occasion and on a second occasion did not) and therefore suggests that Edna Pettipas has ElectroHyperSensitivity. Dr. Fox also mentions this test when providing his opinion on the same issue.

[55] Bell Aliant alleges that Dr. Havas' conclusions regarding the heart rate variability test are flawed because the cordless telephone base emits different (higher) RFR levels than those recorded by Dr. Havas at the cell tower.

[56] Again, the weight to be accorded to the heart rate variability test in proving the plaintiffs' claim because the cordless telephone base produces different emission levels than those recorded at the cell tower is a matter for trial. It is not an issue for summary judgment.

3) Subjective Complaints Alone

[57] Bell Aliant equates Ms. Pettipas' complaints to those in the case of **Cherny v. GlaxoKilneSmith** Inc., 2009 NSCA 68. In **Cherny,** *supra,* the Court of Appeal stated at paras. 20 to 23:

> [20] In this case, unlike the plaintiff in Snell, Mr. Cherny does not have an expert report which indicates that Zyban is a possible cause of his hair loss, or that there is no other possible cause. If he did have an expert report saying that since he had never

experienced any hair loss in the past, it is possible that Zyban caused the alopecia universalis, there would be a genuine issue of fact for trial. However, given the medical history that Mr. Cherny has suffered alopecia at various times since he was a child, the lack of any scientific or medical opinion supporting his theory of causation and the defendant's expert report Indicating there is no connection between the alopecia universalis and drug use, it cannot be said that there is a genuine issue of fact for trial.

[21] With respect, the chambers judge erred in the application of the test for summary judgment by finding that there is a genuine issue of fact to be determined at trial. As in **McNeil v. Bethune**, if the matter were permitted to go to trial, the plaintiff would have no chance of success because he has no evidence to support his allegations that the damages he suffered were caused by or contributed to by any act or omission of the defendant.

[22] It is necessary for the plaintiff to have more than his own anecdotal evidence in a case such as this where the cause of a medical condition, alopecia universalis, is an issue. The chambers judge distinguished the cases cited by the defendant including McNeil v. Bethune, Maslen v. Chishlom, [2003] O.J. No. 3960, Claus v. Wolfman, [1999] O.J. No. 5023, apparently because they were medical malpractice suits where the defendant's standard of care was in issue. Causation was the issue in McNeil v. Bethune, see ¶ 26 and Claus v. Wolfman, see: ¶ 21. The standard of care is an issue in this case as well. The defendant has not admitted a breach of the standard of care. However the defendant's application was brought solely on the basis that the plaintiff has no evidence to prove causation, one of the other elements of the tort that the plaintiff would be required to prove at trial.

[23] The point is, that in order to find causation, in this case, the trier of fact will need the assistance of an expert. What causes a medical condition is a scientific matter and outside the experience and knowledge of a judge or jury. See R. v. Abbey, [1982] 2 S.C.R. 24, page 42. This case is not like a situation where a scalpel is left in a patient after an operation in which a lay person could determine causation of the patient's subsequent injuries. I agree with the following statements from Claus v. Wolfman and find that they are applicable to this case:

> 4 It seems to me that on the authority of the cases following, unless this is a case where the issues to be decided are within the ordinary knowledge and experience of the trier of fact (a position not vigorously advanced by the plaintiffs), the motion must succeed, as the plaintiffs will be unable to prove at a trial that the defendants were negligent. [case citations omitted]
>
> 20 Admittedly in Snell v. Farrell, supra, at pages 328-329, the Supreme Court of Canada observed that "[i]n many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence

> of evidence to the contrary." However, here the plaintiffs have not provided even the "little affirmative evidence" and, what is more, the defendants have provided "evidence to the contrary."
>
> 21 The right of the trier of fact to draw the inference that the proximity in time of the defendants' treatment to the injury suffered by the plaintiff Elizabeth Claus may be indicative of some causal connection is not impaired by the failure of a medical expert to testify that the injury was definitely caused by the treatment nor by the existence of other potential causes. However, there must [b]e some medical testimony, no matter how tentative, proffered to support the inference.

[58] Unlike **Cherny**, *supra*, Bell Aliant has not filed an expert report to indicate a lack of connection between the cell tower emissions and Edna Pettipas' medical issues. And unlike **Cherny**, *supra*, in this case Edna Pettipas does have evidence to support her allegations that the damages she claims to have suffered were caused by, or contributed to by, an act or omission of Bell Aliant. That is, Ms. Pettipas has more than one expert report that points to the cell tower emissions as the cause of her problems. Certainly this case involves more than Edna Pettipas merely making unsupported subjective complaints. It bears repeating that the evidence and reports presented on this application state variously:

[59] At pg. 5 of Patrick Last's Report:

> After reviewing my findings of the EMF home surveys I can conclude that at the time of my testing the RF levels inside and outside the home at 394 Old Antigonish Road were substantially higher than the levels inside and outside of the home located at 484 Old Antigonish Road.

[60] Dr. C. Benjamin Boucher, writes in his report:

> Please be advised that I have seen the above patients on numerous visits regarding various ill-health symptoms and complaints while living or attempting to live at their property near a cell phone tower (394 Old Antigonish Road). **Based on their files and collected medical information, I strongly feel there is a positive correlation between their ill-health and medical symptoms and living in close proximity to this cell tower.** …
>
> **…**
>
> **I strongly advise Ms. Pettipas and Katlyn medically to avoid anything or anywhere that could result in further medical harm.** [Emphasis added]

[61] In Dr. Havas' affidavit filed by the plaintiffs, she concludes at paras. 23 to 25:

> 23. Although the readings provided by the EMFATIK report are below the Health Canada Safety Code 6 Guidelines they are in my opinion within the range that affects people who have developed a sensitivity to this radiation as mentioned in my report and I base this opinion on cases I have dealt with and the scientific literate.
>
> 24. **It is my opinion that the cell tower is located too close to the Pettipas' new home** and I believe Bell Aliant should have made her aware of the health risks that exist in living in such proximity to a cell tower.
>
> 25. **Based on my understanding of Mr. Pettipas' health conditions and my review of her situation with the cell tower I do not believe she should live at her new home located near the cell tower because EMF radiation from the cell tower causes her to become sick.** [Emphasis added]

[62] Dr. Jonathan Fox states in his report in part:

> …An essential aspect of environmental or chemical sensitivities is the fact that the sensitivity involves more than simply an intolerance to chemicals. Most patients who are seen report some combination of light sensitivity or noise sensitivity. This occurs because of the fundamental change in the central nervous system. **The central nervous system has become sensitized such that the level of around or alert is elevated. In other words, the nervous system is taking in more information from the environment, responding to lower levels of stimulation. Because of her pre-existing environmental sensitivity, Edna would likely be more vulnerable to health effects from proximity to the cell tower. In other words, she would likely develop symptoms more quickly that would an individual who is not environmentally sensitive.** This is not to say that the level of EMF radiation was safe but that it would likely require longer for a non-environmentally sensitive individual to display symptoms.
>
> Having said this, the condition of electromagnetic sensitivity has been described. There are case reports in the medical literature and fairly extensive writings from Europe. In the population of patients that we see, predominantly with chemical sensitivities, a small percentage do also display EMF sensitivity. Once an individual is sensitized to a particular environmental trigger, then they, of course, will respond to such exposures in other locations, apart from the original triggering location**. In this case, it is more challenging to treat this aspect of the person's sensitivities as the only course of action is to avoid the exposure.** [Emphasis added]

[63] Dr. Fox writes in his follow up letter:

> ... **However, as I said in the latter part of the letter, because of her environmental sensitivities, her ability to deal with this form of environmental stress, i.e. elevated radiofrequency radiation would have been lower than the average person. She would have been more easily adversely affected and, therefore, her living in this home with the elevated radiofrequency radiation was exacerbating her condition of environmental sensitivities.**
>
> To answer your question, **"do you believe from a medical perspective that Ms. Pettipas' decision to move from her home located near the cell tower was reasonable and consistent with your findings?". Yes, I do believe that her decision to move from the home was reasonable and consistent with my findings**. **Secondly, "on the balance of probabilities, do you believe it is more likely than not that Ms. Pettipas' health condition was aggravated or exacerbated by living near the cell tower?". Yes, her condition was clearly exacerbated by living near the cell tower.** [Emphasis added]

[64] Dr. Havas, Dr. Boucher and Dr. Fox all support Edna Pettipas' position. In particular, Dr. Fox relies on information provided by Edna Pettipas, information provided by an investigative health nurse, information provided by Patrick Last in the EMFatik Report as well as Dr. Havas' investigation, testing and conclusions. Dr. Fox does not just rely on Dr. Havas' potentially flawed calculations regarding the level of RFR found at the original and the new home; Dr. Fox does not just rely on the cordless phone base testing, nor does Dr. Fox rely merely on Ms. Pettipas' subjective reporting. Again, the issue of causation includes factual elements, such factual elements are in issue and these issues are material.

Was the health controversy and were the health issues regarding cell tower emissions and/or RFR well known in when the representations were made to the plaintiffs by Frank Harland on behalf of MT&T?

[65] Although Bell Aliant fails at stage one of the summary judgment analysis, I would like to address one other aspect of Bell Aliant's argument on this summary judgment application.

[66] At paras. 9 and 10 of Dr. Havas' affidavit she states:

> 9. The health controversy and health issues regarding radio frequency radiation (generated by cell phone towers broadcast antennas and radar) existed before 2002 and were well known within the industry.

10. There were many published studies completed prior to 2002 indicating that radio frequency radiation poses a risk to those in close proximity.

[67] At paras. 1 to 7 of Edna Pettipas' affidavit she states:

1. In October 2001 Mr. Frank Harland approached myself and my spouse to discuss MT&T (Bell Aliant) leasing our land to install a cell tower.

2. During the meeting I asked Mr. Harland about whether the tower posed any health risks because I was planning on building a new home on that land.

Mr. Harland's Representation

3. Mr. Harland stated clearly and unequivocally that the cell tower would pose no health risks if it were built on our land other than posing a risk for falling ice within 300 feet of the cell tower.

4. As a result of Mr. Harland's reference to falling ice our home was built more than 300 feet from the cell tower.

5. My biggest concern at the time regarding construction of the cell tower was that it would be an eyesore, we trusted Mr. Harland's representation that the cell tower would pose no health risks.

Reliance

6. At substantial financial and personal cost we constructed our new house in 2007 at 394 Old Antigonish Road, and I believe, based on my rough measurements, it is approximately 600 feet from the cell tower.

7. In placing our new home in the vicinity of the cell tower, I had no concerns about health risks because I believed Bell Aliant's representations.

[68] For the purpose of this summary judgment application, Bell Aliant does not dispute that Frank Harland made those representations to Edna Pettipas. While Bell Aliant does not dispute that Mr. Harland made these comments, Bell Aliant does not concede that Mr. Harland would have been aware that any health controversy regarding cell tower emissions and RFR existed and/or were well known within the industry at the time the lease was signed. Bell Aliant points to academic articles as well as the World Health Organization Backgrounder dated March 2000 as support for their position that Frank Harland would not have been aware of any potential health risks that might arise from cell tower emissions.

[69] On the other hand, the plaintiffs, through the evidence of Dr. Havas, state that potential health risks posed by cell tower emissions and RFR were known within the industry at the time of Mr. Harland's discussions with Edna Pettipas and infer that MT&T (Bell Aliant) would or should have been aware of the potential health risks posed by cell tower emissions and RFR.

[70] Whether or not Frank Harland and/or MT&T and/or Bell Aliant were aware of potential health risks posed by RFR and cell tower emissions is also a material fact in issue that will have to be decided by a trier of fact.

[71] Here is one example of why this fact is material: The plaintiffs allege a breach of implied warranty as well as fraudulent and negligent misrepresentation in relation to Mr. Harland's assurances to the plaintiffs in 2001/2002. Bell Aliant argues in part that there is no implied warranty here because there was a written lease created after the plaintiff's discussion with Mr. Harland that does not include any assurances as to the lack of health risk associated with cell towers. In **Desmond v. McKinlay,** [2000] N.S.J. No.195 Wright J. confirmed at paras. 41-43:

> [41] As stated in Cheshire, Fifoot & Furmston's Law of Contract (13th Ed.) 1996 at pp. 275-279,
>
> > A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue. The representor's state of mind and degree of carefulness are not relevant to classifying a representation as a misrepresentation but only to determining the type of misrepresentation, if any...
> >
> > The general rule is that mere silence is not misrepresentation...there is no general duty of disclosure in the case of a contract of sale...
> >
> > There are, however, at least three sets of circumstances in which silence or non-disclosure affords a ground for relief. These are, firstly, where the silence distorts positive representation...
> >
> > Silence upon some of the relevant factors may obviously distort a positive assertion. A party to a contract may be legally justified in remaining silent about some material fact, but if he ventures to make a representation upon the matter it must be a full and frank statement, and not such a partial and fragmentary account that what is withheld makes that which is said absolutely false. A half-truth may be in fact false because of what it leaves unsaid, and, although what a man

> actually says may be true in every detail, he is guilty of misrepresentation unless he tells the whole truth.

[42] The application of these legal principles is illustrated in the decision of the Court of Appeal in Nottingham Patent Brick and Tile Co. v. Butler (1886) 16 Q.B.D. 778. There, the purchasers of a property they intended to use for a brickyard asked the vendors' solicitors if there were any restrictions on the use of the property. The solicitor replied that he was not aware of any. This was literally true. However, the solicitor did not go on to disclose that he had not read the deeds in which any such restrictions would be found. The Court concluded that this constituted a misrepresentation tainting the whole of the contract and the agreement was set aside.

[43] In the present case, the essential question in my view comes down to this. Was it an actionable misrepresentation for the vendor Joan McKinlay to have held out to the purchaser through her realtor's listing cut (with information provided by her) that the property was only 14 years old without further disclosing the fact that the water supply and sewage disposal systems servicing the property were in excess of 40 years old by an indeterminate length of time? I have concluded that such partial disclosure of the true facts did create such a misleading impression to the plaintiff, on which she relied to her detriment, so as to create an actionable misrepresentation at law. Implicit in stating the age of the property to be 14 years was a representation to the plaintiff as a prospective purchaser that the water and sewage disposal systems servicing the property were likewise only 14 years old. A prospective purchaser would have no reason to think otherwise.

[72] Justice Wright went on to find at paras. 48-49:

[48] I also conclude that had the plaintiff been made aware that the water supply and sewage disposal systems servicing the property were in excess of 40 years old by an indeterminate length of time, she would not have finalized the transaction on the terms she did or at least without seeking some form of express warranty. It follows, similarly as in Morash v. Stevens (1973) 4 N.S.R. (2d) 780 (N.S.C.A) at para. 27, that the representation made by the defendant vendor did induce the plaintiff to enter the contract of Purchase and Sale to her ultimate detriment.

[49] In the result, the vendor’s representation that the water supply and sewage disposal systems implicitly were only 14 years old constitutes a collateral warranty, thereby entitling the plaintiff to damages for its breach. The law with respect to collateral warranty is described in the leading case of Gilmour v. Trustee Company of Winnipeg et al. [1923] 4 D.L.R. 344. There it was held that:

> If the representation is made by the vendor at the time of the negotiations, and antecedent to written contract, with the intention of inducing the purchaser to execute the contract, it amounts to a warranty and if the purchaser executes the

> contract on the faith of the warranty and the facts represented are afterwards found to have been innocently misrepresented, the purchaser's remedy, where the contract has been fully performed, is an action for damages for breach of warranty.

[73] In **Desmond v. McKinlay,** 2001 NSCA 24, the Nova Scotia Court of Appeal confirmed Wright J.'s decision and stated at paras. 2-3:

> [2] Justice Wright relied on the authority of **Gilmour v. Trustee Company of Winnipeg et al.**, [1923] 4 D.L.R. 344 and **Morash v. Stevens** (1973), 4 N.S.R. (2d) 780 (C.A.) and summarized his conclusions and application of the law to the first issue at para. 51:
>
> > To sum up on this issue, I am satisfied that a misrepresentation of fact was made by the defendant vendor to the plaintiff purchaser by stating the age of the property to be 14 years without further disclosing the true antiquated age of the water and sewage disposal systems servicing the property; that **this misrepresentation was material and served as an inducement to the plaintiff to buy the property; and that it was relied upon by the plaintiff to her financial detriment. Such misrepresentation is properly characterized as a collateral warranty entitling the plaintiff to recovery of damages for its breach.** In light of this finding, the doctrine of merger can have no application to this case as argued in the alternative on behalf of the defendants. [**emphasis added**]
>
> [3] Alternatively, the trial judge was satisfied on the evidence that the respondent had proved the existence of a negligent misstatement based on **Queen v. Cognos Inc.,** [1993] 1 S.C.R. 87.

[74] Are there health risks associated with cell tower emissions and RFR? Did MT&T/Bell Aliant know of potential health risks/health controversies related to cell tower emissions when the lease was entered into? These are questions for trial, not summary judgment.

[75] If Mr. Harland induced the plaintiffs to enter into a lease, thereby allowing Bell Aliant to construct a cell tower on their land by telling the plaintiffs that there were no health risks associated with the cell tower aside from falling ice, and if there actually are health risks associated with cell tower emissions, then it is possible that a trier of fact could find Bell Aliant breached an implied or collateral warranty.

[76] Additionally, as Wright J. went on to add in **Desmond**, *supra*, at para. 52:

> [52] While it may be unnecessary, in light of the foregoing findings, I have concluded that liability can be ascribed to the defendant vendor in a parallel way under the tort doctrine of negligent misstatement. The general principles of this doctrine were recently referred to by Cromwell, J.A. in Barrett v. Reynolds et al. (1998) 170 N.S.R. (2d) 201 who began his review of the law as follows (at p. 224):
>
> > In Queen (D.J.) v. Cognos Inc., [1993] 1 S.C.R. 87; 147 N.R. 169; 60 O.A.C. 1; 99 D.L.R. (4th) 626, at p. 110, Iacobucci, J. (writing for 5 of the 6 judges participating in the appeal) set out five general requirements for liability in negligent misrepresentation: 1. there must be a duty of care based on a "special relationship" between the representor and the representee; 2. the representation in question must be untrue, inaccurate or misleading; 3. the representor must have acted negligently in making the misrepresentation; 4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and, 5. the reliance must have been detrimental to the representee in the sense that damages resulted.

[77] In applying those five elements to the factual findings that could possibly be made at trial in this case:

- First, it is possible that a trier of fact could conclude that a special relationship existed between Mr. Harland and Edna Pettipas so as to create a duty of care;

- Second, it is possible that a trier of fact could find that there are health risks associated with the cell tower emissions;

- Third, it is possible based on the testimony of Dr. Havas, that a trier of fact could determine that Mr. Harland and/or his employer, MT&T/Bell Aliant, did not measure up to the standard of care required in the circumstances. As Iacobucci J. stated in **Queen v. Cognos Inc. [1993]** 1 S.C.R. 87 at para. 55:

> > The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, "reasonable person". The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading. …

- Fourth, it is possible that a trier of fact could find that Ms. Pettipas reasonably relied on Mr. Harland's negligent misrepresentations, if they are found to have actually been negligent misrepresentations;

- Finally, it is possible that a trier of fact could find Ms. Pettipas' reliance to have been detrimental and having caused a loss, depending on the issue of causation as discussed below.

[78] The facts relating to Mr. Harland's and/or MT&T/Bell Aliant's knowledge of potential health issues in 2001/2002 related to cell tower emissions and RFR are in dispute, are material and must be resolved at trial.

Conclusion

[79] Edna Pettipas makes subjective complaints and therefore her credibility may be in issue. Nonetheless, there is objective evidence in the form of expert reports, to support the plaintiffs' allegations. However, the facts relied on by Dr. Havas' in coming to her conclusions as well as the weight to be given to Dr. Havas' testimony will be issues for trial. Dr. Bouchard and Dr. Fox rely in part on the opinion and report of Dr. Havas. Therefore, the weight to be given to Dr. Bouchard's and Dr. Fox's opinions may be in issue. The potential health risks associated with cell tower emissions may be at issue at trial. Bell Aliant's knowledge of the potential health risks associated with cell tower emissions at relevant times may also be in issue.

[80] There are certainly disputed questions of fact, or mixed law and fact, and/or the appropriate inferences to be drawn from disputed facts in this case. There are questions and issues directly related to the weight to be given to critical material evidence. There are questions that require the evaluation of credibility.

[81] According to Rule 13.04 and the law delineated in **Burton**, *supra*, Bell Aliant does not get past the stage one analysis as delineated by the Nova Scotia Court of Appeal in **Burton**, *supra*. As a result, Bell Aliant fails and the motion for summary judgment is dismissed.

Arnold, J.