SUPREME COURT OF NOVA SCOTIA
Citation: Robert v. Brooks 2014 NSSC 49

Date: 20140204
Docket: Bwt. 391841
Registry: Bridgewater

Between:

Mark H. V. Robert

Plaintiff

- and -

Dr. Simon Alan Laurence Brooks

Defendant

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	December 19, 2013 at Bridgewater, Nova Scotia
Counsel:	Mark H. V. Robert, self represented W. Harry Thurlow and Peter LeCain, counsel for the Defendant

By the Court:

[1] Mark H. V. Robert commenced action against Dr. Simon Alan Laurence Brooks for damages for Dr. Brooks's refusal to prescribe certain medication to Mr Robert. Dr. Brooks filed a Notice of Defence.

[2] On July 29, 2013 Dr. Brooks filed a Notice of Motion for an order for summary judgment pursuant to *Civil Procedure Rule* 13.04 dismissing Mr. Robert's action with costs. The motion was scheduled to be held on September 26, 2013. At that hearing, I informed Mr. Robert he could not be an expert in his own case. I also directed him to the *Civil Procedure Rules* and case law dealing with the proper contents of an affidavit. Mr. Robert was given until November 29, 2013 to file any additional material he might wish to file concerning the motion. The hearing of the motion for summary judgment was adjourned to December 19, 2013 with both parties consenting to the date.

[3] In his Statement of Claim Mr. Robert stated he consulted Dr. Brooks on May 12, 2010. Mr. Robert was referred to Dr. Brooks by Mr. Robert's nurse practitioner concerning Mr. Robert's prescription of amitriptyline. Dr. Brooks concluded Mr. Robert was suffering from Narcissistic Personality Disorder (NPD) not massive depression and would not benefit from amitriptyline or any medication. Mr. Robert then goes on to say Dr. Brooks did not practice due diligence in determining Mr. Robert suffered from Narcissistic Personality Disorder; in determining Mr. Robert did not suffer from massive depression; and in determining whether the prescribed amitriptyline was contributing to Mr. Robert's behaviour at the time. Mr. Robert claims Dr. Brooks's actions constituted medical malpractice.

[4] Dr. Brooks is seeking summary judgment pursuant to Rule 13.04 which provides:

> **Summary judgment on evidence**
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> 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.
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> (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.
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> (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.
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> (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.
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> (6) The motion may be made after pleadings close.

[5] The test for summary judgment is well known. Recently, Saunders, J.A., in giving the Court's judgment in *Burton Canada Company v. Coady* 2013 NSCA 95 stated at paragraphs 27 and 28:

> [27] In **Guarantee** the Supreme Court enunciated the test for summary judgment. But because the Court's clear statement of the test is not always reiterated with precision, the Court's words bear repeating. The Court said:
>
> > 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).
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> [28] That statement was affirmed by the Supreme Court of Canada in **Canada (Attorney General) v. Lameman**, 2008 SCC 14 where the Court *per curiam* reiterated the test for summary judgment:
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> > [11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The

> defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.

[6] Here Dr. Brooks must satisfy the court there is no genuine issue of material fact requiring a trial. Only if Dr. Brooks succeeds at this first stage does Mr. Robert have to show he has a reasonable prospect for success on the undisputed facts.

[7] Dr. Brooks submits this proceeding requires determination of psychiatric standards, diagnosis, treatment and the potential effects of certain medication. In this type of case where liability and causation are not within the ordinary knowledge or expertise of the trier of fact, expert evidence is required to prove medical negligence. Mr. Robert has not disclosed supporting expert evidence. The absence of an expert opinion supporting Mr. Robert's claim is sufficient to show there is not a genuine issue for trial. Mr. Robert's claim has no chance of succeeding.

[8] Mr. Robert submits no expert is required as Dr. Brooks's failure can be seen clearly by anyone reading his reports. In a response affidavit Mr. Robert stated:

> "...5 no expert is required as the defendants failure can be seen clearly by anyone reading his reports. he failed in his duty by not making any attempt to confirm my claims. had he done so, he would have found them true and changed his diagnosis.

6 even though an expert is not required the information contained in my book “the last revolution”, exhibit ‘f’, a book which was suggested to be non existent and the belief of its existence to be the result of a delusion on my part by dr. abidi, a book which the defendant and his lawyer have in their possession, my expertise far exceeds that of the defendant, dr abidi and dr yuzda. no amount of cv’s from those who admit little or no understanding of brain function, human behaviour, intelligence or any of the mental disorders they prescribe to, compares to a person who does, in fact, understand the same. although a great deal of skepticism is inevitable as to whether my book does contain the necessary information to confirm my claim, i can easily prove it does so.

discovering how the brain works was a shock to me as all the world has been led by the science community to believe the brain was of incomprehensible complexity. the task, in fact, was very easy for me, as it required only recognizing a shockingly blatant error which has gone undiscovered for more than half a century. making it even easier was the fact that scientists discussed the error and suggested the correction. sadly they dismissed the solution as too simple. it can be read about in exhibit ‘d’ and ‘e’. (claiming something is too simple indicates inadequate intelligence which i will explain in court in terms of brain structure and function.)

on page 1723 of exhibit ‘d’ in the paragraph marked ‘a’ the author points out the error by stating “this suggested a new order of cortical response to electrical stimulation.” he was questioning the conclusion that memories were experienced as a result of stimulation in only a few areas of the cerebral cortex

on page 1724 of exhibit ‘d’ in the paragraph marked ‘b’ the author suggested the correction and then sadly dismissed it as too simple. “to conclude here is the mechanism of memory would be an unjustified assumption. it would be too simple.”

further research revealed why scientists incorrectly dismissed the idea memories were located throughout the cerebral cortex.

in exhibit ‘e’ paragraph marked ‘a’ the author describes memories experienced as “crickets, a wind in the trees, a railroad train passing, a slamming of doors, etc.” as elementary sensations.

in exhibit ‘e’ paragraph marked ‘b’ the author further explains why he does not consider the memories, memories. “responses to stimulation in the auditory area are elementary. the patient never hears a word or a voice.” he shockingly only recognizes words or voices as memories.

> discovering the error took me less than a week from the day i first began research to understand human behaviour, as i claimed.
>
> with the knowledge the cerebral cortex was the "mechanism of memory" the understanding of intelligence, human behaviour and much more become a simple exercise for me.
>
> "7 much of the documents which will prove my claim are contained in my disclosure of documents. as i was waiting for a date of discovery before completing the affidavit i will be adding to it. the defendant is without them because his lawyer repeatedly refused to meet for discovery. see exhibit 'c'. i had intended to hand them to the defendant's lawyer personally as it was obvious from our first meeting that he would require my help in understanding the relevance of many of them as he had trouble in understanding of the relevance to the hearing of the questions i posed in my request for a subpoena."

[9] Mr. Robert's claim is one of medical malpractice. In *Anderson v. Queen Elizabeth II Health Services Centre* 2012 NSSC No. 360 Bourgeois, J. set out the elements of a malpractice action stating at paragraphs 41 and 42:

> **THE LAW**:
>
> [41] The elements of proof in a malpractice action are summarized by Dean Meredith in his text, *Malpractice Liability of Doctors and Hospitals* at p. 156 as follows:
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> > "The success of a malpractice suit founded on negligence is dependent upon the existence of four conditions:
> >
> > First: There must have been a legal duty on the part of the doctor towards his patient to exercise care. This duty arises as a matter of law when the doctor takes on the case, and as already stated, is independent of contract.
> >
> > Second: There must have been negligence on the part of the doctor, i.e. a breach of his legal duty to conform to the standards of proficiency and care required by law.
> >
> > Third: The patient must have suffered loss or injury. Negligence not resulting in loss or injury provides no ground for a civil action in damages.
> >
> > Fourth: The patient's loss or injury must have resulted directly from the doctor's negligence. In other words, the negligence must have been the determining (as distinct from the indirect or remote) cause of the damage."

> [42] This text, and the above quote has been cited extensively, including by the Supreme Court of Canada (see *Cardin v. City of Montreal* (1961), 29 D.L.R. (2d) 492), and by this Court (see *Anderson v. Grace Maternity Hospital et al* (1989), 93 N.S.R. (2d) 141 and *Locke v. Lea* 1997 NSSC 131).

[10] Dr. Brooks admits he owed a duty of care to Mr. Robert but denies the other necessary elements are present.

[11] The standard of care of medical practitioners in the performance of their professional duties was set out by MacPherson, J.A., in giving the court's judgment in *Commisso v. North York Branson Hospital* (2003), 168 O.A.C. 100 (C.A.) at paragraph 17:

> " The general standard of care expected of a medical practitioner, including a specialist like Dr. Handysides, is not in dispute. As expressed by Schroeder, J.A., in **Gent and Gent v. Wilson,** [1956] O.R. 257 (C.A.), at 265:
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> > "Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability." .."

[12] If negligence was established Mr. Robert would then have to establish the alleged negligence was the cause of his loss. In *Clements v. Clements* 2012 SCC 32 McLachlin, C.J., in giving the majority judgment, summarized the current state of the law in Canada regarding causation at paragraph 46:

> [46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:
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> > (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.

> (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

[13] Here the claim against Dr. Brooks is one of medical malpractice. Mr. Robert has not filed any expert reports. He has deposed expert reports are not needed. Although informed he can not be an expert in his own action, Mr. Robert does not accept that fact.

[14] In dealing with a case in which summary judgment was granted when expert reports filed did not support the plaintiff's allegations, Roscoe, J.A. in giving the Court's judgment in *MacNeil v. Bethune* 2006 NSCA 21, stated at paragraphs 27 and 28:

> [27] The chambers judge found, on the basis of these reports, that there was no genuine issue of material fact requiring trial, and that there was "virtually no chance of success". I would agree with that conclusion. There was no arguable issue that required a trial.
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> [28] Although he was listing relevant principles for a summary trial, not a summary judgment application, Green, J., as he then was, in **Marco Ltd. v. Newfoundland Processing Ltd.**, [1995] N.J. No. 168 (T.D.), described the threshold common to both as:
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> > 76. . . . 9. There will be a "genuine issue for trial" if the issue in question is not spurious and the issue relates to a material fact or point of law that is necessary to be decided to resolve the ultimate controversy between the parties. Obviously, there will not be a genuine issue for trial if the responding party can put forward no evidence that could constitute either a defence or a claim in law.
> >
> > In my view, in this case, after considering the evidence presented by all parties on the applications, it can be said with confidence that there was no controversy of fact or law that required resolution by a trial. If the matter were permitted to go to trial, the plaintiffs would have no chance of success because they have no evidence to support their allegations that the damages they suffered were caused by or contributed to by any act or omission of the defendants.

and at paragraphs 31 and 32:

[31] I would underline, however, that as I have said the summary judgment test has two steps, each of which has a different onus. The first step is that the moving party must show that "there is no genuine issue of material fact for trial and therefore summary judgment is a proper question for consideration...": **Guarantee Co. of North America**, *supra*. This requirement has been described in **Somers Estate v. Maxwell** (1995), 107 Man. R.(2d) 220; [1996] M.J. No. 46 (Q.L.)(C.A.), as follows:

> 10 In some respects a defendant's motion for summary judgment is like a motion to dismiss a claim as one disclosing no cause of action. The most significant [difference] is that, unlike the motion to dismiss on the pleadings, a motion for summary judgment is not decided on the assumption that the facts alleged are true. The defendant must prove the facts to be such that, *prima facie*, the action fails in law. The burden then shifts to the plaintiff to prove facts which establish, if not the validity of the claim, at least a genuine issue for determination.
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> 11 The initial question for the motions judge was not therefore that which she asked herself. There was no onus on the plaintiff to establish either a genuine issue or a *prima facie* case until the defendant had proven, on a *prima facie* basis, the absence of a valid claim in law.

[32] I have also found the comments of Green, J., as he then was, in **Marco**, *supra*, helpful in this regard:

> 76 . . . 3. To bring himself or herself within the Rule the applying party must:
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> (a) in a case where he or she has the ultimate burden of proof on the merits, put forward an evidentiary basis for the claim which, if considered alone, would prove each element of the cause of action; or
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> (b) in a case where the other party has the burden of proof on the merits, put forward an evidentiary base establishing a defence to the claim as defined in the pleadings or tending to show that the other party's claim has no substance to it.
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> 4. In either of the foregoing cases, the applying party's case must consist of an organized set of facts set out in a coherent way, either from primary sources or the best sources available, including admissions on interrogatories and discoveries, that constitute proof of a proper foundation of the claim or defence, as the case may be.

[15] It is clear from his affidavit Mr. Robert has no expert medical or scientific evidence to support his claim. There is no genuine issue of fact for trial. If Mr. Robert's claim was permitted to go to trial, it would have no chance of success as he has no evidence Dr. Brooks breached the requisite standard of care and no evidence the damages, if any, he suffered were caused by or contributed to by any act or omission of Dr. Brooks.

[16] I grant Dr. Brooks's motion for summary judgment and dismiss Mr. Robert's action.

[17] I will receive written submissions from the parties regarding costs within thirty days of the release of this judgment.

Coughlan, J.