SUPREME COURT OF NOVA SCOTIA

Citation: *Gibson v. Party Unknown*, 2014 NSSC 220

Date: 20140704
Docket: Hfx No. 426136
Registry: Halifax

Between:

Phyllistean Gibson
as litigation guardian of Nigel Gibson Brown

Applicant

v.

A Party Unknown

Respondent

Judge: The Honourable Justice Peter P. Rosinski

Heard: April 29, 2014, in Halifax, Nova Scotia

Counsel: Nicolle Snow, for the Applicant
John Kulik, Q.C., for the Defendant

INTRODUCTION

[1] It is asserted that on the evening of April 7, 2013, 14 year-old Nigel Gibson Brown was struck from behind by "a white van" while he was walking alone alongside the shoulder of Canaan Avenue, Kentville, Nova Scotia. The vehicle did not then stop, and the driver left the scene without rendering any assistance to him or to allow identification of the driver or vehicle.

[2] "He presented at the Kentville Hospital emergency department where an x-ray demonstrated a longitudinal fracture through the left distal humerus… He was transferred to the IWK (Children's Hospital in Halifax) due to the mechanism of injury" – discharge summary IWK Center Exhibit " A" – affidavit of Nicolle A. Snow sworn April 9, 2014. On April 9, 2013 he had surgery to place three screws in the left distal humerus. He remained in the hospital until April 10, 2013.

[3] On April 9, 2014, Nigel Brown's mother, as Litigation Guardian on his behalf, filed a Notice of Application in Chambers showing as defendant, "A Party Unknown", pursuant to *Civil Procedure Rule* 5.03.

[4] The use of a nominal defendant, "A Party Unknown", was prompted because Nigel Brown's assertion is that he has been unable to identify the owner or driver of the vehicle in question, or even the precise vehicle.

[5] Pursuant to sections 139J and 139K of the *Insurance Act* RSNS 1989 c. 231, any person who would have had a cause of action against the owner or driver in respect of an injury arising out of the operation, care, or control, of an automobile, but where the identity of the automobile, the owner and driver of it cannot be established, may apply to the Court for permission to bring an action in the Supreme Court of Nova Scotia against the nominal defendant to be designated as "a party unknown".

[6] Sections 139B and 139J identify "the Facility Association" as the representative of the unknown party, liable for payment of the damages in respect of such death, personal injury or property damage, that the Plaintiff can establish.

[7] Thus, in this Application in Chambers the Plaintiff has given notice to the Facility Association.

[8] Section 139K reads:

> **Powers of Court on application**
>
> **139K** A judge of the Supreme Court of Nova Scotia may make an order permitting the applicant to bring an action against a party unknown if satisfied that
>
> (a) there are reasonable grounds for bringing the action;
>
> (b) all reasonable efforts have been made to ascertain the identity
>
> of the automobile involved and of the owner and driver of it;
>
> (c) the identity of the automobile involved and of the owner and driver of it cannot be established; and
>
> (d) the application is not made by or on behalf of an insurer in respect of any amount paid or payable by reason of the existence of a contract of insurance, and that, subject to subsection (4) of Section 139A, no part of the amount sought to be recovered in the intended action is sought in lieu of making a claim or receiving a payment that is or was payable by reason of the existence of a contract of insurance and that no part of the amount so sought will be paid to an insurer to reimburse or otherwise indemnify the insurer in respect of any amount paid or payable by it by reason of the existence of a contract of insurance. 1995-96, c. 20, s. 3.

[9] The Facility Association argues that the Plaintiff has not satisfied the Court on proper evidence of these prerequisites to granting leave to bring an action against "A Party Unknown."

Particulars of the Evidence in this Case

[10] As evidence in this case, I have the sworn affidavits of Nicolle A. Snow of April 9, 2014 and April 28, 2014.

[11] Counsel for the Facility Association challenges those affidavits as containing "inadmissible hearsay". The Facility Association relies on *Civil Procedure Rule* 5.13 and argues that the relaxed hearsay rules applicable on a motion under *Rule* 22.15 have no relevance.

[12] They also rely upon *Rule* 39 regarding affidavits.

[13] In summary they argue that:

1. Ms. Snow's affidavit contains inadmissible hearsay insofar as paragraphs 4, 5 and 6 assert an account of what happened on April 7, 2013 to Nigel Brown – the Facility Association suggests that he is the proper source of that information, and

would be available potentially for cross examination on issues such as the location of the hit-and-run, his observations of, and efforts to discover, the identification of the vehicle/driver in question.

2. Ms. Snow's affidavit contains inadmissible hearsay insofar as paragraphs 7 and 8 assert injuries sustained by Nigel Brown were as a result of a motor vehicle/pedestrian incident April 7, 2013; and that following the incident Nigel Brown's mother attended at the Kentville police station to file a report – the Facility Association suggests that the information in paragraph 7 should come from Nigel Brown; and similarly the information in paragraph 8 should come from his mother.

3. Ms. Snow's affidavit contains inadmissible hearsay insofar as paragraphs 11 and 12 purport to establish that neither Nigel Brown's mother, nor anyone else in the household, had motor vehicle insurance on April 7, 2013.

4. It is improper for Ms. Snow to have filed any affidavit, insofar as they might touch upon substantive matters as opposed to procedural matters, and as such is bad practice at best, and breach of the code of professional conduct at worst – see *Venoit v. Dohaney* 2000 NSJ No. 400(SC) per Goodfellow J.

[14] In the written materials the Facility Association states:

> In short, the entirety of Ms. Snow's affidavit addresses substantive rather than purely procedural or uncontroverted matters. These facts are within the personal knowledge of the Applicant and his mother. They plainly ought not to be advanced by Ms. Snow who can testify only to her belief in her clients' assertions. Indeed, Ms. Snow fails to state her belief in the hearsay statement at paragraph 11. The evidence must be resubmitted through the Applicant and his Litigation Guardian. (Paragraph 21)

[15] In response, the Plaintiff argues that the nature of the application in question allows for hearsay, and that *Rule* 22.15 is applicable. In essence, the Plaintiff argues that its proceeding for leave to name "A Party Unknown" is a procedural step, and one that only allows the Plaintiff the opportunity to commence the action against "a party unknown", albeit effectively against the Facility Association. The Plaintiff suggests that although the *Civil Procedure Rules* (2009) require him to

commence a "proceeding" by using an application in Chambers to obtain leave to commence his Action, in effect, the leave application is more akin to a motion.

Why *Rules* 5.13 and 39 govern this application

[16] *Rule* 22.15 falls within *Rule* 22 - "General Provisions for Motions". It reads:

> Rules of evidence on a motion
>
> **22.15 (1)** The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.
>
> **(2)** Hearsay not excepted from the rule of evidence excluding hearsay may be offered on any of the following motions:
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> (a) an *ex parte* motion, if the judge permits;
>
> (b) a motion on which representations of fact, instead of affidavits, are permitted, if the hearsay is restricted to facts that cannot reasonably be contested;
>
> (c) a motion to determine a procedural right;
>
> (d) a motion for an order that affects only the interests of a party who is disentitled to notice or files only a demand of notice, if the judge or the prothonotary hearing the motion permits;
>
> (e) a motion on which a Rule or legislation allows hearsay.
>
> (3) A party presenting hearsay must establish the source, and the witness' belief, of the information.
>
> (4) A judge, prothonotary, commissioner, or referee may act on representations of fact that cannot reasonably be contested.

[17] In this case the Plaintiff has proceeded by way of an "Application in Chambers" before the Court.

[18] That Application in Chambers is grounded in *Rule* 5 – "Application". Rule 5.01 [1] reads:

> As provided in these Rules, an application is an original proceeding and a motion is an interlocutory step in a proceeding.

[19] *Rule* 5 is the general governing rule that applies to Applications in Chambers. Within that rule, we find *Rule* 5.13 – Rules of Evidence on an Application:

> **The rules of evidence, including the rules about hearsay, apply** on the hearing of an application **and to affidavits filed for the hearing except a judge may, in an ex parte application, accept hearsay presented by affidavit** prepared in accordance with rule 39 – affidavit. [Emphasis added]

[20] On its face, *Rule* 5.13 carries a stricter requirement regarding the admission of hearsay evidence, than in relation to motions as contained in *Rule* 22.15. The underlying rationale may be rooted in the distinction between originating procedures, such as Applications in Court, and Applications in Chambers, which have stricter requirements, and motions, which are interlocutory steps in a "proceeding".

[21] Why is that distinction made? Generally speaking the purpose of a "proceeding" is to obtain a substantive result as opposed to a procedural one. Similarly, the purpose of an interlocutory step within a "proceeding" generally seeks to obtain a procedural result. Generally speaking, hearsay would be expected to be more likely admissible in relation to the hearing of interlocutory/procedural steps taken than in relation to proceedings seeking a substantive result.

[22] Yet that distinction is too simplistic to be of assistance in resolving this case. I acknowledge that some motions which seek "procedural" outcomes may have a substantive effect – for example: a motion for summary judgment, or a permanent stay of proceedings each may effectively terminate a "proceeding".

[23] A more helpful approach to understanding these distinctions and resolving this case is to begin with the basics.

[24] Hearsay generally involves, within the testimony of a witness, the witness repeating, for the truth of its contents, what the witness was told or became aware of out-of-court, by a first-hand observer or source of information. Hearsay is presumptively inadmissible. Exceptionally it may be admissible.

[25] I recognize that under the rules of evidence, hearsay may also come from documentation. Such documentation may be admissible as an exception to the hearsay rule, if it meets the test for the *Ares v. Venner* criteria (the common law exception) or under s. 23 of the *Evidence Act* RSNS 1989 c. 154, records made in the usual and ordinary course of business; or if it can be characterized as "necessary" and "reliable: – *R. v. Khelawon* [2006] 2 SCR 787; and its probative value significantly outweighs its prejudicial effect on the fair trial process.

[26] Hearsay may also exceptionally be admitted as permitted by legislation or our Civil Procedure Rules. An example of the latter may be found in Rule 5.13: "…except it judge may, in an ex parte application, accept hearsay presented by affidavit…".

[27] *Ex parte* applications in chambers are governed by Rule 5.02, which exceptionally permits a party to seek an order without notice to another person. To proceed *ex parte* an applicant must provide to the court "a statement explaining why it would be appropriate for the judge to grant the order without notice to other persons".

[28] In the case at Bar the true defendant party is unknown. The Plaintiff is placed in a position of not being able to give notice to that party or any traditional insurer on their behalf. A plaintiff may argue that it is therefore entitled to proceed by way of *ex parte* application in chambers in cases such as at Bar.

[29] However, courts are loathe to hear matters on an *ex parte* basis. Our Court of Appeal has said that presumptively notice should always be given to a person who may be affected by any proceeding directed against him or her – *Society of Lloyd's v. Partridge and van Snick,* 2000 NSCA 84 per Bateman JA.

[30] In this case the Facility Association is a legal person who may be affected by the Plaintiff's application in chambers, and thus the Plaintiff was right to proceed by way of application in chambers on notice.

[31] The party seeking to introduce hearsay evidence always bears persuasive burden to establish the exceptional circumstances under which they say that hearsay should be admitted.

[32] In the case at Bar the proposed evidence comes by way of affidavit. Rule 39.02 is particularly relevant and reads:

> (1) a party may only file an affidavit that contains evidence admissible under the rules of evidence, these rules, or legislation.
>
> (2) an affidavit that includes hearsay permitted under rule 5.13 of rule 5 – application; rule 22.15 of rule 22 – general provisions for motions; another rule, a rule of evidence, or legislation, must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.

[33] To be clear, although Rule 5.13 reads in part: "the rules of evidence, including the rules about hearsay, apply on the hearing of an application and to

affidavits filed for the hearing", in my opinion Rule 39.02 supersedes Rule 5.13 where affidavits are the form of evidence tendered. Moreover, although Rule 5.13 only expressly refers to hearsay as exceptionally admissible under "the rules of evidence", generally speaking it is more likely also intended to permit hearsay as permitted under the *Civil Procedure Rules* or legislation.

[34] In the case at Bar therefore, presumptively inadmissible hearsay, could exceptionally be admissible if permitted by a rule of evidence, a Civil Procedure Rule other than Rule 39, or pursuant to legislation (including regulations).

Hearsay may be admissible under s.139K of the *Insurance Act* if permitted by a Civil Procedure Rule other than 39; a rule of evidence; or legislation

[35] There is no other Civil Procedure Rule applicable here which would permit hearsay evidence to be admissible.

[36] I have alluded to the common law exceptions allowing presumptively inadmissible hearsay to be admissible; and to the statutory exception in section 23 of the *Evidence Act*.

(i) *Precedessor* Legislation and the Interpretation of the present legislation

[37] Is hearsay, whether presented as *viva voce* testimony or through an affidavit, permissible pursuant to the legislation relevant here; namely, section 139K of the *Insurance Act*?

[38] Recall that section 139K reads:

> A judge of the Supreme Court of Nova Scotia may make an order permitting the applicant to bring an action against a party unknown if satisfied that:
>
> (a) there are reasonable grounds for bringing the action;
>
> (b) all reasonable efforts have been made to ascertain the identity of the automobile involved and of the owner and driver of it;
>
> (c) the identity of the automobile involved and of the owner and driver of it cannot be established; and
>
> (d) the application is not made by or on behalf of any insurer… No part of the amount sought to be recovered in the intended action is sought in lieu of making a claim or receiving a payment that is or was payable by reason of the existence of a contract of insurance…

[39] The Court must be "satisfied that" each of these preconditions has been demonstrated by evidence.

[40] For a court to be satisfied that there are "reasonable grounds for bringing the action", presumably it must be satisfied that, from the evidence presented, a plaintiff has shown a reasonable evidentiary basis for their claims [actionable behavior by another party, that has caused damage/injury to the plaintiff] sufficient to permit a court to conclude that the action should proceed.

[41] In my opinion, this does not mean that the plaintiff must establish a *prima facie* case – see *inter alia* the comments of Justice Karakatsanis for the Court in *Hryniak v. Mauldin* 2014 SCC 7 at paragraphs 1-2; I note that litigants facing traditional insurers do not need to obtain leave to proceed with their action. In my opinion, courts should not unnecessarily place hurdles in the way of such litigants to obtain leave to proceed.

[42] I also find support in the wording used by the predecessor legislation ("that the plaintiff would have a cause of action"), mentioned below, which can be taken to give some indication of the intention of the legislature even more recently, in enacting section 139K of the *Insurance Act*.

[43] What will constitute "reasonable grounds for bringing the action", or "would have a cause of action", will depend on the unique factual circumstances in each case, and the evidence presented to satisfy a court thereof. "Reasonable grounds" are inherently an amalgam of factual considerations, more so a legal conclusion, than a discrete factual matter in dispute.

[44] Therefore, it is difficult to cast this conclusion in terms of a civil standard of proof. Whether a fact has been proved or not, is properly subject to a civil standard of proof such as balance of probabilities. It is more appropriate to characterize the plaintiff's obligation to satisfy the court of the existence of "reasonable grounds" as a mere onus – consider the meaning of "reasonable grounds" for an arrest to be valid in the criminal context – *R. v. Storrey* [1990]1 SCR 241 at para. 17.

[45] Notably in the criminal context, an arresting police officer may rely on hearsay received from other sources, which he honestly believes to be reliable, and which the court finds is a reasonable belief. Nevertheless, in that context generally often time is of the essence, whereas in a civil action there is much more time available to investigate the circumstances of the proposed action. Thus the rationale underlying that criminal analogy, which allows hearsay evidence, is not

applicable to the case at Bar, and cannot be of assistance to the plaintiff here in supporting his position that hearsay evidence should be admissible under section 139K (a) of the *Insurance Act*.

[46] As early as the *Motor Vehicle Act* RSNS 1967 c. 191, the Legislature permitted in the predecessor section 230 (2):

> No action shall be brought against the Registrar [of Motor Vehicles] under this section unless two months previous notice in writing of intention to bring the action has given to the Registrar, which notice contains the name and residence of the intended plaintiff and a statement of the cause of action, and is accompanied by **an affidavit of the intended plaintiff or some person on his behalf that there exist** in the case, the circumstances set out in clauses(a) to (d), inclusive, of subsection (5). [Emphasis added]

[47] Subsection 5 read:

> If, **on the trial of an action** brought under this section, the court is satisfied:
>
> (a) that the plaintiff would have a cause of action…;
>
> (b) that all reasonable efforts have been made to ascertain the identity…;
>
> (c) that the identity… cannot be established…;
>
> (d) that the action is not brought by or on behalf of an insurer…
>
> the court may order the entry against the Registrar of any judgment for damages that it might have ordered against the owner or driver of the motor vehicle in an action by the plaintiff. [Emphasis added]

[48] Similarly, in identical limited fashion, hearsay was permitted by section 256(2) of the *Motor Vehicle Act* RSNS 1989 c. 293.

[49] Under these regimes, a plaintiff did not require leave of the court, but merely had to ensure that he gave notice in writing of its intention to bring the action, including a statement of the cause of action, and **an** affidavit "that there exist in the case the circumstances set out in clauses(a) to (d) of subsection (5)."

[50] Until recently, section 213 – Judgment Recovery (N.S.) Ltd., of the *Motor Vehicle Act* RSNS 1989 c. 293, permitted recovery in such cases against Judgment Recovery (NS) Ltd.

[51] As of July 1, 1996 the regime changed, and section 139K and 139Q of the *Insurance Act* were substituted, to the effect that, the Facility Association became

the appropriate representative of the unknown defendant. By adding section 213 (1A) of the *Motor Vehicle Act*, the Legislature effected the following amendment:

> Notwithstanding subsection(1), no application for payment of a judgment may be made pursuant to that subsection where the judgment is recovered in an action for damages and the damages arose out of the operation, ownership, maintenance or use of a motor vehicle on or after July 1, 1996. - SNS 1995 – 1996 c. 20, s. 4

[52] Thus, only since July 1, 1996 has hearsay not expressly been permitted by the applicable legislation, and has leave of the court been required to commence such actions. Regarding "Section D" coverage, Justice Bryson (as he then was) comprehensively examined the related changes in *Faulds v. O'Connor* 2010 NSSC 55.

[53] I was provided with no relevant cases by counsel, and could find none, that specifically dealt with the issues herein under the post July 1, 1996 regime. Under the old regime see: *Rushton v. Nova Scotia* [1994] N.S.J. No. 32 (CA); *McNutt v. Registrar of Motor Vehicles* [1977] N.S.J. No. 626 (SC) per Morrison J; *Berends v. Registrar of Motor Vehicles* [1977] N.S.J. No. 449 (CA) per MacDonald JA; *Guymer v. Nova Scotia* [1984] N.S.J. No. 85 (SC) per Grant J; and *Haley v. Registrar of Motor Vehicles* [1963] N.S.J. No. 2 (SC) per Patterson J.

[54] I bear in mind that section 139P of the *Insurance Act* reads:

> In an action against a party unknown, a judgment against a party unknown shall not be granted unless the court in which the action is brought is satisfied that all reasonable efforts have been made by the claiming party to ascertain the identity of the automobile and the owner and the driver of it, and that such identity cannot be established.

[55] Thus, even if leave is granted to conduct the action, a plaintiff must at trial again establish that "all reasonable efforts have been made" to identify the vehicle/owner/driver and "that such identity cannot be established."

[56] I remain mindful of the interests of the Facility Association. Their concern is that if the evidentiary standard regarding satisfying the court of the preconditions in section 139K is unduly lowered, then the court may be faced with cases where the plaintiff makes little or no effort to present the best and reliable evidence in relation to those preconditions. Moreover in the case at Bar, as counsel has pointed out, Nigel Brown and his mother are readily available as affiants.

[57] The express exclusion, by the Legislature, in the new regime of the wording in the predecessor legislation that "an affidavit of the intended plaintiff or some person on his behalf" must be provided to the representative of the unknown defendant, and the requiring of leave of the court to commence such actions, suggests that the old regime has been left behind, and is to that extent not of much significance in interpreting the words of the new regime: for the principles of statutory interpretation generally see *Cape Breton (Reg. Municipality) v. Nova Scotia (Att. General)* 2009 NSCA 44 per MacDonald CJNS at paras. 36-41.

[58] Thus I must conclude that, section 139K on its face does not appear to permit hearsay evidence to be tendered in an affidavit to establish the preconditions in subsections (5) (a) to (d).

(ii) Exceptional admission of hearsay under the *Rules of Evidence*

[59] This does not however preclude a proposed plaintiff from tendering hearsay in an affidavit, if the plaintiff can bring themselves under the exceptions permitted by a rule of evidence, such as recognized exceptions to the hearsay rule, including the common law "business records" or statutory "business records" [section 23 Nova Scotia *Evidence Act*] exceptions, or the principled exception articulated by the Supreme Court of Canada in *R. v. Khelawon supra*.

Application to the Case at Bar

[60] I therefore conclude in relation to the case at Bar:

1. Regarding paragraphs 4, 5 and 6 which assert an account of what happened to Nigel Brown on April 7, 2013, no exceptional basis has been shown why such hearsay evidence is admissible in this case – therefore I strike as inadmissible paragraphs 4, 5 and 6.
2. Regarding paragraphs 7, which asserts the extent of injuries sustained by Nigel Brown on April 7, 2013, and 8, which asserts that his mother attended at the Kentville police station to file a report, an exceptional basis has been shown in part why such hearsay evidence is admissible in this case: – the medical records, as business records, merely establish what injuries Nigel Brown had, not how he received them; that his mother filed a report is not sufficiently confirmed by the mere fact of the existence of the accident report at Exhibit "C" of the affidavit, and therefore paragraph 8 is struck.

3. Regarding paragraphs 11 and 12 which assert that the plaintiff was not covered by motor vehicle insurance on April 7, 2013, no exceptional basis has been shown why that evidence is admissible – while the confirmation from Aviva rules it out as an insurer, that does not rule out all potential insurers – and therefore paragraph 11 is struck.

Costs

[61] Since there was divided success, and there was no jurisprudence directly on point, each party should bear its own costs. I direct the plaintiff to draft an Order to reflect my decision.

Rosinski, J.