

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

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Judge: The Honourable Justice Peter P. Rosinski

Heard: April 29, 2014 in Halifax, Nova Scotia

Written

Decision: June 18, 2014

Subject: Section 139K *Insurance Act* – Civil Procedure Rules 5.13 and 39 – *Motor Vehicle Act*/an action in negligence against an unidentified party.

Summary: 14-year-old Mr. Gibson Brown was struck and injured by an unidentified vehicle while walking alongside a public road. An action was contemplated against the “party unknown” pursuant to section 139K of the *Insurance Act*. Such unidentified parties are represented by the statutorily created Facility Association, which would defend the action and be responsible to pay damages, costs and disbursements in the event of a finding against the “party unknown”. A proposed plaintiff must obtain leave of the court to commence such actions, and meet the preconditions contained in section 139K of the *Insurance Act*.

Those preconditions include satisfying the court that: “there are reasonable grounds for bringing the action”; “all reasonable efforts have been made to ascertain the identity of the automobile involved and of the owner and driver of it”; “the identity of the automobile involved and of the owner and driver of it cannot be established”; “the application is not made by or on behalf of an insurer...”. Counsel for the plaintiff tendered her own affidavit in support of proof of these preconditions. The Facility Association objected.

Issues: Is hearsay evidence in an affidavit permissible to establish the preconditions in section 139K to the satisfaction of the court? Are any parts of the affidavit of counsel in this case hearsay which is not admissible?

Result: Hearsay evidence in the circumstances is permissible if it is admissible on an exceptional basis pursuant to Rule 39.02(2): that is “under the rules of evidence, these rules, or legislation”. Some of counsel’s affidavit is not admissible, and those paragraphs are struck out.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.
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