Date: 20021017
Docket: S. H. No. 149879

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Elliott v. Insurance Crime Prevention Bureau, 2002 NSSC 229]

BETWEEN:

HUGH LAIRD ELLIOTT, HELEN GERALDINE ELLIOTT, MICHAEL DAVID ELLIOTT and THOMAS AUGUSTUS ELLIOTT

PLAINTIFFS/RESPONDENTS

- and -

INSURANCE CRIME PREVENTION BUREAU, WILLIAM A. WILSON, DONALD T. MATHESON ENGINEERING LIMITED, DONALD T. MATHESON, MDS ENVIRONMENTAL SERVICES LIMITED, DOMINIQUE LEVESQUE, THE ATTORNEY GENERAL OF NOVA SCOTIA, FRANCIS J. SAVAGE and MARSH ADJUSTMENT BUREAU

DEFENDANTS/APPLICANTS

D E C I S I O N

HEARD: **At Halifax, Nova Scotia, in Chambers, before the Honourable Justice C. Richard Coughlan on August 28, 2002**

DECISION: **October 17, 2002**

COUNSEL: **H. Keith MacKay, for the Plaintiffs**
Michael E. Dunphy, Q.C. and Vincent Chew (articled clerk), for the Defendants, Insurance Crime Prevention Bureau and William A. Wilson
C. Patricia Mitchell, for the Defendants, Donald T. Matheson Engineering Limited and Donald Matheson
Matthew G. Williams, for the Defendants, MDS Environmental Services Limited and Dominique Levesque
Catherine J. Lunn, for the Defendants, The Attorney General of Nova Scotia and Francis J. Savage
Harry E. Wrathall, Q.C., for the Defendant, Marsh Adjustment Bureau

COUGHLAN, J.:

[1] This is an application by the defendants for an order pursuant to Civil Procedure Rules 25.01 and 37.10(a) and (g), dismissing the action on the grounds of no existing duty of care and the doctrine of witness immunity.

[2] As required in an application pursuant to Civil Procedure Rule 25.01 an Agreed Statement of Facts was filed which sets out the following facts:

> 1. On August 30, 1992, the Plaintiffs' ("the Elliotts") home was destroyed by fire.
>
> 2. By a contract of insurance made between Hugh Elliott and Royal Insurance Company of Canada ("Royal"), Royal agreed to indemnify the Elliotts in respect of loss or damage to the Elliotts' home and personal property caused by certain perils, including fire, for the time period of March 11, 1992 to March 11, 1993 (the "Policy").
>
> 3. A proof of loss form was filed by the Elliotts with Royal on October 21, 1992.
>
> 4. By letter of Kevin Connors of Marsh Adjustment Bureau dated December 21, 1992, Royal rejected the proof of loss filed by the Elliotts "due to the excessive amounts being claimed under building, contents and additional living expense". At that time, the investigation by police and other agencies with respect to the cause of the fire was still continuing.
>
> 5. On or about March 1, 1993 an Originating Notice (Action) and Statement of Claim was issued on behalf of the Elliotts against Royal claiming for losses resulting from the fire and for damages relating to bad faith.
>
> 6. On April 13, 1993, a Defence was entered on behalf of Royal wherein Royal denied liability for the loss on the basis, *inter alia*, that the loss was caused by the "wilful act, neglect, procurement or the connivance of the Plaintiffs". In

essence, Royal took the position that the fire was deliberately set by or at the behest of one or more of the Plaintiffs.

7. In claiming the origin of the fire was deliberately set, Royal relied on the reports and investigations of various experts and agencies, specifically:

- Insurance Crime Prevention Bureau ("I.C.P.B.") and William A. Wilson ("Wilson");

- Donald T. Matheson Engineering Limited ("Matheson Engineering") and Donald T. Matheson ("Matheson");

- M.D.S. Environmental Services Limited ("M.D.S.") and Dominique Levesque;

- Francis J. Savage ("Savage"), Deputy Fire Marshall;

- Marsh Adjustment Bureau ("Marsh").

8. Marsh is an independent adjusting firm and was retained by Royal to investigate and adjust the loss as a result of the fire. Between August 31, 1992 and February 18, 1993 March conducted an investigation of the fire and surrounding circumstances bearing on the Elliotts' claim for indemnity and reported its findings and opinions to Royal in a series of written reports. Marsh invoiced Royal for payment in respect to these activities and this account was paid by Royal.

9. ICPB conducts investigations on behalf of the insurance industry and its members pay fees to the ICPB.

10. At Marsh's request, on September 1, 1992, ICPB commenced an investigation of the fire and the surrounding circumstances relating to the Elliotts' claim under the Policy. Between September 1, 1992 and July 27, 1994 ICPB conducted an investigation of the fire and surrounding circumstances and reported its findings and opinions to Royal in a series of written reports. Royal is a member of and pays fees to ICPB and as such is entitled to the performance of

such services by ICPB. Wilson was the senior special agent in charge of the Halifax office of the ICPB and was the individual in charge of the ICPB investigation related to the fire. Wilson personally carried out the investigation and authorized the ICPB reports. Wilson testified at the trial of the action between Elliott et al and Royal Insurance Company of Canada. He was qualified to give opinion evidence and his qualifications and evidence are set out at paragraphs 37 through 39 of the decision of Boudreau, J.

11. The Defendant, MDS Environmental Services Limited, is a body corporate resulting from an amalgamation under the laws of Canada of several companies, including Fenwick Laboratories Limited, a body corporate incorporated under the laws of Nova Scotia and continued under the laws of Canada, with Head Office at Etobicoke, Ontario, and with a branch office at Halifax, Nova Scotia, and at all material times hereto carried on a business of analytical testing in Halifax, Nova Scotia.

12. The Defendant, Dominique Levesque, resides in Montreal, Quebec, and at all times material hereto held himself out to possess expertise in the field of analytical chemistry and acted as manager of laboratory services for MDS Environmental Services Limited in Halifax, Nova Scotia.

13. MDS was retained by Marsh in or about October, 1992, to provide an analysis of two samples of material taken from the Plaintiffs property. The analysis requested by Marsh was carried out by MDS personnel. Levesque reviewed and interpreted the analytical data generated by MDS's analytical procedures and reported his findings to Kevin Connors of Marsh Adjustment Bureau on October 21, 1992. On November 19, 1992, MDS invoiced Royal Insurance for the services performed by its personnel and was subsequently paid by Royal Insurance for such work. Mr. Levesque testified at the trial of the action between Elliott et al and Royal Insurance Company of Canada. His qualifications and evidence are summarized in the decision of Boudreau, J. at paragraphs 26 through 28.

14. On September 2, 1992, Marsh engaged Matheson Engineering to investigate the possibility the fire originated from an electrical cause. Between September 2, 1992 and September 18, 1992 Matheson Engineering carried out an investigation and reported its findings and opinions to Royal in a written report. On September 28, 1992, Matheson Engineering invoiced Royal for payment in respect of those activities and this account was paid by Royal. Matheson was the President of Matheson Engineering at the relevant time and personally carried out the investigation of the fire at the Elliott home and authored the report. He was

qualified to give opinion evidence and his qualifications and evidence are set out at paragraphs 29 through 36 of the decision of Boudreau, J.

15. Francis J. Savage, a Deputy Fire Marshall, was employed by the Province of Nova Scotia, Department of Labour, in the Office of the Fire Marshall and as such he carried out an investigation of the fire at the Elliott home at the request of Murray Houghton, Deputy Fire chief of District 9A Volunteer Fire Department. Mr. Savage prepared a report dated September 3, 1992, in his capacity as Deputy Fire Marshall, stating the cause and origin of the fire to be incendiary.

16. As outlined in paragraph 5, in 1993, the Elliotts commenced an action in the Supreme Court of Nova Scotia (S.H. No. 93-646)("First Action") against Royal claiming for losses resulting from the fire and for damages relating to bad faith. The Defendants, Wilson of ICPB, Levesque of MDS, Matheson of Matheson Engineering and Savage of the Fire Marshall were each qualified and testified as expert witnesses in the first action.

17. The decision in the First Action was released May 19, 1995. Justice Alan J. Boudreau (sic) found Royal was liable for the Elliotts' losses in accordance with the terms of the policy. Justice Boudreau also found Royal had not acted in bad faith in handling the Elliott's claim.

18. The Elliotts commenced an action in the Supreme Court of Nova Scotia on September 1, 1998 (S.H. No. 149879) ("Second Action") against the Defendants claiming each of the Defendants failed to exercise proper care in investigating and reporting in respect of the fire loss knowing Royal would rely on the Defendant's reports.

19. Each Defendant has filed a Defence to the Second Action and denies liability for any loss suffered by the Elliotts arising from the allegations made with respect to the Second Action.

[3] The issues for the Court to determine are:

1. Did the defendants, or any of them, owe a duty of care to the plaintiffs and, if not, should the plaintiffs' action against the defendants, or any of them, be dismissed?

2. Are the defendants, or any of them, immune from liability to the plaintiffs with respect to the claims made in this proceeding by reason of the application of the doctrine of witness immunity and, if so, should the plaintiffs' action against the defendants, or any of them, be dismissed?

DUTY OF CARE

[4] Whether a duty of care exists is determined under the two-step test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). In *Cooper v. Hobart* (2002) 206 D.L.R. (4th) 193 (S.C.C.) the test was described at p. 203:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the *relationship* between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. ...
>
> On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. ...
>
> . . . .
>
> As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 146 D.L.R. (4th) 577, at para. 24, *per* La Forest J.:

> The label "proximity", as it was used by Lord Wilberforce in *Anns*, *supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of *such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.* [Emphasis added.]

[5] The defendant, Savage, as Deputy Fire Marshal, investigated and reported on the cause of the fire to the local Deputy Fire Chief. The report was prepared pursuant to the **Fire Prevention Act**, R.S.N.S. 1989, c. 171. Section 8(3)(a) of the **Act** provides:

> (3) The Fire Marshal shall
>
> (a) investigate and hold inquiries respecting the cause, origin and circumstances of such fires as he may deem advisable;

[6] In this case Mr. Savage was carrying out his statutory duty to investigate and report on the cause of the fire. This is a public purpose. Mr. Savage's duty is to the public as a whole and not a particular individual. There is not the necessary proximity between Mr. Savage and the plaintiffs to give rise to a duty of care.

[7] In *N.M.-A. et al. v. I.A.S.M.-A. et al.* (1992), 93 D.L.R. (4th) 659 (B.C.C.A.) the Court dealt with a case in which a psychologist (Brooks), in private practice, assessed a child to determine whether the child had been sexually abused by her father. Brooks determined the father had sexually abused the child. The report was acted upon and the child apprehended. Based on the report and Brooks' testimony the Superintendent of Family and Child Service was awarded wardship. Eventually the trial judge found Brooks' report to be "totally unacceptable and unreasonable". The father commenced an action against Brooks, alleging negligence and/or lack of good faith on the part of the psychologist in making the assessment. In dealing with the issue of whether the father had a cause of action, Carrothers, J.A., in giving the Court's judgment stated at p. 665:

> ... Brooks' contractual obligation was to the Superintendent and any duty of care founded on the concept of reliance would be owed to the Superintendent only. Thus is precluded from Brooks the broad sweep of the "good neighbour" principle derived from Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465 (H.L.), and Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.).

[8] The defendants had no contractual relationship with the plaintiffs. They had no relationship with the plaintiffs other than through the first action. The plaintiffs claim the defendants were negligent in investigating and reporting in respect of the fire loss, knowing Royal would rely on their reports. There is not the necessary proximity between the defendants and the plaintiffs to give rise to a cause of action. If the defendants were negligent, Royal would have a cause of action but not the plaintiffs. The defendants do not owe a duty of care to the plaintiffs.

WITNESS IMMUNITY

[9] The witness immunity rule is well established in our law. As the Earl of Halsbury L.C. said in *Watson v. McEwan*, [1905] A.C. 480 at p. 486:

> ... The broad proposition I entertain no doubt about, and it seems to me to be the only question that properly arises here; as to the immunity of a witness for evidence given in a Court of justice, it is too late to argue that as if it were doubtful. By complete authority, including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a Court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable - it is settled law and cannot be doubted. The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by Courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given. So far the matter, I think, is too plain for argument.

[10] In dealing with the rule, Roscoe, J.A., in giving the Court's judgment in *Martini v. Wrathall* (1999), 180 N.S.R. (2d) 38 (N.S.C.A.) at p. 40 agreed with the following statement of law by Reilly, J. in *Dooley v. Weber (C.N.) Ltd. et al.* (1994), 19 O.R. (3d) 779 (Gen. Div.):

> However, I conclude, after considering submissions of counsel and the relevant jurisprudence, that an absolute privilege attaches to the pleadings and they may not form the basis for a cause of action, even for abuse of process. The development of this privilege has been consistent and without exception, applying in England, Canada and other common law jurisdictions to judges, witnesses, counsel and litigants. The privilege extends to statements made in court, the evidence of witnesses, to submissions, to addresses, to statements in court by counsel, to pleadings (as in this case) and perhaps even to statements made to investigators in the preparation of a prosecution.

[11] How far does the immunity extend? In *Evans v. London Hospital Medical College & others*, [1981] 1 All E.R. 715 (Q.B.D.) at p. 719, Drake, J. stated:

> But how far does this absolute immunity extend to cover the acts or omissions of a witness or potential witness during the stage when they are collecting or considering material with a view to its *possible* use in criminal pleadings?
>
> The decision of the Court of Appeal in *Marrinan v. Vibart* does, it seems to me, make the position clear. In the leading judgment given by Sellers LJ with which the other two members of the court, Willmer and Diplock LJJ, agreed, he said ([1962] 3 All ER 380 at 383, [1963] 1 QB 528 at 535):
>
> > 'Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court *and in the preparation of the evidence which is to be so given*.' (Emphasis mine.)
>
> . . . .

... I think it essential to keep in mind the reason for immunity. Counsel suggests that the main reason is to prevent disgruntled convicted prisoners from seeking to have their cases retried in a civil suit. I think that that is undoubtedly one of the reasons for the existence of the immunity; but I think that the reason is in fact more broadly based than this. It was stated by Salmon J. in his judgment at first instance in *Marrinan v. Vibart* [1962] 1 All ER 869 at 871, [1963] 1 QB 234 at 237:

> 'This immunity exists for the benefit of the public, since the administration of justice would be greatly impeded if witnesses were to be in fear that any disgruntled or possibly impecunious persons against whom they gave evidence might subsequently involve them in costly litigation.'

The judgment of Salmon J was approved by all three members of the court on the subsequent appeal. It seems to me that this immunity would not achieve its object if limited to the giving of evidence in court and to the preparation only of the statements or proof of evidence given by the witness. Any disgruntled litigant or convicted person could circumvent the immunity by saying he was challenging the collection and preparation of the evidence, to be taken down as a statement or proof of evidence later, and *not* challenging the statement or proof itself. In other words he would seek to base his claim on things said or done by the witness at some time prior to the statement or proof being given by him.

In my opinion this would largely destroy the value of the immunity. Equally I think that it would open the way to convicted persons seeking to have their cases retired in the civil courts. ...

and at p. 721:

It is for these reasons that I think that the words used by the Court of Appeal in *Marrinan v. Vibart*, that immunity protects witnesses in their evidence before the court and in the preparation of the evidence which is to be given, covers and was intended to cover the collection and analysis of material relevant to the offence or possible offence under investigation, and was not intended merely to cover the preparation of the witness's formal statement or proof of evidence.

[12] In considering the role of an expert witness Huddart, J. stated in *Carnahan et al. v. Coates et al.* (1990), 71 D.L.R. (4th) 469 (B.C.S.C.) at p. 478:

> From my view I have concluded that the protection of the integrity of the judicial process requires at least that an expert witness be immune from suit by any person with whom his only relationship derives from the judicial proceeding. For the purpose of this application I need go no further.

[13] I agree with the statement of law by Huddart, J. (See also *N.M.-A. et al. v. I.A.S.M.-A. et al.*, *supra*)

[14] The reports prepared by the defendants were made in investigating a fire which could result in a denial of a claim and possibility litigation. At the time the reports were prepared the individual defendants were only possible witnesses and their reports might or might not be used in evidence. Such reports were made in anticipation of a proceeding.

[15] The defendants' only relationship with the plaintiffs derived from the first action and the witness immunity rule applies.

[16] The plaintiffs argue that even if the individual defendants have the protection of the witness immunity rule, the claims against the employers of those individuals is not necessarily affected by the rules. I disagree. If there is no liability on the part of the individual, there is no vicarious liability. In the case of the Attorney General of Nova Scotia, there is also s. 5(2) of the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c. 360 which prohibits a proceeding against the Crown unless the act or omission of the officer or agent of the Crown would give rise to a cause of action against that officer or agent. The reports prepared by the defendant, Marsh Adjustment Bureau Limited, are also covered by the rule as the reports were made in investigating a fire which could result in a denial of a claim with consequent litigation.

[17] The questions the Court is asked to determine are answered as follows:

1. Did the defendants, or any of them, owe a duty of care to the plaintiffs and, if not, should the plaintiffs' action against the defendants, or any of them, be dismissed?

Answer: The defendants did not owe a duty of care to the plaintiffs and, therefore, the plaintiffs' action against the defendants should be dismissed.

2. Are the defendants, or any of them, immune from liability to the plaintiffs with respect to the claims made in this proceeding by reason of the application of the doctrine of witness immunity and, if so, should the plaintiffs' action against the defendants, or any of them, be dismissed?

Answer: The defendants are immune from liability to the plaintiffs with respect to the claims made in this proceeding by reason of the application of the doctrine of witness immunity. The plaintiffs' action against the defendants should be dismissed.

[18] The application is allowed and the plaintiffs' action dismissed against all defendants.

[19] I will receive written submissions from counsel on the question of costs.

C. Richard Coughlan, J.