2010 S.CK. Number: 304120

SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Brown v. Newton, 2010 NSSM 28

BETWEEN:

THOMAS K. BROWN

Claimant

- and -

WALTER O. NEWTON, Q.C.

Defendant

DECISION AND ORDER

Date of Hearing:	March 19th, 2010
Place of Hearing:	Halifax, Nova Scotia
Heard Before:	Gavin Giles, Q.C., Chief Adjudicator
Counsel:	For the Claimant: Rubin Dexter For the Defendant: W. Harry Thurlow
Date of Last Written Submission:	March 31st, 2010
Date of Decision:	April 8th, 2010

Gavin Giles, Q.C., Chief Adjudicator

INTRODUCTION:

[1] This matter was heard before the Small Claims Court of Nova Scotia in a "special sitting", held at the offices of McInnes Cooper, Barristers and Solicitors, in Halifax, on Friday, March 19th.

[2] Both the Claimant and the Defendant were present. Both testified. The Claimant was represented by Rubin Dexter. The Defendant was represented by W. Harry Thurlow.

[3] The hearing was preceded by very basic written submissions from both Mr. Dexter on behalf of the Claimant and Mr. Thurlow on behalf of the Defendant. These submissions were not "briefs" in the normal sense. Rather, they comprised basic submissions of case law authorities which were said to be possibly germane to the claim and the defence of the claim and which might therefore be argued. I was asked to review these case law authorities in advance of the evidence being called and the submissions on that evidence.

[4] The Claimant has claimed against the Defendant in negligence and in breach of contract. The Claimant has alleged that he retained the Defendant to provide him with legal services in litigation in which the Claimant was involved.

[5] The Claimant has alleged further that he was seeking from the Defendant - within geographic reason - the best legal services available to him.

[6] Finally, the Claimant has alleged that the Defendant's legal service to him were substandard in that they led him into an unsuccessful Application to the Supreme Court of Nova Scotia which cost him significant fees which were effectively thrown away and which cost him not insignificant party/party costs.

[7] The Claimant now seeks the recovery of these fees and party/party costs from the Defendant as damages.

[8] The Defendant has denied the Claimant's allegations and has mounted a strong defence to them. The Defendant has said that his services were consistent with any standard of care ascribable to him and that he was thus neither negligent nor in breach of his contract with the Claimant.

[9] The Defendant has at least implied that Applications to the Supreme Court of Nova Scotia are, by their very nature, uncertain legal exercises. He has likewise at least implied that he never guaranteed the outcome of the Claimant's Application and did not use terms in his advice to the Claimant about the Application which can in any way be construed as having been consistent with any form of guarantee.

PREAMBLE:

[10] The Claimant's claim against the Defendant was initially heard in the Small Claims Court of Nova Scotia on April 17th, 2009. The hearing proceeded before Adjudicator James A.D. (Jamie) Armour, Q.C.

[11] The hearing before Adjudicator Armour was, not as the Claimant had expected it would be.

[12] The Claimant was present at that hearing and represented himself. The Claimant's "case" was comprised only of his own evidence. At the conclusion of the Claimant's evidence, he "closed" his case.

[13] The Claimant appears not to have known that he could have called the Defendant to give evidence as part of the Claimant's own case; nor, it would appear, that the Claimant knew that he could likely have cross examined the Defendant as part of the Claimant's own case.

[14] Before Adjudicator Armour, Mr. Thurlow, on behalf of the Defendant, elected at the closing of the Claimant's case not to call any evidence of his own. Argument then ensued solely on the basis of the Claimant's testimony.

[15] At the conclusion of argument, Adjudicator Armour was pleased to render an oral decision. His Honour considered the Claimant's testimony and his and Mr. Thurlow's arguments. His Honour then concluded that the Claimant's claim against the Defendant had not been made out. The Claimant's claim was thus dismissed.

[16] The rudimentary summary below of Adjudicator Armour's Decision arises solely out of His Honour's Report of Findings which was filed with the Supreme Court of Nova Scotia when the Claimant took the dismissal of his claim against the Defendant on appeal.

[17] First, Adjudicator Armour concluded that the legal services to the Claimant which lay at the root of his claim against the Defendant were actually rendered by legal counsel other than the Defendant. As such, Adjudicator Armour held that if there was any negligence in the rendering of the legal services the Claimant had received, it was the negligence of the other counsel and not the negligence of the Defendant.

[18] Second, Adjudicator Armour concluded that there was no evidence - or at least no sufficient evidence - to found a conclusion that the Defendant had departed from any duty of care or standard of care he had owed to the Claimant at any of the material times.

[19] In arriving at the former conclusion, Adjudicator Armour did not appear to consider when, why or the limited purpose for which, the other counsel had been retained for the Claimant's Application. That may have been because of some deficiency in the quality and breadth of the Claimant's evidence.

[20] In arriving at the latter conclusion, Adjudicator Armour appeared only to be considering the Claimant's own evidence on a balance of probabilities. Beyond that, Adjudicator Armour's decision did not appear to consider what duty of care or standard of care applied to the Defendant in the course of his broad provision of legal advice and legal services to the Claimant.

[21] Not having established such a duty or standard, it appears to have been axiomatic that Adjudicator Armour could not have considered any breach thereof on the part of the Defendant which could have led to the loss of the fees and party/party costs alleged by the Claimant.

[22] Third, Adjudicator Armour concluded that there was no proof led into evidence by the Claimant that the Application conducted by the Defendant would have been determined differently regardless of the nature of the services he had provided to the Claimant. Adjudicator Armour appeared then to have been applying the "trial within a trial" test referred to by text authors such as Klar, Lewis N., Q.C. in publications such as "*Tort Law*, 4th Ed.", Thomson/Carswell, Toronto, 2008.

[23] This final reasoning by Adjudicator Armour may well have stemmed from the crude manner in which the Claimant's claim against the Defendant was initially framed.

[24] At the time, the Claimant was self-represented. His initial Claim Form, filed with the Court on November 18th, 2008, made mention only of his having "hired" the Defendant "as a high profile lawyer" whose work "did not come close to the level that was expected and was therefore negligent."

[25] Having pleaded his case in that manner, the Claimant might well have left Adjudicator Armour with the impression that it was the Defendant's legal services in the actual hearing of the Application to the Supreme Court of Nova Scotia which were alleged to have been deficient. In fact, however, the Claimant's Amended Claim Form, upon which his claim which proceeded before me was predicated, helped clarify that what he was really alleging was that the Defendant's negligence arose in the very advice that the Claimant proceed with the impugned Application to the Supreme Court in the first place.

[26] Thus, the aspects of the Defendant's legal services of particular concern to the Claimant were not initially or immediately clear. As such, it may well have been impossible for Adjudicator Armour to have parsed them into those which might have been performed carelessly - and from which damages could have flowed - and into those which might have represented mere "errors of judgment" - and from which damages have routinely been held not to flow.

[27] As noted, Adjudicator Armour's decision was taken on appeal by the Claimant to the Supreme Court of Nova Scotia. The nub of the Claimant's appeal was that Adjudicator Armour had erred in law and had failed to follow the rules of nature justice by not in some way affording the Claimant the opportunity to call the Defendant's evidence as a part of his own case.

[28] In fairness to the Claimant, his explanation of his trial tactics outlined before the Supreme Court of Nova Scotia was that he expected that the Defendant would be called to testify as a part of his own defence and would therefore be available to the Claimant for cross-examination. As an extension of that, the Claimant appeared to either not know or to have not consider that he could have called the Defendant as part of his own case.

[29] The Claimant's appeal was allowed.

[30] The question framed by the Supreme Court of Nova Scotia (per: McDougall, J.) was put as follows (see: *Brown v. Newton*, 2009 NSSC 338, at para. 26)

> Certainly the learned adjudicator cannot be faulted for what he did nor what he offered by way of explanation to the appellant. But, should he have done more? Should he have explained to the appellant that he could ask to re-open his case for the purpose of calling the respondent as part of his case-in-chief as is provided for in *Civil Procedure Rule* 54.06 which says:
>
> …
>
> In my view the answer to this question is yes, he should have. Even if it involved the need for an adjournment this could have been accommodated without significant inconvenience or hardship to the respondent. Unless there is an express provision in the Act or the Regulations to the contrary the *Civil Procedure Rules*, although adopted for use in the Supreme Court of Nova Scotia, may be used for guidance or even direction on procedural issues which is in keeping with the stated purpose of [section 2 of the *Small Claims Court Act*].

[31] It was on that basis that McDougall, J. determined that the only resolution fair to the Claimant was to remit the case back to the Small Claims Court for a re-hearing before another Adjudicator upon certain conditions.

[32] One condition was that the Claimant file and serve an Amended Notice of Claim in which his allegations of negligence against the Defendant were detailed.

[33] Another condition was the issuance and service of a subpoena by the Claimant on the Defendant for the latter's attendance at any re-hearing.

[34] The final conditions limited the Claimant, on the re-hearing of his claim, to his own evidence and that of the Defendant. In other words, the Claimant was prohibited from expanding his case or his inquiry simply because he was receiving the benefit of a re-hearing.

BACKGROUND:

[35] The Claimant is currently 44 years old. He has moderate formal education but abundant working and life experience.

[36] The Claimant has been operating his own business in excavation and forestry for 13 years. Prior to that, the Claimant was engaged in a variety of occupational pursuits. These included farming, forestry, trucking, finish carpentry and general construction.

[37] The Claimant struck me throughout his testimony as bright and articulate. He had a direct manner about him. He appeared to me to have a good recollection of salient events. He responded to questions put to him on both direct examination and cross-examination easily and with appropriate levels of detail. He did not strike me as prone to either understatement or overstatement. He was not argumentative. On the whole, I found the Claimant to be a credible witness.

[38] The Defendant really needs no introduction; at least an introduction in these pages.

[39] The Defendant is one of the Province's most senior lawyers. He was admitted as a Barrister of the Supreme Court of Nova Scotia in 1968. He has been practising law privately since that time - more than 41 years. He was appointed as a Queen's Counsel in 1983 after 15 years of practice.

[40] Though the Defendant testified to his law practice as being "general", he also testified that he has "done all kinds of litigation, both civil litigation and criminal litigation".

[41] The Defendant regards himself as a senior and experienced litigation lawyer. He represented himself as such to the Claimant. The Claimant testified that he approached the Defendant about the latter's retention because of a reference from his then lawyer and because of the Defendant's reputation as one of the Annapolis Valley region's most prominent and capable lawyers. The Defendant did nothing to dissuade the Claimant from the latter view. In fact, the Defendant, by two of his comments to the Claimant represented himself as more or less deserving of the reputation he had acquired by that time. My last comment is meant as an observation and certainly not as a criticism.

[42] The Defendant also struck me as direct in his testimony and with an appropriate recollection of salient events. He responded to questions put to him on both direct examination and cross examination with appropriate levels of detail. He was occasionally argumentative with the Claimant's counsel. That much could have been expected given the nature of the claim against

him. Nothing the Defendant did or said while testifying detracted from my assessment of his credibility.

[43] The Defendant also did not strike me as having either understated or overstated his role in the matter involving the Claimant. He made appropriate concessions and admissions.

[44] On the whole, I found both parties to be credible. There were no other witnesses.

[45] In short, this case does not resolve on findings of credibility, on the reconciliation of the differences between the Claimant and the Defendant on any key factual elements or on the basis of which factual theory of the case presented me with greater confidence.

[46] The Claimant and the Defendant did not differ from each other widely on the key factual elements of the case. As such, the case resolves on the basis of the appropriate interpretation to be given to key events and the case law authorities which govern them.

[47] Regrettably for the Claimant, and as it came to pass, for the Defendant too, the Claimant became embroiled in a bitter dispute with his two sisters over the trio's late father's estate. The Claimant's late father had favoured him with a single bequest of only $500. The Claimant took umbrage over that bequest and commenced an action against his late father's estate pursuant to the provisions of the Testators' Family Maintenance Act.

[48] The nub of the defence to the Claimant's *Testators' Family Maintenance Act* proceedings was the allegation, in effect by the Claimant's sisters, that he had received a "gift" from his late father, in the course of the father's lifetime, of some $13,000.

[49] Though the Claimant conceded having received $13,000 from his father during the older man's lifetime, the Claimant described it as a loan which had been repaid prior to the father's death. The Claimant's sisters disputed that. They - one of them was the late father's Executrix - instructed the Estate's counsel to defend the Claimant's claim pursuant to the Testators' Family Maintenance Act on the basis that the $13,000 had effectively been an advance bequest by the Claimant's late father to him and that as such, he was not entitled to any further consideration in his late father's Will.

[50] The Claimant's claim pursuant to the *Testators' Family Maintenance Act* was ultimately resolved by the Supreme Court of Nova Scotia at trial (see: *Brown v. Brown Estate*, 2005 NSSC 271). I have reviewed the decision (per: LeBlanc, J.) in that case.

[51] It appears from LeBlanc, J.'s analysis that the relationship between the Claimant and his late father had become strained over the years prior to the older man's death. So too had the Claimant's relationships with his sisters.

[52] Though there was insufficient evidence before me which would permit the objective conclusion that the dispute between the Claimant and his late father's Estate was "bitter", there is no doubt that it was intense and hard fought.

[53] Proof enough of that fact could be inferred from the overall value of the Claimant's late father's Estate. Comprised of a little bit of real estate, some personal property which likely did not have a lot of actual cash value and, apparently, a little bit of cash, it would appear that the overall value of the Estate would not have objectively justified much in the way of dispute, let alone the significant litigation expenses which must have been incurred by the various contending parties along the way.

FACTS:

[54] The Claimant commenced his *Testators' Family Maintenance Act* claim through legal counsel in 2003. The Claimant's then legal counsel of choice was relatively senior and relatively well-known in the Annapolis Valley. He possessed what the Claimant considered to be a solid reputation. The Claimant initially thought that he had made a good choice of his legal counsel. The Claimant's initial legal counsel appears to have carried his *Testators' Family Maintenance Act* claim for about a year, maybe a little less than that.

[55] For reasons which were not well developed in the testimony before me, the Claimant eventually became disappointed in the performance of his legal counsel. Whether the legal counsel was providing the Claimant with prudent legal advice which he was refusing to accept, whether the Claimant's legal counsel was not moving the claim forward quickly enough or whether the Claimant's legal counsel was not aggressive enough was not at all clear.

[56] What was clear was that the Claimant approached his legal counsel and asked for his recommendation of "a more senior lawyer". The only recommendation which the Claimant received was with respect to the Defendant. The Claimant accepted his then legal counsel's recommendation with respect to the Defendant. He then called the Defendant and made arrangements for the two to meet.

[57] The Claimant's initial meeting with the Defendant took place at the latter's office in Kentville. According to the Claimant, he told the Defendant that he "wanted a fighter". The Defendant appeared to allow that he was just the type of lawyer the Claimant seemed to want. I confess that just what the Defendant may have said to the Claimant in that regard was not in evidence before me.

[58] Beyond the early discussion about "fighters", the balance of the initial meeting between the Claimant and the Defendant related to the latter's hourly charge out rate for his legal services - $250. According to the Claimant, he told the Defendant that $250 an hour was a lot more than he had been paying to his initial legal counsel. He seemed to have initially baulked at this hourly rate. There was no indication that the Defendant was in any way "negotiable" on his hourly charge out rate.

[59] The Claimant then followed-up with two specific questions of the Defendant. It seems that it was on the bases of the Defendant's answers to these questions that the Claimant was intending to make up his mind over his formal retention of the Defendant for the balance of his *Testators' Family Maintenance Act* claim.

[60] The first question was whether the Defendant was worth $250 an hour. The Defendant responded, simply, that he was.

[61] The second question was whether the Defendant was that much better than the Claimant's initial legal counsel. Again, the Defendant said that he was.

[62] Through this discussion alone, the Claimant appeared to have gained sufficient confidence in the Defendant that the latter was effectively retained on the spot for the balance of the Claimant's *Testators' Family Maintenance Act* claim. Thereafter, the services of the Claimant's initial legal counsel were no longer required.

[63] The Defendant's carriage of the Claimant's *Testators' Family Maintenance Act* claim appears to have proceeded uneventfully until the latter part of the first third, or so, of 2004.

[64] At that time, the precise time being April 28th, 2004, the Defendant received correspondence from legal counsel for the Claimant's late father's Estate which set forth some settlement options.

[65] It seems that correspondence from legal counsel for the Claimant's late father's Estate was a bit of a surprise. Until it was received, it seemed that the contending parties - and their respective legal counsel - were really only girding themselves for trial.

[66] The correspondence from legal counsel for the Claimant's late father's Estate to the Defendant dated April 28th, 2004 was not led into evidence before me. Moreover, neither the Claimant nor the Defendant testified to its contents.

[67] Regardless, the Defendant responded, on May 3rd, 2004, in part, as follows:

> I have reviewed your fax of April 28, 2004, which I have reviewed with my client, Thomas Brown.
>
> After considering the options which you set forth in the letter, I am advised by Thomas Brown that he is prepared to make an offer to purchase the real estate owned by the late Murray A. Brown and which was devised in his Will to his daughter, Glenna Brown.
>
> Thomas Brown has incurred substantial legal costs in pursuing this matter and it also appears that his sisters have spent for unknown purposes most of the cash in the Estate. My only information on this latter point is through my telephone conversation with you, at which time you did advise that they had spent all but about $300 of the funds on deposit.
>
> Having these two factors in mind, Thomas Brown has authorized me to advise you that he is prepared to pay the sum of $15,000, all inclusive, for all of the real estate owned by Murray A. Brown at his death, exclusive of contents of the residence, but inclusive of the contents of the barn and the wood splitter [sic].
>
> Payment of the sum of $15,000 would be made to the estate of Murray A. Brown in return for a warranty deed to the real estate executed in favour of Thomas Brown by Glenna Brown and Mahala Spicer. The real estate may be subject to the payment of capital gains tax, which is the responsibility of the estate of Murray A. Brown. Therefore, we also require indemnification from Glenna Brown and Mahala Spicer against payment of any capital gains tax on this property, should it be subject to such tax.
>
> …

> If the foregoing proposal is unacceptable, we wish an accounting of the Estate proceeds and also the name of new counsel who will be taking over the conduct of this file. We look forward to your reply by May 6, 2004. [underlining mine]

[68] The Defendant's correspondence of May 3rd, 2004, was marked "without prejudice". It thus appeared that the Defendant was treating the correspondence he received from legal counsel for the Claimant's late father's Estate on April 28th, 2004 as an "invitation to treat" as opposed to an "offer to sell" on behalf of the Claimant's late father's Estate.

[69] The time imposed by the Defendant for the response to his offer to the legal counsel for the Claimant's late father's Estate was limited - only three days. That was consistent with the Claimant's approach to his *Testators' Family Maintenance Act* claim. He wanted the matter dealt with quickly. He wanted the matter dealt with aggressively. He did not want to see a lot of time being wasted. He was minded to get the claim before the Court unless it could be earlier resolved on terms entirely satisfactory to him.

[70] Legal counsel representing the Claimant's late father's estate did not respond to the Defendant's May 3rd, 2004 correspondence right away. He waited until May 6th, 2004. He and the Defendant spoke by telephone on that date.

[71] The evidence led before me of the subject matter of that telephone discussion was scant.

[72] The Claimant did not participate in that telephone discussion. Legal counsel for the Claimant's late father's estate did not testify at all.

[73] Only the Defendant testified with respect to the telephone discussion. He testified only that there was some "minor discussion" about some aspects of the Claimant's "offer" which had to be "clarified".

[74] Despite having been pressed by both the Claimant's counsel and his own counsel, the Defendant had little recollection about precisely what there was about the Claimant's "offer" which was left to be "clarified". That much is reasonably understandable. The telephone discussion in issue took place almost a full six years ago. It had not been "recorded" by way of a memorandum to the Defendant's file. There was some evidence of some notes of the telephone

discussion which had been taken by the Defendant. Though these notes were not led into evidence before me, they were referred to by Warner, J. in the Supreme Court of Nova Scotia to have been silent or least equivocal on the seminal point of whether the Defendant and the legal counsel representing the Claimant's late father's Estate had reached a full and final settlement of the Claimant's *Testators' Family Maintenance Act* claim.

[75] Regardless of the telephone discussion between the Defendant and the legal counsel to the Claimant's late father's Estate on May 6th, 2004, the latter followed-up with correspondence sent by facsimile to the Defendant on that same date. This correspondence is to my mind important. I reproduce it below:

> This is further to our telephone conference today and to confirm that the estate is in substantial agreement with your proposal subject to clarification in writing of the questions raised. [underlining mine]

[76] The Defendant followed-up with the Claimant by telephone immediately on having received the May 6th, 2004 correspondence from legal counsel for the Claimant's late father's Estate. According to the Claimant's recollection of that discussion, the Defendant told him that "it was a deal" if he would agree to one of his sisters being permitted to keep his late father's wood splitter and the other of his sisters being permitted to keep either the personal property or at least some of the personal property stored in his late father's barn.

[77] The terms with respect to the wood splitter and the contents of the barn were acceptable to the Claimant. According to him, he then and there instructed the Defendant to "make it happen".

[78] Thereafter, the Claimant and Defendant discussed a period of approximately two weeks to complete the transfer of the Claimant's late father's real property.

[79] Next, sometime after speaking with the Defendant on May 6th, 2004, the Claimant decided on an additional condition to govern his acquisition of his late father's real property. He wanted to ensure that when it was conveyed to him, his late father's house was both "reasonably clean" and "in the same shape it was when his late father had died".

[80] Neither the concept of "reasonably clean" nor the concept of "the same shape" were defined by the Claimant. Nevertheless, the Claimant thereafter called the Defendant and left the Defendant a message to effect those two new conditions. The Claimant also added in his message a comment to the effect that he only wanted to pursue these two new conditions if "they would not hurt our deal".

[81] The Defendant called the Claimant back the following morning, that is, the morning of May 7th, 2004. The Defendant had lost the Claimant's message and required him to repeat his two new conditions. The Claimant once again discussed his new conditions with the Defendant but underscored that he "only wanted it if it would not alter the deal".

[82] Notwithstanding the Claimant's discussion with the Defendant on the morning of May 7th, 2004, there does not appear from the totality of the evidence led before me for there to have been any immediate communication between the Defendant and legal counsel to the Claimant's late father's estate. Instead, the Defendant appears to have waited until May 12th, 2004 before following-up on the Claimant's two new conditions.

[83] In that regard, there were two writings of note.

[84] First, on the correspondence to the Defendant from the legal counsel for the Claimant's late father's estate dated May 6th, 2004, there is a handwritten note, dated May 12th, 2004 which states that:

> Thomas wants house in same condition as they found it and reasonably clean on their departure.

[85] Second, the Defendant wrote again to legal counsel for the Claimant's late father's estate on May 12th, 2004, (in part) as follows:

> Further to my letter to you of May 3, 2004, and our subsequent telephone conversation, it is my understanding that we have now settled this proceeding on the following terms:
>
> …
>
> 9. The offer to purchase the real estate is contingent upon the premises being vacant at the time of closing and in the same condition as they existed at the time of the death of Murray Brown. As well, the premises will be reasonably clean after they have been vacated by the present occupants.

> I trust the foregoing is consistent with your understanding of the settlement and that you will confirm the consent of both [of the Claimant's sisters] to the terms of this settlement by May 14, 2004. [underlining and double underlining mine]

[86] Again, this correspondence was marked "without prejudice".

[87] The Defendant and legal counsel to the Claimant's late father's Estate spoke again after the former's correspondence of May 12th, 2004. Apparently, there were some errors in that correspondence.

[88] In paragraph 2 of "the following terms", the Defendant had referred to one of the Claimant's sisters when he ought to have referred to the other sister. In paragraph 5 of "the following terms", the Defendant had referred to a specific piece of the Claimant's late father's personal property in the possession of one of his sisters when he ought to have referred to several general pieces of that personal property.

[89] Accordingly, the Defendant followed-up with new correspondence to the legal counsel for the Claimant's late father's Estate on May 13th, 2004. This correspondence made the corrections to paragraphs 2 and 5 as referred to above and still concluded as follows:

> 9. The offer to purchase the real estate is contingent upon the premises being vacant at the time of closing and in the same condition as it existed at the time of the death of [the Claimant's late father], ordinary wear and tear accepted. As well, the premises will be reasonably clean at the after they have been vacated by the present occupants.
>
> I trust the foregoing is consistent with your understanding of the settlement and that you will confirm the consent of both [of the Claimant's sisters] to the terms of this settlement by May 14, 2004. [underlining mine]

[90] Again this correspondence was marked "without prejudice".

[91] What happened next was not contemplated by either the Claimant or the Defendant. The terms set out by the Defendant on behalf of the Claimant were rejected by legal counsel to the Claimant's late father's Estate.

[92] Notwithstanding the Defendant's "feeling" that he had reached a binding contract with legal counsel for the Claimant's late father's estate, the latter was clearly not

of the same mind. Rather, the legal counsel to the Claimant's late father's estate regarded the Defendant's correspondence to him of both May 12th, 2004, and May 13th, 2004, as offers to which his clients - the Estate and the sisters - were entitled to accept or reject. When they responded negatively, legal counsel to the Claimant's late father's estate had no choice but to inform the Defendant that there would no binding contract - at least on the terms and conditions then being proposed by the Claimant.

[93] According to the Defendant's recollection of the time, legal counsel to the Claimant's late father's estate had said that the Claimant's sisters had denied extending any authority to him to enter into a binding agreement with the Claimant on behalf of the late father's Estate. This was not consistent with the position taken by legal counsel to the Claimant's late father's Estate later when he later denied, in an Affidavit filed with the Supreme Court of Nova Scotia, that his exchanges with the Defendant were anything but his attempt to clarify the Claimant's offer for the subject property so that he could present it to the Claimant's sisters for their consideration.

[94] The Claimant and the Defendant then found themselves considering the Claimant's remedies - if any. By the time, the Claimant's *Testators' Family Maintenance Act* claim had already been set down for trial in the Supreme Court of Nova Scotia. In fact, one of the factors stated by the Defendant as having motivated the April 28th, 2004 correspondence to him from legal counsel to the Claimant's late father's Estate was that the latter did not want to go to trial and "wanted off of this [file] real bad."

[95] One of the Claimant's clear options, therefore, was to simply permit his *Testators' Family Maintenance Act* claim to be resolved at the trial which had already been set down. If true that legal counsel to the Claimant's late father's Estate did not want to go to trial and "wanted off of this [file] real bad" - as suggested by the Defendant - the matter's slow drift towards trial would likely have produced the type of pressure on the Claimant's sisters which would have - or at least could have - resulted in the form of settlement which the Claimant had initially proposed, albeit somewhat later.

[96] But the Defendant proposed another option to the Claimant. That option entailed an Application (now a Motion) to the Supreme Court of Nova Scotia, in Chambers, seeking an Order forcing the purported settlement of the Claimant's outstanding claims on the terms and conditions outlined by the Defendant in his correspondence to legal counsel for the Claimant's late father's Estate of May 12th (or May 13th) 2004.

[97] With respect to any such purported settlement, the Defendant advised the Claimant that the latter had an "iron clad deal". Though this nomenclature was initially employed by the Claimant in describing the Defendant's comments to him, it was later adopted by the Defendant himself. In fact, in response to questions posed to him by his own counsel, the Defendant testified that the Claimant proceeded with an application to enforce the terms set out in the May 12th or May 13th, 2004 correspondence "relying on what I told him". In that regard, the Defendant also testified that:

> I'd be kidding myself to say anything but that I told him to proceed with the application [to enforce settlement] because we had a binding deal. [underlining mine]

[98] The Claimant found the Defendant's advice about the Application to enforce the purported settlement attractive. In that regard, the Claimant was motivated by two things.

[99] First, the Claimant was looking for the quickest resolution available to his *Testators' Family Maintenance Act* claim.

[100] Second, the Claimant was a man of limited financial resources. He could not afford to waste them. He was thus attracted to the Defendant's representations to him that the Application to enforce the purported settlement could be undertaken far more quickly and far more inexpensively than would have been the case had the matter been permitted to drift into, or even towards, trial.

[101] Recognizing that he would be called upon to file an Affidavit and perhaps give evidence - at least through cross examination - in support of the Application to enforce the

purported settlement he was recommending to the Claimant, the Defendant advised the Claimant that he would have to retain other counsel at least for the actual courtroom aspects of the Application.

[102] The Claimant and the Defendant next discussed who the other counsel should be. The two settled on the Claimant's initial counsel - the one whom the Defendant had replaced.

[103] While the Claimant had discussion with his initial counsel and his initial counsel raised with the Defendant the basis upon which the Application to enforce the purported settlement would be made, there was no indication that the Claimant's initial counsel was ever retained.

[104] Thereafter, the Defendant proposed to the Claimant that he retain yet another counsel for the purposes of the Application. Though this third counsel was effectively retained by the Defendant on behalf of the Claimant for the court room aspects of the Application, the Defendant, himself, tended to the required Interlocutory Notice, his own Affidavit in support of the Application, the necessary filings and the preparation of the Pre-Application brief and related Book of Authorities. The Defendant also testified that the third counsel "didn't do anything I didn't tell him to do." The legal services from the third counsel were billed to the Claimant by the Defendant.

[105] The Claimant's Application to enforce the terms of the purported settlement said by the Defendant to have been set out in his correspondence to legal counsel to the Claimant's late father's estate dated May 12th and May 13th, 2004, was unsuccessful.

[106] In fact, just at the outset at the hearing of the Application, the Claimant's third counsel, the one who had been retained to handle the courtroom aspects of the Application, advised the Claimant that the likelihood of the success of the Application was poor.

[107] According to the Claimant's testimony, he said to the third counsel just prior to the commencement of the Application words to the effect of "we're going to win this, aren't we" and the third counsel responded to the effect of "not likely". Those were the first and only dealings the Claimant had with the third counsel. All of his other dealings with respect to the Application to enforce the purported settlement had been with the Defendant.

[108] Though the revelation by the third counsel about the prospects for the Application's success "shocked" the Claimant given the Defendant's earlier advice to him that an "iron clad deal" had been negotiated with legal counsel for the Claimant's late father's Estate, it was then too late to retreat from the Application or even to re-group in an effort to determine the root cause of the third counsel's doubts. The Application was only seconds or minutes from actually commencing.

[109] Moreover, the Claimant had already essentially paid for the Application in the sense that all of the Defendant's preparatory work had been done. The Defendant's Affidavit was before the Court and he was present to give additional *viva voce* testimony and to be cross examined.

[110] The Defendant's viva voce testimony in support of the Application was not as strong as the Claimant had hoped it would be. In fact, in the Defendant's *viva voce* testimony in support of the Application he acknowledged that he knew legal counsel for the Claimant's late father's Estate to have been engaged in on-going discussions with the Claimant's sisters with respect to the terms upon which they were prepared to settle the Claimant's *Testators' Family Maintenance Act* claims.

[111] Additionally, and though the Defendant had been highly critical of the Affidavit filed in response to the Application by legal counsel for the Claimant's late father's Estate, there was no challenge to that Affidavit through cross examination in the course of the Application.

[112] Moreover, there were several aspects of the Defendant's *viva voce* testimony in support of the Application which accorded with the deposed evidence in the Affidavit of legal counsel to the Claimant's late father's Estate.

[113] The observations made to the Claimant about the likely success of the Application by the third counsel retained at the behest of the Defendant turned out to have been accurate. In fact, Warner, J. of the Supreme Court of Nova Scotia, in Chambers, arrived at the conclusion that the correspondence of May 6th, May 12th and May 13th, 2004 could not have amounted to anything more than an offer being extended by the Defendant on behalf of the Claimant for the Claimant's sisters to thereafter consider and either accept or reject.

[114] On dismissing the Application, Warner, J. ordered costs payable by the Claimant in favour of his late father's Estate. Unclear from the testimony before me was whether those costs were agreed upon or whether they are set by Warner, J. Regardless, the costs were in the amount of $1,250. Led into evidence was the Claimant's receipt for his payment of those costs.

[115] Since the dismissal by Warner, J. of the Claimant's Application to enforce the purported settlement of his *Testators' Family Maintenance Act* claim, there has been considerable rancour between the Claimant and the Defendant. There was a somewhat harsh face-to-face discussion between the two in September of 2004. That discussion was recorded surreptitiously by the Claimant. It later formed part of the basis for a complaint by the Claimant to the Nova Scotia Barristers' Society over the quality of the Defendant's advice and services on the subject Application.

[116] The Defendant also counselled the Claimant to take the decision of Warner, J. on appeal. The Defendant described the decision by Warner, J. dismissing the Application to enforce the purported settlement of the Claimant's *Testators' Family Maintenance Act* claim as "clearly wrong".

[117] By his current action, the Claimant seeks the recovery of the legal fees, disbursements and related taxes he paid to the Defendant for the Application. He also seeks recovery of the fees, disbursements and taxes he paid to the third legal counsel who conducted the court room aspects of the Application. Finally, he seeks the recovery of the legal costs he was required to pay to his late father's Estate upon the Application being dismissed.

[118] The Claimant by his Amended Statement of Claim has pleaded negligence, negligent mis-statement and breach of contract on the part of the Defendant. The Claimant has pleaded that he relied on the Defendant's advice in determining that he would proceed with the Application to enforce the purported settlement of his *Testators' Family Maintenance Act* claim. The Claimant has pleaded that the Defendant's advice was given to him in circumstances in which the Defendant would have known or ought to have known that the advice would have been relied upon. Finally, the Claimant has pleaded that he is entitled by way of damages to a refund of the legal fees, disbursements and related taxes he paid to the Defendant which proved - at least to him - to have been of no value together with the costs he was required by Warner, J.'s Order to pay to his late father's Estate.

[119] The Defendant has defended the Claimant's claims on the basis that his services to the Claimant constituted neither a breach of contract nor a breach of any applicable standard of care. As the Defendant's defence developed, also argued on his behalf, was that at the very most, his services to the Claimant constituted an error in judgment for which he cannot be held liable in damages as matter of law.

ISSUES:

1. Was the Defendant careless in his delivery of legal advice and legal services to the Claimant?

2. If the Defendant was careless in his delivery of legal advice and legal services to the Claimant, was his advice that the Claimant had "an iron clad deal" in the settlement of his *Testators' Family Maintenance Act* given negligently or did it amount only to an error in judgment?

3. If the Defendant's advice that the Claimant had "an iron clad deal" in the settlement of his *Testators' Family Maintenance Act* action was given negligently, did the Claimant sustain a loss for which the Defendant is now liable in damages?

ANALYSIS:

(a) An Appeal From the Decision by Warner, J.?

[120] Argued perfunctorily by Mr. Thurlow on behalf of the Defendant was that the Claimant could always have taken Warner's J.'s decision on appeal, as the Defendant had urged him to do. I reject that argument.

[121] Established above is that the Claimant was of limited resources. He only pursued the Application recommended to him by the Defendant because he was looking for a quicker and less expensive resolution of his *Testators' Family Maintenance Act* claim.

[122] Having been unsuccessful on the Application, the Claimant had no choice but to gird himself and preserve what remaining resources he had for the pending trial of his *Testators' Family Maintenance Act* claim.

[123] Though an appeal was a bare or technical possibility, even the Defendant had put its cost at least $2,000. When the Claimant inquired of him about costs, the Defendant acknowledged that should the Claimant be unsuccessful on the appeal, he would be responsible in additional costs to his late father's Estate.

[124] Additionally, there was a very significant legal matter which stood in the way of any successful appeal from Warner, J.'s dismissal of the Application to enforce the purported settlement of the Claimant's *Testators' Family Maintenance Act* claim. As the remedy sought by the Claimant in the Application was a discretionary one and as Warner, J. had exercised the Court's discretion on the basis of a more than plausible interpretation of the documents led into evidence, the likelihood of a successful appeal was remote.

[125] In *Ameron International Corporation v. Sable Offshore Energy Inc.*, 2007 NSCA 70, the Nova Scotia Court of Appeal (per: Roscoe, J.A.) addressed the standard of review applicable to an appeal from a Chambers Judge's dismissal of an application to strike. At paragraph 10 of the decision, Roscoe, J.A. held that:

> It is well established that on an appeal from an interlocutory order involving the exercise of discretion, such as a dismissal of an application to strike a pleading or a part thereof, this court will not interfere unless wrong principles of law have been applied or a failure to intervene would result in a patent injustice. (See for example: National Bank Financial Ltd. v. Mahoney, [2005] NSCA 139 at para 9, Austen v. Forbes Leasing Ltd., NSCA 25 at para 3; Nova Scotia (Attorney General) v. MacQueen, 2007 NSCA 33 at para 16.)

[126] The Application recommended by the Defendant to the Claimant which was heard by Warner, J. did not present either extensive evidence or complex legal principles. Even the Defendant conceded in cross examination before me that the legal principles at play in the Application were very basic. He in fact referred to those legal principles as "first year law school stuff".

[127] In looking broadly at the evidence led in support of the Application, Warner, J. simply concluded that the Defendant and legal counsel for the Claimant's late father's Estate had simply not formed a contract. There was, with obvious respect to the Defendant, an ample factual basis for Warner, J. to have arrived at that conclusion.

[128] Given the standard of review set out by the Nova Scotia Court of Appeal in Ameron, it would have been very highly unlikely that Warner, J.'s reasoning would have been set aside. In short, Warner, J. was not "clearly wrong". Had the Claimant followed

the Defendant's advice to appeal, the only reasonably predictable result was additional fees and costs thrown away, and, it least potentially therefore, a claim in the instant case which would have been larger than the one now being considered

[129] In the result, it is no answer to the Claimant's predicament, *vis-à-vis* the advice provided to him by the Defendant, to argue that he could have taken Warner, J.'s decision in the Application on appeal. Again, with respect, embarking on the quest for such a remedy was very unlikely to have been successful.

(b) Was There an Actionable Misrepresentation by the Defendant?

[130] For an appropriate definition of an actionable misrepresentation, one need look no further than the decision of the Supreme Court of Canada (per: Iacobucci) in *Queen v. Cognos Inc.* [1993] 1 S.C.R. 87.

[131] Queen had its antecedents in the concurrently-released decision of the Supreme Court of Canada (per: La Forest, J.) in *BG Checo International Limited v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 1. Queen also had its antecedents, perhaps to an even greater extent, in the general comments of the House of Lords (as it was) (per: Lord Morris of Borth-y-Gest) in *Hedley Byrne & Company v. Heller & Partners Limited*, [1963] 2 All E.R. 575.

[132] At issue in *Hedley Byrne* was a representation by a bank that one of its customers had sufficient financial standing to justify a third party in continuing to do business with that customer. In the result, the third party, an advertising agency, placed considerable advertising on behalf of the bank's customer on the strength of the bank's representation that the customer had sufficient financial standing to pay for it.

[133] When the bank's customer went into default on its obligations to the advertising agency, the latter took action against the bank contending that it had been the

victim of the bank's negligent misstatement. The bank defended on two alternative grounds.

[134] First, the bank said that it owed no duty of care given the lack of a formal relationship between itself and the advertising agency.

[135] Second, even if the bank did owe a duty of care, its representations with respect to its customer's financial standing were made to the advertising agency in circumstances which were "without responsibility".

[136] On the general issue of liability for negligent misstatements, Lord Borth-y-Gest held (at p. 594), that:

> … I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.

[137] In a concurring decision, Lord Devlin took that analysis, at least at it pertains to the instant case, a little bit further. In doing so, Lord Devlin held (at p. 611) that:

> I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former, *Nocton v. Lord Ashburton* has long stood as the authority and for the latter there is the decision of Salmon, J. in *Woods v. Martins Bank Limited* which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.

[138] In the circumstances of the instant case, there could perhaps be nothing clearer than the "general relationship" between the Claimant and the Defendant. The Claimant was a client. He had gone to the Defendant in particular seeking the Defendant's legal advice and legal services. Is so doing, the Claimant made it clear to the Defendant that he had been seeking a level of legal knowledge and expertise and a quality of legal service which he did not think he had been receiving up until that time.

[139] Upon approaching the Defendant, the Claimant was told by the Defendant, in essence, that the Defendant was a much better legal counsel than the one he would be replacing and that he could therefore justify a much higher hourly docket rate than the Claimant had been paying up until that time.

[140] If there was any doubt in my mind, notwithstanding *Hedley Byrne*, about the general duty owed by the Defendant to the Claimant which respect to the advice given in support of the Application to Warner, J. to enforce the purported settlement of the Claimant's *Testators' Family Maintenance Act* claims, the doubt would be resolved by reference to the much more specific legal principles canvassed by the Supreme Court of Canada in Queen (supra).

[141] The appellant in *Queen* was a chartered accountant. He had been working in Calgary in a position which he did not find challenging and which he did not therefore enjoy.

[142] When the respondent in *Queen* advertised for an accountant to join one of its accounting software development teams, the appellant jumped at the chance.

[143] The appellant was one of six chartered accountants who were interviewed by the respondent. In the course of the appellant's interview, he was told by one of the respondent's accounting software development team leaders that the position which the respondent was attempting to fill was for "a major project which would be developed over a period of two years (the 'primary development period') with enhancements and

maintenance thereafter, and that the position being interviewed for would be needed throughout this period".

[144] What the appellant was not told by the respondent's development team leader in the course of the interview was that the respondent had not fully committed itself to the project. Accordingly, what was represented to the appellant by the respondent's project team leader in the course of the interview as a "sure thing" was little more than a bare potential software development initiative.

[145] On the strength of the respondent's team leader's representations in the course of the interview, the appellant accepted the position later offered to him by the respondent. The appellant then resigned his position in Calgary and moved, with his family, to Ottawa, where the respondent was located.

[146] Soon after the commencement of his position with the respondent, the appellant learned that the project for which he thought he was being hired was prospective only and that, in the result, he could and likely would be shuffled through a variety of much less interesting and therefore much less challenging accounting positions.

[147] The appellant's relationship with the respondent was eventually terminated by the latter. The respondent relied in that instance on some of its contractual language with the appellant which permitted his termination without cause and without much more than a month of notice.

[148] The appellant took action against the respondent, effectively in "wrongful dismissal". The appellant's added contention, however, was that he had been the victim of a negligent or a fraudulent misrepresentation by the respondent's project team leader in the course of the interview referred to above.

[149] The appellant contended, further, that but for the negligent or fraudulent misrepresentation, he would not have resigned his position in Calgary, would not have taken the position offered to him by the respondent, would not have relocated with his

family to Ottawa, and would not have been subject to the financial loss he had incurred as a result of all of that.

[150] Citing *Hedley Byrne*, the trial judge in the appellant's claim found in his favour on the basis of the "special relationship" which existed between him and the respondent as a result of the representations made to him by the latter's project team leader. In turn, that special relationship was held to have given "rise to a duty of care with respect to the representations made during the hiring interview". The fact that these representations were "pre-contractual" did not alter the trial judge's view of them.

[151] The Ontario Court of Appeal (per: Finlayson, J.A.) was highly critical of the trial judge's approach. By that time, the case involved the appellant's allegation of only a negligent, as opposed to a fraudulent, misrepresentation. Nevertheless, Finlayson, J.A. held that the representation by the respondent's project team leader could not have been negligent as it had been honestly believed by him at the time he made it. In the assessment by Finlayson, J.A. of the respondent's project team leader's representations to the appellant: "[w]hat he said was truthful, he believed in it, that was enough."

[152] The Supreme Court of Canada roundly rejected the Ontario Court of Appeal's reasoning and restored the trial judge's award in favour of the appellant. In doing so, the Supreme Court of Canada applied the reasoning of the House of Lords in *Hedley Byrne.*

[153] Commencing at p. 29, the Supreme Court of Canada held that:

> The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements:
>
> (1) That 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 said misrepresentation;

> (4) The representee must have relied, in a reasonable manner on said negligent misrepresentation; and
>
> (5) The reliance must have been detrimental to the representee in the sense that damages resulted.

[154] As the respondent in *Queen* had conceded the "special relationship" existing as between itself and the appellant at the job interview stage, the Supreme Court of Canada did not have to consider that definition. Regardless, it would be impossible to see how there could have been a "special relationship" as between the respondent and the appellant in *Queen* but not as between the Defendant and the Claimant in the instant case. In fact, given the contractual relationship extant at the material times between the Defendant and the Claimant on the strength of the retainer and given the representations by the Defendant to the Claimant on which that contractual relationship had been formed, it would be impossible to say that no "special relationship" existed as between the two of them.

[155] Returning to *Queen*, it was held by the Supreme Court of Canada (at p. 36) that:

> It was foreseeable that the appellant would be relying on the information given during the hiring interview in order to make his career decision. It was reasonable for the appellant to rely on said representations. There is nothing before this Court that suggests that the respondent was not, at the time of the interview or shortly thereafter, assuming responsibility for what was being represented to the appellant by [the project team leader]. As noted by the trial judge, [the project team leader] discussed the [pending] project in an unqualified manner, without making any relevant caveats. The alleged disclaimers of responsibility are provisions of a contract signed more than two weeks after the interview. For reasons that I give in the last part of this analysis, these provisions are not valid disclaimers. They do not negate the duty of duty of care owed to the appellant or prevented from arising as in *Hedley Byrne* and *Carman Construction [Ltd. v. Canadian Pacific Railway Company*, [1982] 1 S.C.R. 958]. It was foreseeable to the respondent and its representative that the appellant would sustain damages should the representations relied on prove to be false and negligently made. There was, undoubtedly, a relationship of proximity between the parties at all material times. Finally, it is not unreasonable to impose a duty of care in all of the circumstances of this case; quite to the contrary, it would be unreasonable <u>not</u> to impose such a duty. In short, therefore, there existed between the parties a 'special relationship' at the time of the interview. The respondent and its representative [the project team leader] were under a

> duty of care during the pre-employment interview to exercise reasonable care and diligence in making representations as to the employer and the employment opportunity being offered. [underlining in the original]

[156] In my view, the comment by the Supreme Court of Canada in *Queen* about the respondent not "making any relevant caveats" is apposite this case.

[157] The testimony before me regarding the Claimant's general strategic motives with respect to his *Testators' Family Maintenance Act* claim was clear. The Claimant required senior, reputable counsel to prosecute his claims aggressively and in a timely fashion. He also had limited resources which he had to conserve for only the most essential elements of his claims.

[158] Against that backdrop, the Claimant sought generally to ensure that the advice he was receiving from his legal counsel was consistent with those broad ends. Had he been advised by the Defendant that the proposed Application to enforce the purported settlement of his *Testators' Family Maintenance Act* might not be successful or, better, was not likely to succeed (the suggestion of the third counsel), it is well beyond likely that the Claimant would not have instructed the Defendant to proceed as he did. This seems to me to be consistent with the purview of "universally accepted albeit hypothetical 'reasonable person' " referred to by the Supreme Court of Canada at p. 41 in Queen.

[159] As regards the general purview of the "reasonable person", the Supreme Court of Canada in *Queen* held at p. 43 that:

> There are many reported cases in which a failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made: … *V.K. Mason Construction [v. Bank of Nova Scotia,* [1985] 1 S.C.R. 271]. In the last case, Wilson, J. said the following speaking for this court (at p. 284):
>
> > The statement was negligent because it was made without revealing that the bank was giving an assurance based solely on a loan arrangement which Mason had already said was insufficient assurance to it of the existence of adequate financing.

[160] In the circumstances of the Claimant in the instant case, the likelihood of the success (or not) of the Application proposed by the Defendant to enforce the purported settlement of the Claimant's *Testators' Family Maintenance Act* claim could not have been other than "highly relevant" or "highly pertinent", to use the terminology adopted by the Supreme Court of Canada in *Queen*.

[161] Though there is no suggestion in either the arguments which have been made before me or in these reasons that the Defendant did not honestly believe that a settlement of the Claimant's *Testators' Family Maintenance Act* claim had been concluded with legal counsel for the Claimant's late father's Estate, the fact of that honest belief, alone, is not relevant to the required analysis.

[162] In referring again to *Queen*, the Supreme Court of Canada in Queen has observed (at p. 45) that:

> Although the representator's subjective belief in the accuracy of the representations and his moral blameworthiness, or lack thereof, are highly relevant when considering whether or not a misrepresentation was fraudulently made, they serve little, if any, purpose in an inquiry into negligence. As noted above, the applicable standard of care is that of the objective reasonable person. The representor's belief in the truth of his or her representations is irrelevant to that standard of care. The position adopted by the Court of Appeal seems to absolve those who make negligent misrepresentations from liability if they believe that the representations are true. Such a position would virtually eliminate liability for negligent misrepresentation as liability would result only where there is actual knowledge that the representation made is not true; the basis of <u>fraudulent</u> misrepresentation. In essence, the Court of Appeal has returned to the pre-*Hedley Byrne* state of law where a misrepresentation had to be accompanied by moral blameworthiness in order to support an action in tort for damages: see, in this respect, my discussion in *B.G. Checo*, of the context in which *Hedley Byrne* was decided. The question facing the trial judge on the negligence issue was not whether [the project team leader] was truthful or believed in what he was representing to the appellant. The question was whether he exercised such reasonable care as the circumstances required so as to ensure the accuracy of his representations.
>
> The trial judge found that the respondent's representative had acted negligently in making the misrepresentations to the appellant about the nature and existence of the employment opportunity and, in particular, the extent of the respondent's commitment to the [pending] project. He found that [the project team leader] was aware, based upon his expertise in the field of computer development, that until there was a feasibility study in which cost estimates had been submitted, considered and approved by

> senior management, one could not say that the respondent had made a firm commitment to the project as [the project team leader] envisaged it and as he described it to the appellant in the interview. [underlining in the original]

[163] With the Supreme Court of Canada having arrived at that conclusion in *Queen*, it is difficult for me to view the representations made by the Defendant to the Claimant in the instant case as having had any lessor a binding effect. In short, if the project team leader in *Queen* could be held liable for failing to properly articulate the potential limits of the project for which the appellant was being considered, there would seem to me to be little available analysis but that the Defendant could be held liable in the instant case.

[164] Accordingly, and subject only to what I will set out below with respect to the distinction between negligence and errors of judgment from the perspective of the attachment of liability for professional carelessness, it is my conclusion, based on *Hedley Byrne* and *Queen*, that the Defendant and Claimant in the instant case were in a "special relationship", that the Defendant's representation with respect to the "iron clad" nature of the purported settlement of the Claimant's *Testators' Family Maintenance Act* claim was inaccurate, that the representation was made by the Defendant carelessly, that the Claimant relied in a reasonable manner on the representation and that the Claimant's reliance on the representation exposed him to party/party costs and to a legal fee account for services which were valueless to him.

(c) Negligence or Error of Judgment?

[165] Submitted on behalf of the Defendant was that his advice to the Claimant with respect to the application to enforce the "iron clad" settlement of the Claimant's *Testators' Family Maintenance Act* claims was, at worst, an error of judgment and, therefore, not actionable as a matter of law.

[166] In Campion, John A. and Dimmer, Diana W., "Professional Liability in Canada", Thomson Reuters, Toronto, 1994 (Looseleaf; updated to December 2009), the learned authors posit (at p.7-38) that:

> A barrister's exposure to civil liability claims depends on the type of services being performed by the lawyer. Even though Canadian courts have rejected a barrister's immunity to civil liability claims for the conduct at trial, there is still a reluctance to find liability against a barrister in these circumstances and other circumstances which involve the exercise of judgment. However, there are other steps which are performed by barristers which often attract liability such as the failure to commence an action within the limitation period, the failure to diligently prosecute an action, the failure to present offers of settlement to the client and the failure to carry out the client's instructions.

[167] The "reluctance" referred to in the above passage is further explained by the learned authors (at p. 7-42.1) as follows:

> The availability of an action by a client for breach of contract or negligence against his lawyer for the lawyer's conduct in defending or prosecuting a civil or criminal court case is limited. Many of the decisions made by a barrister in a court room or in preparation for a trial involve the exercise of judgment. Although Canadian courts have rejected granting immunity to a barrister for civil liability claims in respect of the conduct of litigation, a barrister will not be found negligent for mere errors in judgment. Earlier cases have suggested that an error must be egregious in order to constitute negligence, although later cases have criticized this approach.

[168] Putting his principal argument somewhat differently, it was also submitted on behalf of the Defendant that his advice to the Claimant regarding the Application to enforce the "iron clad" purported settlement of his *Testators' Family Maintenance Act* claims could not have been other than an "error of judgment" as it did not approach an error which was "egregious".

[169] For that argument, the Defendant's counsel relied on the decision of the Supreme Court of Nova Scotia (per: Richard, J.) (as he was) in *Grand Anse Contracting Limited and Robie Wayne MacDonald v. Richard J. MacKinnon* ((1992), S.H. No. 78885, Nova Scotia Law News: S340/30, not reported and no neutral citation available). It was

there on the seventh page of the decision (neither the pages nor the paragraphs of the decision are numbered) that Richard, J. held that:

> It is clear from the authorities that the lawyer's conduct in such circumstances must extend appreciably beyond the realm of an error of judgment and that the liability ought to be imposed only in clear and exceptional cases. The benchmark case appears to be the Ontario case of *Demarco v. Ungaro* (1979), 21 O.R. (2d) 373, a decision of the Ontario High Court (as it then was). This case has gained currency in Canada beyond that normally attributed to a trial court decision perhaps due to the precise and well-sculpted reasoning of Mr. Justice Horace Krever. At page 692 et seq. of the *Demarco* decision Krever, J. said:
>
> > I have come to the conclusion that the public interest … in Ontario does not require that our Courts recognize an immunity of a lawyer from action for negligence in the suit of his or her former client by reason of the conduct of a civil trial … . I emphasize again that I am not concerned with the question whether the conduct complained about amounts to negligence. Indeed, I find it difficult to believe that a decision made by a lawyer in the course of a case will be held to be negligence as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a court will conclude that it is negligence. [underlining mine]

[170] "Precise and well-sculpted" though Krever, J.'s reasons for decision in *Demarco* may have been, they simply did not support the conclusion by Richard, J. in *Grand Anse* that a lawyer's error would have to be "egregious" before it could he held as the basis for a claim by a client in negligence.

[171] In fact, that very notion, which has been articulated by countless judges in innumerable courts well beyond Richard, J. and well beyond the Supreme Court of Nova Scotia, has a genesis of dubious merit which has since been debunked in a number of highly persuasive decisions.

[172] To begin with "egregious" has a meaning which entails or connotes a marked departure from normal behaviour. The word has been defined in terms of conduct in such authoritative publications as the *Oxford English Dictionary* as "remarkable in a bad sense; gross, flagrant, outrageous".

[173] It would thus appear from a literal reading of *Demarco* that for a lawyer's carelessness to found a claim in negligence, it would have to be extreme. Short of that, the literal reading of *Demarco* would contend that all remaining aspects of a lawyer's lack of care would be "mere error in judgment" and therefore not actionable.

[174] Noted above was the criticism for this fairly broad limitation articulated by text writers such as Campion and Dimmer. The reason for the criticism is that *Demarco* and its effects have been consistently overstated by the many subsequent authorities which have relied on it - *Grand Anse* (*supra*) being but one of them.

[175] Although *Demarco* certainly does use the term "egregious" in describing a type of lawyer's error which would be actionable, the comment was really only made by Krever, J. in passing and did not even form a part of the *ratio* of the decision.

[176] Rather than addressing succinctly the standard of care applicable to a lawyer's error in the conduct of a case, *Demarco* addressed whether lawyers in Ontario carrying out legal services akin to those provided by English barristers should be immune from claims in negligence. Krever, J. decided that no such immunity applied. That was the sum and substance of the decision.

[177] The distinction between what *Demarco* actually stands for and how it has been incorrectly applied to subsequent decisions has been highlighted in the decision of the Saskatchewan Court of Appeal (per: Jackson, J.A.) in *Hagblom and George Hagblom Masonry Limited v. Henderson and Campbell*, 2003 SKCA 040.

[178] At issue in *Hagblom* was the allegation that a masonry contractor's defence counsel in a piece of civil litigation had been negligent in failing to advise him of the existence of the other side's expert's report contending his negligence and in failing to advise him to retain an expert of his own. In later proceedings, it appeared clear that if the defence counsel had obtained an expert's evaluation of the fire loss said to have been attributable to the masonry contractor's negligence, the initial finding against the masonry contractor would not likely have been made.

[179] In considering *Demarco* from the perspective by which it was relied upon by Saskatchewan Court of Queen's Bench, Jackson, J.A. held (at para. 63) that:

> In my respectful opinion, the second trial judge erred in his interpretation of *Demarco*. While Krever J. used the word 'egregious', this is simply an illustration of a clear case against barrister's immunity from negligence suits, rather than a statement of the standard of care expected of a lawyer. The focus of *Demarco* was whether barrister's immunity as set forth in Rondel [v. Worsely, [1969] 1 A.C. 91] exists in Canada and not as to what is the standard of care. But in any event, Krever J. did not establish a standard of care for lawyers for the management or preparation of a case. His obiter remarks are directed to the conduct of the case at trial.

[180] Preferring the standard established by the Supreme Court of Canada (per: LeDain, J.) in *Central Trust Company v. Rafuse,* [1986] 2 S.C.R. 147, that a lawyer "is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken …" Jackson, J.A. continued (starting at para. 68) that:

> Thus, these cases, which cite *Demarco* whose ratio does not fix a standard of care for barristers, but, rather, holds that barristers do not have immunity, cannot be taken as authority for the proposition that the standard of care for a barrister in preparing for trial is not to commit clear and egregious error. Thus, I must conclude that the second trial judge erred when he characterized the applicable test for this case to be 'care and egregious error'.
>
> To find a different standard of care for lawyers performing barristers' work than for those doing solicitors' work is really a means of introducing barristers' immunity in a different form, and should probably be rejected for the same reasons. But since we are not considering negligence arising during the actual running of the trial, we do not need to decide whether that conduct demands a different standard of care than that available for trial preparation. We need look no further than Rafuse and the authorities upon which it relies to establish the required standard of care in this case. The question which the trial judge should have asked himself is whether [the defence counsel] exercised reasonable care, skill and knowledge when he undertook to perform the services required by his client and did not consult and expert.
>
> Nor in my view can this be considered a 'mere error of judgment' as though the decision were one hastily made or in the exigencies of the moment. If the error is one which a lawyer exercising the necessary care, skill and knowledge would not make, it is difficult to conceive of it as being a 'mere error of judgment'. A converse is also no doubt true. If a decision can be classified as mere error of judgment, a lawyer would not be held to have

> fallen below the requisite standard of care. The decision not to consult an expert, however, in light of an expert's report from the other side fixing one's client with blame in a fire causation case where no other evidence exists to rebut the expert's conclusion as to cause cannot be disposed of by calling it a 'mere error of judgment'.
>
> In conclusion on this part, to determine whether a lawyer in preparing for trial has been negligent, the court does not ask whether the lawyer has committed an egregious error. The lawyer is required to bring reasonable care, skill and knowledge to the performance of the professional service which he or she has undertaken to perform. [underlining mine]

[181] Shortly after my having come across *Hagblom* subsequent to the hearing of the instant matter, I highlighted the authority for counsel and asked if there was any interest in supplementary submissions on it.

[182] Mr. Dexter essentially demurred on behalf of the Claimant. He was generally of the view that *Hagblom* spoke specifically-enough on the applicable standard of care that he need not say more.

[183] Mr. Thurlow made a supplementary submission of behalf of the Defendant on March 31st, 2010. In Mr. Thurlow's submission, *Hagblom* at least implies that before finding a lawyer liable in negligence, a court would have to have very cogent evidence on the applicable standard of care and that the lawyer departed from it.

[184] Mr. Thurlow went on to submit that the Claimant's allegations against the Defendant boil down into two very basic points. First, that the Defendant mistakenly advised the Claimant on the strength of his case on the suggested Application to enforce the purported settlement. And second, that the Defendant failed to advise the Claimant that he might lose.

[185] Mr. Thurlow continued that the Defendant's error on the strength of the case on the suggested Application to enforce the purported settlement really only entailed a "judgment call" and thus could not found a claim in negligence. As for the failure to advise the Claimant that he "might lose", Mr. Thurlow essentially acknowledged that although the Defendant may have fallen below the requisite reasonable care, skill and knowledge

threshold, there was no expert evidence to say so. Implicit in this submission is that I could not speculate on what precise standard applied to the Defendant and therefore that he had fallen below it.

[186] Intriguing and carefully put though Mr. Thurlow's submission has been, I have, on careful consideration rejected it.

[187] With obvious respect, I regard a lawyer's assessment of the strength of any given case as something which may range from a mere error of judgment on the one end to negligence on the other.

[188] In matters of factual and legal complexity, inconsistent authorities or where the remedy being considered is a novel one, the lawyer's assessment as to the likelihood of success, will, in my view, be held to a much lower standard.

[189] In matters which are routine, however, and which relate only to straightforward uncontested evidence and basic legal principles, the lawyer's assessment as to the likelihood of success, will, equally in my view, be held to a much higher standard.

[190] Further, and in circumstances such as those in the instant case, where there was essentially no dispute on the facts and the applicable legal principles were, as put by the Defendant, "first year law school stuff", the lawyer's assessment as to the likelihood of success, will, again in my view, be held to the highest standard.

[191] On the question of the requirement for the definition of the applicable standard through expert evidence, I again reject Mr. Thurlow's thoughtful and careful argument on behalf of the Defendant.

[192] In that regard, it is incumbent upon me to consider the Court's general objects as set out pursuant to the provisions of Section 2 of the *Small Claims Court Act*: the informal and inexpensive adjudication of claims according to established principles of law and natural justice. Against that somewhat proletarian backdrop, the suggestion that the

Claimant in the circumstances of the instant case should put to the expense of expert reporting and testimony on his behalf would appear anathema.

[193] More particularly, the issues posed by this case are not complex. The Defendant essentially advised the Claimant that his success on the impugned Application was a sure thing. In doing so, the Defendant appeared to ignore the legal and factual bases upon which a sure thing, in context, could be established. The Defendant also appeared to ignore the fact that the Claimant could really not afford to lose. To hold that expert evidence would be required by the Claimant to establish that these two factors fell below the standard of care applicable to the senior litigation counsel the Claimant had retained would appear to me to defeat the very purpose of this Court.

[194] Additionally, expert evidence on applicable standards of care has not been universally embraced as the only means of proof in cases such as the instant one. In fact, in Jackson, Rupert M. and Powell, John L., "*Professional Negligence*", Sweet & Maxwell, London, 1987, the learned authors are clear at para. 1.26 that: "evidence as to general and approved practice, although of very considerable importance, is not automatically conclusive in every case." That is because the courts are not bound to accept any profession's stated standards regardless of how lax they might be.

[195] Thus, in the context of the instant case, I would have been slow to accept, even on expert evidence in support, that the standard of care applicable to the Defendant in the circumstances of the instant case was so low that it would have permitted him to have unconditionally promoted the impugned Application to the Claimant as a "sure thing" and then escape liability for the Claimant's related losses when the Application was not successful. In my view, such a finding would tend to make a mockery of *Hagblom* and the authorities upon which it was based.

[196] Though trite that *Hagblom* is not binding on courts in Nova Scotia, it would seem to me that just about any well-reasoned Canadian Court of Appeal decision ought to be persuasive to just about every Small Claims Court Adjudicator. And, if my reliance on

Hagblom requires any additional comfort, I have found it in the Ontario Court of Appeal decision (per: Doherty, J.A.) in *Folland v. Reardon*, [2004] O.J. No. 434.

[197] The issue in Folland was the quality of representation an accused had received in a criminal case. The accused had been charged with sexual assault but denied any wrongdoing. While he conceded that the complainant had been a victim of forced sexual intercourse, he suggested that it was his friend who had assaulted the victim and that she was simply mistaken as to her allegation that it had been him.

[198] The accused was nevertheless convicted at trial and sentenced to a lengthy prison term. He later learned that the police, in the course of their investigation, had recovered a pair of men's underwear at the scene of the assault and that it had been found to have been stained with semen. The DNA extracted from the semen matched that which had been found on the underwear which the victim had put on after she had been assaulted and before she had been taken to the hospital.

[199] On appeal, the accused's counsel was able to establish that the semen matched the friend who had been suspected by the accused all along. That fact having raised reasonable doubt in favour of the accused, a new trial was ordered. Thereafter, the Crown elected not to proceed.

[200] For whatever reason, the accused's trial counsel saw no reason to seek the testing of the underwear in an effort to establish if it had in fact been stained with semen and, if so, to whom the semen had belonged.

[201] Upon the determination by the Crown that it would not proceed with the new trial of accused, he commenced an action in negligence against his trial counsel. He secured expert evidence from a prominent criminal lawyer who reported - and testified - that the accused's trial counsel had made three glaring errors.

[202] The first was the trial counsel's error to secure the DNA testing of the underwear which would have ruled the accused in or out as a suspect in the first place.

[203] The second was the trial counsel's error was in using his cross examination of the complainant at trial to effectively test her eyesight. The accused's trial counsel had tried this "trick" in the course of the accused's pre-trial conference and it had backfired on him. When she again passed his test(s) at the accused's trial, her credibility was bolstered substantially.

[204] The third was the trial counsel's error in questioning the accused in the course of his direct examination on the accused's theft, on the same day, of a bottle of liquor from a neighbourhood store. Rather than avoiding the issue, the accused's trial counsel asked him who had "purchased" the liquor. The accused answered that he had. When he later conceded in the course of his cross examination that he had stolen the liquor, his credibility was badly undercut in the eyes of the members of the jury.

[205] The accused's trial counsel was successful in obtaining a summary judgment in his favour on the accused's allegations in negligence on the misperceived basis that trial - or litigation - counsel cannot be held liable in negligence except for errors in the delivery of their legal services which are "egregious".

[206] In rejecting that very high threshold test on appeal, Doherty, J.A. held (at para. 43) that:

> An individual being defended in a criminal case is entitled to expect that his lawyer will perform as a reasonably competent defence counsel. Courts should avoid using phrases like 'egregious error' and 'clearest of cases' when describing the circumstances in which negligence will succeed against their lawyers. These phrases invite the application of an inappropriately low standard of care to the conduct of lawyers. At the very least, these phrases create the appearance that where an allegation of negligence is made against a lawyer, judges (former lawyers) will subject those claims to less vigorous scrutiny than claims made against others: [reference omitted]. A lawyer defending an accused who fails to perform as a reasonably competent defence counsel would be expected to perform is negligent.

[207] Conceded is that some might review and understand this passage but then attempt to relegate it to criminal defences or not apply it to litigation generally. Such a dichotomy would be false in my view. Doherty, J.A. placed no such limitation on the Court's

findings in *Folland*. In fact, Doherty, J.A. went on in the decision to refer to the reasonably competent standard of care applicable to lawyers engaged in law suits generally (see: paras. 44 and 55).

[208] Finally, Doherty, J.A. did not in *Folland* strike down, eliminate or reduce in any way the "error in judgment" defence or exception to allegations of negligence against litigation counsel. What His Lordship did do was hold that the exercise of any judgment in such cases must be weighed against the judgment which would have been exercised by reasonably competent litigation counsel.

[209] To be recalled in the instant case is that there are two principal factors from the Claimant's perspective which he says supports his contention that the Defendant was negligent.

[210] The first was that he wanted a quick resolution to his *Testators' Family Maintenance Act* claim.

[211] The second is that he only had limited resources with which to pursue litigation against his sisters and his late father's Estate and that he wanted to make sure that those resources were used as efficiently as possible.

[212] A third factor, which in my view cannot be discounted, is that the Claimant retained the Defendant in part on the basis of the latter's expressed and implied representations that he was a better litigation lawyer than the one the Claimant had initially retained. With those representations comes a higher expectation with respect to the level - or competence - of the services the Defendant actually provided.

[213] Against that backdrop, the Defendant very clearly advised the Claimant that he should make the Application ultimately made to Warner, J. to enforce the purported settlement which had been said to have been entered into with legal counsel to the Claimant's late father's Estate.

[214] When giving his advice to the Claimant on the Application to enforce the purported settlement, the Defendant offered neither condition nor caveat.

[215] First, the Defendant did not offer anything with respect to the pros or cons of the proposed Application.

[216] Second, the Defendant does not appear from the evidence led before me to have discussed the cost of the Application with the Claimant.

[217] Third, the Defendant does not appear from the evidence led before me to have discussed with the Claimant the likelihood (or even the possibility) that the Application would be dismissed.

[218] Fourth, the Defendant does not appear from the evidence led before me to have discussed with the Claimant what the latter's obligation in party/party costs would be if the Application was indeed dismissed.

[219] Fifth, the Defendant does not appear from the evidence led before me to have discussed with the Claimant the standards or principles by which the Application would be decided by Warner, J. and whether any of those standards or principles might cut in favour of any argument or potential argument the Claimant's late father's Estate could lead in response to the Application.

[220] Instead, it seems to me on the totality of the evidence led before me that the Defendant's only position - and advice - with respect to the Application to enforce the purported settlement of the Claimant's *Testators' Family Maintenance Act* claim was that it should be "full speed ahead".

[221] Further, it was conceded by the Defendant, in both questioning by me and in argument on his behalf, that his position - and advice to the Claimant - on the Application was that it was tantamount to being a "lead pipe cinch" or a "no brainer" or a "sure thing" to employ other nomenclature. Such an approach - some might call it "cavalier" - simply

cannot be the standard to which reasonably competent counsel in like circumstances would subscribe.

[222] Against that backdrop, the Defendant's own viva voce evidence on the hearing of the Application to enforce the purported settlement is telling. I make the comment because of my observation that the Defendant's *viva voce* evidence in support of the Application was not as definitive on the existence of the impugned settlement as his advice to the Claimant on the commencement of the Application would have implied.

[223] Despite the Defendant's representations to the Claimant about the strength of his case surrounding the application to enforce the purported settlement of the Claimant's *Testators' Family Maintenance Act* claim, the Defendant appears to me to have retreated from that position while testifying before Warner, J.

[224] Though the Defendant was undoubtedly truthful while he was testifying before Warner, J., and I make no suggestion whatever that he was not, his truthful testimony served to erode the earlier confidence he appeared to have with respect to the Claimant's "iron clad" settlement of his *Testators' Family Maintenance Act* claim.

[225] At page 14 of the transcript of the Defendant's viva voce evidence before Warner, J., he testified, in reference to legal counsel to the Claimant's late father's Estate that:

> Well, he had a specific request for clarification and he did clearly say that there was a meeting again with his client, there's absolutely no question about that, but that was in the context that they had made us an offer, that they had provided us with an opportunity to make an offer which we made and they said we were in substantial agreement. There's absolutely no question that he did say he was meeting again with his client …

[226] At page 20 of the same transcript, the Defendant again testified in reference to legal counsel to the Claimant's late father's Estate as follows:

> Q: Did you - when you received Mr. Dowell's affidavit, were you surprised at the fact that he's indicated to you that - he states he indicated to you that this - he had to take this offer still to his client?

> A: He absolutely at that point told me he still had to meet with his client, there's no question about that. He told me that - I'm sure he told me that more than once, but as far as I was concerned there was no contact and there was a little bit of, you know, trivial business that had to be resolved and it had to be resolved but it wasn't very much. We had already confirmed that there was substantial agreement, they already agreed to sell, and these couple of minor points we agreed to that obviously he'd have to take instructions on them [sic]. [underlining mine]

[227] The Defendant next repeated this evidence on questioning by the Court itself. I refer in that regard to page 23 of the same transcript as follows:

> Q: … you've said it two or three times - that Mr. Dowell made it clear to you on more than one occasion during the May 6 phone call that he had to meet with his client again about this matter.
>
> A: Yes.
>
> Q: Your letter of May 13, the last half of the last sentence - and I'm not sure I have that in front of me - the last half of the sentence says:
>
> h Glenna. Bard that you will confirm the terms of this settlement by May 14, 2004.
>
> That was in response - that's in response - or I assume and I'm asking, I guess - in response to Mr. Dowell's statements to you during the phone call of May 6 that he would have to met again with his clients?
>
> A: That's right. I began that letter by saying, 'It's my view that we have a settlement' but I knew that he had to address those final points and, you know, I wrapped [sic] up the thing and I gilded that a little bit too much, but in any event, I knew that there were these couple small points [sic] and I knew that he was still meeting with his client and I never expected a call back and said that we don't have a deal … [sic]. [underlining and double underlining mine]

[228] Given that it was principally on the basis of this testimony that the Application to enforce the purported settlement was dismissed, it seems to me that any applicable standard of care would have required the Defendant to have discussed these expressions of doubt with the Claimant prior to advising him that he ought to proceed with the Application to enforce the purported settlement of the Claimant's *Testators' Family Maintenance Act* Application. That would be especially so given the Claimant's advice to

the Defendant that he was a man of limited resources and need to use what he had efficiently in the litigation process involving his sisters and his late father's Estate.

[229] I referred above to Warner, J. having had "little difficulty" in arriving at the decision that the Application to enforce the purported settlement of the Claimant's *Testators' Family Maintenance Act* claim would be dismissed. In so doing, Warner, J. concentrated on three aspects of the matter.

[230] The first was that legal counsel to the Claimant's late father's Estate had easily discharged the onus on him to have demonstrated on a balance of probabilities that he did not have ostensible authority at any of the materials times to have entered into an agreement on behalf of his clients - the Claimant's late father's Estate and the Claimant's sisters.

[231] The second was that the Defendant had failed in his onus to demonstrate on a balance of probabilities that an agreement on the settlement of the Claimant's *Testators' Family Maintenance Act* claim had ever been concluded.

[232] The third was that the salient proof of the second was the ultimate paragraph in the Defendant's letters of May 12th and May 13th, 2004 in which he sought the "confirmation" legal counsel to the Claimant's late father's Estate that a settlement had indeed been reached.

[233] The concentration by Warner, J. on these three aspects did not involve significant analysis - either factual or legal. Instead, Warner, J. perceived the Application in straightforward terms and applied straightforward legal principles to them.

[234] Against the backdrop of the clear and unconditional advice given by the Defendant to the Claimant with respect to the impugned Application, the ease with which Warner, J. dismissed it is striking. It is my view, and I so find, that the factors leading to the ease with which Warner, J. ultimately dismissed the Application were things which reasonably competent counsel should have had in mind and which reasonably competent

counsel should have brought to the attention of a client in the Claimant's circumstances.

[235] Well beyond an error of judgment, the Defendant's failure in that regard struck at the very nature of his retainer and undermined the very basis upon which the Claimant had retained him. Again in my view, and I so find, the Defendant is therefore liable for the Claimant's losses related to the Application.

(d) Would the Claimant Have Proceeded Anyway?

[236] The final point raised by Mr. Thurlow is his March 31th, 2010 submission on the part of the Defendant is that there was no proof offered by the Claimant in the course of the hearing before me that he would not have proceeded with the impugned Application anyway even if he had been advised by the Defendant that the Application was not a sure thing.

[237] Mr. Thurlow has fashioned this argument around the classic "but for" test; *viz*.: that there was no proof that "but for" the Defendant's negligence the Claimant would not have suffered his alleged loss.

[238] That said, the means and standard by which such proof can be given in the circumstances of the Claimant in the instant case do not appear to have been fully canvassed in the authorities and available texts. Campion and Dimmer (supra) (at p. 7-30) refer only to proof on a balance of probability - the ordinary civil standard. Collectively, the limited authorities are not *ad idem* on the applicable onus of proof.

[239] Interesting, at least to me, is that nowhere can I find reference to any requirement on the part of a client in the circumstances of the Claimant in the instant case to lead specific uncontroverted evidence along the lines of "*had I known that the advice of my litigation counsel had been given carelessly and that the 'sure thing' represented to me was actually a remedy the availability of which was in some doubt, I would not have*

proceeded." Instead, the standard referred to in Camion and Dimmer (supra) appears to me to be at least somewhat more flexible than that.

[240] While completely accurate for Mr. Thurlow to have represented that the Claimant did not give any testimony along the lines of what is found within quotations in paragraph 239 above, he did make it clear that he was of limited resources and had to muster those resources to the overall remedy which he was seeking: the resolution of his *Testators' Family Maintenance Act* claim on his terms. In short, it was clear from his evidence that he did not want to waste resources. Therein, at least in my view, lies the proof on a balance of probability that the Claimant would not have proceeded with the impugned Application had its true risk been explained to him by the Defendant.

[241] The decision of the Alberta Court of Queen's Bench (per: Russell, J.) in *285614 Alberta Ltd. v. Burnet, Duckworth & Palmer*, [1993] A.J. No. 157 is helpful in explaining this conclusion. At issue in *285* was a loan from a client's holding company to the client's wife to permit the couple to purchase a luxury dwelling. The loan had been structured as a shareholder's loans by the defendant law firm - the client's wife having been a shareholder of the client's holding company as well.

[242] The structuring of the loan in this manner was improvident in that it attracted income tax as if the amount of the loan had been income earned by the client's wife during the holding company's fiscal year in which the loan was made. Neither the client nor his wife had any idea that structuring the loan in this manner could - and likely would - attract an income tax liability. This was especially so with respect to the client's wife who was inexperienced with business matters and simply signed what she was asked to sign to put the impugned loan into effect.

[243] By the time the client's wife was assessed for this tax, it amounted to almost $400,000. By the time of trial, interest had served to increase the tax liability to more than $800,000.

[244] Russell, J. found against the law firm on two bases: (1) that it was negligent for the law firm not to have advised the client's wife, in particular, of the highly potential negative income tax consequences accruing from the loan; and, (2) that it was negligent for the law firm not to have advised the client and his wife about a remedial repayment of the loan within a time period which would have eliminated the tax liability.

[245] On the issue of causation, the law firm argued - as Mr. Thurlow has argued on behalf of the Defendant in the instant case - that the client and his wife would have effectively suffered their income tax losses regardless of how the holding company's loan had been structured. Russell, J. rejected that argument holding (starting at the bottom of p. 7) as follows:

> In *Major v. Buchanan* (1975), 61 D.L.R. (3d) 45 (Ont. H.C.) Goodman, J. stated:
>
> > ... a solicitor has the duty of warning a client of the risk involved in a course of action, contemplated by the client or by his solicitor on his behalf, and of exercising reasonable care and skill in advising him. If he fails to warn the client of the risk involved in the course of action and it appears probable that the client would not have taken the risk if he had been warned, the solicitor will be liable.
>
> Generally the courts have tended to be sympathetic with the client once a breach of duty by a professional is established. In *Schloss v. [Knaut], et al.* (1979), 107 A. P. 96, the Alberta Court of Appeal said:
>
> ... any uncertainty as to whether he would have gone on with the investment must be construed against the solicitor.

[246] The reference to *Major* supports the overall theory of the Claimant's case already dealt with above. The reference to Schloss supports the finding that the Claimant's circumstances were such that he would not have proceeded with the impugned Application, as Mr. Thurlow has argued, had he been carefully and properly advised by the Defendant that the purported settlement was not "iron clad" and the success of the Application was a long way - as found by Warner, J. - from a "sure thing".

(e) Witness Immunity

[247] The focus of all of the above has been on the Defendant's advice to the Claimant on the appropriateness of commencing the Application to enforce the purported settlement of the Claimant's *Testators' Family Maintenance Act* claims. My finding above is that the Defendant's advice in that regard was given negligently in that it essentially failed to account at all for the possibility of a decision of the type which Warner, J. rendered.

[248] Nevertheless, a subsidiary element of the Defendant's defence focused on a much later time in the proceedings. I have referred to that time tangentially above when I remarked on the strength of the Defendant's testimony before Warner, J. when the impugned Application was actually being heard.

[249] There has been some suggestion, though I am not sure of its genesis, that at least a part of the Claimant's claim against the Defendant stems from the "quality" of his testimony before Warner, J. In that regard, Mr. Thurlow has referred, on the Defendant's behalf, to the decision of the Nova Scotia Court of Appeal in *Elliott v. Insurance Crime Prevention Bureau,* [2005] NSCA 115.

[250] I am continuing on to consider Elliott in the event that I am later found to have been correct in my assessment - and findings - with respect to the Defendant's negligence. Should the focus of the inquiry then be on the Defendant's role as a witness - as opposed to as counsel - a word or two must be said about the concept of witness immunity.

[251] *Elliott* is not an easy decision to read much less apply.

[252] The issue in *Elliott* was the Appellants' fire loss. Their home had been destroyed by fire and they made a claim on their fire insurance policy.

[253] The fire was investigated by some of the respondents and by others who were associated with the other respondents. Based on the investigation, the Elliotts' insurer denied coverage. They sued on the policy and were largely successful.

[254] Though largely successful, the *Elliott*s failed to prove that their insurer had not acted in bad faith. Accordingly, the *Elliott*s' claims for inconvenience, mental distress, aggravated, punitive or exemplary damages were dismissed.

[255] The *Elliott*s then sued the respondents: "claiming that they had failed to investigate [the fire] carefully, knowing that the insurer would rely on their work".

[256] The respondents then applied to the Supreme Court of Nova Scotia for an Order striking the *Elliott*s' claims. The respondents contended, fundamentally, that they did not owe the *Elliott*s any duty of care. They also contended that their immunity as witnesses afforded them a complete defence.

[257] As I understand one of the Defendant's defence theories in the instant case, there may be a contention that he was negligent in testifying as he did about the nature of the communications he had with legal counsel to the Claimant's late father's Estate about the settlement of the Claimant's *Testators' Family Maintenance Act* claim. Though no such contention was well-developed in the evidence and arguments lead before me, it remained a defence theory with respect to the legal services related to the purported settlement of the Claimant's *Testators' Family Maintenance Act* claim, that the Defendant would be immune from civil liability.

[258] As held by Cromwell, J.A. at para. 102 of *Elliott*:

> Witnesses are immune from civil liability for what they say and do in judicial or quasi-judicial proceeding[s]. This is the core of witness immunity. Outside that core, the immunity may also extend to things witnesses (and even potential witnesses) say and do out-of-court, provided that the extension is necessary in order to make the protection of testimony effective. But how far the immunity extends to things said and done out-of-court is a grey area. This case falls within that grey area. It is concerned with whether witness immunity protects the respondents' statements made out-of-court to the insurer while they were investigating the cause of the fire.

[259] Further in the same decision (at para. 114), Cromwell, J.A. held that:

> … It is critical to understand that it is not the nature of the conduct or the words which is the focus of the immunity, but the occasion on which the

> words are said or the conduct is performed. Saying exactly the same words will be either actionable or not depending on the occasion on which they are said. This is true whether the immunity is advanced as a defence in a defamation case or in other types of actions. The immunity applies only to a protected occasion.

[260] Cromwell, J.A. then went on to consider the two main public policy considerations on which the concept of witness immunity is based.

[261] First, witnesses require immunity so that they can tell the whole truth as they see it, "free of concern about consequences to themselves."

[262] Second, witness immunity is required to protect against the potential for the multiplicity of actions over a single cause, as in the case of a disappointed party who or which then sues his or its witnesses for failing to perform in the witness box as he or it thought they should have.

[263] The first of these public policy considerations may be apposite this case.

[264] Regardless of what the Defendant told the Claimant leading to the commencement of the impugned Application and regardless of what the Defendant deposed in his Affidavit in support of the impugned Application, he testified with a disarming candour before Warner, J. about his knowledge of the communications which legal counsel to the Claimant's late father's Estate was going to have with the Claimant's sisters regarding the offer to settle the Claimant's *Testators' Family Maintenance Act* claim. Having done so, the Defendant can hardly be faulted. Much less can he be held liable for testifying as he did.

[265] It is unfortunate that not all witness testimony lines up with the case theory of the party for whom or for which the witness is being called. That said, if witnesses could be held liable for the "quality" of their testimony, the potential for subsidiary litigation would never end.

[266] Thus, to the extent that there is any theory floating about that the Claimant should be held liable for the manner in which he testified before Warner, J., he is clearly immune from any such finding.

CONCLUSION:

[267] The Claimant was a man of limited resources engaged in an intense dispute with his siblings over their late father's will. He was dissatisfied with his initial legal counsel for reasons not precisely in evidence before me. He obtained a reference from his initial legal counsel to the Defendant. He told the Defendant he was looking for a fighter.

[268] The Defendant was considerably more senior than the Claimant's initial legal counsel and he came at a much higher price. That much concerned the Claimant and he asked the Defendant if he was worth it. The Defendant represented that he was.

[269] Despite the Claimant's claim against his later father's Estate having been set for trial, the Estate offered the possibility of settlement. The possibility lay in the option for an offer from the Claimant for some balance of the property then remaining in the Estate.

[270] The Claimant, through the Defendant, made such an offer and it was rejected. The Defendant then advised the Claimant that the offer had resulted in a binding settlement and that the Claimant should apply to the Court to have that binding settlement enforced. There were no conditions placed by the Defendant on that Application. The Defendant regarded the purported settlement as "iron clad". He did not raise with the Claimant any doubts about the propriety of the Application or how it might be truly viewed by the Court.

[271] The Application was dismissed. In dismissing the Application, Warner, J. of the Supreme Court of Nova Scotia held that the Claimant had not come close to meeting the onus on him to establish that the purported settlement had been concluded.

[272] The Claimant has taken action against the Defendant seeking the recovery of what he paid in legal fees and disbursements for the Application and the recovery of what he was required to pay to the Estate in party/party costs - it being successful on the Application.

[273] The Defendant has defended. He says that his advice to the Claimant on the Application, if careless, might have been an error of judgment but did not amount to negligence. I have rejected the Defendant's approach.

[274] In the particular context of the case, I would not accept, even if it had been supported by expert opinion, that the standard of care applicable to the Defendant was so low that it would have permitted him to have unconditionally promoted the impugned Application to the Claimant as a "sure thing" and then deny liability when the Application was not successful.

[275] In my view, the standard of care applicable to the Defendant is much higher than that. Included in the standard of care of a litigation lawyer acting in the circumstances of the instant case would include, at a minimum, the careful appraisal of the strength of the impugned Application and a clear warning that not even the best of prospective cases are decided in favour of their proponents.

[276] The Defendant has breached this standard of care and is liable in the result for the Claimant's losses. Those losses are less than the sum the Claimant has claimed in his Claim Form and amount to the payment on the Defendant's invoice tendered into evidence as Exhibit 8 ($4,949.84) and to the payment of the party/party costs awarded against the Claimant ($1,250).

[277] I will hear Messrs. Dexter and Thurlow - in writing - on the issues of interest and costs, if either is sought.

[278] If either is sought, I suggest that Mr. Dexter lead off with as short a written submission as his position can tolerate and that he provide it to me not later than April 15th,

2010. Mr. Thurlow can then respond within the same suggested limitations by April 22nd, 2010.

ORDER:

[279] The Defendant will pay to the Claimant the sum of $6,199.84.

[280] I will hear counsel separately as to interest and costs, if either or both are sought.

[281] Mr. Dexter shall submit on behalf of the Claimant not later than April 15th, 2010. Mr. Thurlow shall then submit on behalf of the Defendant not later than April 22nd, 2010.

DATED at Halifax, Nova Scotia, April 8th, 2010.

Gavin Giles, Q.C., Chief Adjudicator,
Small Claims Court of Nova Scotia

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