IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Moore v. Fairway Insurance Services,
2016 NSSM 52

Claim: SCD No. 449625
Registry: Digby

Between:

MICHELLE MOORE and MEGAN DOUCETTE

Claimant

– and –

FAIRWAY INSURANCE SERVICES

Defendant

Adjudicator: Andrew S. Nickerson, QC

Heard: July 11, 2016

Decision: July 25, 2016

Appearances: Jonathan T. Hughes for the Claimants
Lisa Wight for the Defendant

DECISION

[1] After I had set this matter down for trial, and very shortly before the trial date I had occasion in my legal practice to put the defendant in this matter on notice of a potential claim on behalf of client which I was representing. Before hearing this matter I disclosed to the parties and their solicitors in open court the circumstances and invited them to decide whether they had any concerns with me hearing this case. I pointed out to them, that although I was comfortable that I would have no difficulty in fairly adjudicating this matter, that the real test was the lack of the perception of bias. I indicated to them that I was prepared to hear the case should the parties be comfortable with my impartiality, but that I was certainly open to hearing representations and

recrusing myself should there be discomfort on the part of either of the parties. The parties availed themselves of the opportunity to consult their respective counsel with respect to this, and after doing so, both solicitors unequivocally advised me that they were satisfied for me to hear the case.

FACTS

[2] Only the Claimant Michelle Moore testified for the Claimant. She stated that April of 2014 her daughter, also the other claimant, Ms. Doucette, had been involved in an automobile accident while driving a 1998 Toyota Corolla. She says that after the accident she called the defendant and one of the defendant's staff stated that they could not find any reference to a Toyota being registered in her name and stated that the policy they had referred to a Chrysler Neon. She also stated that this agent indicated that her daughter's first name was "Heavenly" and she advised the agent that her daughter's name was actually Megan. She informed this agent that she had called in around November 15 or 16 of the previous year to change the policy to cover a Toyota Corolla. She says she was advised that they would check and if they could find a note where the claimant had called in November that coverage would be provided.

[3] Ms. Moore says that she had a number of calls with more than one person at the defendant's agency in an attempt to establish coverage based on her November call. She says that one lady told her that the only call in November of 2013 related to a 1998 vehicle to which Ms. Moore said "that is it". She says that shortly thereafter the lady denied that is what she said. After several calls she ended up speaking to Mr. Keith Amirault who also assured her that if they could find any notation of it at all that coverage could be afforded. Ms. Moore says that during

this conversation that Mr. Amirault called her a “turnip” and stated if there was a “loophole” they were not going to pay.

[4] Ms. Moore testified that she had never changed over a vehicle before on her own. She said in the past she had always been assisted by her daughter’s father with whom she lived at that time. By the time she acquired the Toyota Corolla she was separated and no longer had his assistance. She said that on November 15 or 16, 2013 she spoke to the defendant’s employee who answered the phone call and says that she gave all of the necessary information. She testified that she was asked questions about what was needed for the change. She says that she was asked for the year, the number of doors, the VIN number and other particulars of the vehicle. She says that she asked the agent if she would need to come in to sign the document and was told no that she did not need to. She says she was advised that she would be sent a temporary document.

[5] Exhibit 1 TAB 8 is the ownership of the Toyota Corolla which shows a registration date of November 28, 2013. She was challenged in cross-examination as to why she would have called on November 15 or 16 when she did not own the vehicle until the 28th. The witness responded that she had acquired the vehicle approximately a week to a week and a half before in a private deal with a relative but knew that she would be acquiring the vehicle earlier and in fact already had it in her yard.

[6] TABs 5 and 6 of Exhibit 1 are various receipts for payment on the claimant’s insurance policy. Of particular note is one receipt which does say it is for an auto policy but in actual fact was for her tenant’s policy.

[7] The final outcome of the accident was that the defendant and her daughter were left with a judgment against them for the sum of $9,369.78. Since they had no valid insurance coverage

and were unable to pay they were suspended by the Registry of Motor Vehicles and remain suspended.

[8] In cross-examination Ms. Moore admitted that she was familiar with getting notes or letters from the defendant when changes were made to her policy and having to sign them and return them to that agency. She acknowledged that she received a policy change dated October 4, 2010 which related to adding an accident waiver [Exhibit 2 TAB 1]. She also acknowledged that she had in fact signed this document. She acknowledged that she called the agency to add her daughter as an occasional driver in February 2012. She admitted having received notices when she had added her daughter as an occasional driver in early 2012. She also acknowledged signing for policy change September 21, 2012 that deleted her daughter as an occasional driver. [Exhibit 2 TAB 13]

[9] The claimant acknowledged that she had been involved in the changing a vehicle on one other occasion when she changed her vehicle from a Dodge Caravan to a Chrysler Neon in October of 2012. The claimant acknowledged that she signed the document at Exhibit 2 TAB 15 when that change was made. The claimant did however say that when the changeover from the Caravan to the Neon was done she did have help from her daughter's father. Ms. Moore did admit that she received a notice [Exhibit 2 TAB 18] received by the defendant on October 30, 2012 not long after that date, which still showed the Caravan after she had made the change to the Neon. She was challenged in cross-examination on a basis of the document at [Exhibit 2 TAB 15] that she had noticed this and called the agency concerned and was advised that it was simply a delay in processing the documentation. Ms. Moore indicated she did not recall this incident but did not doubt that it occurred or challenge the truth of that assertion. The defendant's' documents show she subsequently received corrected documentation.

[10] She was referred to Exhibit 2 TAB 24 and she acknowledged that she would have received that or a similar document around the time that she acquired the new vehicle. This document covers the period from November 20, 2013 to the same date 2014 and shows a Chrysler Neon is the insured vehicle. It is not dated and on its face does not give any indication of when Ms. Moore would have received it or when the defendant would have received it.

[11] Ms. Moore acknowledged that on each occasion when a change had been made she had received a written notification and had been required to sign acknowledging documentation. Ms. Moore acknowledged that she had signed documentation for changes on at least three or four occasions. She acknowledged with respect to the change from the Chrysler Neon to the Toyota Corolla she had not received a document which she was asked to sign to acknowledge the change. She also admitted that on each occasion when she had made a change she had received a new "pink paper" being the certificate of insurance one would carry in the vehicle. She was challenged in cross-examination that within five months she had not received anything and had not made any inquiry as to why the paperwork did not show a change to the Corolla. Her response was that she thought she did not have to sign anything because the lady she spoke to said she did not have to go down to sign paperwork.

[12] Ms. Moore testified that she does not have a cell phone and the call that she made would have been from her home phone. She acknowledged that she had not produced any phone records to verify that she had made the phone call on November 12 or 13th, 2013.

[13] Ms. Moore testified that she believed that the insurance change had taken place because she had no difficulty when she went to the Department of Motor Vehicles and reregistered the Corolla in her name. She also says the officer at the accident did not notice that it was the wrong vehicle.

[14] Sarah Amirault, the president of the defendant testified on behalf of the defendant. She has been in the insurance industry for over 20 years. She says that she reviewed the claimant's electronic file and that the file contains no reference to any phone call in November 2013. It does not make any reference to a Toyota Corolla.

[15] She described the process of making a change to the policy. She said that each policy is assigned to an account manager and when a phone call is made the callar would be transferred to the appropriate person. She says that they do not use paper notes but their employees are required to use three programs specifically designed for the insurance industry. One is the broker management system called Powerbroker, the second is a quotation program called Compuquote and the third is a program to identify vehicle identification numbers called VINlink. We are not concerned with the quotation program.

[16] She said that the first step would be to enter identifying information such as a name to bring up the appropriate file. Then the VINlink program would be used to make sure that the client was giving them a valid VIN number. Then the employee would bring up a change form and fill it out. The form contains places to indicate the vehicle to be deleted and a screen to enter the new one. This would require make, model and VIN number. At the end of that process a form would be printed and signed if the client had walked in or sent out to the customer for signature if the client had called in the information to ensure that the change is correct, but that change would take effect immediately. She identified TABs 14 and 15 of Exhibit 2 as demonstrating the type of documentation that would be used. Those tabs showed the change from the Caravan to the Neon. She also stated that no one other than the insured, in this case Ms. Moore, would be able to make any changes.

[17] Ms. Amirault stated that the defendant has nothing to do with the renewal notices as those

are sent directly to the insured by the insurance company, in this case Portage La Prairie Mutual Insurance.

[18] Ms. Amirault testified as to Exhibit 1 TAB 5, which is a cash receipt for payment. This document shows the payment amount for the claimant's tenant's package and the policy number for the tenant's package but says on the receipt "automobile policy". She stated that this receipt is irrelevant to the insurer and is internal to the defendant. All it shows is that funds were in fact received and those are then forwarded to the insurance company on a monthly basis. When that part of Powerbroker system comes up the employee would have to type in the policy number and the amount, but the policy type is pre-populated.

[19] Ms. Amirault testified that their operations are entirely based on a computer system and that she has looked on the computer system for any record of the claimant's call. She said it was not possible that the claimant called and it was not entered because the employee involved would have to call up the file and any note of it would have to be in the file and therefore there would have to be a record of something.

[20] Ms. Amirault was cross-examined as to TABS 14, 19 and 22 of Exhibit 2 and it was suggested to her that the changes to policies did not seem to have taken place for over a month from the time of request. She testified that this only indicates that the insurer had not processed it formally through their records which can take anywhere from two weeks to 45 days but that change is effective when made. She stated that they do check processing on the changes made after 30 days if the insurer has not notified them. She had no indication of any follow-up with the insurer with respect to the claimant.

[21] Mr. Keith Amirault testified on behalf of the defendant. He acknowledged that he had spoken to the claimant Michelle Moore and had reviewed her file. When she initially spoke to

him and he looked into the Powerbroker system he brought up the file for another Michelle Moore. He quickly identified that he had the wrong file and found the correct one. While on the phone he advised Ms. Moore that there was no indication of her phone call on the system. He testified that if a person called, the appropriate account manager would have to confirm the existing vehicle was deleted and enter the data as described by Sarah Amirault. He said that the staff was constantly trained and he was confident that the employees would follow the correct procedure. He acknowledged in cross-examination that human error can occur but was insistent that it would not occur on a vehicle change due to the way the system worked.

[22] Mr. Amirault was emphatic that he had at no time called Ms. Moore or any other customer a "turnip" and denied that he had ever said that he was attempting to find a "loophole" to avoid payment on her policy.

[23] Mr. Amirault also testified that he had examined the file of the other person named Michelle Moore and determined that there was nothing in that file to suggest that the defendant had made any phone call in November of 2013.

[24] The evidence of both of the defendant's witnesses was that entries into the Powerbroker system cannot be reversed or deleted. They can be overridden by another note or entry but they do remain on the system.

ISSUES

[25] What findings of facts should the court make taking into account the credibility assessments the court must regarding the evidence before it?

[26] How should the court assess the evidence of the defendants in the absence of the production of the actual computer records upon which the defendant's evidence is based?

[27] If the defendant is to be held liable, was the claimant contributorily negligent?

[28] If the claimant was contributorily negligent how should damages be apportioned?

ANALYSIS AND DECISION

[29] I am obliged to make a credibility finding in this case. I have instructed myself as to the correct method of approaching and accomplishing that task. In the cases of **Nova Scotia Community College v. Nova Scotia Teachers Union, 2006 NSCA 22**, **Sable Mary Seismic Inc. v. Geophysical Services Inc., 2012 NSCA 33,** and **R. v. D.D.S., 2006 NSCA 34** the Nova Scotia Court of Appeal adopted as correct law in this province the approach set out in **Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.).** This case addressed the assessment of witnesses with an interest in the outcome and provides my fundamental and overriding guide in approaching my task**.**

[30] An excellent summary of the **Faryna** case and other relevant jurisprudence is provided in the decision of Justice Margaret Stewart in **Goulden v. Nova Scotia (Attorney General), 2013 NSSC 253** as follows:

> [20] ***Credibility.*** This proceeding also raises questions of credibility. The Supreme Court of Canada considered the problem of credibility assessment in *R. v. R.E.M.*, 2008 SCC 51. McLachlin C.J.C. repeated the observation of Bastarache and Abella JJ. in *R. v. Gagnon*, 2006 SCC 17, that "[a]ssessing credibility is not a science" and that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon* at para. 20, cited in *R.E.M.* at para. 28). The Chief Justice went on to say, at para. 49:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[21] The assessment of the evidence of an interested witness was considered in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), where O'Halloran J. said, for the majority, at para. 11:

> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[22] Such factors as inconsistencies and weakness in the evidence, interest in the outcome, motive to concoct, internal consistency, and admissions against interest are objective considerations going to credibility assessment, along with the common sense of the trier of fact: see, e.g. *R. v. R.H.*, 2013 SCC 22. It is open to a trier of fact to "believe a witness's testimony in whole, in part, or not at all": *R. v. D.R.*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8, at para. 93. I have taken these principles into account in reviewing the *viva voce* and documentary evidence in conjunction with counsel's submissions and the relevant law.

[31] I also take instruction from the words of Justice Stewart.

[32] I start by saying that I did find Ms. Moore to appear to be a credible witness. I found her to give her evidence in a straightforward manner. She was clearly not a sophisticated person but she did list appropriately the information that she says she gave to the defendant's employee in the November 2013 conversation. The items such as make, model, number of doors, VIN number that she mentioned seem to be the logical things that would have been asked. She was not evasive in cross-examination. She gave direct answers to the questions in what appeared to me to be the best of her ability. She did not equivocate or make excuses and acknowledged without hesitation when she was challenged with things she should have readily admitted, including matters such as having received change notices and having signed change notices.

[33] Since Ms. Moore testified that she made the telephone call from her land line and I have no evidence that land line bills show local calls, I do not find her credibility diminished by this.

[34] I do not think the divergence in the evidence between the claimant and Mr. Amirault regarding their conversation really amounts to a serious discrepancy. Undoubtedly the claimant was emotionally upset at the time she had the conversation with Mr. Amirault and I suspect she was not clearly hearing what he was saying. The word "turnip" is an extremely unusual word to have been used in this circumstance. It also bears a striking verbal similarity to the phrase "turn up". We know that various of the defendant's employees had indicated that if there had been some note of the November conversation found that the defendant would have accepted liability. I think it highly likely that Mr. Amirault used the phrase "turn up" in the context of something being discovered and the claimant in her emotional state misinterpreted what he said. I also think it highly likely that she misinterpreted his indication that the insurer would not pay under the circumstances as meaning that the defendant was attempting to utilize a "loophole".

[35] As Justice Warner said in **Kings (County) v. Berwick (Town), 2009 NSSC 398** cross examination is a powerful tool for truth finding and I have considered carefully the cross

examination of the Claimant. In my view the cross examination did not reveal any serious internal contradictions. As stated I do not consider the “turnip” and “loophole” comments to be external contradictions that would affect her credibility. The comments of the claimant on the initial contact with the defendant after the accident I view as having the same character of being the result of confusion from emotional surprise and distraught.

[36] As pointed out by Justice Stewart it can be quite difficult to articulate the basis of finding a witness credible and beyond what I have said I can only say that I found her overall demeanour and the tenor of her evidence convinced me that Ms. Moore was telling the truth at least subjectively as she understood it and recalled it in her mind. I did not get any sense that she was attempting to mislead the court in any way.

[37] Having said that, I now must turn to assessing her evidence in the overall context of all of the evidence as required by **Faryna**. I have cautioned myself, as quoted above, that “the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

[38] Equally I found both of the witnesses for the defendant to be credible *per se*. There was nothing in their examination or cross-examination to suggest that they were not honourable business people operating a business in a professional manner. I accept their evidence to the extent of the weight that it can carry, for as will be seen below I do have some concerns about the nature of the evidence which they gave.

[39] What troubles me about the evidence of the defendant is that, in essence, it is either hearsay or something in the nature of hearsay. Essentially both the defendant’s witnesses asked me to reach a conclusion based on the contents of computer records that they have seen

but neither the court nor the defendant's counsel have seen. The real evidence is the actual computer records or the printouts that could be obtained from them as neither of the defendant's witnesses were actually involved in any transaction of relevance between the claimant and the defendant and neither testified to any specialized knowledge of functioning of the computer program.

[40] While I am completely satisfied that both the defendant's witnesses would not deliberately mislead the court there is always a danger, even with honourable people, that they look at documents or records through their subjective perspective and not objectively. I have some discomfort that there may have been something in the actual documentation that the court or defendant's counsel may have viewed differently. That weakness in the evidence does cause me some considerable concern. There is the possibility of a concern as to the content of the records but there is also a procedural concern in asking the court to rely on something that neither the court has had the opportunity to scrutinize nor the defendant has had the opportunity to challenge. I am in no way speculating here that there was something that would support the claimant. My concern is with the nature, quality and persuasive value of the evidence placed before the court.

[41] I have reviewed the provisions of the **Nova Scotia Evidence Act. R.S. c. 154** relating to business records and the electronic form of business records. I find the following excerpts to be relevant to the matter before me:

> **Business records**
>
> 23 (1) In this Section,
>
> ……

(3) Evidence to the effect that the records of a business do not contain any record of an alleged act, condition or event shall be competent to prove the non-occurrence of the act or event or the non-existence of the condition in that business if the judge finds that it was the regular course of that business to make such records of all such acts, conditions or events at the time or within reasonable time thereafter and to retain them.

(4) The circumstances of the keeping of any records, including the lack of personal knowledge of the witness testifying as to such records, may be shown to affect the weight of any evidence tendered pursuant to this Section, but such circumstances do not affect its admissibility.

…..

Burden of proof

23C The person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be. *2002, c. 17, s. 2.*

Integrity of electronic records system

23E In the absence of evidence to the contrary, the integrity of the electronic records system in which an electronic record is recorded or stored is presumed in any legal proceeding

(a) by evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record, and there are no other reasonable grounds to doubt the integrity of the electronic records system;

……..

23F For the purpose of determining under any rule of law whether an electronic record is admissible, evidence may be presented in any legal proceeding in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or stored, having regard to the type of business or endeavour that used, recorded or stored the electronic record and the nature and purpose of the electronic record. *2002, c. 17, s. 2.*

[42] I acknowledge that Section 23(3) says that evidence that the records do not contain something is “competent” to disprove a fact, but it does not say that such evidence is sufficient. The whole of the circumstances, including what records are available and what records have been placed before the court, must be considered in determining what weight to give that

evidence. What troubles me is that in this case there were actually records of the Claimants dealings with the Defendant. Nothing in the evidence indicates that they could not have been produced. This is not a situation where there is no producible record at all.

[43] Overall, these provisions suggest to me that if business records are to be considered by the court the records themselves or at least something in the way of a printed report of the electronic data is what properly should be before the court. Secondly these sections suggest that the party purporting to rely on these is required to put forward in evidence as to the nature of the computer system, its workings, how it is maintained and its reliability.

[44] I also note that it is specifically provided that where the person testifying about the records does not have personal knowledge of the records that fact that can affect the weight to be given the records. I do not have the evidence of someone who can speak to the technological workings of the Powerbroker system. I believe I can take judicial notice that computer programs often contain meta-data since that is specifically addressed in the Nova Scotia Civil Procedure Rules. The metadata may well have been able to show when the claimant's file was accessed by anyone during the relevant time. We simply do not know. Again I am not speculating that there was something there; I am simply pointing out the potential for incompleteness of the evidence which goes to the weight it should be given.

[45] I have tried to find some jurisprudential guidance as to how I should treat these problems. I have not found any cases specifically on point however I did find **R. v. Strauss Enterprises Ltd.**, 2004 CarswellBC 3657, [2006] B.C.W.L.D. 5878 where the British Columbia Provincial Court refused to allow to be entered as evidence the testimony of a person who had reviewed the records when the records were not before the court. The Learned Provincial Court Judge stated the proposition as follows:

> "2 The testimony offered is that of Sandra Jarvis who is proposed to testify that she examined the database and did not find on that database any record of an application for a drug identification number or for a filing of a new drug submission."

[46] And the conclusion was as follows:

> 19 In this case, the Crown, in order to introduce the document itself or a print-out of the document, would have had to comply with the notice requirements of Section 28 of the Canada Evidence Act and would have to comply with Section 31.1 of the Canada Evidence Act. What they are trying to do is to avoid the application of those sections by having a witness who does not appear to be the keeper of the document, or the person responsible for the keeping of the document, testify to its contents.
>
> 20 In my view, that evidence is not admissible and I so rule.

[47] I fully acknowledge that this was a criminal case considering the **Canada Evidence Act** and a somewhat different fact situation. This was also a ruling with respect to admissibility and in the case before me the claimant did not object to admissibility. Nevertheless it gives me some comfort that my concerns have been shared by at least one other court. I would suggest that anyone adjudicating any proceeding would have some discomfort with a witness saying in effect "I am not producing the records but trust me I have reviewed them and this is what they say" (or do not say as the case may be). By way of analogy, I would not think that a court would place much weight on a witness who says I have reviewed all of the photographs and they don't show anything when the photographs were in the witness's possession but not provided to the court. This may not be an exact analogy but I think it illustrates my concern.

[48] As to hearsay all courts are familiar with the principled exception set up by the Supreme Court of Canada permitting hearsay to be admitted on the basis of both necessity and reliability. However, in the Small Claims Court, on the authority of **Towle v. Samad, 2013 NSSC 260,** it is my understanding that the Small Claims Court can admit hearsay on the principled exception considering only reliability and the Small Claims Court does not have to assess necessity.

[49] The most usual application of this case is to permit invoices and other documents to be entered into evidence without the necessity of calling the author or keeper of those documents. But what I am being asked to do in this case is an entirely different character.

[50] The evidence given for the defendant, if not hearsay, is of the same nature and fraught with the same potential problems. I am troubled that the defendant did not produce printouts of the records representing the claimant's file and that of the other person named Michelle Moore. There can be no objection to the production of the claimant's file as she is a party to this litigation. There may be some privacy issues with relation to the other Michelle Moore however those could have been alleviated by appropriate orders for sealing of records and undertakings from defendant's counsel as to preserving confidentiality.

[51] I take the view that the reliability referred to in **Towle v. Samad, 2013 NSSC 260** relates to sufficient reliability in order that the evidence should be admitted, and does not relate to the weight to be accorded to the evidence. Because evidence is admissible does not make it conclusively determine an issue. It still must be weighed.

[52] By not producing these records the defendant has deprived both the claimant and the court the ability to independently examine the records. Were I able to examine the records and have the scrutiny of the claimant's solicitor applied to them, I would have been substantially more comfortable in accepting that the evidence given by the defendant's witnesses could sufficiently outweigh the evidence of the claimant in an overall consideration of the case. This deficiency gives me great pause as to what weight I can properly give to the defendant's evidence about the records, remembering that the real evidence is the records, not the evidence given by the defendant's witnesses.

[53] So this leaves me in a position where standing alone I found the claimant's evidence to be credible but I must assess her credibility on the basis how it logically fits with the whole of the evidence. The only other evidence I have is the assertion by the defendant's witnesses that the records contain no indication of the phone call having been made in November 2013. I do not have those records before me. Neither do I have evidence from a person familiar with the technological workings of the Powerbroker system. The defendant asks me to deny this claim on the basis of those records and argues that those records should outweigh the claimant's testimony. It is possible that they would outweigh the claimant's testimony if I had the comfort of those records being scrutinized by the defendant and presented to the court for the court's interpretation. To base a decision on this evidence in these circumstances seems to be permitting the defendant, in part, to be the trier of fact instead of the court.

[54] I have indicated that I do not doubt that the defendant's witnesses gave their evidence honestly in the sense that they subjectively believed what they were testifying to and were making no effort to mislead the court. But this still leaves me with the problem that the evidence I must consider is the computer records and those are not before the court. In addition, Mr. Amirault agreed that human error can occur, but I cannot agree with him that the evidence in this case eliminates that possibility. I am not satisfied that his evidence as to training, the computer system and the business methods employed, is sufficient to remove human error from consideration when weighing the Claimants evidence in the context of the **Faryna** test.

[55] I am also mindful of Ms. Wight's submission about the difficulty of proving a negative and I have considered that carefully. It is the defendant that asserts a negative in its defence. While I recognize what she says, I cannot conclude that it changes the burden of proof and, as always, the party that asserts a proposition bears the burden to prove it. Neither does it change the overall determination of the balance of probabilities.

[56] Considering all these factors, assessing the claimant's evidence in light of the whole of the evidence, and reviewing the whole of the evidence before me, I am unable to conclude that the defendant's evidence is sufficiently powerful to outweigh the claimant's evidence. This is not to say that the claimant's evidence could not be inaccurate. That is a real possibility, but I am required to decide on a balance of probabilities. Both parties put forward strongly arguable positions. I have weighed the evidence and submissions repeatedly and struggled greatly to determine a legally correct, fair and just conclusion. Ultimately my best considered judgment is that when I apply the balance of probabilities standard of proof, given the concerns about the evidence of the defendant, and considering the whole of the evidence, I am satisfied that the claimant has tipped the scales slightly in her favour. I therefore hold that the defendant did negligently fail to arrange the coverage for the new vehicle and is therefore liable.

[57] However, I believe that there is a measure of contributory negligence here as well. The test for contributory negligence was set out by the Supreme Court of Canada in **Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. [1997] 3 S.C.R. 1210**:

> Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckoning he must take into account the possibility of others being careless.

[58] In **Barron v. Barron, 2003 NSSC 090.** Justice LeBlanc states the test this way:

> [47] There remains the issue of whether the claimant was contributorily negligent. If the claimant's own unreasonable conduct contributes to their injury, the right to tort recovery is reduced. In proportion to the degree of fault (see,e.g., Linden, Canadian Tort Law, supra., at 445). Viscount Simon articulated this obligation of reasonable conduct in Nance v. B.C. Electric Railway, [1951] 2 All. E.R. 448 (P.C.) at 450, stating that a defendant alleging contributory negligence "must prove to the satisfaction of the jury that

> the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury."
>
> [48] Linden notes (at 450) that the contributory negligence must not only be a cause of the loss, but it must be a proximate cause; "[i]n other words, the loss must result from the type of risk to which claimants expose themselves, not from a totally different hazard."

[59] The claimant knew the process for making changes. On all prior occasions she had received a document sometime after making a request that she had to sign and return to the defendant. I am also satisfied that the claimant received a renewal notice [Exhibit 2 TAB 24] within weeks of making her request for change of vehicle. That notice clearly stated that the vehicle insured was a Chrysler Neon. In the past when an error of this nature had been made she called the defendant to alert them to it. I find that she was contributorily negligent in not doing so. Also she made no inquiry over a period of approximately 5 months. I don't think that the fact that she was able to register the vehicle negates this lack of diligence on her part.

[60] I am faced with the difficult task of apportioning fault. From the authorities, this appears to be a largely discretionary decision to be made judicially, based on an assessment of the whole of the evidence. The initial fault lies with the defendant. I do not think that the Claimant's fault is quite of the same degree but she should bear some significant responsibility. I therefore conclude that the appropriate apportionment of fault is 35% to the claimant and 65% to the defendant.

[61]The claimant's loss is $9,369.78. I will grant judgment to the claimant in the amount of 65% of that or $6,090.36. Given that there was divided success I will exercise my discretion not to award costs.

Dated at Yarmouth this _____ day of July, 2016.

Andrew S. Nickerson Q.C., Adjudicator