SCCH. No. 406887

SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: A.B. v. C. D. 2013 NSSM 1

Between:

A. B.

Claimant

v.

C. D.

Defendant

Decision

[1] This matter came on before me on October 23, 2012. It arises out of an affair of the heart, and such affairs do not always run smoothly. The claimant and the defendant began dating in late 2009, became sexually intimate in early 2010 and ended their relationship in June 2010. The claimant now makes a claim against the defendant in two parts, as follows:

a. a claim for the payment of debts the claimant says is owing by the defendant to her; and

b. a claim for damages stemming from the claimant's Herpes Simplex which she alleges was transmitted to her by the defendant.

[2] When I was advised of the second part of her claim I warned the claimant that her claim, at least insofar as general damages was concerned, was limited to $100.00–and that given the nature of her claim it might be better brought in a different forum. She understood the limitations imposed on claims by the Small Claims Court Act and elected to proceed in any event.

[3] I heard the testimony and submissions of the claimant and the defendant. At the conclusion of the hearing I reserved, urging the parties to make an effort to settle. I gave them two weeks to do so before commencing consideration of the matter. I was

subsequently advised by the claimant by email that the parties had not been able to settle.

[4] In view of the personal nature of the issues raised in this claim I have decided to alter the name of the claimant to "A.B." and that of the defendant to "C.D."

The First Claim

[5] The parties met through an online dating site. They were involved in a relationship from late December 2009 until early June 2010. The debt for which the claimant claims consists of two principal amounts.

[6] The first is the defendant's share of a trip south paid for by the claimant. The defendant acknowledged and agreed before me that the claimant paid the entire amount, and that he had agreed to reimburse her one half of the total cost, or $1,531.50.

[7] The second consists of small sums of money that the claimant testified the defendant would ask her for from her from time to time when they were out at a bar, or at a party, or to pay certain expenses such as insurance premiums. The defendant would ask for money to buy beer, or drinks, or presents at birthday parties. The claimant acknowledged that there was no contract or "hard evidence" regarding the status of these payments as loans (as opposed to gifts). However, she was a single mother on a tight budget and not in a position to give money without an expectation of getting it back. She gave the money to the defendant when he asked "in good faith to a person I was dating thinking I would get it back." The claimant testified that she kept careful track of these sums, which, she said, the defendant always promised to pay back to her and which, from time to time, he did. At the end of the relationship the amounts (which includes the two principal amounts) as of May 27, 2010 paid by her was $2,496.50: see Exhibit C1, Tab 1.

[8] The defendant, while acknowledging that some of the monies he had from the claimant were loans of a sort, denied that they all were. Some were gifts of money of the type that typically occur between two people who are dating. He testified that in his view he had more than repaid the claimant whatever he had borrowed from her.

[9] The relationship came to an end on June 7, 2010. Between then and January 6, 2011 the defendant made a number of email payments (totaling $777.00) and cash

payments (totaling $1,005.00) to her, for a grand total of $1,782.00. The balance of the debt, after these amounts are taken into account, is $714.50: Exhibit C1, Tab 1 and Tab 9. This is the amount she now claims.

[10] Having considered the testimony of the claimant and the defendant, as well as the nature and type of the "loans" set out in the claimant's spreadsheet at Tab 1, Exhibit C1, I am satisfied that this part of the claim must fail.

[11] I come to this conclusion for two reasons.

[12] First, some of the payments–the trip south or the insurance payment–are payments that would not in ordinary course be considered gifts. Indeed, the defendant acknowledged as much. These totaled $1,631.50. The defendant paid the claimant $1,782.00, which can be taken as a repayment of those amounts.

[13] Second, insofar as the balance is concerned, such payments–such as for dinners, or drinks at a bar–are the types of payments that one partner will often make on behalf of both during the course of a dating relationship. In our day and age when partners go out on a date and one pays for drinks or for supper such payments would in ordinary course be considered gifts. They would not be considered loans, unless there were express words to that effect. What counts in this regard are express words to the effect that the payments are to be considered loans, regardless of the paying partner's intention, and regardless of what they think in their own mind.

[14] It may be that some of these payments were more couched as "loans" than as gifts. But the onus of proving that they were in fact loans and not gifts is on the claimant. The payments in question were made numerous times for relatively small amounts ($20.00 or $50.00 being common) for things typically considered as "partner" activities (such as dinners or beer for a party). That being the case, I was not satisfied that the claimant had satisfied the onus of proof that was on her in this regard. Hence this part of her claim fails.

The Second Claim

[15] The defendant was diagnosed with and treated for Herpes Simplex 1 (the source being on his penis) in October 2006: Exhibit D2. He testified that after its treatment he had had no further outbreaks of the condition. He did not tell the claimant about

this medical history prior to the commencement of their intimate relations in the early part of 2010.

[16] The claimant, for her part, testified that she had never had herpes. She was a single mother. She had only started dating about a year before December 2009, and in the ten years prior to that had only had two dates. Once her child was old enough she had started to date again. Her last sexual contact with someone prior to the defendant had been some time in June or July 2009.

[17] Relevant to these proceedings is the fact that with the defendant, the claimant had jaw surgery in mid November 2009 "and almost died." The site became infected; she was on several antibiotics; and had a second surgery to remove the infection in January 2010. As a result the claimant's immune system and health were compromised in the early part of 2010.

[18] Some time in January 2010 the claimant and the defendant became sexually intimate. During the first two weeks of their intimacy they used condoms. However, the defendant (according to the claimant) did not like using them. She questioned him about the possibility of pregnancy, and he said that he had had a vasectomy. She then "allowed him not to use a condom." In early February 2010 the claimant developed a severe yeast infection coupled with a severe outbreak of herpes in her genital area. The herpes was subsequently diagnosed as being Herpes Simplex 1. When the two of them saw her doctor on February 9, 2010 the defendant acknowledged at that time that he had had herpes several years ago.

[19] The claimant claims that

a. the defendant did not advise her that he had had herpes in the past,

b. had he done so she would not have permitted him to be intimate with her without using condoms,

c. the defendant transmitted the herpes to her, and

d. she has incurred medical expenses associated with the treatment of the herpes, as well as pain and suffering.

[20] The defendant's position, on the other hand, is that

a. the claimant had genital herpes,

b. genital herpes is Herpes Simplex 2, not 1,

c. the claimant had had sexual partners in the past,

d. none of his other partners had ever had problems with herpes, and that accordingly

e. he could not have been the one that transmitted herpes to her.

[21] Neither party presented any medical opinion evidence that touched on the issue of causation. The defendant testified that he had researched the issue, and that genital herpes was generally caused by Herpes Simplex 2. Simplex 1 was simply a cold sore. Since what he had been diagnosed with years ago was Simplex 1 he could not possibly be the source of the claimant's genital herpes.

[22] The claimant relied on information from the website www.herpes-coldsores.com, www.quickclear.net/what-are-herpes.php, the Nova Scotia Communicable Disease Manuel and an article by Andrew Kawaski titled "Cold Sore Blister–Basic Information about Herpes Simplex, Treatments, and Simple First Aid:" see Exhibit C1, Tab 7. The first of these sources states that cold sores on the mouth and lips are generally caused by Herpes Simplex 1, and that genital herpes is generally caused by Herpes Simplex 2. However, it also states as follows:

a. "Even so, it is possible to transfer the different virus types to different areas of the body. HSV-1 (or cold sores) can be transferred to the genitals through oral sex. In the same way, HSV-2 (or genital herpes) can be transferred to the mouth."

b. "Since the genital herpes virus can be transmitted through oral sex as well as vaginal sex, it is also possible to contract the virus from a cold sore on a partner's mouth or face. It is possible to pass the virus on even if they did not have a cold sore present at the time of contact."

c. So it is very easy for a person to unwittingly transmit the infection to their partner. The symptoms of the infection vary greatly between individuals. It might be totally unnoticeable in one person, but cause severe blistering in their partner."

d. “Typically, if there is a recurrence a herpes sore will occur in the same location as it did previously, or closely nearby.”

e. “Each nerve has a particular area of skin it serves, called a dermatone, so the herpes lesions are limited to the dermatone it initially infected, unless you autoinnoculate (self-infect) yourself somewhere else.”

[23] The other sources also refer to the fact that Simplex 1 and Simplex 2 can both cause genital and oral herpes, though, again, Simplex 1 is generally associated with oral sites and Simplex 2 with genital sites.

[24] Based on the testimony of the claimant and the defendant, and on the medical information submitted by the claimant, I make the following findings of fact:

a. the defendant was diagnosed several years prior to his contact with the claimant with Herpes Simplex 1 on his penis;

b. the defendant did not tell the claimant of his prior history of herpes infection prior to persuading her to engage in intimate contact without the use of condoms;

c. had he done so the claimant would not have agreed to sexual intimacy without the use of condoms;

d. generally, Herpes Simplex 1 (cold sores) infections centre on the mouth and lips while Herpes Simplex 2 (genital herpes) is found in the genital area;

e. however, Herpes Simplex 1 can be transmitted to the genital area;

f. transmission of the herpes virus is by way of direct contact between the area originally infected and an uninfected area;

g. the fact that the virus is active (that is, transmittable) is not always clearly evident (such as, for example, by way of an open sore);

h. the claimant had intimate contact with the defendant at a time when her immune system was compromised;

i. the claimant had had sexual partners in the past but had never had herpes;

j. the claimant had a severe outbreak of Herpes Simplex 1 in the genital area shortly after having unprotected sexual relations with the defendant.

[25] On these facts I must determine

a. whether the defendant owed the claimant a duty of care and, in particular, a duty to advise her prior to unprotected intimate contact that he had had herpes in his genital area in the past,

b. if so, whether he breached that duty, and

c. if he breached any such duty, whether the breach caused damage to the claimant.

[26] Dealing with the existence of a duty of care, I am satisfied that the potential emotional, psychological and economic consequences of a herpes infection, particularly when it is located in the genital area, are enormous. That being the case there is in my opinion a duty on a person who has had an outbreak of herpes in the genital area, regardless of whether it is Herpes Simplex 1 or 2, to advise his or her partner of that fact so that appropriate precautions can be taken by him or her–or so that any risks of transmission are willingly assumed by that partner. The defendant had that duty. He breached it when he failed to advise the claimant of his past infection prior to persuading her to allow him intimate contact without the use of a condom.

[27] Turning to the question of causation, I am also satisfied on a balance of probabilities that is is more likely than not that the defendant (rather than some previous partner) transmitted herpes to the claimant. I come to this conclusion for three reasons.

[28] First, and most importantly in my opinion, both suffered from outbreaks of Herpes Simplex 1 in the genital area. Herpes Simplex 1 infections in the genital area, while not impossible, are atypical of the virus. Herpes Simplex 1 is more often located on the mouth or lips. It can however be transmitted to the genital area by sexual contact. The fact then that both the defendant and the claimant suffer from an outbreak of Herpes Simplex 1 in an atypical area support a conclusion that the claimant contracted the virus from the defendant as opposed to any previous sexual partner in the past.

[29] Second, there is the question of timing. If the claimant had been infected by the Herpes Simplex 1 virus by a previous partner one might have expected an outbreak at some point in the past–and particularly in November and December 2009, when her immune system was compromised after her surgery. There was, however, no such outbreak until a week or so after her first unprotected intimate contact with the defendant. The outbreak came not after her initial protected contact with the defendant but after her later unprotected contact.

[30] Third, there is the fact that when the defendant asked the claimant to engage in unprotected intimate contact with him he created an elevated risk of her acquiring a herpes infection. The medical information presented by the claimant makes clear that an infected person will always carry the herpes virus. The virus may not always be active (that is, transmittable) but it is also not easy to determine when or if the virus is active. A partner who fails in the duty to warn in such circumstances cannot be heard to say that his or her partner cannot prove beyond a doubt that he or she–as opposed to some other previous partner–was the source of the infection.

[31] I turn now to the question of damages.

[32] With respect to general damages, I am satisfied on the evidence that the claimant did suffer (and will continue to suffer) pain and suffering as a result of having been infected with herpes. I award $100.00, which is the most that can be awarded for general damages for pain and suffering in the Small Claims Court.

[33] With respect to special damages–that is, for the expenses associated with the treatment of herpes–I am satisfied that the claimant is entitled to claim for those medications directly linked to the treatment of herpes. She was prescribed Toradol and Valtrex for the condition: see Exhibit C1, Tab 5. She also received a number of other medications: see Exhibit C1, Tab 4. Of these one (Mylan-Fluconazole for the treatment of yeast infections) was not in my opinion proved to be linked to the herpes. The others were. The total for those prescriptions that she had to pay for out of her own pocket was $118.05, and I award that amount to her.

[34] She is also entitled to court costs, but not the cost of lunch for her friend who served the defendant.

[35] I will make an order incorporating the above findings and awards. I will also make an order shielding the names of the claimant and the defendant to guard their privacy.

Dated at Halifax, this 2nd day of January, 2013.

Original:	Court File	)	
Copy:	Appellant	)	______________________________
Copy:	Respondent	)	Augustus Richardson, QC
			ADJUDICATOR