SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *West v. WN Law Firm Inc*, 2022 NSSM 49

Date: 20220907
Docket: SCCH 509625
Registry: Halifax

Between:

Claude West

Claimant

- and -

WN Law Firm Inc (coba Waterbury Newton) and Kathleen Hutchinson

Defendants

REASONS FOR DECISION AND ORDER

Adjudicator: Eric K. Slone

Heard: Via zoom in Halifax, Nova Scotia on May 27, 2022

Appearances: For the Claimant,
Richard Norman, counsel

For the Defendants,
Colin Bryson, counsel

BY THE COURT:

[1] The Claimant achieved what he perceived to be a poor result in matrimonial litigation, causing him to pay to his ex-wife significantly more than he believed he owed. He blames his lawyers. As such he has sued them for negligence, or more accurately professional malpractice, claiming significant damages which he has reduced to $25,000.00 to remain within the jurisdiction of this court.

The legal context

[2] While solicitors' negligence cases are not uncommon, claims against barristers are relatively rare and difficult to prove, for what are probably good reasons.

[3] In Great Britain barristers were once (and for several decades) immune from such suits by virtue of the decision of the House of Lords in *Rondel v. Worsley*, [1969] 1 A.C. 191, [1967] 3 All E.R. 993, which held that such suits are against public policy. Canadian courts flirted with the idea of following the British example but decided against it in a series of cases in the 1970's starting most notably with *Banks et al. v. Reid*, 1977 CanLII 1316 (ON CA) and *Demarco v. Ungaro et al* (1979) 21 O.R. (2d) 673 (H.C.). The House of Lords ended up reversing itself in *Arthur J.S. Hall & Co. v. Simons* [2000] 3 All E.R. 673, but not before it had provoked some soul-searching throughout the Commonwealth.

[4] Though there is no immunity from suit in Nova Scotia, there are still very good reasons to treat such cases with great caution. In Nova Scotia, the case of *Grand Anse Contracting Ltd. v. MacKinnon*, 1993 CanLII 4546 (NS SC) made clear that liability does not attach to mere errors in judgment, but rather is reserved for more significant defaults:

> It is clear from the authorities that the lawyer's conduct in such circumstances must extend appreciably beyond the realm of an error of judgement and that the liability ought be imposed only in clear and exceptional cases. The benchmark case appears to be the Ontario case of *Demarco v. Ungaro* (1979), 1979 CanLII 1993 (ON SC), 21 O.R. (2d) 673, 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 at the suit of his or her former client by reason of the conduct of a civil case. 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 conduct of a case will be held to be negligence as opposed to a mere error of judgement. But there may be cases in which the error is so egregious that a Court will conclude that it is negligence."

[5] Other cases have cautioned that *Demarco* is not to be understood as setting the bar so high that only egregious errors may attract liability. A lawyer conducting litigation may still be liable for failing to meet the standard of a reasonable practitioner in the area of law they practice. But as I will show later, the language of egregious error still has some currency.

[6] Almost every piece of contested litigation results in a winner and a loser. Based upon my own four decades of litigation experience I can say with some confidence that winning counsel (and their clients) rarely second guess their approach to the case. They don't care which of their theories were accepted by the judge. They do not agonize about points not made, questions not asked, or witnesses not called. They pat themselves on the back, take the victory and move on.

[7] On the other hand, losing counsel almost always conduct a post-mortem on their approach to the case. They question every tactical decision, every cross-examination question not asked, every argument not made, every assumption that proved to have been wrong. They would say, though perhaps not to their client, that if given another chance they would do many things differently. And an objective third party looking back on those decisions might well conclude that it should have been evident, if not obvious, that what turned out poorly was predictably a losing strategy.

[8] It would truly be against public policy to adopt a standard that made litigators liable for negligence every time, or almost every time they lose a case.

[9] The fact of the matter is that trials are to a considerable extent unpredictable. If they were predictable, we would not need to have them.

[10] Judges bring their own experiences and tendencies to the task of deciding a case. The same case might achieve a different result before a different judge. Although courts of appeal can correct some serious trial errors, the fact is that trial court decisions are largely unassailable on questions of fact. And fact-finding is as much an art as a science.

[11] All of which is to say that the barrier for proving negligence by a barrister is, and must be, a fairly high one.

[12] There are certain minimum requirements that a barrister must meet, or risk being found negligent. For example, missing a limitation period or some other court-imposed deadline, through carelessness, would typically be actionable. Those types of defalcations are not matters of professional judgment. They are examples of sloppy practice. And they more resemble examples of solicitor's negligence than barrister's negligence.

The need (or not) for expert evidence

[13] Counsel for Ms. Hutchinson argues that the case brought by Mr. West is fatally flawed because there is no expert evidence before the court on the applicable standard of care, which would be that of a reasonable matrimonial law practitioner. Counsel for Mr. West argues that expert evidence should not be required in a Small Claims case as it would defeat the court's mandate to provide inexpensive and expeditious justice of smaller claims.

[14] In the Ontario Court of Appeal case of *Krawchuk v. Scherbak*, 2011 ONCA 352, 106 O.R. (3d) 598, at para. 130, leave to appeal refused, [2011] S.C.C.A. No. 319, the court held:

> [I]n general, it is inappropriate for a trial court to determine the standard of care in a professional negligence case in the absence of expert evidence.

[15] This was qualified by the statement at paras. 133-35, that expert evidence is not necessary where:

> (1) it is possible to reliably determine the standard of care in relation to "non-technical matters or those of which an ordinary person may be expected to have knowledge"; or

(2) the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard.

[16] In keeping with those principles, I believe that Mr. West's case must stand or fall under principle 2: *the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard.*

[17] I am mindful of the need to facilitate access to justice, but in a case involving $25,000.00 and where the Defendant's professional reputation is implicated, I do not believe that the need for expert evidence should be dispensed with.

[18] The subtleties of matrimonial litigation are not something that an adjudicator of this court (let alone an ordinary person) can be expected to know. I cannot completely ignore the fact that I practiced some matrimonial litigation over my career, but I am in no position to set standards for lawyers who are in and out of the Family Division on a daily basis. To reach the threshold of professional malpractice, Ms. Hutchinson's conduct would have to impress me as egregiously wrong or inadequate.

[19] It is with these principles in mind that I begin to consider the Claimant's case.

The matrimonial litigation

[20] Mr. West and his former spouse were divorcing after a 27-year relationship. The active issues in the litigation mostly concerned division of matrimonial property with related issues of claimed exclusions as inherited or gifted assets and business assets. There were pension division issues. There was also a claim by Mr. West for spousal support.

[21] That divorce action was started by Ms. West sometime in 2016. Mr. West retained Lynn Connors QC to represent him. The usual financial documents were prepared and exchanged, and (as is common in matrimonial litigation) the matter came before the court for a settlement conference in November 2018, before Justice Lester Jesudason. The matter did not settle but was scheduled for a continuation before the same judge about a month later. After the second conference, Ms. Connors wrote to her client, Mr. West, and made it quite clear that the judge's view of a settlement range was something that she would recommend,

but that he (Mr. West) was rejecting. Ms. Connors took the extraordinary step of saying that she would no longer act for him if he was not prepared to take her advice and settle along the lines of what the judge was recommending. She prepared a notice for him to sign, indicating that he would thenceforth be representing himself.

[22] On his instructions she made a settlement offer on Mr. West's behalf that was far less generous to his ex-wife than the settlement conference judge had recommended. It was rejected, and a counteroffer made which Mr. West rejected. Ms. Connors exited the picture with Mr. West assuming carriage on his own behalf.

[23] This was actually the second time that Mr. West represented himself, having done so from May 2017 to April 2018, before he re-retained Ms. Connors (for reasons not known to me.)

[24] A short time after Ms. Connors exited, Mr. West retained the Defendant Waterbury Newton, and specifically lawyer Lindsay O'Reilly. In late February 2019, the matter was back in court and was scheduled for a trial starting October 21, 2019, before Justice Cindy Cormier, and various deadlines were set for the filing of documents and such. As is also common in matrimonial proceedings, evidence in chief was to be elicited through affidavits, with cross-examinations taking place in open court.

[25] Unfortunately, Ms. O'Reilly had a health emergency and had to take a medical leave in about July 2019. The West file was taken over by Ms. Hutchinson of Waterbury Newton at about the beginning of August 2019. At that point there was less than three months before the scheduled trial date.

[26] Both Ms. O'Reilly and Ms. Hutchinson were lawyers with about four years at the bar in 2019, and both practiced family law.

[27] It bears mentioning, at this point, that Ms. Hutchinson could have recommended to Mr. West that they seek an adjournment because of Ms. O'Reilly's inability to continue. She did not do so but made the judgment that she could handle the extra workload of Ms. O'Reilly's files and be prepared for the trial. (I do not know how Mr. West would have reacted to a suggestion of a delay. He was not asked this question at the hearing. I also take notice of the fact that the Family Division is very busy and any delay might have been substantial.)

[28] As Ms. Hutchinson took over the file, there were disclosure issues outstanding and affidavits had to be drafted and filed.

[29] The preparation of Mr. West's affidavit was a significant undertaking, and one of Mr. West's contentions in this claim is that Ms. Hutchinson mishandled this in several respects:

a. He claims that she did not explain to him that the affidavit took the place of examination in chief and was his only (or primary) vehicle for putting his evidence before the court. He believed that it had to be formatted as a point-by-point response to the affidavit first filed by his ex-wife.

b. He alleges (and this is conceded) that Ms. Hutchinson missed the filing deadline for his affidavit and as a result the last set of changes to the draft were not permitted to be used.

[30] As to the first objection, it is evident that Ms. Hutchinson drafted the affidavit and elected to structure it in a way that it mostly responded to Ms. West's affidavit. She had met with him prior to drafting his affidavit, and after a first draft was prepared, she sent it to him for review. It was quite detailed, measuring 12 pages in length in a small font, single spaced. It was Ms. Hutchinson's professional judgment that using this format was an effective type of advocacy. There was no evidence that suggests it is not an appropriate or effective format in matrimonial proceedings.

[31] As for the late filing, the reason it became an issue was that opposing counsel had based her client's response affidavit on an earlier unsworn affidavit of Mr. West, and she objected to any changes being admitted. The judge (in a teleconference) agreed and as a result the final changes did not get added to the affidavit. Opposing counsel was also objecting to the admission of the affidavits of supporting witnesses, though these were eventually allowed in evidence.

[32] Ms. Hutchinson says that she had the option of seeking to adjourn the trial, but that would likely have exposed Mr. West to a significant costs order in the range of $20,000.00. She says that she made a judgment call that the changes to the affidavit were not important enough to justify such a cost and delay of the trial. Mr. West says that Ms. Hutchinson should have sought the adjournment, and in fact he believed that she would be seeking an adjournment of the trial.

[33] The trial proceeded as scheduled. Both principals were cross-examined as

were a number of minor witnesses.

[34] The trial focussed mainly on issues of whether certain properties were matrimonial assets subject to division. Spousal support was also in issue.

[35] Though this is perhaps an oversimplification, the matrimonial property issues concerned properties and businesses that Mr. West insisted were either inherited or gifted to him, while Ms. West contended that they had either been acquired with matrimonial funds or were used for family purposes, and thus were matrimonial assets. The evidence surrounding these businesses and properties was, as far as I can tell, a bit short of documentation and slightly convoluted. Much of Mr. West's position was based on his own testimony and that of his witnesses. He contends that Ms. Hutchinson failed to bring forward some corroborating evidence that he had or could have obtained, but that Ms. Hutchinson never sought them from him, and as such the judge did not have the benefit of considering such evidence.

[36] As noted, the result was mostly in favour of Ms. West's position. In the course of a lengthy and detailed decision, the judge made negative comments about Mr. West's credibility.

[37] In this claim, Mr. West contends that there were things that Ms. Hutchinson could and should have done differently, that he says would likely have led to a different and more favourable result, for him. These are his specific complaints, in the order set out in his counsel's brief:

a. **The missed deadline for filing affidavits**, already commented upon.

b. **Lack of instructions to Mr. West and his witnesses**. The contention is that the lack of instructions concerning Mr. West's affidavit led to "insufficient and lackluster" evidence that contributed to the poor result.

c. **Failure to follow instructions.** Mr. West contends that Ms. Hutchinson made a "unilateral and very prejudicial" decision not to seek an adjournment.

d. **Failure to keep client reasonably informed.** Mr. West contends that Ms. Hutchinson failed to advise him of the deadlines for filing affidavits. He also objects to the fact that he was not provided with a draft copy of Ms. Hutchinson's legal brief to be filed with the court.

e. **Lack of preparation for trial.** Mr. West contends that Ms. Hutchinson was ill-prepared for the trial, as evidenced (in part) by her time records which show very little time spent preparing for trial. This complaint also includes the allegation that Ms. Hutchinson could have brought forward additional evidence that supported Mr. West's position on various property valuation and attribution issues. He also alleges that Ms. Hutchinson failed to advance an argument that he was entitled to share in his ex-wife's WCB annuity. He says that Ms. Hutchinson failed to cite a 2003 case which treated a WCB annuity as a matrimonial asset, but instead relied on a 2014 case that found otherwise.

[38] Ms. Hutchinson's counsel has answered these criticisms in various ways.

[39] He argues that Mr. West had inflated expectations, at odds with the advice he had received at the Settlement Conferences and from his own lawyers, most notably Ms. Connors.

[40] He argues that the strength of Ms. Hutchinson's advocacy both in terms of her written work (affidavits, brief) and oral advocacy (cross-examinations and oral argument) can only be assessed against a standard established by expert evidence. Mr. West's criticisms are essentially Monday morning quarterbacking, using hindsight that is only available once the judge made her decision.

[41] He argues that only a matrimonial law expert could speculate meaningfully on whether the additional evidence that Mr. West complains was not used, or arguments not made, would have made a difference in the final result.

[42] Even on those matters where Ms. Hutchinson admits she made an error, namely missing the filing deadline and (arguably) not making a timely request for an adjournment, Mr. Bryson argues that there is no basis to conclude that things would have turned out better for Mr. West.

[43] He argues that there is no basis to conclude that Ms. Hutchinson was unprepared for the trial. He says that on all of the contested points where Mr. West now says they should have been supported with additional evidence, there was already evidence to support those points in the record which, for reasons of her own, the trial judge either ignored or simply did not accept.

Discussion

[44] It is implicit in the Claimant's position that the result of Justice Cormier's

decision was unjust or incorrect, or more accurately that it fell outside the range of reasonable outcomes. If it was a reasonably just result, on the facts, then it would be difficult to argue that he should have received a more favourable (i.e. unjust in his favour) result had certain evidence been put forward or had he (and his lawyer) been better prepared. So in order to succeed, he must be saying that the result was unjust to him.

[45] Was it?

[46] One of the challenges in posing this question is that it invites a virtual retrial of the matrimonial action. Even to get a sense of what went on before Justice Cormier, one would have to read the trial transcript. There is no way to assess the strength or weakness of Mr. West's case without reading his cross-examination. Ms. Hutchinson's notes taken during the trial are not a substitute for a transcript.

[47] Or more accurately, a matrimonial law expert having the benefit of all of the documents plus a trial transcript might have been able to assess the strengths and weaknesses of the case and measured it against the legal effort that Ms. Hutchinson made.

[48] Reading the judge's lengthy reasons, it emerges that on virtually every contested point, she preferred the evidence of his ex-wife. Though phrased gently, she found him not to be credible. She was critical of his bookkeeping practices and his use of cash. How can we ever know what it might have taken to have presented the Claimant in a more favourable light, to the extent that it might have changed the judge's opinion of him? Or that might have affected the judge's clear preference for the evidence of Ms. West.

[49] In the final analysis, I cannot say that Ms. Hutchinson's handling of any aspect of the file was so egregious that it amounts to professional malpractice.

[50] Still, I do not pin any medals on her. Some of her professional judgments were slightly eyebrow raising. Her decision to forego seeking an adjournment when she first took over the file was somewhat risky. After all, she was not responsible for the fact that Mr. West had to change lawyers so close to trial. It would have been better practice to discuss it with the client, offer advice but allow him to make the final decision, and confirm the decision in writing. But it is purely speculative to say that this would have produced a better result in the end.

[51] Her failure to seek the adjournment closer to the trial was also risky and Mr. West ought to have been more involved in the decision. But once again it is purely speculative to say that anything would have turned out better. In fact, it

might have been to Mr. West's significant financial detriment if he had been assessed a significant costs order to obtain the adjournment.

[52] Ms. Hutchinson probably should have shared the draft brief with Mr. West, but there was very little time and his input may or may not have been valuable. That too is speculation.

[53] The criticisms about lack of preparation raises issues that every litigation lawyer understands. How much time preparing is reasonable or justified? And how much is really needed, for a lawyer who knows their case? Clients do not necessarily appreciate their bill being run up with (seemingly) excessive hours of preparation. Lawyers have a duty to operate with some efficiency. And clients/witnesses do not always improve with additional preparation. The decision as to whether a witness is adequately prepared is a matter of professional judgment.

[54] In the result I do not believe that the Claimant has established professional malpractice and I will be dismissing the claim.

Damages

[55] If I am wrong on liability, I must still try, if I can, to assess damages.

[56] Mr. West argues for both consequential damages (exceeding $25,000.00) and also for the refund of all of his legal fees paid to Waterbury Newton of approximately $16,000.00.

[57] As for the return of legal fees, Mr. Bryson argues that Mr. West would have had to pay these legal fees in any event. Assuming he had established professional malpractice and been awarded damages for it, he would theoretically be made whole and refunding his legal fees would amount to double compensation. I agree.

[58] As for consequential damages, I do not accept the proposition that "but for" the negligence complained of, Mr. West <u>would have</u> achieved the better result that he hoped for.

[59] Even if I accepted that Ms. Hutchinson could have done more to make certain arguments and focus on certain documents, it remains very speculative as to whether the result would have been more in Mr. West's favour. However, the difficulty of proving damages is not a complete bar to recovery. In solicitor's negligence claims, if the plaintiff can establish that there was a breach of duty,

then he need only show that there was a lost chance of a better result. *Alliance v. Gardiner Roberts*, 2020 ONSC 68 provides a recent statement respecting the operation of this doctrine:

> 140 … Where a plaintiff can establish that but for the solicitor's negligence he or she lost a chance to avoid a loss, the plaintiff can seek recovery for the value of that chance: *Jarbeau v. McLean*, 2017 ONCA 115(Ont. C.A.), at para. 28. In this case, the plaintiffs submit that if Gardiner Roberts had told Mr. Hart about Mr. Baker's conflict, Mr. Hart would likely have pursued arbitration and would have had a very good chance of recovering damages for Henry Schein's breach of the OSA. They value that chance at 85% to 90% of recovering the $12.7 million that the plaintiffs invested in Dentech.
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> 141 There are two parts of the loss of chance analysis, causation and quantum. At the first stage, the plaintiff must prove on a balance of probabilities that the defendant's breach or negligence caused the plaintiff to lose a substantially real and significant chance to avoid a loss or obtain a benefit. At the second stage, a court will evaluate the reasonable probability of the real and significant chance and award damages based on the assessed probability: see *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2015 ONSC 3824(Ont. S.C.J.), aff'd 2017 ONCA 545(Ont. C.A.).

[60] As such, I would have approached the damages issue on the basis that Mr. West lost a chance to achieve a better result, and I would have assessed the value of that chance on a percentage of probability basis. I would then have run up against the difficulty of making that assessment in the absence of expert opinion and I would have been obliged to rate those chances at a very low percentage.

ORDER

[61] In the result, it is my opinion that the Claimant has failed to make out a case of professional malpractice and the claim should be dismissed.

Eric K. Slone, Adjudicator