

CANADA / JUDGMENT

Chaster v. LeBlanc

2009 BCCA 315

COURT

British Columbia Court of Appeal

DECIDED

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2009 BCCA 315 Chaster v. LeBlanc

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chaster v. LeBlanc,

2009 BCCA 315

Date: 20090707

Docket: CA035422

Between:

Adrian Chaster, by his Guardian Ad Litem, Libby Soper

Appellant

(Plaintiff)

And

Valmon J. LeBlanc

Respondent

(Defendant)

Before:

The Honourable Madam Justice Prowse

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Bauman

On appeal from the Supreme Court of British Columbia,

August 21, 2007, 2007 BCSC 1250, Docket S015417

Counsel for the Appellant:

A.L. Murray Q.C.

K. Jamieson

Counsel for the Respondent:

D.C. Quinlan

G. Ritchey

Place and Date of Hearing:

Vancouver, British Columbia

May 27, 2009

Place and Date of Judgment:

Vancouver, British Columbia

July 7, 2009

Written Reasons by:

The Honourable Madam Justice Prowse

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Madam Justice Prowse:

INTRODUCTION

- [1] Mr. Chaster is appealing from the order of a trial judge, made August 21, 2007, dismissing his claim for damages in negligence against his former lawyer, Mr. LeBlanc, and awarding him nominal damages of \$1,000 for breach of contract.
- [2] Mr. Chaster's action against Mr. LeBlanc was for the negligent investigation and prosecution of his personal injury action which arose out of an accident on September 18, 1995 when the motorcycle owned and operated by Mr. Chaster collided with another vehicle in downtown Vancouver. Mr. Chaster received very serious injuries in that accident, including a traumatic brain injury. Mr. Chaster alleged that the failure of Mr. LeBlanc to properly investigate and prosecute his case, and to provide Mr. Chaster with appropriate legal advice, resulted in Mr. Chaster entering into a premature, improvident and grossly inadequate settlement of his claim. The settlement was entered into by Mr. Chaster, on his own behalf, shortly after an

unsuccessful mediation of the claim on August 5, 1998. The trial judge found that Mr. Chaster did not advise Mr. LeBlanc that he intended to settle the action with the opposing adjuster, and that he did not tell Mr. LeBlanc about the settlement until after the fact.

- [3] Mr. Chaster's action was based on his claim that he would not have entered into the settlement if Mr. LeBlanc had properly prepared for and pursued the action in accordance with the appropriate standard of care and advised Mr. Chaster accordingly. Most significantly, Mr. Chaster submitted that Mr. LeBlanc was negligent in failing to recommend that the August 1998 mediation and the October 1998 trial be adjourned pending the determination of the extent of Mr. Chaster's traumatic brain injury. He submitted that the measure of damages he suffered as a result of Mr. LeBlanc's negligent representation and breach of the solicitor-client contract, was the difference between what he settled for and the amount he would have received at trial, assuming a trial date in 2000. The difference was substantial, primarily because, approximately nine months following the settlement, Mr. Chaster ceased practising law.
- [4] The trial judge found that Mr. LeBlanc had breached the standard of care in several respects in his conduct of the action, but he concluded that Mr. Chaster had not established a causal connection between those breaches and his loss. In essence, the trial judge found that Mr. Chaster would have entered into the settlement of his claim even if he had been fully and properly advised by Mr. LeBlanc.

ISSUES ON APPEAL

- [5] Mr. Chaster submits that the trial judge erred in:
- (1) failing to apply the appropriate standard of care required of a lawyer prosecuting a claim for damages on behalf of a client with a traumatic brain injury;
 - (2) failing to address all of the alleged breaches of the duty of care, "including the key issue advanced at trial, that [Mr. LeBlanc] failed to advise [Mr. Chaster] not to proceed to mediation and to adjourn the trial when his prognoses, medically and professionally, were precariously uncertain";
 - (3) failing to address the issue of causation, by conducting his analysis at the wrong point from a temporal perspective;
 - (4) committing palpable and overriding errors in relation to certain facts.
- [6] In reply, Mr. LeBlanc denies that the trial judge erred as alleged, and states that Mr. Chaster is, in effect, asking this Court to conduct a new trial and come to a conclusion different from that of the trial judge. He asserts that, when the appropriate standard of review is applied, the appeal should be dismissed.

BACKGROUND

- [7] At the time of the accident, Mr. Chaster was an accomplished civil trial lawyer practising primarily in the area of personal injury law. He was an active member of the Trial Lawyers' Association and had served as its President from 1989-1991. He practised in partnership with Mr. Ian Donaldson under the firm name of Oliver and Company in an equal profit-sharing arrangement, and was doing very well financially in his practice. He was married to Ms. Soper, with whom he had three children.
- [8] Mr. Chaster was also an avid motorcycle rider and enthusiast. He rode a Ducati motorcycle which he had modified so that it could accelerate and travel more quickly. He was riding his motorcycle to work on September 18, 1995 when the accident occurred. At that time, he accelerated through an intersection at high speed, apparently in order to "beat the light", and collided with a vehicle which was turning left across his path. As a result of the accident, he suffered multiple injuries, the most significant of which was a traumatic brain injury. He was hospitalized for approximately a month, at which time he insisted that he be discharged home.
- [9] Despite the seriousness of his injuries, Mr. Chaster attempted to return to work in January 1996. He continued his efforts to resume his practice from then until April 1999 when his treating psychiatrist, Dr. Price, recommended that he take a leave of absence. Mr. Chaster never returned to work as a lawyer. He was eventually successful in obtaining a disability pension.
- [10] Immediately following his accident, members of Mr. Chaster's firm took steps to interview the investigating police officer and witnesses to the accident, and to obtain a reconstruction report. They also retained Mr. LeBlanc to represent Mr. Chaster in his action against the other driver (Ms. Lee), and this retainer was subsequently confirmed by Mr. Chaster. Mr. LeBlanc is an experienced personal injury lawyer who had been sharing space with Oliver and Company since 1991.
- [11] On February 21, 1996, Mr. LeBlanc issued a Writ of Summons on behalf of Mr. Chaster with the style of cause, Chaster v. Lee. Thereafter, the following are some of the relevant dates and events:
- (a) May 1996 - Dr. Schmidt conducts a neurological assessment of Mr. Chaster;
 - (b) June 11, 1996 - Statement of Defence;
 - (c) October 15, 1996 - Notice of Trial, setting the action for 8 days commencing October 26, 1998;
 - (d) November 1, 1996 - Notice of Jury Trial received;
 - (e) June 10, 1997 - ICBC makes an offer to settle for \$50,000, less Part 7 benefits which had already been paid;

- (f) March 1998 - Mr. Chaster begins treatment with Dr. Price, a psychiatrist;
- (g) April 10, 1998 - Mr. Chaster writes a letter to his father-in-law acknowledging some of his difficulties in his practice and agreeing with Dr. Price that it would be better if the litigation were resolved;
- (h) Spring 1998 - Mr. Chaster and Mr. LeBlanc decide to attempt to settle the action through mediation;
- (i) June 1998 - Mr. Donaldson advises that he is taking steps to terminate the partnership, effective August 31, 1998;
- (j) June 1998 - Dr. Schmidt conducts a second neuropsychological evaluation of Mr. Chaster;
- (k) July 8, 1998 - Letter from Mr. LeBlanc to Dr. Schmidt asking for a medical report and advising he has been instructed to pursue mediation
- (l) July 9, 1998 - Notice to Mediate provided by Mr. LeBlanc with the date set for August 5, 1998;
- (m) July 10, 1998 - Mr. C.J. Simmons, C.A. provides a report regarding past wage loss and future loss of capacity to earn income;
- (n) July 13, 1998 - Dr. Schmidt provides a medical legal report;
- (o) July 16, 1998 - Mr. Thompson provides a legal opinion to Mr. LeBlanc and Mr. Chaster indicating that liability for the accident on the defendant Lee could range from zero to 10-20%;
- (p) July 24, 1998 - Letter from Mr. LeBlanc to Dr. Price referring to difficulties arising from Mr. Chaster's "relentless optimism"; advising of the dissolution of the partnership, and requesting comments;
- (q) July 28, 1998 - Dr. Price provides a medical legal report;
- (r) July 30, 1998 - Mr. LeBlanc provides his Mediation Brief;
- (s) August 5, 1998 - unsuccessful mediation followed by Mr. Chaster's attendance at the adjuster's office later that afternoon to settle the claim for \$100,000 new money;
- (t) August 6, 1998 - Mr. Chaster advises Mr. LeBlanc of the settlement;
- (u) August 7, 1998 - Mr. LeBlanc receives settlement funds;
- (v) August 24, 1998 - Mr. Chaster executes a full release;
- (w) August 31, 1998 - Effective date of the dissolution of the partnership;
- (x) September 1, 1998 - Mr. Chaster continues his law practice in the same premises as a personal law corporation;

- (y) April 1999 - Mr. Chaster takes a leave of absence from the practice of law and never returns to it;
- (z) November 23, 1999 - Dr. Price provides a report saying that Mr. Chaster can no longer practise law;
- (aa) September 2001 - Mr. Chaster commences this action against Mr. LeBlanc;
- (bb) April 30 - June 1, 2007 - Twenty day trial of this action, involving 24 witnesses;
- (cc) August 21, 2007 - Reasons for Judgment released.

DECISION OF THE TRIAL JUDGE

- [12] The trial judge set out a chronological description of the various events leading up to and including the accident, and the steps subsequently taken by Mr. LeBlanc to pursue the action on Mr. Chaster's behalf. The reasons for judgment are lengthy and I will set out only some of the many findings which factored into the trial judge's determination that Mr. Chaster had not established a causal connection between Mr. LeBlanc's conduct of the action and the loss alleged by Mr. Chaster arising from his settlement of the claim in August 1998.
- [13] The trial judge began by setting out the general duty of care expected of a lawyer in relation to his client at para. 98 of his judgment:
- [98] The requisite duty of care expected of a lawyer stated in *Tiffin Holdings v. Millican* [(1964), 49 D.L.R. (2d) 216 at 219 (A.B.S.C.); reversed 53 D.L.R. (2d) 674 (A.B.S.C.A.D.); restored 60 D.L.R. (2d) 469 (S.C.C.)], *supra*, was adopted by Kirkpatrick J. (as she then was) in *Startup v. Blake*, 2001 BCSC 8:

The obligations of a lawyer are, I think, the following:

- (1) To be skilful and careful.
- (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
- (3) To protect the interests of the client.
- (4) To carry out his instructions by all proper means.
- (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
- (6) To keep his client informed to such an extent as may be reasonably necessary according to the same criteria.

- [14] The trial judge then went on to state that the standard of care was that of a reasonably competent and diligent counsel in Vancouver from 1995 to 1998, citing the reasons for judgment of Kirkpatrick J. in *Startup*. He observed that the standard of care was not to be judged with the benefit of hindsight, but was to be judged in the light of what Mr. LeBlanc knew, or reasonably ought to have known, at the time of the acts of negligence alleged against him, and that he would not be found liable for mere errors in judgment.
- [15] The trial judge proceeded to discuss the various allegations of breach alleged against Mr. LeBlanc. In summary, he found that Mr. LeBlanc had not met the required standard of care in his representation of Mr. Chaster in four respects:
- (1) He failed to locate and interview one liability witness;
 - (2) He failed to obtain all pre and post-accident records;
 - (3) He failed to keep Dr. Schmidt and Dr. Price advised of Mr. Chaster's ongoing difficulties; and
 - (4) He failed to advise Mr. Chaster as fully as he should have of the risks he faced in proceeding to mediation and to trial given his own assessment of Mr. Chaster as someone who was relentlessly optimistic, but who did not fully accept his own limitations.
- [16] The trial judge observed that it was common ground that many individuals with brain injuries, including Mr. Chaster, do not fully appreciate their own limitations and often minimize them unrealistically. But, at para. 140 of his decision, he ultimately rejected the argument that "due his brain injury, Mr. Chaster was incapable of meaningful appreciation of his own circumstances without appropriate advice."
- [17] The trial judge commented on the fact that from the late spring of 1996 until April of 1999, Mr. Chaster was engaged in the practice of law, including representing others with personal injuries, and that he had conducted trials and appeals in late 1996 and in 1997 subsequent to his accident.
- [18] The trial judge also referred to the filed Admissions of Fact whereby Mr. Chaster acknowledged that at all relevant times he was mentally competent, that he had the capacity to enter into legally binding agreements, and that he did not require a Committee or a Guardian.
- [19] The trial judge concluded that, while it would have been preferable for Mr. LeBlanc to have conducted thorough interviews of various collateral witnesses and to have obtained more complete medical records prior to the mediation, he was satisfied that he had sufficient "working knowledge of the circumstances" to put together a "good" mediation brief, and one which Mr. Chaster approved.

- [20] While the trial judge was of the view that "there was nothing to have been lost" in proceeding to non-binding mediation in August 1998, he expressed "grave doubts" as to whether Mr. LeBlanc could have been ready to try the quantum issues by the trial date of October 1998.
- [21] Given the significance of the issue of liability in Mr. Chaster's action, the trial judge discussed the relative strengths and weaknesses of Mr. Chaster's case at some length and ultimately concluded that liability would likely have been determined 80/20 against Mr. Chaster.
- [22] In reviewing the issue of quantum, the trial judge took into consideration the fact that the medical records were incomplete. He found, however, that Dr. Schmidt had conceded that the additional records would not have changed his opinions, and that Dr. Price's opinion at trial was significantly affected by his erroneous recollection that he had not been informed in 1998 of the impending breakup of Mr. Chaster's partnership and the significant reduction in Mr. Chaster's billings following the accident. The trial judge also found that the complaints referred to by Dr. Price in his report of November 23, 1999 were essentially the same as those he had set out in his report of July 28, 1998, prior to the mediation.
- [23] The trial judge also commented on the fact that, while Mr. Chaster had approved the mediation brief, his personal opinion was that the amount claimed for future loss was unrealistically high; Mr. Chaster referred to it as "twaddle".
- [24] In dealing with Mr. Chaster's decision to take matters into his own hands and settle the action directly with the adjuster following the mediation, the trial judge discussed what he referred to as "Mr. Chaster's Priorities Prior to Settlement". The trial judge observed that Mr. Chaster's plan "was to attend the mediation and get what he could, but not to accept nothing" (at para. 176); and that Mr. Chaster stated that, "I, in my heart, never intended to go to trial ... I fully intended to settle the case." (at para. 177).
- [25] The trial judge also noted that, as the time for mediation approached, Mr. Chaster stated that he had more than enough on his plate, including the dissolution of his partnership, the prospect of setting up his own practice, and pending family holidays and that these were priorities which affected Mr. Chaster's decision to settle.
- [26] In his further discussion of Mr. Chaster's priorities at the time of mediation, the trial judge stated, at paras. 178-79:
- [178] Most importantly, Mr. Chaster did not want to take his case to trial, at any time prior to August 6, 1998. Quite reasonably, Mr. Chaster concluded that if he were to proceed to trial, he would have to assert that he was incapable of or compromised in his ability to continue to practise law, if he were to approach anything near the magnitude of the damages suggested in Mr. LeBlanc's mediation brief.

- [179] Mr. Chaster concluded that if he were to proceed to trial on that kind of argument, he would have to face the reality that he would either succeed, in which case his ability to practise law could well be destroyed by a finding that he was incapable of practising law, or worse, yet, there could be a finding that he was capable of continuing in practise, jeopardizing his reputation with the court, other counsel, and presumably his referral practise, if not his clients' reliance upon him, for having asserted a contrary position.
- [27] The trial judge rejected Mr. Chaster's evidence that he had told Mr. LeBlanc at the end of the mediation that he was going to meet with the ICBC adjuster to settle his claim. He found that Mr. Chaster's recollections in that regard (and with respect to some other matters) were unreliable. The trial judge found that Mr. LeBlanc first learned of the settlement the following day when Mr. Chaster told him that he had settled for \$100,000 new money. At that point, Mr. LeBlanc was of the view that the settlement was what I will colloquially refer to as a "done deal." The trial judge agreed. More importantly, the trial judge found (at para. 192) that even if Mr. LeBlanc had counselled Mr. Chaster against meeting the ICBC adjuster on his own, Mr. Chaster would have done so despite this advice. The trial judge reiterated this view at paras. 198 and 218 of his decision, where he stated:
- [198] As late as 2000, Mr. Chaster could still be accurately described as relentlessly optimistic and I am satisfied that is how he approached the settlement of his claim in August of 1998, and how he would have approached it regardless of any advice Mr. LeBlanc did or might have given him.
- ...
- [218] Although I have found that Mr. LeBlanc was in breach of his duty in tort to Mr. Chaster, I have found that no breach of that duty by Mr. LeBlanc caused a loss to Mr. Chaster, as Mr. Chaster would have settled his claim, as he did, regardless of advice from Mr. LeBlanc, even if Mr. LeBlanc's preparation had been what I conclude it ought to have been.
- (The reference to Mr. Chaster's continued optimism in the year 2000 appears to refer to the fact that, in 2000, Mr. Chaster applied to be appointed to the Provincial Court, although he withdrew his application shortly thereafter.)
- [28] Perhaps the most critical finding of the trial judge with respect to the issues on appeal, is his finding at para. 185 of the decision where, in rejecting Mr. Chaster's submission to the contrary, the trial judge stated:
- [185] I do not accept that Mr. Chaster was incapable of meaningful appreciation of his own circumstances with or without appropriate advice when he settled his claim against Ms. Lee.
- [29] In coming to this conclusion, the trial judge observed that, at approximately the same time Mr. Chaster settled this claim, he also settled various aspects of the dissolution of his partnership directly with Mr. Donaldson and that Mr. Donaldson, who knew Mr. Chaster well and had observed him throughout the post-accident period, had no concern in that

regard. In terms of Mr. Chaster's litigation against Ms. Lee, Mr. Donaldson told Mr. Chaster to do what he thought was best for himself and stated that he felt that Mr. Chaster was capable of making that decision. The trial judge also observed that Mr. Murphy, Q.C., who was approached by Mr. Chaster and Ms. Soper to assist in resolving the partnership issues, had no compunction about Mr. Chaster conducting one-on-one negotiations with Mr. Donaldson in that regard. Finally, the trial judge noted that Ms. Soper expressed no concern about Mr. Chaster attending mediation, or when he told her that night that he had settled the case on his own. The trial judge stated that he was satisfied that if Ms. Soper had had a concern at that point, she would have raised it, as she did in later proceedings.

- [30] In summary, the trial judge concluded that Mr. LeBlanc had breached several of his duties to Mr. Chaster in both tort and contract and had failed to live up to the standard of a reasonably competent lawyer in certain respects. He concluded, however, that those breaches were not causally connected with Mr. Chaster's actions in entering into the settlement of his claim directly with the adjuster. The trial judge was satisfied that Mr. Chaster would have settled even if Mr. LeBlanc had properly performed all of his duties as counsel.

DISCUSSION

1. Introduction

- [31] The events which are central to the matters in dispute took place between 1995 and 1998. The witnesses at trial, therefore, were testifying about events which had happened nine to 12 years before the trial. Mr. Chaster had no recollection of the accident whatsoever. Mr. LeBlanc and Dr. Schmidt had dismantled their files, which had to be reconstructed after this action was commenced. The trial judge had to make findings of fact against this backdrop where the reliability of the some of the evidence, and the potential for reconstruction of events by the witnesses with the benefit of hindsight, were factors which had to be carefully considered in assessing their evidence. The trial judge was in a unique position to do so.

2. Liability

- [32] Liability for the accident was at all times a significant problem with respect to Mr. Chaster's claim. Mr. LeBlanc rather dramatically referred to it as "the sword of Damocles" hanging over his head and that of Mr. Chaster. It had the potential to result in a dramatic reduction in the amount of damages which Mr. Chaster could hope to achieve at trial. Although the defence had made a without prejudice opening offer of \$50,000 early in the action, defence counsel and the responsible adjuster at all times took the position that Mr. Chaster could not establish liability, and they continued to take a hard line on that issue up to and throughout the mediation. Mr. Chaster's own expert reconstructionist, Mr. Baker, estimated that Mr. Chaster's speed at the time of the accident was between 72 and 118 kph, with a probability of it being 83 kph. Two of the eye witnesses had Mr. Chaster accelerating through an amber light turning to red when Ms. Lee was in the intersection. The trial judge observed that Mr. LeBlanc described the liability prospects to Mr. Chaster as "bleak". That opinion was

reinforced by the legal opinion on liability dated July 16, 1998 prepared by Mr. Thompson for Mr. LeBlanc, and reviewed and discussed by Mr. LeBlanc and Mr. Chaster. This opinion estimated that liability on Ms. Lee could range from zero to 10-20%. Although Mr. Chaster stated that he was more optimistic that liability could be as much as 60/40 in his favour, he clearly identified some of the problems he faced in terms of liability in the following passage from his discovery evidence (in his later action against his insurer for disability benefits), referred to by the trial judge at para. 45 of his reasons for judgment:

[45] I was going at ridiculous speed according to my own reconstruction guy who was on the scene within 24 hours.

So they're [the defence] trying to get a jury - you've got a young lawyer on an Italian hot rod, the Ferrari of motorcycles they call it, travelling at vast speed at morning rush hour traffic. I had a big liability problem.

[33] While the trial judge concluded that liability would have been divided 80/20 in favour of Ms. Lee, it must be remembered that the defence had filed a jury notice and that Mr. Chaster clearly viewed that as a negative development given his own view (shared by many) that juries are notoriously hard to predict.

[34] The significance of the liability problem cannot be underestimated in determining whether the trial judge erred in finding that Mr. Chaster would have settled his claim even if he had been fully and properly advised prior to the mediation.

3. The Standard of Review

[35] Mr. Chaster is attempting to overturn various of the trial judge's findings of fact, including his finding that causation had not been established. There is no question that the standard of review with respect to those findings is one of palpable and overriding error. I do not understand Mr. Chaster to take a contrary view.

[36] Mr. Chaster also submits, however, that the trial judge asked himself the wrong question in finding that causation had not been established and that he applied the wrong standard of care. If the trial judge asked himself the wrong question, I am satisfied that this would amount to an error of law, which attracts a standard of correctness. Similarly, I am satisfied that the question of whether the trial judge stated and applied the appropriate standard of care is a question of law attracting a correctness standard.

[37] I now turn to a discussion of the issues.

4. The Standard of Care

- [38] The trial judge stated that the standard of care to be applied in these circumstances was that of a reasonably competent and diligent counsel in Vancouver from 1995 to 1998, with reference to the Startup decision, *supra*. Mr. Chaster suggests that the standard of care is of a different magnitude when a lawyer is dealing with a brain-injured client. This submission is referred to at para. 48 of his factum:
48. Brain-injury claims present unique and complex challenges for prosecuting counsel. Accordingly, in such cases, the applicable standard of care differs from that which prevails in other types of personal injury claims. In the Appellant's submission, the trial judge failed to acknowledge, analyze or apply the appropriate standard of care in the case at bar. Rather, he focused on the fact that the Appellant was a lawyer but substantially ignored the much more relevant fact that he was also a brain-injury victim. In so doing, he fell into error. [Emphasis added.]
- [39] In support of the proposition that a heightened standard of care must be applied in brain injury cases, Mr. Chaster relied on the evidence of two lawyers, Mr. Marr, Q.C. and Mr. Roos. The trial judge did not refer to the evidence of these witnesses in his reasons for judgment. Mr. Chaster submits that he erred in failing to do so.
- [40] In my view, the fact that Mr. Chaster suffered a brain injury did not change the standard of care per se, but was an important fact that Mr. LeBlanc had to take into account at all times in his dealings with Mr. Chaster. He had to meet the standard of a reasonably competent and diligent lawyer in 1998 who was dealing with a client with a brain injury. I do not understand the trial judge to have found otherwise.
- [41] Like Mr. LeBlanc, the trial judge was fully alive to the fact that Mr. Chaster had suffered a serious brain injury in his accident. This was the principal focus of the trial. While it is true that the trial judge did not reframe the standard of care to incorporate a special provision for clients suffering brain injuries, in my view his failure to do so did not constitute error. It is apparent that in applying the standard of care in relation to Mr. Chaster, the trial judge took into account the fact that Mr. Chaster had suffered a serious brain injury, that the injury affected his cognitive functioning to some extent, that he was prone to be unrealistically optimistic about his abilities to continue to practise law, in particular, and that he had suffered other deficits as a result of the brain injury. The trial judge was also fully aware of the opinions of Dr. Schmidt and Dr. Price that Mr. Chaster suffered from permanent cognitive defects. To the extent Mr. Chaster is suggesting that the trial judge did not take Mr. Chaster's brain injury into account in determining and applying the standard of care, I do not agree.
- [42] As part of the evidence before the trial judge concerning the extent of Mr. Chaster's brain injury, the trial judge also had evidence before him, including evidence which post-dated the settlement, which indicated that Mr. Chaster was functioning at a very high intellectual level; that he had competently conducted trials and appeals following the accident (albeit with substantial organizational assistance from his junior); that he was fully competent to

enter into contracts; and that Mr. Donaldson and Mr. Murphy had treated him as capable of settling his financial and other partnership issues directly with Mr. Donaldson during the same time as Mr. Chaster settled his personal injury claim.

- [43] In the result, the trial judge found that Mr. LeBlanc had failed to meet the standard of care in several respects. He came to that conclusion without specifically referring to the opinion evidence of Mr. Marr and Mr. Roos. The question remains whether he erred in failing to address or accept their opinions.
- [44] Early in the trial, the trial judge questioned the need for expert evidence in determining the appropriate standard of care. There were lengthy submissions in this regard, many of which centred on the opinion of Mr. Marr, which contained opinion on matters which fell within the domain of the trial judge. During the course of submissions, Mr. Marr's opinion was significantly redacted and it appears that counsel eventually consented to the redacted version being admitted into evidence. In it, Mr. Marr opined on the difficulties of representing clients with brain injuries and the particular care which had to be taken in such cases to obtain all relevant pre and post-accident information. It is apparent that the trial judge accepted his evidence in that regard and found that Mr. LeBlanc had not met the standard of care in obtaining relevant information.
- [45] Mr. Marr also emphasized the importance of obtaining information from "collaterals"; that is, individuals such as the plaintiff's family, co-workers, and others who interacted regularly with the plaintiff before and after the accident. In his view, a case manager, preferably a rehabilitation specialist, should almost invariably be engaged to gather and coordinate that information. The trial judge found that this case was atypical, however, in that Mr. LeBlanc had worked with Mr. Chaster on a daily basis since 1991, and continued to work with him, and with all but one of the principal "collateral witnesses" on a daily basis in the same offices after the accident. Mr. Chaster and his problems were a constant source of discussion amongst those with whom he worked. The trial judge concluded that Mr. LeBlanc had sufficient working knowledge of their potential evidence to put together a good mediation brief and he was satisfied that their evidence could have been marshalled in time for the October trial. In effect, the trial judge accepted that Mr. Chaster was not a typical client in many respects and Mr. LeBlanc's working relationship with Mr. Chaster and the collateral witnesses was unique.
- [46] Mr. Marr also testified concerning the importance of keeping the doctors who were involved in the treatment and assessment of Mr. Chaster's functioning apprised of information derived from collateral contacts. It is apparent that the trial judge accepted the substance of this opinion and found that Mr. LeBlanc was in breach of the standard of care in that respect.

- [47] Mr. Roos' report was generally consistent with Mr. Marr's report in terms of his approach to plaintiffs who had suffered brain injuries. Through no fault of Mr. Roos, however, his report was based, in part, on a misapprehension of relevant background facts which necessarily affected its weight.
- [48] While it would have been preferable if the trial judge had referred to the opinion evidence of Mr. Marr and Mr. Roos, his findings that Mr. LeBlanc breached the standard of care and his duties to Mr. Chaster in several respects accords with their opinions.
- [49] To the extent that the trial judge did not adopt all of the opinions of the experts, he was not bound to do so. It is self-evident that not all brain injury clients suffer from the same degree of cognitive impairment and that all clients, including clients with brain injuries, have to be treated individually according to their respective needs and abilities. This was acknowledged by both Mr. Marr and Mr. Roos in cross-examination. In this case, the trial judge made specific findings of fact in relation to Mr. Chaster's level of functioning, and Mr. Chaster's unique relationship with Mr. LeBlanc. Many of his factual findings were not reflected in the expert opinions. For example, the trial judge rejected the portrayal of Mr. Chaster as someone "with profound impairment which caused him to lack insight into his own condition". He also rejected the argument that Mr. Chaster was a person who was not capable of a meaningful appreciation of his own circumstances, with or without legal advice from Mr. LeBlanc.
- [50] In short, the trial judge's reasons for judgment indicate that he effectively accepted some of the expert opinion as to the standard of care, but that he rejected other aspects of the opinion based on his findings of fact, both as to the extent of Mr. Chaster's problems, and the unique nature of the solicitor-client relationship between Mr. LeBlanc and Mr. Chaster.
- [51] In the result, I am not persuaded that the trial judge erred in his statement or his appreciation of the applicable standard of care. In assessing the standard of care and the application of that standard to the facts before him, the trial judge made findings of fact which were open to him on the evidence concerning Mr. Chaster's level of functioning at the relevant times, the nature of the solicitor-client relationship between Mr. Chaster and Mr. LeBlanc, Mr. LeBlanc's conduct of the proceedings, and the causal connection between Mr. LeBlanc's shortcomings and Mr. Chaster's ultimate decision to resolve the action on his own.
5. Failure to Address Further Alleged Breaches of Duty
- [52] Mr. Chaster submits that the trial judge erred in failing to address additional breaches of duty which he had raised at trial. In particular, he submits that the trial judge failed to address whether Mr. LeBlanc failed in his duties to Mr. Chaster by: (1) failing to advise Mr. Chaster not to proceed to mediation and to adjourn the trial; (2) failing to advise Mr. Chaster concerning the quantum of damages and a reasonable settlement amount; and (3) failing to advise against the offers made at mediation and to adjourn the mediation. Mr. Chaster submits that the trial judge's failure to address those issues deprives the Court of meaningful appellate review. (I note, however, that Mr. Chaster does not seek to have the action remitted

to the trial court in the event of error, but asks this Court to make the necessary findings to determine the case.)

- [53] I will deal with these allegations together. In my view, it is implicit in the trial judge's reasons that he did not accept the proposition that before proceeding to mediation, Mr. LeBlanc had to prepare the case to the same extent as would be necessary before proceeding to trial. In other words, he did not accept that all medical reports, collateral witness statements, and other trial preparation had to be complete, or almost complete, before Mr. LeBlanc could proceed to a meaningful mediation. In that regard, while Mr. Chaster's focus was on the steps Mr. LeBlanc had not taken in preparation for the mediation, it is important to note some of the more important steps which Mr. LeBlanc had taken. Those steps included the following: examinations for discovery had been conducted of Mr. Chaster and Ms. Lee; witness statements had been obtained from two of the three eyewitnesses (and the trial judge found that the evidence of the third would not likely have made a difference); two legal opinions had been obtained, one of which presented a dim picture of liability; an oral report on accident reconstruction emphasizing liability concerns had been obtained from Mr. Baker; Mr. Simmons had provided an economic report on past and future loss; Ms. Mizuno had provided an actuarial report; and current medical reports had been obtained from Dr. Schmidt and Dr. Price. Mr. LeBlanc also had the benefit of his ongoing working relationship not only with Mr. Chaster, but also with most of the principal collateral witnesses, who regularly discussed Mr. Chaster's ongoing problems at work.
- [54] All of this information was considered by Mr. LeBlanc in the preparation of his Mediation Brief, which the trial judge found sufficient for its purpose. It is evident that he and Mr. Chaster approached the mediation as an opportunity to canvass the possibilities of settlement and to move the defence from what had been its intransigent position on both liability and quantum. Mr. LeBlanc stated that, for tactical reasons, he did not usually provide "will say", or similar summaries of the evidence of his collateral witnesses prior to mediation, since the information contained in them could potentially be used to the benefit of the defence in the event that settlement was not effected, despite the confidentiality of the mediation proceedings.
- [55] It was in this context, and in the context of Mr. Chaster's ongoing desire to settle his claim, that the trial judge stated that Mr. Chaster had nothing to lose by engaging in non-binding mediation at that stage of the proceedings. By this I take him to mean that, if the mediation did not result in a settlement, Mr. Chaster retained the ability either to proceed to trial in October, or, if considered appropriate, to adjourn the trial. In that respect, the mediation was analogous to other types of without prejudice settlement discussions which counsel engage in on a regular basis at various stages of the litigation process, depending on the circumstances, including circumstances where there are uncertainties regarding the plaintiff's future.

[56] The trial judge was critical of Mr. LeBlanc's preparation for trial and expressed "grave doubts" as to his ability to prepare the medical evidence in time for the trial as then scheduled. But it is apparent from his reasons that he found that Mr. LeBlanc was sufficiently prepared to engage in a mediation and that the mediation brief he had prepared was "good". Because issue is taken with this latter finding of fact, I will address it in greater detail now.

[57] Mr. Chaster now says that the mediation brief was not "good", particularly insofar as it stated that he had returned to work full-time at some point following the accident. Mr. Chaster submits that this statement did not reflect the reality of his situation which was that, although he may have gone into the office in the morning and left at night, there were many wasted hours in between (including hours when he disappeared from the office) and that the work he did when he was there was largely unproductive. In my view, this reality was largely reflected in the mediation brief when taken in the context of the supporting documents. For example, the mediation brief contained the following comments:

The Plaintiff's closed head injury remains troublesome. He returned to his law practice in early 1996 but was initially unable to work effectively because of fatigue, memory problems and lack of the ability to concentrate. He did not resume full-time practice until September 1996. During the recovery period he experienced anxiety, sleep disturbances as well as problems with concentration, memory and word-finding. He also was more irritable and more easily frustrated than before the accident, and his self-confidence was affected. He is presently practising law full-time, but not as effectively as before the accident. He still has problems with fatigue and concentration, although his irritability and lack of self-confidence have improved. He has been treated for depression since March 1998. His organization, motivation and energy are lower than they were before the accident.

...

Dr. Schmidt is of the view that:

"While he is going to be able to, in my opinion, continue to work in that field he will also, in my opinion, find that he is not able to be as productive as he has been in the past. In particular, I believe he will find that he has to exert more energy to absorb and retain information and to deal with complex situations. He will find 'multi-tasking' demands, as might occur when he is trying to manage several cases at once or deal with several aspects of a complex case, more problematic for him."

...

Dr. Price stated on p. 3 of his report:

"There are no known further treatments to effect further healing of the neurological damage that Mr. Chaster sustained in his motor vehicle accident. Consequently the prognosis in this area is very poor. However, with a treatment goal of developing improved and more adaptive coping and management skills to continue living with the permanent residual neurological damage, then, with the combination of ongoing psychotherapy and antidepressant medication, the overall prognosis is good."

[58] With respect to Mr. Chaster's claim for future loss in earning capacity, the mediation brief stated as follows (after citing several leading authorities):

The Plaintiff's position is that all four of the factors in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) are present here. Before the accident Mr. Chaster was at the height of his income earning potential. He was able to juggle the demanding vagaries of a very successful civil litigation practice. While he is still able to manage a given case at a given time he is unable to successfully juggle the numerous ongoing aspects of such a practice. He is less capable now of earning income from employment, less attractive as an employee both to himself and to potential employers and he is also incapable of taking advantage of various opportunities that present themselves in his practice.

The medical evidence supports the position that Mr. Chaster's deficits are permanent. The treatment focus is now and in the future will be on coping mechanisms. These coping mechanisms will not improve the injuries but make their acceptance less burdensome on Mr. Chaster.

[59] The mediation report then went on to quote from the findings of Mr. Simmons with respect to Mr. Chaster's future loss of earning capacity. While the trial judge ultimately found that Mr. Simmons overstated Mr. Chaster's loss, the report provided considerable support for Mr. Chaster's claim that the impact of the accident on his income earning capacity was substantial. The following is some of the "relevant information" he was asked to assume (and which Mr. LeBlanc intended to establish) for the purpose of his opinion:

2. Mr. Donaldson and the associates in the firm carried on with the civil practice, as well as they could, after the M.V.A. The firm utilized its cash reserves and bank line of credit, to survive thereafter. Cash reserves of \$201,916.00 at the end of 1995 were fully gone by the end of 1996. Mr. Donaldson also reduced his drawings in 1996 to less than half of those in the prior year.
3. Effective August 31, 1998 the partnership will cease and Messrs. Donaldson and Chaster will operate their criminal and civil divisions within their own PLC's but still under the name of Oliver and Company. This change is necessary to recognize the large decline of profitability of the civil practice subsequent to the M.V.A.

4. A large part of Mr. Chaster's civil practice is contingency matters in the areas of medical malpractice and personal injury. As Schedules no. 10 and 11 ("Change in Trial and Matter" and "Trials Actually Conducted Subsequent to the M.V.A.") show many matters had to be deferred to a later date or handled by a non-firm lawyer. The cost of financing these files and their disbursements has not been calculated.
5. File Openings and particularly those relating to larger matters declined significantly after the M.V.A. ... This situation is only now beginning to be rectified but the effects of this are not likely to "hit the bottom line" for two to three years.

[60] Mr. Simmons was also asked to make the following assumptions:

2. Mr. Chaster was fully incapacitated, immediately subsequent to the accident until January 2, 1996, when he tried to resume his duties on a part-time basis. He resumed "full time" work in September, 1996. Even today Mr. Chaster is not fully caught up with his practice. It has been assumed that billings and net income are still being adversely affected due to the M.V.A. and therefore all calculations have been made up to June 30, 1998, the date of the latest internal financial statements.
3. Mr. Chaster's civil practice continued to operate subsequent to the accident by others in the office taking on extra work, by adjourning some matters, and by engaging the services of other law firms to conduct certain matters which could not be deferred. It has been assumed that this revenue would have been earned by Mr. Chaster.
4. A legal assistant, Maureen McColl, contracted by Adrian Chaster for a number of years to assist with personal injury and medical negligence cases, increased her hours to full time immediately subsequent to the accident to maintain files and to continue ongoing contact with clients. ...

[61] In discussing Mr. Chaster's future loss of income, Mr. Simmons stated that Mr. Chaster's greatly reduced income from his practice:

... is not likely to rectify itself for a number of years and possibly never depending on his medical state. Also, operating separately from Mr. Donaldson's practice, other problems and possibly a lack of viability may ensue.

[62] I refer to this report at some length because it sets forth in considerable detail the position of Mr. LeBlanc on behalf of Mr. Chaster in the mediation. Copies of all expert reports, including this report, were provided to the defence. It is apparent that Mr. LeBlanc was taking the position on behalf of Mr. Chaster that he would be in a position at trial to establish a substantial future loss claim on Mr. Chaster's behalf. In my view, it was open to the trial judge to conclude that the brief was "good"; certainly I am not persuaded that his statement in that regard reflects palpable and overriding error.

- [63] Further, I am not persuaded that Mr. Chaster had no reasonable idea of the potential value of his claim whether or not Mr. LeBlanc actually sat down with him and expressed an opinion that Mr. Chaster's damages would likely fall within stated figures. The fact of the matter is that this would have hinged to a significant extent on the determination of liability which was a huge unknown and was potentially as low as zero percent on the part of Ms. Lee.
- [64] As noted by the trial judge, the future loss claim was complicated by the fact that Mr. Chaster continued to work as a lawyer, and clearly intended to do so in the future. It does not appear that anyone tried to persuade him that this was not a practical possibility. If they thought so at that time, the evidence does not indicate that they expressed those views to either Mr. Chaster or Mr. LeBlanc. On the contrary, Mr. Chaster's associate, Ms. Brunton, chose to go into practice with Mr. Chaster after the breakdown of the partnership and Mr. Donaldson agreed to an ongoing space-sharing relationship. During this time, Mr. Chaster was practising law, including conducting trials and appeals, albeit on a much reduced level and with increased support from those who worked with him.
- [65] A further complication arose from Mr. Chaster's own perception that the figures contained in the mediation brief representing future loss were "twaddle". He was happy to have them included in the brief as a bargaining tool, but he did not intend to allow them to get in the way of what he had determined to do from the outset, which was to settle the case. He stated in his evidence at one point that, secretly, his view of his future loss was closer to that of the adjuster, than to that of Mr. LeBlanc.
- [66] In my view, it cannot be said that the trial judge erred in all of the circumstances before him, in finding that Mr. LeBlanc's mediation brief was good, in the sense of representing a reasonable approach to settlement as matters stood at that time, or in failing to find that Mr. LeBlanc should have adjourned the mediation in circumstances where he was not fully geared up for trial. To say that lawyers who are not fully prepared for trial should not engage in mediation is a proposition which would take many lawyers in the personal injury bar by surprise and, in my view, with good cause. There are many reasons for choosing to mediate at a particular point in time and many strategies and approaches which lawyers may take in doing so, depending on variables which do not lend themselves to a "one size fits all" strategy. The trial judge was obviously of the view that Mr. LeBlanc was not negligent in proceeding to mediation in the circumstances having regard to all of the evidence and I am not persuaded that his finding in that regard is in error.
- [67] The question of whether Mr. LeBlanc erred in failing to adjourn the trial became moot once Mr. Chaster settled the case on his own behalf. There was evidence that Mr. LeBlanc had left open the possibility of adjourning the trial depending on the outcome of the mediation. Mr. Chaster, on the other hand, was consistent in his stated view that he was not going to trial. Rather, he wanted to get the case off his plate, get on with his life, including his new law practice, attend the holiday with his family which was imminent, and alleviate some of his financial worries, including the cost associated with opening his practice. Mr. LeBlanc was

fully cognizant of Mr. Chaster's drive to settle and the trial judge found that Mr. Chaster would have pursued his intentions to settle with or without the advice from Mr. LeBlanc which Mr. Chaster now says Mr. LeBlanc should have provided.

- [68] The submission that the trial judge should have found that Mr. LeBlanc failed in his duties either by failing to advise Mr. Chaster against the offers he was making during the mediation, or by failing to advise Mr. Chaster to walk out of the mediation does not, in my view, reflect the reality of what was occurring at the time. It is apparent that the mediation was somewhat unusual. The strategy of the adjuster in attendance was to take an extremely aggressive approach by refusing to budge from his position that there was no liability on the defendant, but that \$50,000 was sufficient to cover any risk of liability being found. Mr. Chaster, on the other hand, took it upon himself to reduce his "position" on damages in large amounts, apparently to reflect his personal view of the worth of his claim. Mr. LeBlanc evidenced his concern with this approach and Mr. Chaster was aware that Mr. LeBlanc was unhappy with him. Mr. LeBlanc stated that at one point he suggested that they leave the mediation on the basis that it was going nowhere, but Mr. Chaster was not amenable to that suggestion. Since Mr. Chaster was legally competent, it was obviously not open to Mr. LeBlanc to manhandle him out of the room. The fact is that the mediation ended without a settlement despite Mr. Chaster's efforts to the contrary.
- [69] In any event, the evidence indicates that it is highly unlikely that Mr. Chaster was going to leave the mediation until he was ready to do so. The best evidence of this is Mr. Chaster's ultimate decision to, in effect, continue the mediation by contacting the adjuster and arranging a meeting to have further settlement discussions shortly after the mediation was over. The trial judge found that he did so without consulting Mr. LeBlanc and entirely on his own initiative. He decided to take matters into his own hands. It is not disputed that he was competent to do so.

6. Failure to Properly Address Causation

- [70] Mr. Chaster submits that the trial judge erred in law in asking himself the wrong question in finding no causal connection between Mr. LeBlanc's breaches and Mr. Chaster's loss. (I note that this submission is closely linked with Mr. Chaster's other grounds of appeal.) Mr. Chaster submits (at para. 73 of his factum) that the question that the trial judge failed to address in his reasons was "whether the Appellant, properly advised throughout, would have instructed the Respondent not to proceed to mediation at all and to adjourn the trial." Mr. Chaster submits that the trial judge's analysis "began and ended after the mediation was over." In short, Mr. Chaster says that if Mr. LeBlanc had properly investigated and conducted the case, he would have advised Mr. Chaster to adjourn the mediation and the trial and that Mr. Chaster would have followed his advice. Mr. Chaster submits that there is no evidence to support a finding that, but for his attendance at mediation, he would have entered into an improvident settlement with the adjuster at that time, or at all. Rather, he submits that if the mediation and trial had been adjourned, he would not have settled his case but events would simply have unfolded as they did. Thus, he would have set up his own law practice in

association with Ms. Brunton; he would have realized that he was not capable of conducting a financially viable practice; he would have obtained medical advice to that effect; and he would have gone to trial (as he finally did in this proceeding) and obtained substantially greater compensation for his injuries.

- [71] As support for the proposition that the trial judge asked himself the wrong question, Mr. Chaster referred to the decision of *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647, 2001 SCC 23. I do not propose to discuss that decision since I do not find it is analogous to the circumstances here, having regard to the findings of fact of the trial judge. Mr. Chaster's submission that the trial judge asked himself the wrong question is tied to his submission that Mr. LeBlanc was in breach of a duty of care to advise Mr. Chaster to adjourn the mediation and the trial. The trial judge found that Mr. LeBlanc was not under a duty to advise Mr. Chaster to adjourn the mediation and I have concluded that he did not err in that finding. The question of whether Mr. LeBlanc should have adjourned the trial was rendered moot by Mr. Chaster's actions in settling his claim immediately following the mediation and without notice to Mr. LeBlanc.
- [72] In the result, I do not agree that the trial judge misconceived the issue of causation or that he failed to appreciate that Mr. Chaster's position was that he would not have settled his case if he had been properly advised throughout and/or if he had been advised to adjourn the mediation and the trial. There can be little doubt when reading the trial judge's reasons as a whole that he concluded that Mr. Chaster was bound and determined to settle his case and that his priority was to settle the case for the most money he could get and get it off his plate. The trial judge set out the many reasons Mr. Chaster had for wanting to settle, rather than continuing on to a trial. The very fact of ongoing litigation was a significant source of stress which Mr. Chaster had discussed with Dr. Price; he had financial obligations to Mr. Donaldson arising from their partnership; he was anticipating requiring a significant financial outlay (\$150,000) to start up a new practice; he had an upcoming family vacation and family responsibilities which were weighing on him; he was adamant that he did not want to testify and take the chance of having his credibility being found wanting; he knew that liability was a substantial factor in his case and he was worried about the uncertainties posed by a jury trial; he was concerned that, if the trial established that he had suffered significant brain damage, he would never be able to practise again in any capacity. The trial judge found that his priorities were geared toward settlement, rather than continued litigation. This was so throughout Mr. LeBlanc's conduct of the file.
- [73] More importantly, the trial judge specifically rejected Mr. Chaster's submission that, if Mr. LeBlanc had recommended adjourning the mediation and the trial, Mr. Chaster would have "put him through his paces" but that, if satisfied there was a good basis for an adjournment, he would have accepted Mr. LeBlanc's advice. Mr. Chaster points to the fact that he had never rejected Mr. LeBlanc's advice as support for this submission.

- [74] The trial judge noted, however, that Mr. Chaster was not inclined to accept the advice of others as to what he should or should not do when it was in conflict with his own views. The trial judge gave as examples the fact that Mr. Chaster insisted upon being released from the hospital contrary to medical advice and that he insisted upon going back to work in January 1996, contrary to Ms. Soper's advice. He also pointed to the fact that there was no occasion in which Mr. LeBlanc and Mr. Chaster had had a serious disagreement about any aspect of the case; at most there were issues where Mr. Chaster said he would have done things differently, but that he had no problem with the way in which Mr. LeBlanc had proceeded. In other words, the evidence accepted by the trial judge did not support the proposition that Mr. Chaster would have followed Mr. LeBlanc's advice had Mr. LeBlanc advised him to adjourn the mediation.
- [75] While the trial judge's comment that Mr. Chaster would have rejected Mr. LeBlanc's advice was addressed to the question of whether he would have rejected Mr. LeBlanc's advice not to meet with the adjuster on his own, it is evident from his reasons as a whole that the trial judge was of the view that Mr. Chaster was determined to settle his claim despite any advice to the contrary. As Mr. Chaster stated at one point in his evidence in a related action: "we ditched the lawyers and I met with the major loss guy for a beer at the end of the day and we did settle." While the mediation provided the occasion for Mr. Chaster to settle the claim, the trial judge found that Mr. Chaster had what he regarded as pressing reasons to settle his claim and he was anxious to do so at that time (which was approximately three years following the accident).
- [76] The critical findings of the trial judge in relation to the issue of causation are contained at paras. 185, 198, 218 and 219 of his reasons, which I repeat here for emphasis:
- [185] I do not accept that Mr. Chaster was incapable of meaningful appreciation of his own circumstances when he settled his claim against Ms. Lee.
- ...
- [198] As late as 2000, Mr. Chaster could still be accurately described as relentlessly optimistic and I am satisfied that that is how he approached the settlement of his claim in August of 1998, and how he would have approached it regardless of any advice Mr. LeBlanc did or might have given him.
- ...
- [218] Although I have found that Mr. LeBlanc was in breach of his duty in tort to Mr. Chaster, I have found that no breach of that duty by Mr. LeBlanc caused a loss to Mr. Chaster, as Mr. Chaster would have settled his claim, as he did, regardless of advice from Mr. LeBlanc, even if Mr. LeBlanc's preparation had been what I conclude it ought to have been.

[219] Mr. Chaster's claim for damages in contract fails on the issue of causation for the same reasons as it fails in tort; while I find that Mr. Leblanc breached his contractual duties to Mr. Chaster, I also find that Mr. Chaster would have settled his claim regardless of any advice from, or preparation by, Mr. LeBlanc.

[77] In the result, I am not persuaded that the trial judge erred in his analysis on causation. His finding that Mr. Chaster had not established causation was a finding of fact. Mr. Chaster has not established that that finding was the product of any palpable and overriding error.

7. Other Factual Errors

[78] I have dealt with most of the factual errors alleged by Mr. Chaster in other parts of this judgment. The only other allegation of error to which I will refer is Mr. Chaster's submission that the trial judge erred in finding that Mr. Chaster had irrevocably settled his claim on August 5, 1998 following the mediation. In my view, this finding was fully supported by the evidence. Mr. Chaster was legally competent to settle his claim and the fact that he did not sign a release until August 24, 1998 was simply a reflection of the fact that he had gone on holidays shortly after the mediation. The settlement funds were received by Mr. LeBlanc on August 7, 1998. The trial judge found that there was no basis in law for setting aside the settlement; nor did Mr. Chaster seek to do so. His first indication to Mr. LeBlanc of dissatisfaction with the settlement arose when he commenced this action three years later.

[79] The remaining alleged errors could not have affected the result, so I do not propose to deal with them.

8. Final Observations

[80] This was a very difficult case from beginning to end. It arose out of a moment's failure of judgment on the part of Mr. Chaster which has had devastating consequences for him. His counsel have done an excellent job of bringing forward every conceivable argument which could be advanced on his behalf. After reviewing substantially all of the evidence in the record, however, I am not persuaded that there is a basis for setting aside the order under appeal.

CONCLUSION

[81] I would dismiss the appeal.

"The Honourable Madam Justice Prowse"

I Agree:

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Mr. Justice Bauman"

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