
CANADA / JUDGMENT

Mund v. Sovio

2010 BCSC 252

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 252 Mund v. Sovio

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mund v. Sovio,

2010 BCSC 252

Date: 20100226

Docket: S115685

Registry: New Westminster

Between:

Jaswant Singh Mund

Plaintiff

And

Dr. Olli Matti Sovio

Defendant

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Counsel for the Plaintiff:

S.T. Cope

Counsel for the Defendant:

M.K. Kinch

Place and Date of Hearing:

New Westminster, B.C.

November 19, 2009

Place and Date of Judgment:

New Westminster, B.C.

February 26, 2010

- [1] The defendant, Dr. Olli Matti Sovio, seeks to strike the plaintiff's, Jaswant Singh Mund's, amended statement of claim ("ASC") for failure to disclose a reasonable cause of action pursuant to Rule 19(24)(a) of the Rules of Court (the "Rules") .

BACKGROUND

- [2] Mr. Mund was injured in a motor vehicle accident October 10, 2007. At all material times, Mr. Mund was an insured under the provisions of Part 7 of the Insurance (Vehicle) Regulations, B.C. Reg. 447/83, s. 79 (the "Regulations"). Under the Regulations, Mr. Mund was entitled to receive payment of medical expenses, rehabilitation costs and Part 7 benefits during his recovery from the motor vehicle accident.
- [3] Pursuant to s. 99 of the Regulations and as a result of a request by ICBC, Mr. Mund attended a medical examination conducted by Dr. Sovio on June 11, 2008. On June 11, 2008, Dr. Sovio produced a report pursuant to s. 99 of the Regulations (the "report").
- [4] The Insurance Corporation of British Columbia ("ICBC") paid Part 7 benefits to Mr. Mund until January 16, 2008.
- [5] Mr. Mund, in para. 10 of his ASC states that Dr. Sovio made remarks in his report that were biased, inflammatory and were false assertions, which are as follows:
- a) the Plaintiff was "staying at home, not doing any exercise and appears to be content to carry on in this fashion";
 - b) "there is nothing to suggest that" the Plaintiff "should be disabled to this degree" and the Plaintiff's "medical care appears to be somewhat disjointed";
 - c) "legal matters" were interfering with the Plaintiff's case; and
 - d) the Plaintiff "has a history of [being] off work for an extended period of time in the past and seems content to continue with this role of disability at this time".
- [6] Mr. Mund alleges that ICBC, relying on the report, empowered Dr. Sovio to control Part 7 benefits which imposed on Dr. Sovio an obligation and duty jointly to both Mr. Mund and ICBC to assess Mr. Mund's alleged injuries "in an objective, fair and even handed manner" [paragraph 9 of the ASC].

- [7] Mr. Mund alleges that Dr. Sovio's "excessive and misguided advocacy against" Mr. Mund's entitlement to Part 7 benefits "warrants censure and condemnation by an award of punitive damages" [paragraph 12 of the ASC]. Besides punitive damages, Mr. Mund claims general and special damages.

POSITIONS

- [8] Dr. Sovio's position is the ASC should be struck out as the allegations are too general, no duty of care in law exists between Mr. Mund and Dr. Sovio, and merely alleging it is insufficient.
- [9] On the basis of the pleadings, Dr. Sovio claims there is no duty in contract, no duty of insurer-insured good faith and no duty of care in negligence.
- [10] Dr. Sovio claims he has witness immunity.
- [11] In the alternative, Dr. Sovio states that if the ASC does disclose a reasonable cause of action, Dr. Sovio seeks leave to amend his amended statement of defence to respond to the cause of action found to exist by the court.
- [12] Mr. Mund's position is that the s. 99 medical examination is for the benefit of both ICBC and Mr. Mund, which supports the fiduciary duty alleged in the ASC.
- [13] Mr. Mund argues that the purpose of s. 99 of the Regulations is to adjust his claim not to acquire medical evidence to bolster ICBC's case.
- [14] Mr. Mund argues that when a person such as Mr. Mund is required to attend a medical examination this requires Dr. Sovio to deal with Mr. Mund "in an objective, fair, and even handed manner [paragraph 3 of Mr. Mund's outline].
- [15] Mr. Mund argues that a general duty of care arises in law by a person such as Dr. Sovio who ought to foresee a risk of harm; Dr. Sovio is in proximity to Mr. Mund who is at risk and policy reasons do require imposing a duty.

ANALYSIS

- [16] In applications pursuant to Rule 19(24)(a), the court must consider the facts alleged in the ASC to be true.
- [17] Evidence is not required to support the alleged facts (Canadian Bar Assn. v. British Columbia, 2008 BCCA 92).
- [18] The test is set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para. 33:
- [33] Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the

plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

- [19] Mr. Mund's ASC does not allege that Dr. Sovio intended anything or pursued the course of action intentionally. Nor does the ACS refer to malice on the part of Dr. Sovio toward Mr. Mund.
- [20] Mr. Mund does not allege that Dr. Sovio was incorrect in any of the conclusions that he reached in his report.
- [21] Mr. Mund does not allege that there is any contract between him and Dr. Sovio or that Dr. Sovio is Mr. Mund's doctor.
- [22] The only relationship alleged in Mr. Mund's ASC is in paragraph 7. In that paragraph he alleges that there is relationship between ICBC and Dr. Sovio. Paragraph 7 states that Dr. Sovio has done many reports for other insureds at the request of ICBC pursuant to s. 99 of the Regulations and as a result, Dr. Sovio should know that his findings and comments will determine whether or not the plaintiff will receive Part 7 accident benefits.

FIDUCIARY DUTY

- [23] Mr. Mund argues that once Dr. Sovio examines him, that a fiduciary or trust relationship is established between Dr. Sovio and Mr. Mund.
- [24] For this proposition, Mr. Mund relies on the case of *Parslow v. Masters*, [1993] 6 W.W.R. 273. Ms. Parslow was in receipt of long-term disability payments pursuant to a disability policy of insurance. She was required to submit to medical examinations at the request of the insurance company. After the medical examination of Ms. Parslow by the defendant, Masters, the insurance company determined that the plaintiff was no longer disabled pursuant to the terms of the policy and terminated the benefits.
- [25] The plaintiff tried to obtain a copy of Dr. Masters' report and notes from both the insurance company and Dr. Masters, which were refused. Ms. Parslow brought an originating notice to obtain the report and notes relating to her examination by Dr. Masters.
- [26] The court in *Parslow* found a physician/patient relationship was created between Ms. Parslow and Dr. Masters. The court in *Parslow* found a "fiduciary obligation" based on the Supreme Court of Canada decision of *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415 and *Norberg v. Wynrib*, [1992] 2 S.C.R. 226.
- [27] In *Parslow*, Mr. Justice Hunter stated the following at para. 27:

Great-West contends that at no time did Masters assume or undertake responsibility for Parslow's interests as a patient nor did he expressly or by implication undertake to exercise any power over Parslow for her benefit or to assume responsibility for her interests. The assessment was completed for the benefit of Great-West.

[28] In coming to the conclusion that there existed a fiduciary obligation between Ms. Parslow and Dr. Masters, Mr. Justice Hunter stated at para. 28:

The reported conclusion of the physician to the insurance company affects the interest of the insured person. The physician assumes the responsibility to carry out a proper examination and exercises the power over the patient to the extent that the medical report may impact on disability benefits to the patient. In some cases, the physician may even recommend a treatment program which a patient should undertake in an effort to rehabilitate and become re-employable. Accordingly, there is a fiduciary obligation to Parslow in respect of the contents of the medical report prepared for Great-West.

[29] The facts in Parslow are not different from this case. ICBC, like the insurance company in Parslow, is entitled to have Mr. Mund examined by a physician of their choice. Both Parslow and Mund have remedies against their insurer. Mr. Mund is entitled to start legal action pursuant to s. 103 of the Regulations.

[30] In Parslow, the court did not do a detailed analysis of McInerney, nor Norberg. In both McInerney and Norberg, there was a doctor/patient relationship in the sense that the patient sought to become a patient of the doctor and the doctor accepted the patient and their relationship. The situation in McInerney and Norberg do not relate to the situation of Mr. Mund and Dr. Sovio.

[31] The ASC does not allege that Dr. Sovio is Mr. Mund's physician or that there is a doctor/patient relationship. Further, Mr. Mund does not allege that there rests a contract between Dr. Sovio and Mr. Mund. Nor does Mr. Mund allege that ICBC breached its contract by terminating Mr. Mund's Part 7 benefits after January 16, 2008.

[32] In *Wong (Guardian ad litem of) v. Wong*, 2006 BCCA 540, the Court of Appeal adopted the words of Mr. Justice Brooke in *Bellamy v. Johnson* (1992), 8 O.R. (3d) 591 (Ont. C.A.) when considering whether a plaintiff could bring in a recording device during a medical examination pursuant to Rule 30(1) of the Rules of Court. At p. 10, Brooke J.A. said:

However, it must be kept in mind that the quality of the examination contemplated by the rules is not dependent upon the confidence which is the basis of a doctor/patient relationship. It is, rather, dependent on the skill and integrity of the doctor in conducting the examination in a manner that will best facilitate discovery in the adversarial process.

[33] Despite the powers that an insurer wields over a claimant, the court found in *Wong* that the relationship of the insured and insurer is not fiduciary.

[34] Dr. Sovio's role and relationship with Mr. Mund cannot be greater than that of ICBC. It is not within the power of Dr. Sovio to determine whether Mr. Mund receives Part 7 benefits. The power and the exercise of that power is that of ICBC.

[35] In *Warrington v. Great-West Life Assurance Co.*, [1996] 10 W.W.R. 691, Madam Justice Newbury for the court stated at paras. 10 and 11:

To my mind, the insurer's obligation to pay benefits under the policy upon receiving such proof is virtually indistinguishable from any other contractual duty undertaken by a contracting party and it is a long stretch indeed to characterize its role in this regard as a fiduciary one, even where the insured is "vulnerable" in the sense that he is in dire need of benefits. In this connection, I respectfully agree with the comments of the Ontario Court of Appeal in a recent case that was not cited to us, *Plaza Fibre Glass Manufacturing Ltd. v. Cardinal Insurance Co.* (1994) 22 C.C.L.I. (2d) 161. There, Robins, J.A. said for the Court:

The fact that a contract is one of utmost good faith does not however mean that it gives rise to a general fiduciary relationship. The relationship between insured and insurers is not akin to the relationship between, say, guardian and ward, principle and agent, or trustee and beneficiary. In these latter instances, the inherent character of the relationship is such that the law has traditionally imported general fiduciary obligations. The insurer-insured relationship is contractual; the parties are parties to an arms length agreement. The principle of *uberrima fides* does not affect the arms length nature of the agreement, and, in my opinion, cannot be used to find a general fiduciary relationship. The insurance contract, as noted above, imposes certain specific obligations on its parties. These obligations, however, do not import general fiduciary duties to each and every insurance relationship. Before such fiduciary obligations can be imported, there must be specific circumstances in the relationship that call for their imposition.

[11] At the risk of over-simplification, I reach the same conclusions here. Great-West had very little discretion or power with respect to the payment of the benefits to Mr. Warrington: it was bound by the policy to pay the benefits upon the requisite proof, i.e., proof satisfactory to a reasonable person, being presented to it. The insurer was not required, or authorized, to exercise any other judgment of the kind that would necessitate the operation of Equity on its conscience. As for Mr. Warrington and his employer, they placed in Great-West no more trust or confidence than a contracting party normally places on the other: they expected Great-West to do what it was contractually bound to do.

[36] Dr. Sovio argues that the dissent of Madam Justice Wilson in *Frame v. Smith*, [1987] 2 S.C.R. 99, cited with approval *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, and describes fiduciary obligation:

[60] Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[37] I find that Dr. Sovio is not in a fiduciary relationship, nor in a doctor/patient relationship, nor is one created between Mr. Mund and Dr. Sovio as a result of the medical examination by Dr. Sovio of Mr. Mund.

PURPOSE OF s. 99 OF THE REGULATIONS

[38] In paragraph 2 of Mr. Mund's outline, Mr. Mund alleges that the purpose of s. 99 of the Regulations is to adjust the applicant's claim, not to acquire medical evidence to bolster an insured's case.

[39] ICBC accepted Mr. Mund's claim for benefits. In this situation, s. 99's sole purpose is to permit ICBC to obtain medical information as to whether, in their opinion, Mr. Mund ought to continue to receive benefits.

[40] Section 99 does not say how ICBC is to use Dr. Sovio's opinion, the weight it gives his findings, or how ICBC exercises its discretion.

WORTHMAN V. ASSESSED INC., [2006] O.J. No. 925

[41] Mr. Mund argues that there is a duty on the part of Dr. Sovio to deal with him in "an objective, fair, and even handed manner. He must be neutral and free of bias" [paragraph 3 of Mr. Mund's outline]. Mr. Mund relies specifically on Worthman, a case of the Ontario Court of Appeal.

[42] Mr. Mund relies on other Ontario cases to support his position. The Ontario and British Columbia statutory schemes for the payments of benefits as a result of motor vehicle accidents are significantly different.

[43] There is no expert evidence before me as to the Ontario statutory scheme or how it actually works. Dr. Sovio referred to *Lowe v. Guarantee Co. of North America*, [2005] O.J. No. 2991 to explain the Ontario statutory scheme. In *Lowe*, the expressions "SABS" and "DAC" have the respective meanings "Statutory Accident Benefits Schedule" ("SABS") and "Designated Assessment Centre" ("DAC").

[44] *Lowe* provides an explanation as to how Ontario SABS operates:

- [12] The SABS specify four types of assessment that DACs may perform. In this case, the appellants were each referred for a medical and rehabilitation assessment. Section 38 of the SABS describes the circumstances in which such an assessment is required. In particular, ss. 38(12) of the SABS provides that in the event the insurer refuses to pay for any of the goods or services contemplated by a treatment plan prepared by the insured's health care professional, the insurer shall require the insured to be assessed by a DAC.
- [13] Under the SABS, neither party selects the DAC that will conduct the assessment. Rather, s. 53(1) of the SABS requires that the assessment be conducted at the DAC nearest to the insured person's residence. Further, like the health care professional who prepares the treatment plan on behalf of the insured⁴, under s. 53(2) of the SABS, the DAC must give notice of any conflict of interest in relation to the assessment.
- [14] Section 43(4) of the SABS requires that the DAC assessor prepare a report and provide a copy of that report to each of the insurer, the insured person and the insured person's health practitioner. Section 43(6) of the SABS requires that the report include a statement of whether, in the assessor's opinion, an expense in relation to a medical or rehabilitation benefit "is reasonable and necessary for the insured person's treatment or rehabilitation".
- [15] Importantly, s. 38(14) of the SABS requires an insurer to pay for any expense which a DAC assessor opines is reasonable and necessary, but provides that the insurer is not required to pay for the expense if that opinion is not given. Further, the preamble to s. 38(14) makes the DAC assessment of the payment obligation "[s]ubject to the determination of a dispute relating to the expense in accordance with sections 279 to 283 of the Insurance Act." Those sections provide for mediation, arbitration and litigation. In effect therefore, s. 38(14) makes the DAC assessment final and binding unless one of the parties chooses to dispute it.
- [45] As stated earlier, the difference is significant between that of Ontario and British Columbia.
- [46] In Ontario the assessor is not chosen by either the insured or the insurer, although in Ontario the insurer may be asked by the insured to be medically examined. In British Columbia, ICBC, the insurer, has the sole discretion to choose who they wish to examine the insured.
- [47] In Ontario, there are conflict of interest rules to which DAC's assessors must adhere. The DAC's assessors' professional qualifications must have minimum years of experience. There are guidelines with provisions of neutrality in the DAC assessment process. In the DAC's assessment process, assessors recommend proposed treatment and rehabilitation services to help the claimant recover any impairment following a motor vehicle accident. The insured is entitled to a copy of the DAC's report. Finally, the DAC's decision is final.
- [48] In British Columbia, ICBC may choose, pursuant to s. 99, the medical practitioner. The sole purpose of the s. 99 examination is that the medical practitioner examine the insured. It is entirely at the discretion of ICBC when, and if, there is an examination. There is no requirement that the medical practitioner provide a plan of care for the insured such as the

Ontario DAC. The doctor's opinion is not binding on anyone; neither the insured nor the insurer. ICBC may use, for different claims, for different insureds, the same medical practitioner time and time again. ICBC may reject the medical practitioner's opinion in whole or in part. It is simply not a process in which the insured participates in other than to present himself or herself to the medical practitioner designated by ICBC.

- [49] If the insured's benefits are terminated, the insured may commence an action against ICBC for the benefits, at which time they may present their case based on their medical evidence and refute that which is brought by ICBC, including Dr. Sovio, should his evidence be proffered by ICBC.
- [50] Mr. Mund relies on Worthman. Pursuant to SABS, the insurer is entitled to have a claimant for benefits to be examined as "reasonably necessary" by a health professional. In Worthman, Mrs. Worthman was examined by Dr. Grant. A report was sent to the insurers and a copy was sent to Mrs. Worthman (this is required by SABS), together with a notice that the benefits would be terminated. A DAC was scheduled and Mrs. Worthman failed to attend. The matter was then referred to arbitration in accordance with the Ontario Insurance Act. Mrs. Worthman was eventually successful. Her medical witnesses were preferred over Dr. Grant.
- [51] Mrs. Worthman started an action against Dr. Grant and the insurer, claiming damages for bad faith, intentional interference with economic relations, injuries, falsehood, negligence, malpractice and breach of duty of care. The allegations were solely based on Dr. Grant's report.
- [52] The application before the court in Worthman was brought by the defendants who alleged that Mrs. Worthman's claims were bound to fail, seeking a dismissal of the action. In Worthman, the court dismissed an application brought by the defendant insurance company to dismiss Mrs. Worthman's claim summarily based on disclosing no cause of action. The insurance company appealed. Mr. Justice Power for the Ontario Court of Appeal, in dismissing the appeal, stated:
- [60] [17] In *Campeau v. Liberty Mutual Insurance Co.* [2001] O.F.S.C.I.D. No. 37, (FSCO A00-000522) (Ontario Insurance Commission) Arbitrator, Lawrence Blackman had this to say about SABS:

IME (independent medical examinations) and DAC (Designated Assessment Centre) examinations are not defence medical examinations. They do not arise because the physical or mental condition of an adverse party in an existing legal proceeding is in question. They are legislatively mandated as part of a statutory scheme of first-party contractual rights and obligations, to clarify, as part of the normal adjusting process, whether an applicant has met the applicable entitlement requirements.

I find these comments to be instructive.

...

- [70] [27] In my opinion, based on the record as it now exists, it is not clear that, when the insurer required the plaintiff to be examined, there was a *lis* or anticipated *lis* between the parties. There is, of course, always a possibility of a *lis* developing in a contractual or duty of care relationship.
- [71] [28] I am very mindful of the ramifications of limiting the doctrine of privilege and/or immunity with respect to medical reports and of extending the duty of care to physicians who deliver reports concerning non-patients. However, it seems to me that the plaintiff should be given an opportunity to prove that some malfeasance was in place from the very beginning. This is the tenor of Ms. Worthman's complaint. As aforesaid, her complaint goes far beyond a mere allegation of negligence. If her allegations are proven, surely it would be contrary to public policy to clothe the defendants with an absolute privilege or immunity.
- [72] ...It will be particularly important for the trial judge in this case to examine the closeness, or proximity, of the relationship between the parties and, if there is a close proximity, to determine whether there are any considerations which ought to negate or limit the scope of the duty of care, the class of persons to whom it is owed, or the damages caused by the breach of duty. (See *Anns v. Merton London Borough Council*, [1978] A.C. 728 and *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2).
- [73] [30] It is important to note that the Ontario Court of Appeal's decision in *Lowe*, *supra*, was released on July 15, 2005 (i.e. subsequent to the decision of Matlow J. under appeal and the order of MacFarland J. granting leave to appeal to the Divisional Court). Notwithstanding that the Court of Appeal's decision in *Lowe* was made in the context of r. 21 rather than r. 20 with which we are concerned, and that the role played by a DAC is broader than the role played by an expert under s. 65 of SABS, there are similarities and, therefore, serious issues to be tried concerning whether the manner in which the examination was conducted, the report that emanated from it, and whether the expert should or should not be subject to absolute privilege, witness protection, or a duty of care. I appreciate that the focus in this action is on the examination and report, not on Dr. Grant's testimony.
- [74] [31] In the result, therefore, Matlow J. was correct in holding that "although many of the authorities cited seem to establish the principle that a doctor retained by a third party to examine and report on a person to the third person owes no legal duty to the person other than to avoid injuring her, it may well be that, on the facts of this case, the legal duty owed by the defendants to the plaintiff may have been broader in the context of the mechanism established for the resolution of contested claims for no-fault benefits by the Insurance Act. As well, it may be that the duty to avoid injuring the plaintiff extended to the avoidance of both psychological and economic injuries."

[75] [32] This is an important and an evolving area of law and, therefore, this action should not be determined on a summary judgment motion particularly where there are disputes between the parties with respect to material facts.

[My emphasis]

[53] Although the facts here and those in *Worthman* have similarity in that the insurer may seek a medical examination of the insured, they arise under different schemes of insurance whose objectives may be similar in that the insurer provides benefits. But, the manner in which these objectives are legislated are quite different. *Worthman* relates to the Ontario scheme of insurance and cannot be transported to the B.C. insurance scheme.

THE ANNS TEST

[54] Mr. Mund argues that he and Dr. Sovio are in such proximity that Dr. Sovio owed Mr. Mund a duty of care. This engages the Anns test. The Anns test is described by the Supreme Court of Canada in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79 at para. 30:

...the Anns analysis is best understood as follows. At [page551] the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

[55] Mr. Mund relies on *Milne v. Alberta (Workers' Compensation Board)*, [2008] A.J. No. 1282, a decision of Master J.B. Hanebury of the Alberta Court of Queen's Bench. Before the Master was an application for summary dismissal of an action as having "no genuine issue for trial" [Alberta Rule 159(3)], against two doctors and the Workers' Compensation Board of Alberta. Neither of the defendant doctors had met or examined Mr. Milne.

[56] The plaintiff, who had been injured in an industrial accident for which he sought benefits from the Board. In the process of the plaintiff's claim, he was required to attend a work hardening program and a pain management program. Mr. Milne, amongst other allegations, alleges that the doctors failed to diagnose his condition, misinterpreted test results and permitted him to be forced into a work hardening program which was not medically warranted and, in fact, further injured him. Eventually the plaintiff obtained medical treatment on his own behalf.

- [57] The Board dismissed his claim, as did a review panel on which they found that the plaintiff's symptoms were unrelated to the accident. The following paragraph describes the plaintiff's claims against the Board and the doctors:
- [10] Mr. Milne alleges that the defendants used their power to injure the plaintiff physically, emotionally and financially while being responsible for his well-being. He alleges that they grossly abused their legal powers to divest him of his right to medical treatment and financial compensation. Their conduct was malicious; they breached their duty to act in good faith; they ignored the opinions of his physicians; and, caused Mr. Milne humiliation, distress and injury.
- [58] The doctors' defence was that they owed no duty of care to the plaintiff, they were independent medical advisors, and the conspiracy allegations were not substantiated. As well, there was a limitation defence. Master Hanebury concluded:
- [54] Based on the decisions in *Lowe* and *Worthman*, I am not convinced that the law is clear that the doctors are protected from such claims. The earlier case law cited by the doctors' counsel involved factual situations considerably different than this one where there is a statutorily mandated scheme that proscribes the options and remedies open to an injured employee and involves his treatment and rehabilitation. Do the professionals utilized or employed pursuant to that legislative scheme owe a duty of care to the injured worker? There is no case law precisely on point and in my view, this question cannot be determined on a summary judgment application. It is a decision that must be made after a careful analysis of the *Anns/Kamloops* test and, if necessary, a consideration of important public policy factors. Therefore, this aspect of the claim of Mr. Milne cannot be summarily dismissed.
- [59] The basis of the plaintiff Milne's allegations are that the doctors participated in the treatment of Mr. Milne to which he was obliged to attend. The purpose of s. 99 of the Regulations was not so Dr. Sovio would treat Mr. Mund. Dr. Sovio did not treat Mr. Mund. Mr. Mund, in his ASC, does not state that the purpose of the s. 99 report is for treatment.
- [60] Dr. Sovio states in his written submission, as it relates to the second part of the *Anns* test, the following:
20. ... this Court can assume, taking the plaintiff's case at its highest, that there is basic foreseeability and proximity. It can be assumed on this application that the defendant would have been aware of the identity of the person he was assessing and that the assessment was in relation to insurance benefits.
- [61] Dr. Sovio argues that Mr. Mund's claim fails on the second arm of the *Anns* test in that any duty of care is negated by policy considerations.

- [62] The second arm of the Anns test is concerned with the effect of a duty of care on "other legal obligations, the legal system and society more generally". (*Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115). The appellant's case failed in *Elliott* at this stage, for the following reasons:
- [80] In the present case, two main policy considerations show that it would be unwise to recognize the duty of care proposed by the appellants. First, persons in the appellants' situation have their contractual remedy on the policy, which remedy includes, in a proper case, a claim for aggravated and punitive damages. While this remedy will not always be complete for persons in the appellants' situation, it is a substantial and meaningful remedy making the case for some new form of liability less compelling than it would absent such a remedy. Second, imposing the proposed duty would distort the legal relationships among the insurer, the insured and the investigators and could potentially undermine the ability of the insured and the insurer to properly deal with insurance claims. I will discuss each of these policy considerations in turn.
- [81] The availability of an alternate remedy has been recognized by the Supreme Court of Canada as one policy consideration which may negate an extension of liability in negligence: see, e.g. *Cooper* at para. 37; *Odhavji* at para. 60. This consideration figured prominently in the *Mortensen* case in which the court was unanimous that no duty of care should be imposed. Significantly, four of the five judges reached this result on the basis that policy considerations negated the *prima facie* duty they found to exist.
- [63] Dr. Sovio examined Mr. Mund at the request of ICBC pursuant to a regulatory obligation which ICBC is entitled to impose on Mr. Mund.
- [64] In *Elliott*, Mr. Justice Cromwell, as he then was, was concerned that the insurance investigators would have contractual obligations with the insured and then have imposed on them a duty of care to the insured in negligence.
- [65] In *Elliott*, Mr. Justice Cromwell demonstrates the absurdity of the imposition of such a duty of care:
- [91] This concern also operates in the opposite direction. If an expert retained by an insurer for purposes of administering the contract owes a duty of care to the insured, it is hard to see why a similar duty would not apply to experts retained by the insured for the purpose of persuading the insurer to pay. In short, I would find it difficult to confine the proposed duty of care to situations even roughly analogous to the very sympathetic circumstances of this case. This concern was noted by Richardson, J. in *Mortensen* when he observed that the duty of care contended for could not reasonably be confined to insurance investigators and that its "... ambit would be inherently expansive and unacceptably indeterminate": at 309. He said, and I agree, that it would be difficult to justify not extending the proposed duty of care to anyone who, in the course of a contractual engagement, carelessly investigates and reports on the conduct of a third party: at 309. I do not regard this concern as either speculative or trivial. For example, if this duty of care were recognized, why would it not

apply to permit an insurer to sue the insured's family doctor who, on behalf of the insured, prepared a doctor's note in support of an application for insurance benefits? Such potential liability could well inhibit the preparation of routine medical letters and reports which are issued at nominal cost in the thousands every day for insurance and employment purposes. That such a result would be undesirable is, to me, self-evident.

- [92] Liability in negligence of investigators to both the insured and the insurer would create problems of divided loyalties on the part of investigators. When investigating a fire, the relationship between the investigator and the insured is at least somewhat adversarial and becomes, as Casey, J. says, "a direct confrontation if arson is suspected": at 314. Citing the principle that one cannot serve two masters, he expressed the view that imposing a duty of care in relation to the insured might inhibit the investigators' ability to discharge their primary duty to the insurer. I agree with this concern.
- [66] The complainant in this case, Mr. Mund, is required under s. 98 of the Regulations, when making a claim for Part 7 benefits at the request of ICBC, to furnish a certificate or report of an "attending medical practitioner" as to the nature and extent of his injuries and the treatment and current conditions and prognosis of the injuries. The medical practitioner is someone that Mr. Mund chooses. This, together with s. 99 of the Regulations, demonstrates the relationship of claimants such as Mr. Mund and medical practitioners who provide medical information and opinions for claims made pursuant to Part 7. This is the dilemma that Mr. Justice Cromwell identifies in Elliott.
- [67] Mr. Mund has failed to disclose a reasonable claim on the second stage of the Anns test.

WITNESS IMMUNITY

- [68] Mr. Mund alleges that his medical examination, pursuant to s. 99, that "witness immunity gives way to the demand of neutrality and the avoidance of bias. When these features are breached the author becomes the subject of inquiry and claim" [paragraph 5 of Mr. Mund's outline].
- [69] In this case, it is still open for Mr. Mund to commence action against ICBC as he is still within the limitation period. Dr. Sovio could be a witness for ICBC and would either be discredited, accepted or other experts could be preferred. Witness immunity applies because the examination of Mr. Mund by Dr. Sovio was conducted pursuant to a statutory scheme that contemplates legal action being started by Mr. Mund against ICBC.
- [70] This was recognized in *McDaniel v. McDaniel*, [2009] B.C.J. No. 218 as follows:
- [37] There can be no doubt that Jack McDaniel was a potential witness in the British Columbia litigation. Paragraph 30 of Brian McDaniel's amended statement of claim says as much, and Ms. Carmichael deposed, and the chambers judge accepted that:

All communications that I had with the defendant Jack McDaniel was for the predominate purpose of determining whether he had any evidence relating to [the insurance action].

- [38] Whether Jack McDaniel knew that he was a potential witness seems irrelevant given Ms. Carmichael's evidence and the background facts. In such circumstances, it is the occasion that attracts the immunity not the intention of the person providing the information.
- [71] In *Howatt v. Klassen*, 2005 CanLII 11191, Dr. Klassen was requested by the College of Physicians and Surgeons of Ontario to examine Dr. Howatt. That was the extent of the relationship between Dr. Klassen and the plaintiff, Dr. Howatt. The court concluded that Dr. Klassen acted as an agent and for an appointee of the college. In dismissing Dr. Howatt's action, the court stated:
- [11] In any event, I agree with the submission that Dr. Klassen is protected by the common law doctrine of witness immunity, which protects individuals from civil suit based on their status as witnesses or potential witnesses at judicial proceedings. The case law establishes that this protection is absolute so that even allegations of bad faith are insufficient to exclude the application of the witness immunity doctrine.
- [72] A similar situation occurred in *N. (M.) v. Forberg*, [2009] A.J. No. 253. The court found a witness immunity applied to a psychologist who counselled children involved in a custody and access dispute. In proceedings between the parents of the children, the mother of the children asked the psychologist to give an opinion. The opinion was adverse to the plaintiff father, and the court found the psychologist owed no duty of care, no fiduciary duty to the father and concluded that witness immunity applied, stating the following at para. 57:

If professionals in the field of health care are exposed to the threat of law suits when they intervene on behalf of persons to whom they clearly owe a duty and have determined are vulnerable individuals, there will be a chilling effect on the willingness of health care providers to deliver their necessary assistance to the Court, and to be full and frank in their opinions when doing so.

- [73] Similarly, Dr. Sovio, in providing assessments pursuant to s. 99, must not be exposed to the threat of lawsuits for delivering his opinion, even if those opinions or actions are contrary to those of Mr. Mund.
- [74] Mr. Mund relied on *Reynolds v. Kingston (City) Police Services Board*, [2007] O.J. No. 900. The plaintiff in *Reynolds* was charged with murder based on the coroner's opinion that Ms. Reynolds' child had been stabbed repeatedly. The coroner testified that the child's loss of blood was a result of 80 stab wounds made by a knife or pair of scissors. This evidence, given at the preliminary hearing, resulted in Ms. Reynolds being committed to trial on the charge of second degree murder. The coroner, after the autopsy and before the preliminary hearing, learned a pit bull terrier had been located in the dead child's home where the body was found. He testified at the preliminary hearing that the wounds were not caused by dog bites. A subsequent autopsy found otherwise.

- [75] Ms. Reynolds' claim against the coroner was based on negligent investigation, and in addition, misfeasance in public office alleging deliberate unlawful conduct in exercising his public function.
- [76] The coroner relied on the witness immunity rule within the Rules of Civil Procedure in Ontario, to strike out Ms. Reynolds' statement of claim on the ground it discloses no reasonable cause of action. The application was dismissed and the coroner appealed to the divisional court who allowed the appeal. Ms. Reynolds appealed; which appeal was allowed. The Ontario Court of Appeal found that Ms. Reynolds' claim against the coroner:
- ... in respect to his role as a public official investigating a suspicious death under the Coroners Act, and not to his role in testifying in her criminal prosecution.
- [77] D. Sovio argues that Ms. Reynolds' claims are in respect to a coroner as being a public official against his role in testifying at a criminal prosecution in a preliminary hearing and has no bearing on Dr. Sovio's position. Dr. Sovio is not a public official, but an expert retained by ICBC. His position is similar to that of Dr. Klassen in *Howatt* and Ms. Froberg.
- [78] Dr. Sovio, in his written argument, makes reference to defamation for which he claims privilege. Defamation is not plead in the ASC. Mr. Mund did not refer to defamation in his outline or in his counsel's oral argument.
- [79] For these reasons, Mr. Mund's ASC is struck out and the claim dismissed for failure to disclose a reasonable cause of action.
- [80] Dr. Sovio will have his party/party costs at Scale B.

"H.C. Hyslop J."

HYSLOP J.

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