

CANADA / JUDGMENT

Smith et al. v. McInnis et al.

[1978] 2 SCR 1357

COURT

Supreme Court of Canada

DECIDED

7 March 1978

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Smith et al. v. McInnis et al.

Collection

Supreme Court Judgments

Date

1978-03-07

Report

[1978] 2 SCR 1357

Judges

Laskin, Bora; Martland, Ronald; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee

On appeal from

Nova Scotia

Subjects

Professional law

Decision Content

Supreme Court of Canada

Smith et al. v. McInnis et al., [1978] 2 S.C.R. 1357

Date: 1978-03-07

George I. Smith, Kenneth M. Matthews, William J. Grant, Lorne O. Clarke, Donald J. MacDonald, James C. Leefe, David R. Hubley and Wayne Anstey, a partnership under the name of Patterson, Smith, Matthews & Grant (Third Parties) Appellants;

and

Alexander D. McInnis, William F. Meehan and T. Daniel Tramble, a partnership under the name of McInnis, Meehan & Tramble (Defendants) Respondents.

1977: December 13, 14; 1978: March 7.

Present: Laskin C.J. and Martland, Spence, Pigeon, Dickson, Beetz and Estey JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, APPEAL DIVISION

Barristers and solicitors—Negligence—Insurance—Claim—Failure to file proofs of loss and to initiate proceedings within time—Contributory negligence of third party—Contracts—Contributory Negligence Act, R.S.N.S. 1967, c. 54.

Appellants are a firm of solicitors, Smith, Matthews who were joined as a third party by the defendants another firm of lawyers, McInnis, Meehan, in an action brought against them by Webb Real Estate Limited and Antigonish Homes Furnishings Limited. The action was for damages for negligence by reason of the failure of McInnis, Meehan to enforce by action certain fire insurance claims within the applicable limitation period. The fire destroyed a building owned by Webb and the stock in trade of Webb's tenant Antigonish. McInnis, Meehan was retained to look after the interests of both companies. The proof of loss filed by the solicitor was rejected by the insurers and Meehan found it necessary in order to meet their requirements to retain Matthews as an experienced insurance counsel and this he did with the clients consent. Counsel assisted in the preparation of proofs of loss and was to be kept advised as to the progress of the claims. There however was a one-year limitation period for claiming under the policies and this expired without Meehan having resubmitted the proofs of loss on the building and without having submitted any proofs of loss on the stock-in-trade, he having thought that the period was two years. The action against the insurer was dismissed [(1977), 20 N.S.R. (2d) 616]. The present action followed. At trial the defendants

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McInnis, Meehan were found to be wholly at fault however the Appeal Division was of opinion that the responsibility for failure to commence the action within the limitation period should be apportioned as between the defendants and the third party as a two thirds to one third basis. The third party appealed.

Held (Pigeon and Beetz JJ. dissenting): The appeal should be allowed; per curiam: The cross-appeal should be dismissed.

Per Laskin C.J. and Martland, Spence, Dickson and Estey JJ.: A reading of the insuring, agreements and of the statutory conditions should have been enough to alert any solicitor to the period within which proofs of loss required to be offered and concern for the limitation period should be taken for granted by a solicitor undertaking to act for clients as Meehan did. While it could have been expected that a mention of limitation periods would have been made as between

Meehan and Matthews that did not place responsibility on Matthews for failing to draw attention to such an obvious matter. The evidence on the extent of Matthews retainer was convassed by the trial judge and there was no reason to set aside his findings.

Per Pigeon and Beetz JJ., dissenting: The time within which the proofs of loss had to be filed was just as much as their contents a point on which Matthews was under a duty to advise without being asked specifically. Under the circumstances a man of experience undertaking to give professional advice had noticed that Meehan needed to be told everything he needed to know. Even if the advice sought is taken to be limited to the proofs of loss the time within which they had to be filed was an essential element which should have been covered. It was however inexcusable on Meehan's part to fail to complete the proofs of loss in accordance with Matthew's advice and with the utmost diligence. This did not excuse Matthew's failure but could well justify the unequal division made by the Appeal Division. As to the matter of apportionment of damages the liability of a solicitor for negligence is in contract only not in tort. A breach of duty will constitute a tort only if it is a breach of a duty owed independently of any contract with the claimant. Even if the Contributory Negligence Act is inapplicable to contractual liability the reason for which at common law there could be no apportionment in negligence actions would not appear to apply in actions

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founded on contract.

APPEAL and CROSS-APPEAL from a judgment of the Supreme Court of Nova Scotia[1], Appeal Division allowing in part an appeal from a judgment of Hart J. allowing an action in damages and holding the defendants wholly liable. Appeal allowed, Pigeon and Beetz JJ. dissenting, cross-appeal dismissed.

A.R. Moreira, Q.C., and A.S. Beveridge, for the appellants.

Harold F. Jackson, Q.C., and John M. Davison, Q.C., for the respondents.

The judgment of Laskin C.J. and Martland, Spence, Dickson and Estey JJ. was delivered by

THE CHIEF JUSTICE—The appellants before this Court are a firm of lawyers, a partnership, herein referred to as Smith, Matthews. They were joined as a third party by the defendants, another partnership of lawyers, herein referred to as McInnis, Meehan, in an action brought against McInnis, Meehan by Webb Real Estate Limited and Antigonish Home Furnishings Limited. The action was for damages for negligence by reason of the failure of McInnis, Meehan to enforce by action certain claims under fire insurance policies within the applicable limitation period. The plaintiffs succeeded against McInnis, Meehan under a judgment by Hart J. who at the same time dismissed the defendants' claim over against Smith, Matthews.

Meehan was the solicitor who was retained by the plaintiffs to pursue claims under policies of fire insurance by reason of losses resulting from a fire which destroyed a building owned by Webb and the stock in trade of Antigonish, Webb's tenant. Meehan found it necessary, in the course of his attempts to obtain satisfaction for his clients, and especially for Webb, to retain Matthews as an experienced insurance counsel, and this he did with Webb's consent. I shall come later to the

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findings of the trial judge on the nature and extent of the services to be provided by Matthews.

Hart J.'s judgment was appealed by the defendants both in respect of their liability to Webb and Antigonish and in respect of the dismissal of their claim over against Smith, Matthews. The Nova Scotia Supreme Court, Appeal Division, dismissed the appeal of McInnis, Meehan against Hart J.'s judgment holding them liable to Webb and Antigonish and also augmented the damages by allowing certain interest on the sums awarded. At the same time, it allowed in part McInnis, Meehan's appeal against dismissal of their claim over against Smith, Matthews, and held that Smith, Matthews should pay to the defendants one-third of the sums payable by them to the plaintiffs.

Leave to appeal the judgment of the Nova Scotia Supreme Court, Appeal Division, was given by that Court, first, to Smith, Matthews on the issue of the nature and extent of Matthews' liability to Meehan on the third party claim and, second, to McInnis, Meehan to cross-appeal on the same issue. Thereafter, leave was given to McInnis, Meehan to appeal the confirmed judgment against them in favour of Webb and Antigonish. The Nova Scotia Court was motivated by what it considered to be "the importance of the issues as to the liability of a solicitor or counsel to his client, especially where another solicitor has been retained as a special adviser". As to this last-mentioned grant of leave to come here, I need only say that this Court dismissed McInnis, Meehan's appeal against Webb and Antigonish at the conclusion of the hearing, reserving only the question of costs. Reasons on this point have been separately prepared for delivery concurrently with the reasons which now follow as to the liability, if any, of Smith, Matthews to McInnis, Meehan.

The crucial question in this case, in respect of the third party claim, was the nature and scope of Matthews' retainer. It is purely a factual question

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on which the findings of the trial judge should not ordinarily be upset on appeal save for error arising from misapprehension of the evidence. The Appeal Division, in interfering with Hart J.'s findings, was of the opinion that the central finding on the extent of the retainer was not purely a finding of fact but involved consideration of inferences arising from the facts found, and that it was therefore open to the Appeal Division to determine whether the proper inferences were drawn.

Meehan, Matthews and John G. Webb, the principal of the plaintiff Webb, all gave evidence, and were the only witnesses who could testify as to Matthews' retainer. They were, of course, examined on it and, on some points, the trial judge had to choose between conflicting versions of what had occurred between the two solicitors and between them and John G. Webb. I turn, therefore, to a brief recital of the facts as disclosed by the record and the judgments below and to the findings made by the trial judge and by the Appeal Division.

The fire occurred on the morning of June 1, 1973. That same day, Meehan wrote to the adjusters advising them that he was representing the plaintiffs. There appeared to be a suspicion of arson but the police completed their investigations without any charges being laid. Since the plaintiffs' business records had been destroyed in the fire it was necessary to establish the inventories in the destroyed building from other sources. The insurance adjusters required certain information in respect of the loss suffered by the plaintiffs, and this was detailed in a letter of June 21, 1973 to Meehan. Following this, blank forms of proof of loss were forwarded to Meehan. The proofs of loss in respect of the building were submitted by Meehan on November 8, 1973 but without certain schedules, and they were subsequently rejected by the adjusters. Meehan had not then prepared any proofs of loss for Antigonish.

Meehan advised Webb in early January, 1974 that he did not think that the insurers were prepared to pay and that it was advisable to retain experienced insurance counsel. It was decided to engage Matthews and an appointment with him was arranged for January 10, 1974. The issue

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mainly discussed was the return of the proofs of loss on the building as being incomplete and the need to prepare them properly for resubmission and acceptance. Further information was needed, there was difficulty in obtaining copies of the insuring agreements and telephone calls and correspondence passed between Meehan and Matthews relating to perfection of the proofs of loss. Matthews also advised on the proper interpretation of a co-insurance clause in the policies. What I may call a round-up meeting took place between Meehan and Matthews on February 22, 1974 and Webb was also present. Meehan and Matthews had different versions of what occurred. The former said they discussed the possibility of Court action and that Matthews agreed to act if that became necessary. Meehan also said that it was his impression of the meeting that Matthews would be in complete charge and that Meehan would simply assist him in the pursuit of recovery under the policies. Matthews' version was that as a result of the conference Meehan was in a position to file proper proofs of loss and that Matthews had completed what he had been requested to do. John G. Webb's evidence confirmed Matthews' version of the meeting, especially as it concerned the extent of Matthews' retainer.

The trial judge made the following findings:

After reviewing all of the evidence I am satisfied that Mr. Matthews' retainer at this stage was a very limited one and had been fulfilled. Although Mr. Meehan attempts to suggest that Mr. Matthews was retained as an expert to oversee the entire matter of both claims, I do not find that this interpretation of the facts is justified. Mr. Meehan had attempted to file the proof of loss for

the building, and it had been rejected. He sought assistance from Mr. Matthews and was given advice on the proper procedures to follow. Mr. Matthews felt that there was nothing further for him to do and so did Mr. Webb. Mr. Meehan had been provided with all the information necessary to proceed with the filing of the claim for the building loss and had not sought any information from Mr. Matthews to assist in the preparation and filing of the claim for the stock-in-trade. He had been led to believe that the Antigonish Home Furnishings Limited claim was basically an accounting

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matter and it was being dealt with by accountants retained by Mr. Webb. He was, in my opinion, justified in believing after the meeting of February 22, 1974, that the services requested of him had been completed and that he had no further responsibility in the matter unless he should be advised that action against the insurers was necessary.

Meehan continued with the preparation of the proofs of loss and was in touch with Matthews about his progress. The proofs for both companies were sworn before Meehan on April 11, 1974 but were not then forwarded to the adjusters, since certain required information about the stock-in-trade was still wanting. There was a one-year limitation period for claiming under the policies and it expired without Meehan having resubmitted the proofs of loss on the building and without having submitted any proofs of loss on the stock-in-trade. Meehan, on his own evidence, became aware of the expiry of the limitation period after the date of expiry, having theretofore thought that the period was two years.

He immediately got in touch with Matthews and there was a discussion between them about courses of action. Late in June, Meehan brought action on behalf of Webb and Antigonish against the insurers. A short time later he spoke to Matthews about the position that his clients were in by reason of the insurers' intention to contest their action on the ground of probable arson as well as on the limitation point. The trial judge notes in his reasons that during the conversation Matthews advised Meehan to place the whole situation before John G. Webb and advise him that he could retain other counsel (other than Meehan, that is) if he so desired. Webb decided to engage Matthews and, at a meeting on July 10, 1974, Matthews agreed to take over the file, with Meehan to act in a junior capacity. A week later, Matthews was given a retainer fee by Webb.

A month later Meehan withdrew as solicitor on the record. The trial judge records that he did this after discussing with his partners the fact that the

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insurers were going to rely solely on the defence of the expiry of the limitation period. After the defence was filed by the insurers, Matthews brought action on behalf of Webb and Antigonish against McInnis, Meehan who then decided to join Smith, Matthews as third parties. Matthews thereupon withdrew as solicitor on the record for the plaintiffs. On June 16, 1975 Hart J. dismissed the plaintiffs' action against the insurers because of the expiry of the limitation period and no appeal was taken from this decision.

As between the plaintiffs and McInnis, Meehan, it is the fact that Meehan was at fault in two respects. First, there was his failure to see that proofs of loss were filed not later than sixty days before action on the policies, as required under the insuring agreements. (The contention that Meehan was impeded by his clients in obtaining the necessary information, particularly in relation to the stock-in-trade, was rejected by the trial judge and no issue was taken with this conclusion on appeal). Second, and most important, Meehan was at fault in failing to bring action against the insurers within the prescribed limitation period. Indeed, the trial judge found, and the Court of Appeal agreed, that at no time did Meehan advise Webb of the limitation period before it expired.

It was put against Matthews in the third party proceedings that it was part of his retainer to advise not only on the proofs of loss but also on the two limitation points above-noted and, particularly, on the period of limitation for bringing action. I have already referred to the trial judge's finding on the scope of Matthews' retainer and he restated this finding in another context (when dealing with one of McInnis, Meehan's defences to the claim of the plaintiffs against them) as follows:

I have already reached the conclusion that Mr. Webb or the plaintiffs did not in fact retain Mr. Matthews to complete the claims in place of Mr. Meehan. Mr. Matthews was retained with the approval of Mr. Webb to

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assist Mr. Meehan in the resubmission of the rejected proofs of loss for the building claim. His work was completed long before the period of limitation expired and I find that there was no solicitor-client relationship between the plaintiffs and Mr. Matthews or the third parties at that time.

He returned to the issue again when disposing of McInnis, Meehan's contention that Smith, Matthews should be responsible for any liability incurred by the defendants to the plaintiffs. He dealt with this submission as follows:

...It is argued that Mr. Matthews was retained by Mr. Meehan as counsel in connection with both claims, and that he failed to alert Mr. Meehan of the necessity of filing proofs of loss sixty days before actions were commenced, and of the necessity of commencing actions within one year of the fire loss. If Mr. Matthews had been retained generally as counsel in connection with these claims, I have no doubt that his failure to ensure that the proper procedures were followed by Mr. Meehan would amount to negligence on his behalf. I find nothing in the evidence, however, to indicate that Mr. Matthews' responsibility was more than that which I found earlier in relation to the plaintiffs, that is, a limited retainer to mainly assist in the proper preparation of the proof of loss for the Webb Real Estate Limited claim.

There are three pieces of evidence upon which the Appeal Division put stress in finding that Matthews should bear one-third of the responsibility. The first is a letter from Meehan to Matthews, dated March 5, 1973, which followed upon the round-up meeting of February 22. In

that letter, Meehan informed Matthews of certain steps he was taking to be in a position to complete the proofs of loss. It was a short letter, ending with this sentence: "I shall keep you advised". The Appeal Division was of the view that this was inconsistent with the trial judge's finding that Matthews' work terminated on February 22. I do not agree that there is inconsistency on the trial judge's view that Matthews' concern was with the proofs of loss but that he might be asked to act as

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counsel if the matter went to Court.

The second piece of evidence was a letter from Matthews to Meehan dated May 15, 1974, some two weeks before the expiry of the limitation period. The body of the letter is as follows:

This file has once more come to my attention. I presume that you simply wish me to place my file ahead. This I have done for another two months. Please let me know if there is anything you wish me to do in the interim.

Meehan did not reply to this letter, and the trial judge accepted Matthews' explanation that the letter was preparatory to billing for his services and did not indicate any further responsibility, save as he might be called upon to be counsel in any Court action.

In addition, the Appeal Division laid stress on a phrase in Matthews' internal memorandum of the meeting of February 22 in which he wrote that

We went over the whole of the matter. We discussed what should be done and the manner of procedure and what would happen if they didn't pay and whether interest was payable now and so on.

They are going to proceed with the proofs of loss and let me know if there is anything further they would like me to do. They do wish me to take part in the matter should it go to Court.

The phrase in the memorandum stressed to the Appeal Division by counsel for McInnis, Meehan, was "manner of procedure" and that Court appears to have accepted the contention that this involved an obligation to advise on the limitation period. The Appeal Division summed up on its appreciation of Matthews' retainer as follows:

When Mr. Meehan went to Mr. Matthews for assistance, Mr. Matthews with all his experience should have put his mind first to the limitation period. Mr. Meehan was obviously in a difficult situation, he did not know how to complete the proofs of loss to satisfy the insurers and he needed help. It is true that we can be very wise after the event, but with respect, it seems to me that the vital and ever present question raised by the statutory

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conditions was the limitation period. Mr. Matthews does not say for sure that he did warn Mr. Meehan on this point. He thinks that he must have from his usual practice, but it does not appear to me that that is enough. These limitation periods are the shoals in which it is easy to founder, especially if one has not the day-to-day experience in insurance litigation.

By February 22, Meehan's advisers were under a duty to make it very clear what limitation periods were involved in these claims. To meet the limitation requirements, the proofs of loss would have to be filed well before March 31st, barely a month away and if they were not accepted, originating notices would then have to be issued by the end of May.

After referring to the contention on the words "manner of procedure" the Appeal Division concluded by a reference to the effect of Matthews' letter of May 15, 1974, in these words:

Finally, there is the letter of May 15, 1974 to Mr. Meehan from Mr. Matthews indicating that he was putting his file ahead for another two months and requesting that Mr. Meehan let him know if there was anything he wished in the interim. This letter is a clear indication that Mr. Matthews was not giving up his responsibilities in the matter, although after the expiration of two months, it would have been too late, the limitation period having expired on May 31. I find it difficult to understand why Mr. Matthews, knowing as he must have known that the limitation period would expire in barely two weeks, not remind Mr. Meehan of that fact, and ask whether the proofs had been accepted and the claims paid—or did they now require him to help with the court action against the insurers?

I cannot take as serious a view of the complexities of limitation periods in relation to the insurance claims as does the Appeal Division. A reading of the insuring agreements and of the statutory conditions would be enough to alert any solicitor to the period within which proofs of loss must be offered, and concern for the limitation period for action brought must surely be taken for granted by a solicitor undertaking to act for clients as Meehan did. I have no doubt that it could be expected that a mention of limitation periods would be made in the conversations or dealings between Meehan and Matthews but that is a different thing from plac-

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ing responsibility on Matthews for failing to alert Meehan to such an obvious matter.

From the beginning of the matter, from June 1, 1973, until the expiry of the limitation period a year later, it was Meehan who was in control of it and who had the file relating to it. It was he who proposed the terms of Matthews' retainer, and I am unable to take from the evidence that he had passed over to Matthews and that Matthews had agreed to advise him on anything more than how to organize the plaintiffs' claims through proper proofs of loss. There is no suggestion that Meehan ever raised with Matthews between June 1, 1973 and May 31, 1974 the question of the limitation period for suit against the insurers or that Matthews ever indicated that this was a matter he would take on.

I find it difficult, moreover, to understand the special role of inference in respect of the evidence in this case. All of the pieces of evidence from which conclusions might be drawn as to the extent of Matthews' retainer were canvassed by the trial judge. Had he made intermediate findings on them without proceeding to assess them in relation to the pivotal question of the scope of the retainer, it could well be said that he had stopped too short in his appraisal and that the intermediate facts supported further inferences. He did not, however, stop short but made a thorough appraisal directed to the scope of the retainer. It is true, of course, that on the central issue of the scope of the retainer we have not only the testimonial evidence of Meehan and Matthews but also letters written by each of them from which inferences may be drawn. Yet the inferences from their assertions as to what was expected of Matthews and the inferences from the letters cannot be sharply differentiated. The trial judge heard the oral evidence and saw the documentary evidence, and all of the evidence directed him to the main issue. I see no ground upon which his findings should be set aside.

I would, accordingly, allow the third party's appeal, set aside the judgment of the Appeal Divi-

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sion and restore the trial judge's dismissal of the claim over against the third party, with costs to the third party throughout. In the circumstances, it is unnecessary to canvass other questions raised on the motion for leave and also raised here as to whether a solicitor's liability to his client lies in tort or only in contract, and the effect, accordingly, of the Tortfeasors Act, R.S.N.S. 1967, c. 307 and of the Contributory Negligence Act, R.S.N.S. 1967, c. 54. I would dismiss the cross-appeal of McInnis, Meehan on the apportionment of liability as between them and Smith, Matthews without costs.

The judgment of Pigeon and Beetz JJ. was delivered by

PIGEON J. (dissenting)—The appellants, "Smith, Matthews" and the respondents, "McInnis, Meehan" are firms of lawyers. The latter have been held responsible towards Webb Real Estate Limited and Antigonish Home Furnishings Limited for the loss which these companies suffered by McInnis, Meehan's negligence in failing to take, within the proper time, all steps necessary to recover for a large fire loss under insurance policies. Their claim against Smith, Matthews on account of inadequate advice was dismissed at trial but allowed for one-third on appeal.

McInnis, Meehan had been retained by one Webb to look after the interests of the two companies following a fire which destroyed their premises and stock-in-trade on June 1, 1973. Meehan, the member of his firm looking after the matter was inexperienced in insurance. After he had done a good deal of work trying to meet the insurers' requirements, he was faced, in the middle of December 1973, with a letter of the adjusters returning to him the proofs of loss he had prepared "as not being completed as stipulated in the statutory conditions". Having discussed the situation with Webb he was authorized to retain Matthews as counsel experienced in insurance matters. He contacted him early in January 1974 and had an interview with him on January 10. As to this

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interview, the trial judge made the following finding:

...In my opinion, Mr. Meehan was simply asking Mr. Matthews' assistance in properly preparing and obtaining the information necessary to pursue the claim for the building loss against the insurers.

It appears to me that the correspondence which followed the interview makes it clear that the trial judge's view of the limited scope of the assistance required from Matthews is incorrect. The last three paragraphs of a letter by Matthews to Meehan dated January 22, 1974 read:

Just as soon as you can obtain the further information in respect to the co-insurance clause, in order that you and I may consider it, then, it is my view, that the proofs of loss should be completed with the inventory attached. In that respect, as we mentioned in our conference of January 21, the replacement cost endorsement should be helpful to the assured.

Further, as suggested in our conference of January 21, it is my view that your letter of January 17 to U.A.B. should go out. This is information which the insurers can demand and there is no reason why it shouldn't be supplied now. We should attempt to show co-operation wherever that is possible and practical.

I will look forward to receiving the further information from you. Once again, I apologize for the delay.

From the terms of that letter it is apparent that what Meehan sought from Matthews was advice as to what should be done. Naturally, there was mention of the proofs of loss because the rejection of those which had been submitted had provoked the decision to retain Matthews, but it is clear that the whole situation was under consideration and this is confirmed by the further correspondence.

On February 5, Meehan sent to Matthews a copy or the original of four policies which Matthews never returned.

On February 18, Matthews wrote a long letter to Meehan in which he refers to the material forwarded on February 5 and one reads:

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In our telephone conference on February 15 you mentioned preparation of the proofs of loss. I note that you did prepare proofs of loss and that these were returned by U.A.B. in their letter of December 14, 1973. They wished more information.

It is my view that you should prepare new proofs of loss. Also, I believe that you should ask Mr. Barron of U.A.B. if the insurers would rather that you prepare individual proofs of loss for each one of the four companies or one proof of loss setting out the names of the four companies. Strictly speaking, I am of the view that the latter is the proper way because you are claiming a loss under one policy which is a subscription policy with four insurers.

The letter ends:

I will look forward to discussing the matter with you and Mr. Webb on Friday February 22 at 10 a.m.

Here is what the trial judge says of Matthews' "version of what was understood as a result from this conference":

...He believed that Mr. Meehan would now have sufficient information to file the proofs of claim and that this brought to an end what he had been requested to do. He denies that there was any discussion about preparation for court action, but says that he was asked if he would act in the event that court action should become necessary. He states that he gave no commitment to do so. Mr. Matthews said that he advised Mr. Meehan that one proof of loss was all that was necessary rather than four separate proofs, and although he does not have a clear recollection of telling him about any limitations under the policy, he states that it is his practice in these situations to do so and assumes that he advised Mr. Meehan about the sixty day waiting period after the filing of proofs of loss before action could be started. He does recall telling Mr. Meehan to resubmit the proof of loss, and felt that there was nothing further for him to do. They had told him that they were going to see Mr. Crosby, the expert in bankruptcy, and that he would be taking over the accounting work, but he does not recall any indication that he was to have any responsibility for the Antigoniish Home Furnishings Limited claim, or that he was to assist Mr. Meehan in getting any information from Mr. Webb. As the meeting ended Mr. Matthews understood that they would let him know if there was anything further they wished him to do.

Mr. Matthews summarized the meeting in his file notes as follows:

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"At 10 a.m. I met with Bill Meehan and Gerry Webb for about 2 hrs. We went over the whole of the matter. We discussed what should be done and the manner of procedure and what would happen if they didn't pay and whether interest was payable now and so on.

"They are going to proceed with the proofs of loss and let me know if there is anything further they would like me to do. They do wish me to take part in the matter should it go to court. K.M.M."

After summarizing Webb's recollection of the conference, the trial judge said:

After reviewing all of the evidence I am satisfied that Mr. Matthews' retainer at this stage was a very limited one and had been fulfilled. Although Mr. Meehan attempts to suggest that Mr. Matthews was retained as an expert to oversee the entire matter of both claims, I do not find that this interpretation of the facts is justified. Mr. Meehan had attempted to file the proof of loss for

the building, and it had been rejected. He sought assistance from Mr. Matthews and was given advice on the proper procedures to follow. Mr. Matthews felt that there was nothing further for him to do and so did Mr. Webb. Mr. Meehan had been provided with all the information necessary to proceed with the filing of the claim for the building loss and had not sought any information from Mr. Matthews to assist in the preparation and filing of the claim for the stock-in-trade. He had been led to believe that the Antigonish Home Furnishings Limited claim was basically an accounting matter and it was being dealt with by accountants retained by Mr. Webb. He was, in my opinion, justified in believing after the meeting of February 22, 1974, that the services requested of him had been completed and that he had no further responsibility in the matter unless he should be advised that action against the insurers was necessary.

It will be noted that the trial judge makes no finding as to whether Matthews did tell Meehan about the one-year limitation for instituting proceedings and the sixty day waiting period after the filing of proofs of loss before action could be started. However, on his own admission Matthews was alert to the importance of the time element. Questioned as to the reason for the mention of the date of the fire on the upper right-hand corner of a hand-written memorandum, he said:

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...I guess it's obvious. You need to know the date of the fire because there are many things which flow from the date of the fire, including, so that you won't have to ask the next question... including proofs of loss and the necessity to issue the originating notice.

The last day on which action could be taken was May 31, 1974. Therefore the proofs of loss had to be filed not later than April 2, 1974. Time was running short and a letter of Meehan to Matthews dated March 5, 1974 clearly indicated that the writer was not conscious of the urgency, it said:

I appreciated the opportunity to meet with you and Mr. Webb on Friday at your office.

I have requested A. H. Roy and Associates Ltd. to provide me with a replacement value effective June 1, 1973; and, further, I have requested directions from Mr. Barron of Underwriters Adjustment Bureau Ltd. as to the mode of addressing the Proofs of Loss, i.e., whether addressed to each insurer individually or the four of them collectively.

I shall keep you advised.

The adjusters' letter advising that it would be sufficient if one proof of loss was filed was mailed April 1, 1974 and the year was over before action was taken.

Speaking for the Court of Appeal, Coffin J.A. said:

When Mr. Meehan went to Mr. Matthews for assistance, Mr. Matthews with all his experience should have put his mind first to the limitation period. Mr. Meehan was obviously in a difficult situation, he did not know how to complete the proofs of loss to satisfy the insurers and he needed help. It is true that we can be very wise after the event, but with respect, it seems to me that the vital and ever present question raised by the statutory condition was the limitation

period. Mr. Matthews does not say for sure that he did warn Mr. Meehan on this point. He thinks that he must have from his usual practice, but it does not appear to me that that is enough. These limitation periods are the shoals in which it is easy to founder, especially if one has not the day-to-day experience in insurance litigation.

By February 22, Meehan's advisers were under a duty to make it very clear what limitation periods were involved in these claims. To meet the limitation requirements, the proofs of loss would have to be filed well

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before March 31st, barely a month away and if they were not accepted, originating notices would then have to be issued by the end of May.

In my view, the Court of Appeal was justified in coming to the conclusion that on February 22, Meehan and Webb had not been informed by Matthews that the proofs of loss would have to be filed before March 31st and proceedings would have to be instituted before the end of May. This is the only logical conclusion when Matthews is unable to remember having given any advice on the time limits. That he was not really concerned, is apparent from the fact that he did not react on receiving Meehan's letter of March 5 and also from the letter he wrote to Meehan on May 15, 1974, saying:

This file has once more come to my attention. I presume that you simply wish me to place my file ahead. This I have done for another two months. Please let me know if there is anything you wish me to do in the interim.

The important question is whether, on February 22, Matthews was under a duty to tell Meehan and Webb that, because insurers become obliged to pay sixty days after receipt of proofs of loss properly completed and proceedings have to be instituted within a year of any loss, the proofs of loss had to be filed with the insurers not later than April 2, 1974. In my view, the time within which the proofs of loss had to be filed was, just as much as their contents, a point on which Matthews was under a duty to advise without being asked specifically. He was being consulted on what should be done as appears from his letter of January 22. He advised that completed proofs of loss should be submitted and undertook to advise as to how Meehan should complete them in great detail and at great length. Meehan was obviously incompetent by himself. Even without experience, a solicitor admitted to the practice of law, having the policies in hand and proper forms of proofs of loss, ought to have been able to prepare acceptable proofs of loss on which to base a claim. That he was unable to do it clearly indicated to Matthews how badly he needed help. Under those circumstances a man of experience undertaking to give professional advice, had notice

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that Meehan needed to be told everything he needed to know.

This is not a case in which definite questions were put in writing and advice could reasonably be limited to what was being explicitly asked for. I have already indicated the reasons why I think the advice sought was as to what needed to be done in the circumstances. Even if this advice is taken to be limited to the proofs of loss, the time within which they had to be filed was, as much as their contents, an essential element which had to be covered.

In *Lambert v. Lastoplex Chemicals*[2], this Court held that the manufacturer of a volatile flammable liquid did not discharge its duty to warn consumers by merely telling them it was inflammable and should be kept away from fire. It was decided that he was bound to notify them specifically that all pilot lights must be eliminated in or near the working area. Although the user in that case was an engineer and should perhaps have been able to appreciate the danger of using a volatile flammable liquid when there was a lighted pilot light in an adjoining room, it was held that the general warning was insufficient and nothing short of an explicit warning could be sufficient in the circumstances. Of course what was in issue was liability in tort and a manufacturer's duty to warn of danger to life. However, I think the case is relevant to show that where a duty to give them a warning arises, the degree of explicitness required depends on the circumstances.

Here the trial judge found that there was a clear duty of Meehan towards Webb to give timely advice so that his companies' rights to recover from their insurers would be safeguarded. When more than six months after the fire, Meehan realized that he did not really know what to do and went for advice to an experienced professional man, I cannot agree that the latter can be heard to say, I told you what to do because this is what you asked me, I did not tell you when to do it because you did not ask me. I must also add that, in the

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assessment of the evidence, consideration should be given to the disgraceful conduct of Matthews who agreed to act for Webb's companies against Meehan. He was obviously in a situation of conflict of interest in seeking to fasten the whole blame on Meehan. There was a clear possibility that Meehan would, as happened, claim against him or that Webb or both would do so. He withdrew only when Meehan did claim against him.

The Court of Appeal held that Smith, Matthews' contribution should be one-third. There is a cross-appeal against this division and it raises two questions:

1. Should the division of responsibility be modified?
2. Is a division justified in law?

On the first question, I find it a fairly well established rule that, because the appreciation of degrees of negligence is a matter of opinion, an appellate court should not interfere unless the decision appears to be based on an error in principle or on a misapprehension of the evidence (*Clyke v. Blenkhorn*[3]). Nothing of the kind is urged against the judgment in appeal and I can see no justification for substituting my own views for those of the court below. While there might be a lot to be said for an equal division, it should also be considered that any delay was seriously

prejudicial to Meehan's clients as he well knew. It was therefore inexcusable on his part to fail to complete the proofs of loss in accordance with Matthews' advice and with the utmost diligence. While in my view, this does not excuse Matthews' failure to advise specifically of the time limits, it may well justify the unequal division made by the Court of Appeal.

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The second question requires consideration of the legal basis for the apportionment of liability. This point was not considered in the Court of Appeal. After finding that Matthews had failed to discharge his duties to Meehan, Coffin J.A. only said that he did not feel he "should have the sole responsibility" and would apportion one-third against his firm. In this Court it was submitted that the liability was in contract, the Contributory Negligence Act, (R.S.N.S. 1967, c. 54) was inapplicable to such liability and therefore there was no legal basis for an apportionment of liability.

I have to agree that the liability of a solicitor to his client for negligence in his duty to give advice, or otherwise, is in contract only, not in tort. I adhere to the view I have previously expressed in other cases, that a breach of duty may constitute a tort only if it is a breach of a duty owed independently of any contract with the claimant, "an independent tort" as I said in *Nunes Diamonds v. Dominion Electric Protection*[4], at p. 777. In the case of a solicitor retained to give advice, his duty to advise properly arises only under contract and I do not see how liability can arise otherwise than on a contractual basis as was held in the case of a consulting engineer in *Halvorson v. McLellan Co.*[5], at p. 74. Breach of contract appears to be the basis on which a solicitor was found liable by the House of Lords in *Nocton v. Ashburton*[6], and by the English Court of Appeal in *Groom v. Crocker*[7].

Even assuming the Contributory Negligence Act is inapplicable to contractual liability, it does not seem to me that this means that there is no basis for the apportionment of liability. The reason for which at common law there could be no apportionment in actions founded on negligence was that any contributory negligence was a complete

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defence. It never was so in contract as far as I have been able to ascertain. In *Corpus juris secundum* under Contracts, para. 525, one reads:

...plaintiff's contributory negligence is not a defense to an action for breach of contract, but plaintiff's negligence may be material where he seeks to hold defendant liable for damage to the property which constitutes the subject matter of the contract, unless such negligence is not the proximate cause of the damage.

There are not many cases cited in support of the above statement and they all appear to do no more than repeat it. The most recent is *Rotman v. Hirsch*[8], a judgment of the Supreme Court of Iowa in which previous decisions are referred to (at p. 56). In *Joint Torts and Contributory Negligence*, (p. 328) Glanville Williams, submits "that at common law the defence of contributory negligence applied in substance (whatever the precise language used) to actions in contract as

well as to actions in tort (para. 59)". With respect, I do not find his reasoning and authorities persuasive. Having read all the cases he cites, I find that they only go on to show that a plaintiff's negligence may, in a proper case, be set up as a defence to an action founded on a contract. For instance, in *London Joint Stock Bank Limited v. MacMillan*[9], the House of Lords held that when a cheque had been written in a way which made it easy to increase the amount for which it was drawn, the loss could not be recovered from the bank. As in other similar cases, it was an all or nothing situation. There was thus no occasion to decide whether the doctrine of contributory negligence as understood in actions in tort, was applicable in actions on contract so as to negate the possibility of apportionment when both parties were at fault.

In the same book, Glanville Williams expresses the opinion that the Law Reform (Contributory Negligence) Act, 1945 (U.K.), is applicable to liability in contract as well as in tort. I must point

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out that this English statute is far from identical with the Nova Scotia Contributory Negligence Act. While it similarly uses the word "fault" in the cardinal provision calling for apportionment of liability, it includes a definition of the term as follows:

'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

The Contributory Negligence Act of Nova Scotia, although originally adopted in 1954, does not take its inspiration from the United Kingdom Act. Section 1, the basic provision, is practically a verbatim copy of the New Brunswick Contributory Negligence Act in the form in which it appeared in the Revised Statutes of New Brunswick 1952, c. 36. As in other similar acts of other Canadian provinces, the wording is a re-arrangement in slightly revised form, of the uniform Contributory Negligence Act prepared by the Conference of Commissioners on Uniformity of Legislation which was adopted by several Canadian provinces, including British Columbia in 1936, and Saskatchewan in 1944. The first Contributory Negligence Act had been adopted by Ontario in 1924 (c. 32) followed by similar statutes in New Brunswick and in British Columbia in 1925 (New Brunswick, c. 41, British Columbia, c. 8).

In all those enactments, the word "fault" (undefined) is used to describe what may occasion a division of liability. In some early statutes the expression was "fault or negligence", however, in the Uniform Act as in all present statutes, the word "fault" is used by itself as in the Nova Scotia enactment where section 1 reads:

1.(1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

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- (2) Nothing in this Section operates so as to render any person liable for any damage or loss to which his fault has not contributed.

Fault, it should be noted, is the word used in the civil law to designate not only every culpable act or omission giving rise to delictual or quasi-delictual liability, but also any violation of a contractual obligation. In the civil law, the division of liability on the basis of the respective degrees of fault is effected by application of the principle of causality without any specific provision in that regard. To the extent that the damage suffered by a plaintiff is due to his own fault, it is held not to have been caused by the fault of the defendant. As at common law there is joint and several liability between the joint authors of fault causing the damage, but this solidarity among the joint authors does not exist as between them and the claimant. To the extent that the latter is the author of his own misfortune, he has to bear his loss but of his share only, because in the civil law nothing prevents a joint author of a delictual or quasi-delictual act from recovering from another such joint author his proper share of the loss; in other words, the situation is as under the Tortfeasors Act. (See what was said under the heading “Consequence of the common fault” in *Hôpital Notre-Dame de l’Espérance v. Laurent*[10], at pp. 606-607 (N.R.), at pp. 133-134 (C.C.L.T.)) It appears to me that the use of the word “fault” in the Contributory Negligence Act is evidence of the origin of the rule and of the intention to adopt the civil law principle with respect to the division of liability in proportion to the respective degrees of fault in all cases.

In the case of liability in contract, I think that even if the Contributory Negligence Act was not applicable the same result would obtain at common law, because there never was in contractual liability the rule that prevented one tortfeasor from suing another. This I think was the true basis of the doctrine of contributory negligence: if the plaintiff was himself negligent he was in the situation of a joint tortfeasor who could have no

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recourse against another tortfeasor. The loss having fallen on him he had to bear it in full. In my opinion the authors of *Corpus juris secundum* are correct in their view that the doctrine of contributory negligence, does not apply in contract liability. The result is that the principle of causality must be applied and, therefore, there has to be an apportionment in the rare case of separate breaches of contract having contributed to a single loss.

The question of contributory negligence in an action founded on a contract recently came before this Court in *Giffels Associates Limited v. Eastern Construction Company Limited* an appeal from the judgment of the Ontario Court of Appeal {sub nom. *Dominion Chain Co. v. Eastern Construction Co.*[11]. The case was decided[12] (February 7, 1978) on a basis that did not require a decision on that question. It should be noted that the Ontario statute is somewhat different not only in its title (The Negligence Act) but also in wording. A list of authorities in the Court of Appeal will be found at p. 221 of the report.

For all the above reasons I would dismiss the appeal and the cross-appeal with costs.

Appeal allowed, PIGEON and BEETZ JJ. dissenting, cross-appeal dismissed.

Solicitor for the appellants: Arthur R. Moreira, Halifax.

Solicitor for the respondents: Harold F. Jackson, Halifax.

[1] (1977), 20 N.S.R. (2d) 6.

[2] [1972] S.C.R. 569.

[3] (1958), 13 D.L.R. (2d) 293.

[4] [1972] S.C.R. 769.

[5] [1973] S.C.R. 65.

[6] [1914] A.C. 932.

[7] [1939] 1 K.B. 194.

[8] 199 N.W. (2d) 53.

[9] [1918] A.C. 777.

[10] (1977), 17 N.R. 593, 3 C.C.L.T. 119.

[11] (1976), 12 O.R. (2d) 201.

[12] [1978] 2 S.C.R. 1346.

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Prepared on 26 October 2026 · Esheria