

NOVA SCOTIA COURT OF APPEAL

Citation: *Tupper v. Nova Scotia (Attorney General)*, 2008 NSCA 44

Date: 20080513

Docket: CA 286230

Registry: Halifax

Between:

Thomas Percy Tupper

Appellant

v.

The Attorney General of Nova Scotia, Representing Her Majesty the Queen in Right of the Province of Nova Scotia; The Minister of Service Nova Scotia and Municipal Relations - The Honourable Barry Barnett; Judgment Recovery (N.S.) Ltd.; and Judgment Recovery's Lawyer - John Kulik

Respondents

Judge: Roscoe, Hamilton & Fichaud, JJ.A.

Appeal Heard: April 8, 2008, in Halifax, Nova Scotia

Held: Appeal dismissed, per reasons for judgment of Hamilton, J.A.; Roscoe & Fichaud, JJ.A. concurring

Counsel: Thomas Percy Tupper, self-represented appellant
Catherine J. Lunn & Duane Eddy, Articled Clerk,
for the respondents, AGNS & Minister of Service
and Municipal Relations
Michael R. Brooker, Q.C., for the respondent, Judgment
Recovery (N.S.) Ltd.
Michael J. Wood, Q.C., for John Kulik

Reasons for judgment:

[1] The appellant, Thomas Percy Tupper, appeals the September 4, 2007 order of Justice Gerald R. P. Moir. The Chambers judge struck all claims in Mr. Tupper's statement of claim against the respondents, The Attorney General of Nova Scotia, ("Attorney General"), The Minister of Service Nova Scotia and Municipal Relations ("Minister"), Judgment Recovery (NS) Ltd., ("Judgment Recovery") and John Kulik, except his claim against the Attorney General for breach of his equality rights under s.15 of the **Canadian Charter of Rights and Freedoms**. The judge also dismissed Mr. Tupper's application to add parties. Mr. Tupper represented himself in Chambers and on appeal.

[2] The Chambers judge set out the background of this appeal in his reasons for judgment reported at 2007 NSSC 232, [2007] N.S.J. No. 341, 259 N.S.R. (2d) 220:

[1] Mr. Tupper sues for damages because his driver's licence has been suspended these past twenty years. He applies for an order requiring answers to a demand for particulars and his interrogatories. In response, the Attorney General applies for an order striking the originating notice and statement of claim. The other defendants support this position. The application of the Attorney General should be dealt with first, because the issues about particulars and interrogatories become academic if all pleadings are struck.

[2] Mr. Tupper also seeks an order joining, by amendment, former ministers of the Crown who were responsible for the Registry of Motor Vehicles, former Registrars and Mr. Harold Jackson Q.C., formerly solicitor for Judgment Recovery. Mr. Tupper has shown no basis in law for personal liability of the ministers or registrars and that part of the application is dismissed. I will deal with Mr. Jackson when discussing the case against Mr. Kulik.

[3] Mr. Tupper's statement of claim, proposed amended statement of claim, and answer to demand for particulars contain lengthy narratives. Also, he filed a booklet of materials and made submissions which I have scrutinized for indications that a further amendment might assist Mr. Tupper's position on the application to strike his pleadings. I summarize his case as follows:

- (a) Mr. Tupper lives in Coldbrook and he is a poor, disabled person who survives on income assistance.

- (b) He identifies the named defendants and, about the lawyer defendants, states "Harold F. Jackson QC is an ex-Judgment Recovery lawyer" and "John Kulik ... is Judgment Recovery's lawyer".
- (c) He introduces his cause with "the defendants collected a bill I never owed them and caused my driver's licence to be suspended" for over twenty years.
- (d) On 4 June 1983 an "off-road racing motorcycle" Mr. Tupper was operating collided with an intoxicated pedestrian, Mr. Larry Hake.
- (e) Mr. Tupper was charged under sections of the *Motor Vehicle Act*, [R.S.N.S., 1989, c. 293 ("MVA")] for operating improper equipment and driving without insurance.
- (f) His driver's licence was suspended from September 1983 until January 1984.
- (g) The driving without insurance charge was dismissed on 15 December 1983 because the [MVA] did not apply to a competitive racing motorcycle that could not be insured for road use.
- (h) Mr. Hake sued.
- (i) Mr. Tupper did not defend.
- (j) The suit was defended by Judgment Recovery.
- (k) Mr. Tupper believed that Judgment Recovery and its lawyers were acting for him.
- (l) They represented him negligently.
- (m) Hake obtained judgment for \$35,000, allowing 25% for his contributory negligence.
- (n) Judgment Recovery would not appeal, which denied Mr. Tupper access to the Court of Appeal because he is poor.

- (o) From August 1985 until July 2005, Mr. Tupper's licence was suspended because Mr. Tupper could not afford to make payments to Judgment Recovery; this offends his equality rights under s. 15 of the *Charter* because this government action discriminates against him on the basis of his poverty.
- (p) In addition, Mr. Tupper was denied natural justice because there was no hearing to determine the suspension, the suspension was not explained to him, and the hardship relief provisions of the [MVA] were not explained to him.
- (q) This amounted to negligence on the part of the Registry.
- (r) It also constituted a violation of Mr. Tupper's rights to liberty and equality.
- (s) These facts constitute a violation of Mr. Tupper's rights under the *Human Rights Act*, [R.S.N.S. 1989, c. 214 (“HRA”)].
- (t) These facts, when coupled with the fact that Mr. Tupper made regular payments to Judgment Recovery without the Registry making itself aware of the payments, constitute an infringement of his right not to be subjected to cruel and unusual punishment.
- (u) The Registry, with the approval of the minister, may make regulations to control suspensions, and both were negligent in failing to make regulations to address Mr. Tupper's suspension.
- (v) Mr. Kulik and Mr. Jackson acted out of conflicting interest by taking recourse against Mr. Tupper; this constituted a breach of their fiduciary obligations owed to Mr. Tupper.
- (w) Mr. Tupper claims \$8,100 he actually paid to Judgment Recovery over the years.
- (x) He claims various damages for breach of fiduciary obligations, tort, and Charter violations.

[3] After setting out this summary of Mr. Tupper's case, the judge referred to the correct test to be applied on an application to strike pleadings. He addressed

Mr. Tupper's central argument that the provisions of the **MVA** permitting Judgment Recovery to defend the action brought by Mr. Hake, to pay the damages awarded to Mr. Hake and to take recourse against him to recover the damages it paid and further providing for the suspension of his driving licence until he made arrangements to repay Judgment Recovery do not apply to him. Mr. Tupper argued that these provisions of the **MVA** did not apply to him because he could not be prosecuted under the **MVA** for driving without insurance in relation to the Hake accident as shown by his acquittal of those charges. With respect to this argument the judge stated:

[11] Section 230(1) of the [MVA] provides:

No person shall drive a motor vehicle registered or required to be registered under this Act unless there is in force in respect of the motor vehicle or in respect of the driver of the motor vehicle a motor vehicle liability policy.

The phrase "registered or required to be registered under this Act" explains the acquittal mentioned by Mr. Tupper in his pleadings. However, the statutory right of payment from Judgment Recovery has no such limit. In 1983, the applicable provision was s. 191(1), and it now is 213(1):

Where in any court in the Province a judgment is recovered in an action for damages resulting from bodily injury to or the death of any person or for damage to property and such injury, death or damage was occasioned by or arose out of the operation, ownership, maintenance or use of a motor vehicle by the judgment debtor within the Province, the judgment creditor may, subject to the provisions of this Act, make application for payment of such judgment to Judgment Recovery (N.S.) Ltd.

Judgment Recovery's liability is for damage that "was occasioned by or arose out of the operation, ownership, maintenance or use of a motor vehicle". The statute defines "motor vehicle" and "vehicle" very broadly in R.S.N.S. 1989, s. 2 (ad) and (ca). Section 213 is not restricted to vehicles required to be registered.

[12] The pleadings make it clear that Mr. Tupper was found to be liable to Mr. Hake for damages resulting from the operation of a motor vehicle, Mr. Tupper was uninsured and could not pay the judgment for the damages, and Judgment Recovery did so. That brought into effect the provision of the [MVA] requiring suspension of Mr. Tupper's licence. The present subsection 227(1), formerly

203(1), was in effect throughout the period of Mr. Tupper's claim except for changes to section numbers and correction of punctuation in the 1989 revision:

Subject to Section 239 [formerly, 213], the driver's license or privilege of obtaining a driver's license and owner's permit or permits, of every person who fails to satisfy a judgment rendered against him, by any court in the Province, or in any other province of Canada, which has become final by affirmation on appeal, or by expiry without appeal of the time allowed for appeal, for damages of one hundred dollars or more on account of damage to property, or damages on account of bodily injury to, or the death of, any person, occasioned by a motor vehicle, within fifteen days from the date upon which such judgment became final, shall be forthwith suspended by the Registrar, upon receiving a certificate of such final judgment from the court in which the same is rendered, and shall remain so suspended, and shall not at any time thereafter be renewed, nor shall any new driver's license or owner's permit be thereafter issued to such person until such judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy, to the extent of the minimum level of financial responsibility required at the time of the accident which gave rise to the judgment and until such person gives proof of his financial responsibility.

Note that this provision gives no discretion to the Registrar. Section 239, formerly 213, allows the judgment debtor to apply to the court for permission to pay the judgment by instalments and to the Minister to restore the licence while the payments are made. The absolute quality of the s. 203(1) suspension is reenforced by s. 219, formerly 196. It provides that the licence remains suspended until the judgment debtor provides proof of financial responsibility and has paid a deductible to the Registrar, has repaid Judgment Recovery, is carrying out an arrangement to pay instalments, or has obtained a satisfaction piece.

[13] The [MVA] may make some suspensions discretionary, but the provisions for suspension as a result of failing to pay a judgment appear to be absolute.

[4] The judge found there was no sustainable claim set out in Mr. Tupper's statement of claim against Mr. Kulik and that there could not be against Mr. Jackson if he was added as a party. He found there was no sustainable claim against Judgment Recovery because its' alleged actions of defending Mr. Hake's action against Mr. Tupper, an uninsured driver, paying the damages awarded by the Court and seeking recourse against Mr. Tupper for the damages it paid were

within the statutory powers given to it under the **MVA** and because it was not a government actor against which a claim for **Charter** breach would lie; (see **Messom v. Levy et al** (1997), 159 N.S.R. (2d) 252 (C.A.) ¶ 46).

[5] The judge struck Mr. Tupper's claim against the Minister based on natural justice and negligence on the basis that the Minister had no discretion under the **MVA** to relieve Mr. Tupper's suspension and no power to make regulations giving him such a discretion because such regulations would be inconsistent with the **MVA**:

[13] The [MVA] may make some suspensions discretionary, but the provisions for suspension as a result of failing to pay a judgment appear to be absolute.

[14] The general power to make regulations in s. 304(1) could not be exercised to change this state of affairs because the regulations cannot be inconsistent with the Act. Nor could the specific power in s. 226, "for the more effective carrying out of" ss. 227, 239 and 219 among others, be exercised inconsistently with the Act.

[15] It follows that the claims which suppose the Registrar has a discretion to relieve against Mr. Tupper's suspension, to provide regulations doing so, or to advise Mr. Tupper of his rights to relief are clearly unsustainable. . . .

[6] The judge indicated that for the same reasons there would be no claim against former ministers or against registrars of motor vehicles if they were added as parties.

[7] He struck Mr. Tupper's **Charter** claims against the Minister, and indicated the same would apply to former ministers and registrars of motor vehicles if they were added as parties, because his alleged actions were in compliance with apparently valid legislation:

[15] . . . The constitutional claims against the Registrar or the Minister are similarly unsustainable. They acted in compliance with apparently valid legislation.

[8] Finally he held that Mr. Tupper's s.15 claim against the Attorney General should not be struck as it was not obviously unsustainable:

[24] Mr. Tupper's claim pertains to the second part of the first issue in [*Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. 12]. The [MVA] fails to take into account the already disadvantaged position in Canadian society of those who are so poor they must survive on income assistance, and in failing to do so, it draws a distinction between that group and the rest of society, between those who cannot pay installments to Judgment Recovery and those who can do so. Those in Mr. Tupper's group cannot get their driving licences restored and this "substantively differential treatment" is based on the "personal characteristic" of being so poor one must survive on income assistance. In my assessment, Mr. Tupper has an argument to make along those lines and his claim cannot be said to be clearly unsustainable on the first issue in *Law*, differential treatment.

[9] There is no appeal from the judge's decision not to strike Mr. Tupper's s.15 claim.

[10] Mr. Tupper raised numerous grounds of appeal which in essence were repetitions of his arguments before the judge which the judge rejected. It is not for this Court to rehear the respondents' applications to strike. Rather the standard of review we are to apply to the judge's discretionary decision effectively terminating most of Mr. Tupper's claims is that his decision is not to be interfered with on appeal unless wrong principles of law have been applied resulting in an injustice; **Purdy Estate v. Frank** [1995] N.S.J. No. 243 at ¶ 9 and 10.

[11] I will not refer to all of Mr. Tupper's arguments because having carefully read the record and the written facts and heard the oral arguments of Mr. Tupper and counsel for the respondents I am satisfied there is no merit to Mr. Tupper's appeal. The judge carefully considered all of his arguments as is apparent from the transcript of the hearing and his reasons and applied the correct principles of law.

[12] I will deal briefly with two of Mr. Tupper's arguments. I will first deal with the argument central to Mr. Tupper's case before the judge and on appeal; namely, that the sections of the MVA permitting Judgment Recovery to defend the action brought by Mr. Hake, to pay the damages awarded to Mr. Hake and to take recourse against him to recover the damages it paid, and the sections providing for the suspension of his driving licence until he made arrangements to repay

Judgment Recovery did not apply to him because he could not be prosecuted under the **MVA** for driving without insurance with respect to the Hake accident. The second argument I will deal with is his argument that the judge erred in not giving him more time to prepare for the hearing of the application to strike and to obtain and present more evidence.

[13] Mr. Tupper supports his argument that the judge erred in finding the provisions of the **MVA** engaging Judgment Recovery and the suspension of his driving licence by referring to **R. v. Boutilier**, 2002 NSSC 207, 207 N.S.R. (2d) 340. He faults the judge for not mentioning this case in his reasons when he had brought it to his attention.

[14] I am satisfied the judge did not err in his determination that the sections of the **MVA** empowering Judgment Recovery to defend Mr. Hake's action, to pay the damages and to take recourse against Mr. Tupper and the sections requiring that his licence be suspended applied to Mr. Tupper for the reasons given by the judge and set out in paragraph 3 above. The fact Mr. Tupper avoided conviction for driving while uninsured because another section of the **MVA** did not require his off road racing motor cycle to be registered and hence insured does not preclude other sections of the **MVA** applying.

[15] **Boutilier**, supra, does not support Mr. Tupper's position on this appeal. Mr. Boutilier was driving his uninsured four-wheel all-terrain vehicle on the sidewalk adjacent to a highway. He was acquitted of the charge against him of operating his uninsured vehicle just as Mr. Tupper was acquitted of a similar charge with respect to the Hake accident. **Boutilier**, supra, stands for the proposition that the operator of a four-wheel drive all-terrain vehicle which could not be registered under the **MVA** could not be found liable for an offence of operating a vehicle without insurance contrary to s.230(1) of the **MVA**. It does not stand for the proposition that no part of the **MVA** applies to the operation of an off-road vehicle on a public highway as Mr. Tupper argued.

[16] Similarly, the judge did not err in proceeding with the application to strike when he did and with the material before him. As to the timing of the hearing, the application to strike was filed and served on Mr. Tupper in November 2006, the respondents' briefs were filed in December 2006 and January 2007, the hearing scheduled for January 11, 2007 was adjourned at Mr. Tupper's request and the

hearing proceeded on March 7, 2007. This amount of time was sufficient for Mr. Tupper to prepare for the application.

[17] As to Mr. Tupper's claim that he needed more time to obtain evidence to respond to the application to strike, a judge faced with such an application under **Civil Procedure Rule** 14.25(1) must proceed on the assumption that the facts contained in the statement of claim are true. No evidence is required. **Rule** 14.25(2) specifically states that no evidence shall be admissible on such an application without order of the court. Assuming the facts to be true the judge must consider whether a claim has been made out; **Haase v. Vladi Private Islands Ltd.** (1990), 96 N.S.R. (2d) 323 (CA) at ¶ 9 and 10. The judge did not err in proceeding with the application and making his decision without evidence, assuming the facts stated in Mr. Tupper's statement of claim to be true.

[18] It is obvious Mr. Tupper has diligently attempted to research the law concerning his appeal on the internet and by watching hearings before the Supreme Court of Canada on television. As a result, in his factum and during oral argument Mr. Tupper referred to several cases and articles that he felt supported his position. These included **Hunt v Carey**, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93; **British Columbia (Attorney General) v. Insurance Corporation of British Columbia**, 2008 S.C.C. 3, **British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)**, [1999] S.C.J. No. 73, [1999] 2 S.C.R. 868; **MacKay v Manitoba**, [1989] S.C.J. No. 88, [1989] 2 S.C.R. 357, **British Columbia (Attorney General) v. Christie**, 2007 S.C.C. 21, [2007] S.C.J. No. 211 and **Canadian Federation of Students v. Greater Vancouver Transportation Authority**, [2006] B.C.J. No. 3042, the last of which has been appealed to the Supreme Court of Canada, heard and the decision reserved. I have reviewed each of these cases to see if they support Mr. Tupper's appeal and am satisfied they do not. Sometimes a word or sentence in a decision appears to support a proposition but when read in the context of the case does not. For example, the paragraphs from **Société de l'assurance automobile du Québec v. Cyr**, 2008 S.C.C. 13, [2008] S.C.J. No. 13 relied on by Mr. Tupper in support of his appeal were from the dissenting reasons.

[19] I would dismiss the appeal and order Mr. Tupper to pay costs of \$500 to each of the respondents, together with disbursements.

Hamilton, J.A.

Concurred in:

Roscoe, J.A.

Fichaud, J.A.