NOVA SCOTIA COURT OF APPEAL

Citation: ***Royal & Sun Alliance Insurance Company v. Hillier***, 2005 NSCA 151

Date: 20051124
Docket: CA 248952
Registry: Halifax

Between:

Royal & Sun Alliance Insurance Company of Canada,
a body corporate

Appellant

v.

Gary Hillier

Respondent

Judges:	Cromwell, Freeman and Saunders, JJ.A.
Appeal Heard:	November 10, 2005, in Halifax, Nova Scotia
Held:	**Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Saunders, JJ.A. concurring.**
Counsel:	Jean McKenna, for the appellant Hugh McLeod, for the respondent

Reasons for judgment:

[1] This is an appeal from an unsuccessful summary judgment application.

[2] Mr. Hillier was injured in a car accident when he was rear-ended by Ms. Mann. He started two actions. In his insurance action, he sued Royal & Sun Alliance for loss of income and medical expense benefits under Section B - Accident Benefits of his automobile insurance policy. In his tort action against Ms. Mann, he claimed damages for the injuries he suffered in the accident.

[3] In the tort action, Mr. Hillier obtained a judgment against Ms. Mann after a jury trial. The jury's award included $ 28,126 for future loss of income. Royal then applied for summary judgment in the insurance action. It argued that Mr. Hillier's claims for loss of income and medical expense benefits under the policy were barred by the judgment in the tort action.

[4] Kennedy, C.J.S.C., in chambers, dismissed the application and Royal appeals.

[5] Royal says that Mr. Hillier's claim is barred by the principles of *res judicata*, issue estoppel or abuse of process, with the main argument resting on abuse of process. Underpinning the application of each of these doctrines is a single question: Does the jury's verdict in the personal injury action decide that Mr. Hillier was not disabled within the meaning of Section B of the policy and therefore not entitled to those benefits? The chambers judge held it does not. I agree and would dismiss the appeal.

[6] The issue in Mr. Hillier's action against Royal is whether he can establish the statutory requirements for entitlement to the Section B benefits. Mr. Hillier will have to prove: 1. that he was employed at the date of the accident; 2. that within 30 days from the date of the accident and a result of it, he suffered substantial inability to perform the essential duties of his occupation or employment; and 3. (assuming the action relates to payments beyond the first 104 weeks of disability) that such injury continuously prevents him from engaging in any occupation or employment for which he is reasonably suited: see Automobile Insurance Contract Mandatory Conditions Regulations, Schedule 2, part II. Proof

of these does not involve prognostication about the duration of his disability, his employment prospects or the general risks of living.

[7] The jury's verdict awarding a lump sum of $28,126 on account of future loss of income is not inconsistent, factually, with any of the things Mr. Hillier must prove in his Section B action. Unlike the statutory benefits, the jury's award for loss of future income was an estimate, extending into the future, of what Mr. Hillier would actually lose as a result of the accident. This requires prognostication about future events. Various future contingencies are generally taken into account, including the risks of future un-employment and premature death as well as the chances of recovery from the injuries. The award is generally based on the pre-accident employment and wage history. None of these considerations is relevant to Mr. Hillier's entitlement to the Section B benefits.

[8] Moreover, all we have to go on in terms of findings in the tort action is the verdict of the jury. It consists of a number on a piece of paper in response to a question concerning future loss of income. One may reasonably conclude that the jury's modest award for future income shows that Mr. Hillier had not proved that he was permanently disabled. But that does not dispose of Mr. Hillier's claim for Section B benefits.

[9] Mr. Hillier, in his action against Royal, does not have to prove permanent disability. Rather, he must prove that during the relevant time period, he met the applicable definition of disability under Section B of the policy. If, at any time, Mr. Hillier no longer satisfies these defined criteria, his entitlement ceases. The jury's award does not show that it concluded that Mr. Hillier was not totally disabled for some period of time during which he alleges that he had an entitlement to Section B benefits.

[10] Issues of potential double recovery and the rights as among Royal, Mr. Hillier and Ms. Mann's insurers in the event Mr. Hillier proves entitlement to Section B benefits are not before us and I would say nothing with respect those matters.

[11] Royal's burden on a summary judgment application was to show that there was no genuine issue of fact for trial. It tried to do this by showing that an issue essential to Mr. Hillier's success in the insurance action had been resolved against

him in the tort action. I agree with the chambers judge that Royal failed in this attempt. That is sufficient to dispose of the appeal and I make no comment on any other aspect of the judge's decision.

[12] I would grant leave but dismiss the appeal with costs fixed at $2000 plus disbursements.

Cromwell, J.A.

Concurred in:
Freeman, J.A.
Saunders, J.A.