S.C.A. No. 02475

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Hart and Chipman, JJ.A.

BETWEEN:	
GRACE ANN DWYER and ARLES TROY HARNISH Appellants	David A. Miller, Q.C. for the Appellant, Grace Ann Dwyer
- and -	
JOHN ROBERT SEYFFERT, ADMINISTRATOR OF THE ESTATE OF LAURA JOAN HADDAD, and JOHN R. SEYFFERT Respondents	Brian W. Downie, for the Respondent
	Appeal Heard: June 11, 1991
	Judgment Delivered: June 11, 1991

THE COURT: The appeal is dismissed with costs as per oral reasons for judgment of Chipman, J.A.; Jones and Hart, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal from a decision of Mr. Justice Davison in Chambers dismissing an application for an order determining the scope of discovery examination of the appellants.

The respondent commenced an action against the appellants for damages arising out of a collision of motor vehicles near Queensland, N. S. on August 31, 1989. As a result of the collision, the respondent suffered personal injuries and his wife was killed. Each of the appellants was the driver of a motor vehicle whose negligence was alleged to have caused or contributed to the collision. The appellant Dwyer was charged under the Criminal Code in connection with the death of the respondent's wife and following a trial in Supreme Court with a jury, was acquitted. At the criminal trial both appellants testified and were cross-examined.

The position taken by the appellants before Mr. Justice Davison was that they had already testified fully under oath as to the circumstances relating to the collision, and that an order should be granted limiting discovery examination of them to matters not dealt with in the evidence given by them at the criminal proceedings.

In rejecting the application Mr. Justice Davison said:

> "Mr. Miller on behalf of his client relies on Schwartz and Schwartz v. Royal Insurance Company (1978), 26 N.S.R. (2d) 223 where the Appeal Division dismissed an appeal from an order of Chief Justice Cowan limiting discovery in a civil case involving arson for the same reasons advanced in the proceeding before me. It is my reading of the decision of the Appeal Division that it found that the Chief Justice, who gave no reasons, was not

wrong. In other words, as I read the decision, the Appeal Court is saying that the Chief Justice was not wrong in the manner in which he exercised his discretion and it would not interfere with that discretion which was with the judge at the pretrail conference at that time. The Appeal Court would not have interfered with a discretionary order unless it 'works a substantial injustice' (see Coughlan et al. v. Westminer Canada Holdings Limited et al., S.C.A. No. 02281, November 30, 1990). To accede to Mr. Miller's submission is to say Macdonald, J.A., in the Schwartz case was laying down a rule of law that discovery examinations are to be limited whenever evidence has been given in another proceeding on the same facts.

As I said, there were no reasons given by the late Chief Justice, so the reasons for the exercise of his discretion at that time are not available to us. I suspect that there may be merit in Mr. Downie's speculation that the fact that the discovery was to take place within a month before the trial by jury was a factor. Chief Justice Cowan may well have considered that the time before trial would render oppressive an extensive examination for discovery when a complete transcript was already available to counsel. Mr. Justice Macdonald makes specific reference at p. 227 to advices the court received during argument to the effect that the examination would take one full day and that an adjournment would be sought. In my view, the Appeal Division is particularly concerned about interfering with the discretion of the trial court when the trial calendar is directly affected. Whatever the reasons for Chief Justice Cowan's conclusion in that case, I think it is clear that I am not bound to exercise my discretion in the same manner in a different case where there are facts to distinguish it in the sense that the trial is not imminent. Convenience and economy are two basic considerations in interpreting the Civil Procedure Rules but there are other factors. I refer to Coughlan et al. v. Westminer Canada Holdings Ltd. et al. (1989), 91 N.S.R. (2d) 214 at 221, where Matthews, J.A., spoke of full disclosure as the object of the discovery rules.

> I believe that the extent of discovery examinations have caused hardships in the past and needless expense to litigants. I believe that too many people are subjected to examinations for discovery and that discoveries are often long, tedious and repetitious and sometimes represent a lazy way of interviewing witnesses. Notwithstanding these views, I do not believe the attempts at economy should commence by depriving a party to an action full discovery of an opposite party except under special circumstances. It is the responsibility and the privilege of counsel in civil proceedings to conduct his case in a manner he considers advantageous to his client. He need not be required by the court to adopt the questions or the approach of a counsel at a criminal trial. Furthermore, the transcript of the evidence of the criminal trial has limited use and it cannot be used to secure admissions. There is no reason of which I am aware why the plaintiffs' counsel should be required to agree to admissions in a transcript over which he had no control. There is a great deal more to proceedings such as examinations for discovery than the use of a transcript. Counsel gains significant advantage from the opportunity of asking questions in the manner he wishes, by adopting the approach he wants to adopt and, further, to have the opportunity of judging the reactions of the witness, all with a view to the better preparation of his case. In my view, principles of economy do not take precedence over the rights of the litigant."

The appellants have an uphill battle. They must show that the Chambers judge, in the exercise of his discretion, applied wrong principles of law or that a patent injustice resulted.

The appellants have not brought themselves within that class of cases where this court will intervene. No error of the type mentioned in Minkoff v. Poole and Lambert (1991), 101 N.S.R. (2d) 143 at 145-6 has been shown. On the contrary, Mr. Justice Davison has given cogent reasons in support of his conclusions

and these furnish a convincing response to the arguments ably advanced by the appellants counsel.

The appeal is dismissed at costs which are fixed at $750.00 including disbursements.

J.A.

Concurred in:

Jones, J.A.

Hart, J.A.