IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Hillier v. Royal & Sun Alliance Co., 2005 NSSC 160

Date: 20050331
Docket: SN 112047
Registry: Sydney

Between:

Gary Hillier

Plaintiff

v.

Royal & Sun Alliance Company of Canada,
a body corporate

Defendant

Judge:	The Honourable Chief Justice Kennedy.
Heard:	March 14, 2005, in Sydney, Nova Scotia
Oral Decision:	March 31, 2005 Written Release: June 16, 2005
Counsel:	Hugh R. McLeod for Plaintiff Jean McKenna for Defendant

By the Court (Orally):

[1] This was an application that was argued before me on March the 14th last. This is Hillier versus Royal and Sun Alliance.

[2] An application for summary judgment made on behalf of the defendant, the insurance company. The insurance company claims that the findings sought by the plaintiff, Mr. Hillier, have been determined in prior litigation, and thus the principles of *res judicata issue estoppel* and abuse of process apply.

[3] The plaintiff, Hillier, is asking this Court to determine, that in the words of section B of his motor vehicle insurance policy with the defendant that:

> "as a result of a motor vehicle accident his injuries continuously prevent him from engaging in any occupation or employment for which he is reasonably suited by education, training or experience..."

[4] As a result, he claims that he is entitled to ongoing income replacement under that policy.

[5] The plaintiff, Mr. Hillier, had previously sued another party to the motor vehicle accident and that matter went to trial before a civil jury. The case name is *Hillier v. Mann*, [2001] N.S.J. No. 499, S.N. No. 109050. The Originating Notice was filed way back in 30 April of 1998. In that tort action Mr. Hillier asked the jury to find that he was totally disabled from employment and therefore entitled to income replacement for future loss of income.

[6] The actual questions put to that jury in *Hillier v. Mann*, *supra,* in the tort action, were as follows and I am quoting:

> ...at what amount do you assess the total damages of the plaintiff in the following categories:
>
> 2 (a) Past loss of income from October 2, 1997 until today if any

[7] October 2nd, 1997 being the date of the accident, and the jury answered,

> $59, 873.
>
> (b) Future loss of income if any?

[8] And the jury answered,

> $28,126.

[9] So, the jury found some future loss of income attributed to that motor vehicle accident and put a figure on it.

[10] The defendant applicant, the insurance company, submits that while Mr. Hillier, in this application, is likely to argue that the question in this contract action involves application of the facts of specific language of the policy, while in the tort action the jury had to make a more general determination to the extent of the plaintiff's injuries and the impact on his ability to work, the defendant says, that notwithstanding that potential submission, that although the issue was not put to the jury using the precise language of the policy, the jury was asked to determine and did determine, the plaintiff's ability to work and consequently his past and future income lost resulting from that accident. That, says the applicant, the insurance company, that determination did involve a question of any continuing disability, i.e., whether the plaintiff is 'continuously prevented from engaging in any occupation or employment for which he is reasonably suited'.

[11] The applicant/defendant says the jury had before it, extensive medical and actuarial evidence, as well as surveillance evidence, which would have allowed it

to consider the extent and duration of the plaintiff's disability, as well as any residual earning capacity.

[12] The plaintiff, Mr. Hillier, the respondent to this application, does submit as the applicant predicted, that the issues are very different. That what the jury was asked to decide is not the issue to be determined under the Section B wording on the contract action. Further, the plaintiff, Mr. Hillier, says there is new evidence, there is new medical evidence that has developed since the jury's decision and that the trier of fact in the contract action should be able to hear that evidence. Finally, the plaintiff/respondent submits that the parties are not the same in the tort and the contract action.

[13] One of the cases cited to me is that *Minott v. O'Shanter Development Company* (1999), 168 D.L.R. (4th) 270, decision of the Ontario Court of Appeal, specifically Mr. Justice John Laskin of that Court, a Judge of considerable renown. He reviewed the question of *res judicata*, *issue estoppel* and I am quoting from Justice Laskin in *Minott v. O'Shanter*, *supra*, at para. 16:

> Issue estoppel prevents the relitigation of an issue that a court or tribunal has decided in a previous proceeding. In this sense issue estoppel forms part of the broader principle of res judicata...Res judicata itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding...Issue estoppel is narrower than cause of action estoppel. It prevents a party from relitigating an issue already decided in an earlier proceeding, even if the causes of action in the two proceedings differ.

[14] And in this case we have a tort action and a contract action, speaking of the matter before me. I continue to quote Justice Laskin at para. 17:

> The overall goal of the doctrine of res judicata, and therefore of both cause of action estoppel and issue estoppel, is judicial finality. "The doctrine prevents an encore, and reflects the law's refusal to tolerate needless litigation".

[15] Lord Guest cited from that *Carl Zeiss Stifung v Rayner & Keeler Ltd. (No. 2)*, [1967] 1A.C. 853, the definitive case in relation to the preconditions for issue estoppel. Three preconditions says Lord Guest oft quoted thereafter:

> (1) The same question has been decided; (2) that the judicial decision which is said to create the estoppel was final, that's not in issue in this application before me; (3) that the parties to the judicial decision or their privies were the same person as the parties to the proceedings in which the estoppel is raised or their privies.

[16] So those are the three preconditions set out by Lord Guest for issue estoppel. Two of the three live before me.

[17] Let me address the third pre-condition initially, that the parties to the proceedings be the same person.

[18] The applicant/defendant, the insurance company acknowledges that the defendant was not a party to the tort litigation, but submits that the defendant herein, the insurance company was an acknowledged factor in that court, in that tort action. That court dealt with the question of the credit available to the defendant in that action to Mr. or Ms. Mann, arising from the Section B income payments made to Mr. Hillier to the date of the decision in the tort action. So that while the Section B insurer was not a party, I suppose they would argue that they were hovering around the process.

[19] Defendant/applicant herein relies on *Kaiser v, Multibond Inc***.** (2003), 219 NSR (2d), 91 in which Madam Justice Hamilton of our Court of Appeal determined the case stands for the proposition that there are situations that allow

for issue estoppel to lie, notwithstanding that the parties are not the same in both proceedings. There are exceptions to the third rule from Lord Guest. I have taken a look at Justice Hamilton's decision in *Kaiser v Multibond***,** and I find that it turns on very specific facts. *Kaiser v Multibond***,** Court of Appeal reviewed a decision of the Human Rights Board of Inquiry. In that case the chair of the Human Rights Board had determined that the complaint of Kaiser was estopped from proceeding before the Board on the basis if *issue of estoppel*. Kaiser had previously pursued a wrongful dismissal action in the Nova Scotia Supreme Court in relation to the very issues he sought to put before the Board. The Board Chairman said no, *issue estoppel*.

[20] The Court of Appeal recognized, Justice Hamilton recognized, strictly speaking, the parties were not the same in both the proceedings, but upheld the decision of the Chairman of Board who ruled that the addition of the Human Rights Commission as a party to the Human Rights Hearing, did not prevent the application of issue estoppel, after considering the role of the Commission in the complaint process and the remedies being sought. So, yes, there was a new party to the application before the Court, but when one considered the role of that new party, and the remedies being sought, then Justice Hamilton agreed with the

Chairman that issue estoppel would nevertheless lie. Paragraph 38 and 39 of her decision I quote:

> With respect to the third precondition to issue estoppel, the mutuality of the parties, the board acknowledged that the parties before the board were different from the parties before the trial judge in that the Commission is automatically a party for the complaint hearing before the board pursuant to s. 33 of the Act and it was not a party to the wrongful dismissal action. The board determined the addition of the Commission as a party did not prevent the application of issue estoppel after considering the role of the Commission in the complaint process in this case and the remedies being sought on this case.
>
> (39) The board stated:
>
> > "What is the effect of having the Commission represented as a separate party in a human rights hearing? At the Board of Inquiry stage the role of counsel for the Commission is to place relevant information before the Board, primarily by calling evidence. In reality, in many cases including this proceeding an individual complainant is not represented by counsel and relies on Commission counsel to put forward their case. Despite appearances or perceptions (especially of those who are respondents to human rights proceedings) this does not mean that the Commission or it's counsel represents one side or the other. Rather the Commission must act fairly as between the parties."

[21] This is Justice Hamilton again, paragraph 40:

> The Commission has not satisfied me that the board erred in finding that the third precondition of issue estoppel had been met even though the Commission was nominally an additional party to the proceeding before it. Mr. Kaiser and the Commission were parties to both the wrongful dismissal action and the complaint. Therefore the rational for the mutuality principle, to ensure a person's legal rights may not be concluded without an opportunity to litigate them...

[22] She goes on subsequently....

> ... Commission has become an additional party to the complaint. While the remedies sought by the Commission in some complaints may provoke a substantial interest in the proceeding, given the facts of this appeal where Mr. Kaiser is not seeking reinstatement and Dural no longer carries on business in Nova Scotia, its interest in the remedies that may be granted by the board are minimal if any. Given these considerations, the parties to both the wrongful dismissal action and the complaint are for all intents and purposes the same.

[23] There is her decision. Given the considerations that Justice Hamilton mentions, the parties to both the wrongful dismissal action before the Supreme Court and the complaint before the Board, are for all intents and purposes the same.

[24] The participation of the applicant/defendant, the insurance company, as defendant in this contract action is not akin to the nominal participation of the Commission in *Kaiser v. Multibond*, a level of participation that allowed Justice Hamilton to determine that the parties of both the dismissal action before the Court, and the subsequent complaint, were for all intents and purposes the same.

[25] Participation of the insurance company in the contract action is dramatically different than the participation of the Commission as a party before the Board and I so find.

[26] I find that the exception to the precondition to issue estoppel created and acknowledged by Justice Hamilton in *Multibond, supra,* case does not help the defendant/applicant in this action.

[27] This precondition, I find, the precondition being that the parties be the same, this precondition I find, is not met in this specific. The parties herein are not the same in both of the actions. The applicant/defendant is a new party to the contract action and very much a central participant.

[28] Neither do I conclude that the first precondition of issue estoppel has been established by the applicant herein. That the same question to be determined by the trier of fact herein has been decided by the jury in the tort action. I do not so conclude.

[29] The applicant's position is compromised. The defendant's position in the application before me is compromised, because it must, of necessity, rely on a jury finding to establish that the same question has been determined. As a result it does have the advantage of a clearly set out decision, clearly set out reasoning to explain why Mr. Hillier was awarded $28,126.00 to compensate for future loss of income. As an aside, I find that that is not a lot of money to address such a significant claim. Why was he awarded that amount? We do not know.

[30] We do know that the jury was not asked to consider the language, any language as precise as to quote, "whether his injuries arising from the motor vehicle accident continuously prevented Mr. Hillier from engaging in any occupation or employment for which he is reasonably suited by education, training, or experience. A very precise, oft litigated language of Section B.

[31] The applicant has not satisfied me that the trier of fact in the contract action will be asked to answer the same question as addressed by the civil jury in the tort proceeding. That jury's figure in damages for future loss of income does not necessarily answer the detailed question in contract. I am not satisfied that the first

precondition, that the question be the same, has been established in this specific application.

[32] As to abuse of process, the applicant asked that, should this Court not be satisfied that this case comes within the parameters of *res judicata,* that it might nevertheless find that the litigation constitutes an abuse of process. Cites *Stevenson v. Bomac Construction,* [1986] S.J. No. 89 Saskatchewan Court of Appeal. In that case it was common ground that the parties to the original proceedings were not the same parties as they were in the second action. The Court went beyond the issue of *res judicata*. That was a court who could not find *issue of estoppel, res judicata,* because the parties were not the same. So the court went on, there is however concern based on public policy that the same issue should not be re-litigated, so that the parties should not be exposed to same risk twice. And also that there be an end to the litigation process.

[33] The courts have not only viewed such matters under the established doctrines of *res judicata* and *issue estoppel*, but also under the broader heading of the concept of abuse of process.

[34] If the only finding I made herein was that the parties were not the same, then I might profitability look to the broader doctrine of abuse of process to get around that precondition to the *issue estoppel* argument, if I believed on the facts that it was equitable to do so. So if that was the only concern I had in relation to preconditions then I could at least theoretically go the route of the Saskatchewan Court of Appeal in *Stevens v Bomac, supra*, and move on to abuse of process.

[35] Having additionally found that I cannot conclude that there is the same questions to be decided, the other important precondition to *issue estoppel*, I do not find justification in the suggestion that this contract action is an abuse of this Court's process. Do not find justification in that suggestion. Do not find an abuse of the court's process.

[36] I do not conclude that this is re-litigation of the issue already determined. I think that there is a real possibility of a separate issue to be determined in the contract proceeding. An issue beyond, that goes beyond the question determined by the jury in the tort procedure.

[37] As to summary judgment having found, as I have, it is obvious, I think, that I do not determine, that there is no arguable issue to be tried with respect to this claim pursuant to *Rule 13.01(a)* of the *Civil Procedure Rules*.

[38] I just want to make briefly, my impression was that the parties were going to be able to work out the situation in relation to medical expenses. That there was some money being held, money that was payable, but the medical expense issue was no longer on the table or shouldn't be on the table. I am going to leave it to the parties to work out. If it turns out that the medical expenses situation cannot be worked out, then I would be prepared to be involved again.

[39] The application is not successful. Costs will be in the cause.

Chief Justice Kennedy