Cite as: Big Wheels Transport and Leasing Ltd. v. Hansen, 1990 NSSC 135

1990 S.T. No. 03851

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

BIG WHEELS TRANSPORT AND LEASING LIMITED,

Plaintiff

- and -

EARL DAVID HANSEN,

Defendant

- and -

STEWART CARROLL,

Third Party

HEARD: At Truro, Nova Scotia, in Chambers before the Honourable Madam Justice Elizabeth Roscoe, Trial Division, on November 27, 1990.

DECISION: November 30, 1990

COUNSEL: Peter M. Rogers,
Solicitor for the Plaintiff
and Solicitor for the Third Party

Stephen Kingston,
Solicitor for the Defendant

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BETWEEN:

BIG WHEELS TRANSPORT AND LEASING LIMITED,

Plaintiff

- and -

EARL DAVID HANSEN,

Defendant

- and -

STEWART CARROLL,

Third Party

ROSCOE, J.:

The defendant, Earl David Hansen, has made application pursuant to **Civil Procedure Rule 25.01(1)(a)** seeking a determination as to whether issue estoppel applies with respect to liability between the parties in this action.

FACTS

On July 17, 1989 at Sable River in Shelburne County, Nova Scotia a truck owned by the plaintiff, Big Wheels, and operated by its employee, third party, Mr. Carroll, was involved in a collision with an automobile owned and operated by the defendant.

Both vehicles were damaged, but there were no personal injuries. A few months after the accident the defendant sued the plaintiff and the third party, in Small Claims Court in Shelburne, claiming compensation for damages to his vehicle. On October 11, 1989 a hearing was held in Small Claims Court before adjudicator, W. Yorke Tutty. Neither party was represented by counsel at the hearing in the Small Claims Court, but both Mr. Hansen and Mr. Carroll testified. In his written decision, the adjudicator found that both drivers were negligent and apportioned liability for the accident on an equal basis. The adjudicator found that the loss sufferred by Mr. Hansen was $932.00 and ordered the defendants to pay one half of that amount. No appeal was taken from that decision and Big Wheels has complied with the order and paid $477.50 to Mr. Hansen.

Subsequently, Big Wheels commenced this action in the Supreme Court, claiming that Mr. Hansen was entirely at fault for the collision and claiming $8,514.10 special damages for damages to the truck, towing costs and replacement rental fees.

The defendant now argues that the question of liability, as between the parties, is governed by issue estoppel arising as a result of the Small Claims Court hearing.

LAW

Issue estoppel is one of the two applications of the general principle of **res judicata.** The other application is cause of action estoppel. The policy of **res judicata** is to prevent litigants from abusing the judicial process through the relitigation of causes of action and issues to bring a finality to litigation and to avoid a multiplicity of judicial proceedings (see **Issue Estoppel and Mutuality of Parties** (1986), 64 CBR 437). The doctrine of issue estoppel was explained by **Diplock, L.J.** in **Thoday v. Thoday,** [1964] 1 All E.R. 341 at p. 352:

> "The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

The difference between cause of action estoppel and issue estoppel is explained in **Spencer-Bower and Turner, The Doctrine of Res Judicata Second Edition** at p. 150:

" Cause of action estoppel is applicable solely to the case where the same cause of action is alleged in successive proceedings. It is a reciprocal estoppel, and operates both as an estoppel **per rem judicatam** and conversely by way of **merger.** The maxim **transit in rem judicatam** prevents a successful plaintiff from re-asserting in a second proceeding the cause of action which he has already made the subject of a judgment in the first. This is the operation of the doctrine of merger. On the other hand the maxim **interest rei publicae sit finis litium** denies the unsuccessful defendant the opportunity of relitigating a case which he has already lost. This is estoppel **per rem judicatam.** (And the case of plaintiff and defendant may be reversed when the opposite circumstances obtain.) But where one cause of action has been the subject of final adjudication between parties, those determinations of particular issues which are its essential foundation, without which it could not stand, may be used as the basis of issue estoppels between the same parties when another cause of action altogether is set up. Thus where two motor vehicles collided, and by reason of the collision a third party suffered damage, and on an action by the third party against both drivers for damages, in which each driver claimed contribution from the other, the court held both to blame, this finding was sufficient to found an estoppel on a different cause of action altogether when one driver sued the other for damage which he himself had suffered arising directly out of the accident." (**Marginson v. Blackburn Borough Council,** [1939] 1 All E.R. 273)

In **Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2),** [1967] 1 A.C. 853 at p. 935, Lord Guest said:

" The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

Both **Thoday v. Thoday** and **Carl Zeiss Stiftung** have been approved and followed by the Supreme Court of Canada in **Angle**

v. Minister of National Revenue (1974), 2 N.R. 397. The Supreme Court of Nova Scotia Appeal Division has also followed **Carl Zeiss Stiftung** and **Angle v. M.N.R.** in **Re Langille (H & L) Enterprises** (bankrupt) (1985), 69 N.S.R. (2d) 140.

The defendant, in this case, submits that the three requirements, as set out in **Carl Zeiss Stiftung**, have been met with respect to the question of liability between the parties and that it is not open for Big Wheels to now relitigate the issue of liability and contributory negligence.

The plaintiff, however, argues that since the Small Claims Court would not have had jurisdiction to deal with the quantum of damages alleged to be suffered by Big Wheels, the matter is not subject to issue estoppel. The jurisdiction of the Small Claims Court is limited by s. 9 of the **Small Claims Court Act** R.S.N.S. 1989 c. 430 to monetary awards not exceeding $3,000.00. The plaintiff relies on **Gough v. Whyte** (1983), 56 N.S.R. (2d) 68 (N.S.T.D.). In that case Grant, J. found that **res judicata** did not apply to bar an action by an insurer after the insured had successfully sued in the Small Claims Court for his deductible and other expenses not covered by the insurance policy. Grant, J. found that special circumstances existed since the defendant knew of the subrogated claim of the insurer prior to the

commencement of the Small Claims Court action and that to stop the plaintiff's action on a defence of **res judicata** would permit a grave injustice to be done. Another important fact in **Gough v. Whyte** was that the insurer of the plaintiff was not aware of the Small Claims Court hearing until after the hearing was over.

I agree with the defendant's submission that **Gough** should be distinguished from the present case since it concerned cause of action estoppel and not issue estoppel and that the special circumstances that existed in that case are not present in this case.

The plaintiff also argues that it would be inequitable to allow the determination of liability in the Small Claims Court to stand since the plaintiff had no method available to have the Small Claims Court action transferred to a superior court. However, as the defendant points out, the plaintiff did have the opportunity, at the time the Small Claims Court action was commenced, to effectively remove the matter from the jurisdiction of that court. If, on receiving notice of the action in the Small Claims Court, the plaintiff had immediately commenced its action in the Supreme Court, the Small Claims Court would not have had jurisdiction to proceed, since s. 15 of the **Small Claims Court Act** says:

> "The court does not have jurisdiction in respect of a claim where the issues in dispute are already before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with subsection (2) of Section 19."

The plaintiff submits that "already" as used in s. 15 means prior to the commencement of the action in the Small Claims Court and not prior to the hearing in the Small Claims Court, however, I am unable to agree with that interpretation.

Another method of ousting the jurisdiction of the Small Claims Court that was available to the plaintiff but not utilized was that of filing a counterclaim in the Small Claims Court for the entire amount of its damages. Since the counterclaim, if made, would have been in excess of the jurisdiction of the Small Claims Court, the adjudicator would have had to dismiss the action in that court, which would have allowed the parties to proceed to have the matter adjudicated in the Supreme Court. This procedure was used by the defendant in **Llewellyn (R.) Building Supplies Ltd. v. Nevitt** (1987), 80 N.S.R. (2d) 415 where the dismissal of the adjudicator for lack of jurisdiction was approved by the County Court.

Although I agree that the Small Claims Court did not have jurisdiction to entertain a claim in excess of $3,000.00,

it did have jurisdiction to determine the issue of liability for the accident when the claim before it was less than $3,000.00, and since the issue was fully argued as between the same parties, and not appealed, the three requirements for issue estoppel have been met. The issue of liability must be taken as being finally determined and the plaintiff is not at liberty to reopen that issue.

The application of the defendant is granted and this matter shall proceed on the basis that liability for the accident is equal, with the only issue remaining being the quantum of damages suffered by the plaintiff.

J.

HALIFAX, NOVA SCOTIA

NOVEMBER 30, 1990