1996 **S.BW. No. 3705**

IN THE SUPREME COURT OF NOVA SCOTIA
(CHAMBERS)
Cite as: Fickes v. Lamey, 1999 NSSC 97

BETWEEN:

JACKSON W. FICKES

PLAINTIFF

- and -

SAMUEL R. LAMEY, ALAN G. FERRIER and ALLEN C. FOWNES

DEFENDANTS

DECISION

HEARD BEFORE:	**The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia (Chambers) on February 24, 1999**
DECISION:	**March 10, 1999**
COUNSEL:	**Mr. G.F. Philip Romney** **Solicitor for the Plaintiff** **Mr. Colin D. Bryson** **Solicitor for the Defendants**

GOODFELLOW, J.

1. BACKGROUND

Jackson W. Fickes was the owner of two lots at Martin's River and his deeds contained a 20 foot right of way over the existing road leading from the highway. Apparently, the existing road did not physically touch either of his lots and Mr. Fickes wanted to construct a helicopter landing pad. It is alleged that he went to Samuel R. Lamey, Barrister, seeking professional legal advice to inquire if he could use part of the right of way for a helicopter pad and remove trees, etc. to facilitate its use.

It is alleged that Mr. Lamey's opinion was that Mr. Fickes could locate the right of way, wherever he wished from time to time and also remove trees, level the lot, etc. Subsequently, the owner of the land between the existing road and Mr. Fickes' lots denied Mr. Fickes' request to remove some power lines, etc. and apparently, threatened a law suit, if Mr. Fickes proceeded. Mr. Fickes alleges that Mr. Lamey confirmed his advice that he could go ahead. Mr. Fickes did so and the owner and her son commenced an action against Mr. Fickes, the 14th of July 1994, claiming that he had caused to be constructed, a helicopter landing pad on their property, resulting in trespassing. Mr. Lamey filed a defence and counter claim on behalf of Mr. Fickes, the 25th of August 1994 and after certain pre-trial procedures, it was apparently agreed in September 1995, that Mr. Lamey would be called as a witness at the trial and Mr.

Fickes alleges he engaged the defendants, Mr. Ferrier and Mr. Fownes to represent him for the balance of proceedings. The trial took place October 1995 and the decision of the trial justice was in favour of the owners and he awarded damages against Mr. Fickes of $32,032.69, plus costs of $7,500.00. Mr. Fickes commenced this action the 18th of July 1996, alleging wrong advice, failure to advise properly, failure to conduct the trial properly, failing in certain aspects said to be appropriate and raising a number of evidentiary conflicts between Mr. Fickes and the defendants. The Amended Statement of Claim alleges that the three defendants were guilty of negligence, in failing to exercise due care and seeks recovery of the $39,532.69 paid to the owners in the October 1995 action, plus the recovery of Mr. Fickes' solicitor and client legal fees and disbursements. There have been some interlocutory proceedings. This application is by the defendants to strike the Jury Notice filed by Mr. Fickes, the 15th of July, 1998.

2. JUDICATURE ACT RSNS 1989

Trials and procedures

34 Subject to rules of Court, the trials and procedure in all cases, whether of a legal or equitable nature, shall be as nearly as possible the same and the following provisions shall apply:

(a) in civil proceedings, unless the parties in person or by their counsel or solicitors consent to a trial of the issues of fact or the assessment or inquiry of damages without

a jury, the issues of fact shall be tried with a jury in the following cases:

(ii) where either of the parties in a proceeding requires the issues of fact to be tried or the damages to be assessed or inquired of with a jury and files with the prothonotary and leaves with the other party or his solicitor a notice to that effect at least sixty days before the first day of the sittings at which the issues are to be tried or the damages assessed or inquired of, except that, upon an application to the Supreme Court or to a judge made before the trial or by the direction of the judge at the trial, such issues may be tried or such damages assessed or inquired of by a judge without a jury, notwithstanding such notice,

3. ISSUE

Should the Jury Notice be struck?

4. CASES

Cameron et al v. Excelsior Life Insurance Co. (1978), 27 N.S.R. (2d) 218 Hallett, J. at p. 222:

5. The case of MacNeil v. Hill The Mover (Canada) Ltd. And Cannon [1961], 27 D.L.R.(2d) 734, established that this was a prima facie right which should not be taken away lightly.

6. The foregoing principle was asserted by Ilsley, C.J., in MacNeil v. Hill The Mover (supra) at p. 737 as follows when he quoted from King v. Colonial Homes Ltd., 4 D.L.R. (2d) 561, at p. 566; [1956] S.C.R. 528, at p. 533, per Cartwright, J.:

> "This Court has more than once affirmed that the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except from cogent reasons."

and **Neelands & Neelands v. Haig,** 9 D.L.R. (2d) 165, at p. 167; [1957] O.W.N. 337, at p. 339, per Laidlaw, J.A.:

> "The right of a party to a trial with a jury is a substantive one. The defendant in this case gave notice of trial by jury, and he is not lightly to be deprived of his right to have the trial proceed in that way. A trial Judge has a wide, and indeed one might say an absolute, discretion as to the mode of trial, but his power to decide whether a case should be tried with a jury or without a jury is one that cannot be exercised arbitrarily or capriciously. It must be exercised in a judicial manner and there must be sufficient reason to deprive a party of the substantive right to trial in the manner chosen by him."

The Nova Scotia Court of Appeal has made it clear that a Justice must give substantial, cogent reasons to exercise the discretion to deprive a party of the *prima facie* entitlement to trial by jury.

Barrow v. Keating [1985] 68 N.S.R.(2d) at 289 and **Lintaman et al v. Goodman et al** [1983] 54 N.S.R.(2d) 320 are two examples where the Justice's discretion was exercised to deny the entitlement to a Jury Trial because the major issues were questions of law and the issues of fact were either negligible in importance or so interwoven with the issues of law, as to make a trial without a jury, appropriate. In both of these cases there was a requirement of prolonged examination of substantial documentary evidence and the legal effect of the documents and transactions.

Killorn v. Health Vision Incorporation [1996] 148 N.S.R.(2d) 169:

[27] A Jury notice may be struck out where the factual issues are of such a technical or scientific nature that a jury cannot adequately deal with the matter. Leadbetter and Leadbetter v. Brand [1979] 37 N.S.R.(2d) 660; 67 A.P.R. 660 (T.D.), Hallett, J.

If an application to strike a Jury Notice is dismissed, it does not preclude the trial justice from addressing the issue, as such a dismissal in no way, encroaches upon the jurisdiction of the trial justice.

As stated in **Killorn (above)** at p.172, “indeed a trial judge may, in rare cases, take all or part of the trial from the jury after its commencement”.

The letter/brief filed by the Applicant sets out the following argument:

ARGUMENT

There are some factual issues to be resolved by the trier of fact in this case. They are:

1. The information given by Mr. Fickes to Mr. Lamey prior to Mr. Lamey giving his opinion on the right-of-way and the location of the power line.

2. The verbal opinion given by Mr. Lamey to Mr. Fickes in May of 1993.

3. The instructions given by Mr. Fickes to the Defendants with respect to whether or not he had requested Mrs. Langille to locate the right-of-way.

4. Would Justice Carver's decision on damages for restoration of the lands have been different had certain evidence been led by Mr. Ferrier and Mr. Fownes?

Principally, however, this case is about legal issues and mixed factual and legal issues. Specifically:

1. A central issue in this case, as it was in the Langille case, is the legal assessment of Mr. Fickes' right-of-way rights. This issue will have to be considered with respect to assessing Mr. Lamey's advice, assessing all the Defendants' advice with respect to the defence of Mrs. Langille's claim and assessing the views of Mr. Fickes' experts. This is clearly a legal and not a factual issue. The first two factual disputes listed above relate to this legal issue. It is submitted that they are inextricably intertwined with this legal issue such that it is not practical to attempt to separate the facts in law on this issue.

2. All the Defendants are accused of being negligent in their assessment of the damages in the Langille claim. This is a legal issue.

3. Mr. Ferrier and Mr. Fownes are accused of being negligent for failing to call certain evidence. This is a legal issue as it attacks those Defendants' legal judgment and their assessment of the evidence.

4. The Defendants are accused of being negligent in failing to provide Mr. Fickes with copies of certain relevant documentation, including one legal opinion by an article clerk. This is an issue of appropriate practice and a lawyer's legal judgment as to what needs to be sent to a client. This is a legal issue.

The Plaintiff, in response, takes the position the issues to be determined are not complicated and involve the determination of a number of facts, but mainly the determination of what took place between the end of April, 1993 and the end of May, 1993 and that the legal issues can easily be separated from the factual issues for determination.

It is clear that in this case there are a number of factual issues to be determined and quite probably credibility will be a factor. The Applicant's brief concedes the facts advanced by the Defendants are not as claimed by Mr. Fickes, particularly in the initial advice allegedly given prior to and in connection with the right-of-way rights of Mr. Fickes.

Our juries are called upon, with some frequency, to deal with experts reports, standard of professionals, etcetera, in medical and other professional malpractice suits as well as accident reconstruction experts, engineers, D.N.A. experts, blood splatter

expert, etcetera, in determining questions of liability and numerous experts of divergent views as to the nature and consequences of injuries suffered.

At this point, there are apparently two expert reports. Mr. Fickes has consulted two senior counsel and secured written reports from them, dated February 22, 1996 and March 14, 1996 respectively. It is clear that these opinions primarily deal with the question of whether or not Mr. Fickes should proceed with an appeal of the Honourable Justice Carver's decision in the 1995 trial. Neither of these opinions make any comment whatsoever on the professional standard required of a barrister in the preparation and conduct of a trial. Both opinions have more to do with what the authors consider to be the "correct law" and recommend against any appeal of Justice Carver's decision. It is difficult, at this stage, to see how these expert opinions can be of any help. It must be remembered that this is not an appeal process, but an action founded on negligence and contract. In any event, the admission, weight and direction with respect to these experts reports is entirely up to the trial justice.

After very careful consideration of all the material and arguments advanced by counsel, I conclude that there are several factual issues that need to be determined that can be quite properly addressed by a jury. The legal issues are easily separated and the jury can be instructed in the law based upon the juries factual findings. Although it may present some difficulty for the trial justice to give instructions on the standard

required of a barrister, in the absence of any assistance by way of expert opinion, undoubtedly the standard is not that of an insurer or guarantor.

The fact that it will require some care in charging the jury, it is not sufficient reason to deprive the Plaintiff of his *prima facie* entitlement to a jury trial. It may well be that the trial justice will find it easier to give instructions on the law in the absence of evidence supporting the reasonable professional standard required of a barrister in the conduct of a trial. I am satisfied that the facts and issues in this case are no more complex than in most medical malpractice suits. The mere fact that some difficulties might arise, is far from sufficient at this stage to consider depriving the Plaintiff of his entitlement to a jury trial and therefore, the application is dismissed.

J.