Cite as: Hughes Estate v. Tower, 1991 NSSC 7

1990 S.H. No. 72216

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

IN THE MATTER OF:

An Action commenced pursuant to the provisions of Sections 2(a), 3 and 5 of the **Fatal Injuries Act**, that being Chapter 163 of the Revised Statutes of Nova Scotia, 1989.

BETWEEN:

THE ESTATE OF THE LATE MABEL A. HUGHES, by its Executor and Trustee, Ronald J. Downie, Q.C., **RONALD JOSEPH DOWNIE, BRIAN DOWNIE, KEVIN DOWNIE, JENNIFER SULLIVAN, LAURA DOWNIE** and **LIANE DOWNIE,**

Plaintiffs
(Respondents)

- and -

MARY BETH TOWER and **MARILYN MacLEOD**

Defendants
(Applicants)

HEARD: AT HALIFAX, NOVA SCOTIA, BEFORE THE HONOURABLE MR. JUSTICE DAVID W. GRUCHY IN CHAMBERS ON JANUARY 15, 1991

DECISION: FEBRUARY 1, 1991

COUNSEL: ROBERT G. BELLIVEAU, Q.C., COUNSEL FOR THE APPLICANTS

GAVIN GILES, COUNSEL FOR THE RESPONDENTS

1990 S.H. No. 72216

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

IN THE MATTER OF:

An Action commenced pursuant to the provisions of Sections 2(a), 3 and 5 of the **Fatal Injuries Act**, that being Chapter 163 of the Revised Statutes of Nova Scotia, 1989.

BETWEEN:

THE ESTATE OF THE LATE MABEL A. HUGHES, by its Executor and Trustee, Ronald J. Downie, Q.C., **RONALD JOSEPH DOWNIE, BRIAN DOWNIE, KEVIN DOWNIE, JENNIFER SULLIVAN, LAURA DOWNIE** and **LIANE DOWNIE,**

Plaintiffs
(Respondents)

- and -

MARY BETH TOWER and **MARILYN MacLEOD**

Defendants
(Applicants)

GRUCHY, J.

This application is concerning an action taken as a result of a motor vehicle accident in which the late Mabel A. Hughes was allegedly struck and injured while a pedestrian on Coburg Road in the City of Halifax. The action was commenced on her behalf on March 26, 1990. The amended statement of claim discloses that Mrs. Hughes subsequently died as a result of the

accident. The action was continued by the present plaintiffs in their various capacities. Ronald J. Downie is the son of the deceased and is the executor and trustee of the estate of Mabel Hughes. The other plaintiffs, Brian Downie, Kevin Downie, Jennifer Sullivan, Laura Downie and Liane Downie are all grandchildren of the deceased. After Mrs. Hughes' death the action was continued pursuant to the provisions of Chapter 163 of the Revised Statutes of Nova Scotia, 1989, the **Fatal Injuries Act.**

The plaintiffs make various claims, including special damages and general damages under different heads. Each plaintiff makes the following claim:

> "General damages to compensate for the loss of guidance, care and companionship that the late Mabel A. Hughes would have provided had her death not occurred, pursuant to the provisions of Section 5(2)(d) of the **Fatal Injuries Act.**"

By interlocutory notice dated January 10, 1991, the defendants have applied for an order "...excluding the grandchildren of the deceased Mabel A. Hughes". By the form of the order sought, it is clear that the defendants wish to exclude each of the grandchildren from their respective discovery examinations. No application has been made to exclude the plaintiff, Ronald J. Downie.

The application is supported by the affidavit of the defendants' solicitor. The essential reason for the request for exclusion is found in that affidavit which reads as follows:

"1. THAT I am the solicitor for the Defendants and have a personal knowledge of the matters herein deposed to except where stated to be based upon information and belief.

2. THAT as appears from the Amended Statement of Claim on file herein, the late Mabel A. Hughes died as a result of injuries she received in a motor vehicle accident which is the subject matter of this proceeding.

3. THAT there are five grandchildren of the deceased who are Plaintiffs in the within proceeding who are all claiming pursuant to the provisions of the Fatal Injuries Act.

4. THAT the parties are in the process of arranging discovery examinations of the Plaintiffs and the lines of questioning of each of the Plaintiff grandchildren will be virtually identical."

In the defendants' submission, the reason for the request is stated more emphatically by indicating that "there is a very real possibility that the grandchildren could be influenced by the questions and answers being put to one of his or her siblings".

While such facts are not in evidence, at the time of hearing of the application it was disclosed to the Court that all of the grandchildren are of the age of majority.

There is no Civil Procedure Rule directly on point. The late Chief Justice Cowan, in **MacMillan et al v. Slaunwhite et al**, 40 N.S.R. (2d) and 73 A.P.R. 25 at p.27, examined the purview of Civil Procedure Rule to determine whether the power of a presiding judge to exclude a witness is restricted to the circumstances outlined in that rule. He concluded:

> "In my opinion, however, the rule in question does not limit the inherent power of a judge presiding at a trial of a civil proceeding to give such directions, including the exclusion of parties during the hearing of any testimony of another witness, as the judge considers necessary for the orderly conduct of the proceeding and for reaching a just conclusion."

Chief Justice Cowan was there dealing with a case where the parties intended to be excluded were seven infant plaintiffs. Details of the proposed subjects of examination of the infant plaintiffs were outlined to the Court and included such matters as "the knowledge of the respective plaintiffs of the age of the defendant and of the defendant's legal status to operate a motor vehicle, the knowledge of the plaintiffs as to the source or ownership of the motor vehicle, the manner in which the motor vehicle was operated at all times, the opportunities available to the respective plaintiffs to exit from the vehicle and whether some or all of the plaintiffs might have encouraged the defendant to act in certain ways in the operation of the vehicle".

Chief Justice Cowan was referred to **Sissons and Simmons v. Olson** (1951), 1 W.W.R. (N.S.) 507 (B.C.C.A.). Counsel before me have likewise referred to that case. As was stated therein by O'Halloran, J.A., in deciding any case of this nature, it is necessary to start with the principle that "every person has an inherent right to be present at a trial or any other proceedings to which he is a party" and that "Such a right, however, must not conflict with the fair and proper judicial conduct of the action or proceedings." As with all cases, the ultimate decision of the Court depends upon the facts adduced before it. O'Halloran, J.A. said that:

> " Appellants had as much right to attend each other's examination as they had to remain in court and listen

to each other's testimony at the trial itself. Acceptance of this conclusion does not deny jurisdiction in the court at the trial, or in the presiding judicial official at any stage of the proceedings to order the physical exclusion of a party should a violation of an essential of justice occur or be threatened if exclusion is not directed. What may constitute such a violation depends on the situation in each case appraised in its own atmosphere. **See Bird v. Vieth** (1899), 7 B.C.R. 31."

Sidney Smith, J.A., in the same case at pp.511-2 dealt with the question of onus as follows:

" The cases are well reviewed in **Pam v. Gale,** [1950] 2 W.W.R. 802 (Man.) and I need not go through them. I do not think they establish that a party has a legal right to be present at all times. The weight of authority holds, I think, that either at a trial or on discovery a party cannot be excluded while his co-party testifies, without cause shown. But I do not think the onus of showing cause thus put on the opposite party is a heavy one; and I think the onus is lighter on discovery than at a trial, since the possibility of injustice from exclusion is more remote. Even at a trial, I think the chance of injustice being done in this way is extremely small. But in many cases the chances of injustice to the opposite party from refusal to exclude may be very substantial. I think the benefit of any real doubt should be given to the party asking for exclusion. If from the pleadings or otherwise it appears that the examinations of the coparties will cover the same ground, and that their credibility will be a factor, then it seems to me their exclusion should be ordered.

I therefore, with respect, venture to disapprove of the disposition of the case made in **Pam v. Gale, supra,** unless the learned judge considered that counsel was exaggerating and that there was no real reason to think that cross-examination would be made less effective by both deponents being present. The only reason I allow this appeal is that the registrar does not appear to have gone into such questions at all, but to have ordered exclusion merely because it was asked for. This is not permitted by the authorities. He must exercise a discretion, and here he does not seem to have done so."

The same subject was adjudicated upon in **O'Neal et al v. Murphy et al** (1964), 50 W.W.R. (N.S.) 252 (B.C.S.C.). In that case Munroe, J., approved the decision of the registrar of that court wherein exclusion was ordered in the following terms:

> " In ordering exclusion in this case he had in mind that the examinations of the defendants were to cover the same ground and concluded that if exclusion was not ordered there was a possibility of prejudice to the plaintiff while, on the other hand, there could be no prejudice to a truthful defendant if an exclusion was ordered. Accordingly, notwithstanding the **prima facie** rights of the defendants, he appraised this situation 'in its own atmosphere' and concluded, in effect, that a violation of an essential of justice may occur if exclusion was not directed. I am in respectful agreement with the said finding."

The enumeration of the respective rights of parties in considering possible exclusion from discoveries was set forth by **Benson et al v. Westcoast Transmission Co. Ltd.** (1974), 49 D.L.R. (3d) 292 (B.C.S.C.) 292, as follows:

> " The major principles were set out in **Sissons et al v. Olson.** The ones that favour the plaintiffs in these proceedings can be described as follows:
>
> 1. Every person has an inherent right to be present at the trial or any other proceedings to which he is a party (O'Halloran, J.A., p.509).
>
> 2. Every party has as much right to attend his co-party's discovery examination as he has to remain in court and listen to this testimony at the trial itself (O'Halloran, J.A., p.510).
>
> 3. For a party to be excluded from his co-party's discovery, cause must be shown by the person asking for the exclusion (Sidney Smith, J.A., p.511).

4. Exclusion of a party does not come as a matter of right but is rather one for the Court to exercise in the circumstances (Sidney Smith, J.A., p.512).

The principles that favour the applicant (defendant) in this action taken from **Sissons et al. v. Olson**, appear to be as follows:

1. The inherent right of one party to attend a co-party's discovery must not conflict with the fair and proper judicial conduct of the action or proceedings (O'Halloran, J.A., p.509).

2. If there is a violation or a threat of a violation of an essential of justice during the proceedings, a party may be excluded (O'Halloran, J.A., p.510).

3. The onus of showing that a co-party should be excluded is a heavy one but is lighter on discovery than at trial (Sidney Smith, J.A., p.511).

4. The benefit of any real doubt as to whether a party should be excluded should be given to the party asking for the exclusion (Sidney Smith, J.A., p.511).

5. If the pleadings show the examination of the co-parties will cover the same ground, and their credibility will be a factor, their exclusion should be ordered (Sidney Smith, J.A., p.511)."

The degree of commonality of interests is also to be considered in a determination of this nature. Bence, C.J.Q.B. of the Saskatchewan Court in **Basu v. Bettschen et al** (1975), 55 D.L.R. (3d) 755:

" I feel that where co-parties have interests in common it is important in the interests of justice that they be excluded when fellow parties are testifying on an examination. If it were otherwise they would be in the

advantageous position of knowing what another has said at the time that they are examined.

It appears in the instant case that the defendants have a very important common issue and it would be valuable to them of course if in assessing their own answers they had the advantage of knowing what another defendant has stated."

I also refer to two recent decisions of the Appeal Division of this Court: **Coughlan and Garnett v. Westminer Canada Holdings Limited et al**, S.C.A. No. 02281 and **Transcanada Pipelines Limited v. The Armour Group Limited**, S.C.A. No. 02351. In the **Westminer** case the oral decision of Mr. Justice Nunn was considered. He had said, in part, as follows:

" The burden is on the Applicant to show that sufficient cause that in any event, if it were treated the same as parties, that some exclusionary order should be granted. The basis of such an exclusionary order would have to be, basically, that it was in the interests of justice, that such an exclusionary order would be granted. I'm not satisfied in this case that the Applicant has met that burden, even accepting it as a lighter burden than in a normal situation, and as a result, I'm going to deny the application with regard to those persons. I don't think there's been sufficient to indicate that there would be a violation of an essential of justice if these parties were not excluded from hearing the evidence of each other. There's a real danger in this type of situation that the Defendant would be prejudiced in the preparation of his defence and in lining up the various witnesses that he might have in giving them and instructing them as to what evidence they may be required to give." (Emphasis added)

Mr. Justice MacDonald, in reviewing Mr. Justice Nunn's decision, concluded that "It is clear that when considerations of justice were considered, the Chambers judge was satisfied that the burden had not been met by the applicant".

To use the words of Mr. Justice Nunn, I must consider whether there is sufficient evidence before me "...to indicate that there would be a violation of an essential of justice if these parties were not excluded from hearing the evidence of each other". The only evidence before me is the affidavit of defendants' counsel.

In the case at hand there is apparently no question about liability; it has been admitted by the defendants. The matter is essentially an assessment of damages, including particularly those damages suffered and claimed by the grandchildren of the deceased pursuant to the **Fatal Injuries Act**. The pertinent subsections of the **Act** read as follows:

> " 5 (1) Every action brought under this Act shall be for the benefit of the wife, husband, parent or child of such deceased person and the jury may give such damages as they think proportioned to the injury resulting from such death to the persons respectively for whose benefit such action was brought, and the amount so recovered, after deducting the costs not recovered, if any, from the defendant, shall be divided among such persons in such shares as the jury by their verdict find and direct.
>
> **Damages Defined**
>
> (2) In subsection (1), 'damages' means pecuniary and non-pecuniary damages and, without restricting the generality of this definition, includes
>
> ...
>
> (d) an amount to compensate for the loss of guidance, care and companionship that a person for whose benefit the action is brought might reasonably have expected to receive from the deceased if the death had not occurred."

Accordingly, each of the grandchildren plaintiffs will be showing in this action the degree of damage individually suffered as a result of the loss of guidance, care and companionship which would have been afforded them by their grandmother. That loss is the subject matter in issue. Each loss is peculiar to each of the plaintiffs.

While the same general subject matter will be covered in each examination, the same ground need not be covered. Each of the grandchildren will have had his or her own special relationship with the deceased. Each relationship is an entirely subjective one. It is that relationship which must be explored upon examination. The evidence concerning those relationships will be vastly different from cases where such matters as the powers of observation of the witnesses will be under scrutiny. The evidence will be subjective to a great degree.

Skilled counsel will be able to frame questions to each of the siblings to elicit the information required without having to go over the same ground with each of them.

Nor is this a situation where the witnesses may be intimidated by the presence of a parent. The applicant has not asked for the exclusion of Mr. Ronald Downie, the father. According to the respondents' submission, which has not been objected to, the children are professional and well educated people. The subtle influence of parent to child, in these circumstances, and indeed, the subtle influence of brothers and sisters, do not appear to me to be of major consideration.

I find that the evidence before me, consisting of the affidavit set forth above, falls short of showing me that "there would be a violation of an essential of justice if these

parties were not excluded from hearing the evidence of each other". The inherent rights of the parties to attend the discovery should not be displaced by the mere assertion that "the lines of questioning of each of the plaintiff Grandchildren

As the learned registrar said in **O'Neal et al v. Murphy et al (supra)**, each case must be appraised "in its own atmosphere". There has not been sufficient atmosphere set forth before me to overcome the presumption that each plaintiff has a right to be present at each examination. There is nothing before me to suggest that the attendance of the parties at the discovery will create a situation in conflict with the fair and proper conduct of the case.

If there is any abuse by the plaintiffs of this procedure, evidence of that may be brought forward at the time of trial and an appropriate adjudication made.

As a result of the above, I exercise my discretion in favour of the plaintiffs and allow all of them to be present during the discovery examinations of one another. Costs of this application shall be the plaintiffs' costs in any event and I fix them at $500.00.

Gruchy, J.

Halifax, Nova Scotia

February 1, 1991

parties were not excluded from hearing the evidence of each other". The inherent rights of the parties to attend the discovery should not be displaced by the mere assertion that "the lines of questioning of each of the plaintiff Grandchildren will be virtually identical". There is no evidence before me that it would be of value to the grandchildren plaintiffs in being able to assess what one another has said.

As the learned registrar said in **O'Neal et al v. Murphy et al (supra)**, each case must be appraised "in its own atmosphere". There has not been sufficient atmosphere set forth before me to overcome the presumption that each plaintiff has a right to be present at each examination. There is nothing before me to suggest that the attendance of the parties at the discovery will create a situation in conflict with the fair and proper conduct of the case.

If there is any abuse by the plaintiffs of this procedure, evidence of that may be brought forward at the time of trial and an appropriate adjudication made.

As a result of the above, I exercise my discretion in favour of the plaintiffs and allow all of them to be present during the discovery examinations of one another. Costs of this application shall be the plaintiffs' costs in any event and I fix them at $500.00.

Gruchy, J.

Halifax, Nova Scotia

February 1, 1991