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Imperfect Information on Summary Judgment

In a recent pair of decisions in a solicitor-negligence action, Superior Court Justices Charney and Boswell confirmed that causation must be proved, not assumed – even on summary judgment motions.

In *Ontario Ltd o/a Trisan Construction v Epstein*, a contracting company, Trisan Construction, brought an action against its former lawyer alleging negligence. The lawyer had been retained by Trisan to help it recover an outstanding sum of \$102,931.22 from Bianchi Contracting (2004) Inc. (“BCI”) for Trisan’s work on a sidewalk installation project. The lawyer issued a claim against BCI on Trisan’s behalf, but the action was stayed when BCI went into receivership.

Trisan alleged numerous breaches of the standard of care applicable to a lawyer, including a failure to advise that a claim could be brought against the directors and officers of BCI personally for breach of trust under the *Construction Lien Act*.

Trisan moved for summary judgment. At the first summary judgment motion, Justice Charney found that the lawyer had been negligent for failing to advise Trisan about the potential trust claim. In the absence of expert evidence as to the standard of care, the Court held that the fact that a subsequent, more experienced lawyer advised Trisan of a potential breach of trust claim provided evidence that “a reasonably competent solicitor familiar with the relevant legislation would at least recommend this option to the client and advise of any advantages or disadvantages of taking this approach.”

Justice Charney held that in the absence of expert evidence, however, he was unable to determine whether the lawyer’s failure to advise caused Trisan any damage, and, if so, the quantification of those damages. The Court therefore invited Trisan to obtain such evidence and return for a further summary judgment motion.

At the second summary judgment motion, Justice Boswell noted that he had before him “a very limited record.” This evidence included the evidence of a construction law expert and the evidence of a director of BCI, Mr. Bianchi (neither of whom were cross-examined on their affidavits). The lawyer did not deliver responding evidence.

Justice Boswell applied the traditional “but for” test to the

limited evidence before him. Based on the construction law expert's evidence, he held that but for the lawyer's negligence, the breach of trust claim against the Bianchis likely would have been successful. In dismissing the lawyer's argument that there was insufficient evidence to show that Trisan would have been able to recover from the Bianchis, the Court held that there was evidence that "at least some recovery would have been realized." This finding was based on Mr. Bianchi's admission that he owned some investments and assets, including half an interest in a home with approximately \$120,000 in equity.

Justice Boswell then directed his attention to quantifying the loss he had found. In response to the lawyer's argument that Mr. Bianchi had under-reported his income, Justice Boswell held "that the court must not speculate about what assets Mr. Bianchi *may* have had. The damage assessment must be based on established facts about Mr. Bianchi's ability to pay." Based on the transcript of Mr. Bianchi's examination, Justice Boswell fixed Mr. Bianchi's assets at \$97,500, but then discounted this amount by 50% to account for the many contingencies associated with debt collection, including the fact that Mr. Bianchi would have defended the action and the costs of enforcing any judgment that was obtained.

In the result, Justice Boswell held that the lawyer's negligence caused damage to Trisan and fixed damages at \$50,000.

Proving Your Case on Summary Judgment Motions

These decisions provide an interesting example of the Court's attempt to balance precision and efficiency when determining issues on summary judgement. Interestingly, the Court:

- relaxed the need for expert evidence to prove professional negligence;
- granted leeway with respect to evidentiary shortcomings in quantifying damages.
- held the moving party to the traditional test to determine causation (and indeed required expert evidence to establish causation); and

In so doing, the Court made findings "on imperfect information," noting that "precision is not always possible."

In *Hryniak v Maudlin*, the Supreme Court made clear that an issue will not require trial if the evidence permits a judge to fairly and justly assess the issue in a timely, affordable and proportionate manner. However, efficiency cannot always be

paramount. When it comes to assessing key elements of a cause of action, courts must still require that parties put their best foot forward.

With notes from Jessica Kras