Court File No. CV-02-0000813-0000

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DALE POIRIER

Plaintiff

- and -

BERNARD J. WIACEK, MARY V. BLAHA and JOHN W. WIACEK
in their capacity as Estate Trustees of JOSEPH M. WIACEK, deceased
TREPANIER HAGEY KNEALE and WIACEK VERITY,
GEORGE W. HATELY, BLAKE, CASSELS and GRAYDON

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Defendant

R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE JUSTICE J. RAMSAY
on September 22, 2008, at Hamilton, Ontario

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APPEARANCES:

J. P. Criger — Counsel for the Plaintiff

J. F. Evans, Q.C. — Counsel for the Defendants

MONDAY SEPTEMBER 22, 2008

R E A S O N S F O R J U D G M E N T

RAMSAY J. SCJ (ORALLY):

This is an action for Solicitor's negligence. The plaintiff retained Mr. Joseph Wiacek to sue Conrad Rochon for damages for negligence in a car accident. Mr. George Hately was retained to give a second opinion. After consulting them he settled his suit for $5,000.00 on December 31, 1977. Each lawyer charged him a modest fee which he paid. The plaintiff now says that they were negligent because they did not advise him to hire an accident reconstruction expert before advising him to settle and they did not look further into his head injury. He also says that Mr. Wiacek did not investigate the action properly or cause it to be investigated but this was not relied on by his experts, and I find no basis for it in any event.

The car accident occurred on November 11, 1974. The plaintiff, then 17, was driving his 1969 Dodge Dart, a medium sized, for the time, Sedan with a four speed stick shift and a 340 cubic inch engine. The original defendant, Conrad Rochon was driving a 1971 Mercury Meteor, a typical heavy vehicle of the day. They collided head on near the intersection of St. Paul Avenue and Terrace Hill Street in Brantford at about eleven o'clock on a rainy evening.

The plaintiff has never had any memory of the accident although according to his testimony he has always doubted that he was at fault. There were no skid marks. The police were unable to place the point of impact. Conrad Rowshawn has since died. His examination for discovery was put into evidence. He deposed that he was driving southbound in his own lane when suddenly he was hit head on by the plaintiff's vehicle. He estimated the plaintiff's speed at 50 miles per hour at least while his own, he said, was about 15 miles per hour as he was slowing down to make a left turn onto Terrace Hill Street. He did not see the plaintiff's headlights until it was too late. St. Paul Avenue goes slightly down hill south of Terrace Hill which fits in with Mr. Rochon's account.

The plaintiff was not wearing a seat belt. He suffered significant injuries. He had a broken neck, broken ribs, broken limbs and a concussion. He was semiconscious for several days. He needed emergency surgery to correct a crush larynx in order to be able to breath properly. A brain scan revealed no subdural hematoma or other lesion. The plaintiff remained in hospital for six months. He has continuing knee problems and he has developed arthritis as the doctors predicted he would. His mobility is reduced and he started to suffer headaches a few years after the accident. They only abated when he stopped working in the late 1990s.

The plaintiff returned to work in 1976 before the lawsuit settled. While supporting his young family he went to night school to learn to be a welder and later a industrial mechanic. He says that he gave up his dream of becoming an auto mechanic because of the accident but I do not believe him. If he had chosen to become an auto mechanic he could have done that just as well as become an industrial mechanic or a welder. I think he made more conservative career choices because he had a family to support. He worked at the same factory for many years. The plaintiff says that his injuries interfere with his ability to work. Dr. Velaconia, a neurophysiologist, testified that the results of psychological tests administered in 2007 revealed cognitive deficits that come from brain damage suffered in the accident. The uniformly impressive performance reviews and reference letters that have been placed in evidence put the lie to that contention and seriously undermine the credibility of the plaintiff and the reliability of the opinions of Dr. Velaconia and Dr. Garner. I could have drawn that conclusion unaided but I did not have to because that is just what Dr. Freedman, the defence expert neurosychologist said. Dr. Freedman also noted that the plaintiff did worse on some of the tests administered on behalf than on tests administered under the supervision of Dr. Velaconia. When brain injury leads to deficits the deficits are most evident early on. If they improve they reach a plateau after which no improvement or deterioration occurs. Dr. Freedman

was surprised at the results he got. This casts doubt on the psychological testing. My own view is that the plaintiff was malingering in an effort to manipulate the tests.

Dr. Steward testified that the plaintiff may feel as if he has cognitive deficits as a result of the depressive aspect of his psychological state. Dr. Garner admits that depression can cause cognitive deficits. I do not accept that the plaintiff has any cognitive deficits that are causally connected to the accident.

The plaintiff also says that his headaches prevented him from earning more money than he did. The headaches began when the plaintiff was in his late twenties. It is common ground amongst the experts that they are cluster migraines. Dr. Steward, the neurologist who testified for the defence, says that cluster migraines are not generally associated with the sort of injury that the plaintiff suffered. The plaintiff's medical expert, Dr. Garner, says that a causal connection between the headaches and the accident cannot be established. Obviously then they have not been shown on the preponderance of the evidence to have been caused by the accident.

The accident did not interfere with the plaintiff's ability to earn a living after his initial return to work in 1976. Because of the accident the plaintiff lost a school year and had to delay his

entry into the workforce. His lost earnings were only partially compensated by accident benefits. His special damages are summarized at Exhibit Eight, tab 11. They amount to about $680.00. OHIP paid about $20,000.00 for the plaintiff's hospital and medical care.

I think that in 1977 his general damages would have been found to be $50,000.00. Damages would have been reduced 10 per cent for his contributory negligence in failing to wear a seat belt. But in order to recover any damages he would have had to prove some liability on the part of Mr. Rochon.

The plaintiff says that if his solicitors had met the standard of care they would have hired an accident reconstruction expert and he would have been able to prove that he had not driven too fast and on the wrong side of the road. OHIP abandoned its subrogated claim for the plaintiff's care. The plaintiff's liability insurer settled with Rochon on the basis that the plaintiff was 100 per cent liable. On the plaintiff's theory then negligence was abounding in connection with his case.

Thomas Prescott, a professional engineer qualified in accident reconstruction, testified before me. He concluded from his review of the accident report, the photographs and Mr. Rochon's deposition that the point of impact was most likely in the plaintiff's lane and that the plaintiff was not driving at excessive speed. Mr. Prescott's

conclusions suffer from two inherent problems, one, they depend on his highly subjective opinion as to the amount of energy that was dissipated by the crushing damage to the cars, and two, his analysis based on the principle of conservation of momentum was done using a one dimensional calculation of a two dimensional collision.

I do not think that there is a sufficient basis in the evidence to draw any conclusions as to the amount of energy that was spent by crushing metal. No measurements were taken. Some poor quality photographs exist. In the case of the Rochon vehicle some extremely poor photographs would show only part of the damage. In these circumstances Mr. Prescott's estimate of the amount of energy imparted by crushing, and therefore taken out of the equation with respect to post-impact movement of the cars, although based on his experience and expertise is highly subjective, I find it impossible to accord significant weight to his conclusions. It also occurred to me when he was testifying that a significant part of his experience would include knowledge gained by him during his career from crash test studies that were done from 1979 on. This was confirmed by the evidence of the defendant's engineer, Dr. Nassar, who said just that. I accept Dr. Nassar's opinion that Mr. Prescott's assessment of the crushing effect of the impact was rough and inaccurate. An important component of such assessments involves precise measurement and a knowledge of the

stiffness coefficient of the metal, two factors which were not available in this case. Stiffness coefficients were developed in the crash test studies that were done after the action settled.

Mr. Prescott said that the impact was online with an offset. That is a contradiction in terms. A collision is either online or offset. The fact that the vehicles spun out after impact makes it obvious that this was not an online head on collision, it was a head on collision with offset. That is, the vehicles hit at an angle, otherwise their post impact motion would have been on the north/south access. This is not just a question of terminology. Mr. Prescott fudged the offset impact into a sort of online impact and then used a linear momentum analysis to calculate the initial position of the vehicles. That would have been fine it had been a one dimensional problem, that is, if each car had moved along one plane, backwards or forewords, as the case may be, but each car moved in two directions, backwards or forwards, as the case may be, and sideways. The problem required solution of a two dimensional equation. There are too many unknowns in the equation for it to be solved validly according to the principles of mathematics. Mr. Prescott's calculations cannot be relied on. My own layman's first impression that there are not enough known facts for a valid accident reconstruction coincides with Dr. Nassar's opinion. I reject Mr. Prescott's evidence. I accept Dr. Nassar's evidence that this accident

could not be reconstructed accurately with 1970s technology.

The plaintiff also called Ross Eddi, an expert in accident reconstruction and in particular in the state of that art in the 1970. He testified that when there are no marks on the roadway it was customary to establish the point of impact from knowledge of the post-impact movement of the vehicles, the rest position, collision dynamics and conservation of momentum. He agreed that in the present case, however, we did not know the post-impact movement of the vehicles before commencing the calculations. Mr. Eddi said that a supportable opinion could have been offered in the present case regarding the location and orientations of the vehicles at impact based on the final location of the vehicles, experience, hand calculations and analysis. Mr. Eddi did not attempt such an analysis. All he can say is that it would have been theoretically possible. He cannot shore up the weakness in Mr. Prescott's analysis that flows from the lack of any precision of the knowledge of the crush damage and the erroneous calculation of momentum.

In these circumstances I have no reason to doubt Mr. Rochon's uncontradicted evidence. I find that the accident occurred because the plaintiff was driving too fast for the wet conditions and on the wrong side of the road. He would not have won his lawsuit in 1978. That does not mean that it had no

value. No lawsuit is a sure thing. Before he settled the action had some nuisance value to the insurance company, that is why they settled. I fix that value at $3,000.00. Since he settled for more than that his damages are nil.

In the circumstances of this case my analysis of the value of the lawsuit comes to the same thing whether I follow the trial within a trial approached referred to in the Riggens and Fellowes cases or the lost chance approach referred to in the Folland Case. The plaintiff argued at an earlier stage of the trial that I should take a different approach to damages. His counsel argued that I should consider damages that logically flowed from the breach of contract, namely the loss of earnings since 1997, on the theory that the plaintiff's psychiatric collapse 20 years later logically flowed from the negligent handling of his lawsuit. In an evidentiary ruling I held that that approach far exceeds anything contemplated by the judgment of Doucherty J. A. in the Folland Case and that it is impossible to reconcile with the Supreme Court of Canada's decision in the Collagen Water Case. The plaintiff's collapse 20 years after the settlement of the action was not foreseeable and it could not reasonably have been in contemplation of the parties when a contract was entered into.

If these reasons are transcribed I will insert a footnote with the citations of the cases that I have mentioned.

I now turn to the question of the limitation period. The plaintiff had six years from the time the cause of action arose or from the time when he, acting diligently, could have discovered it. The plaintiff says that the six years start to run not in 1977, when the alleged acts of negligence were committed, but in 1998 or at the earliest 1997 when he discovered them. The statement of claim was issued in 2002, within six years of either 1997 or 1998.

The plaintiff testified that he went on with his life after 1977 and tried to forget about the accident, nevertheless, he was reminded of it daily because of his injuries. He always thought that he should have got more compensation for his injuries and that he was not at fault for the accident. In September 1997 he was watching television coverage of the death of Diana Princess of Wales. The networks kept running computerized animation of the car accident. The plaintiff decided to revisit his case. He went to see Mr. Prescott who gave him the opinion he wanted on August 19th, 1998. He spoke to the Brantford police. They assigned an accident reconstructionist to review the file. The reconstructionist, Sergeant Bates, as he then was, concluded that it was impossible to say whether the impact occurred in the plaintiff's lane or Mr. Rochon's lane. Undeterred the plaintiff went to see a lawyer and the statement of claim was issued on October 30, 2002. There is no rational connection between computerized animation of the

Princess's accident, an accident reconstruction based on ordinary 1970s physics. The plaintiff simply decided that he would no longer put the accident beside him and move on with his life. Perhaps, as Dr. Valaconia says, the repeated viewing of the cartoons of the Princess's accident triggered his psychiatric disorder, whether it was the delusional disorder diagnosed by Dr. Book in 1999 or the adjustment disorder to which Dr. Valaconia testified. It is important to note that within two years of the Princess's death, by Autumn 1999, the plaintiff's mental state had broken down to the point that he was given C.P.P. disability benefits, not because of his injuries as he testified falsely, but because of his psychiatric condition, namely, the delusional disorder persecutory type diagnosed by Dr. Book. Dr. Book reported to C.P.P. that the plaintiff was suffering from the delusion that a conspiracy had deprived him of the compensation that was due him on account of the accident, that he could not work because of this, and C.P.P. Benefits were awarded.

The plaintiff is still not working and is still receiving these benefits. The delusional state is amply supported in the medical documents by the psychiatric evidence and by the plaintiff himself. He admitted on cross-examination that he has crazy ideas in his head and he doesn't know which ones are true and which ones are not. Because of this and because of untrue statements he made in his evidence about his ability to work the plaintiff

has no credibility as a witness as far as I am concerned. It is striking that the very subject about which he is delusional is the heart of his claim in this litigation.

The plaintiff always doubted the wisdom of his decision to settle. He knew that he had been in a serious car accident, that the only eyewitness said that he was at fault, and that there was such a thing as an accident reconstruction expert. I accept Mr. Hately's evidence that he mentioned accident reconstruction to the plaintiff in August 1977, although he certainly did not recommend it. Mr. Hately qualified that by saying, "To be fair, I am not sure that that would have brought it home." but I am not as charitable to the plaintiff as Mr. Hately is. I think that it did bring it home to him that there was such a thing.

The plaintiff did nothing to further his claim. He made the reasonable decision to get on with his life, earn a decent living, better himself through continuing education and marry and support his family. The television coverage that he saw in 1997 did not put him into any better position to discover the alleged delict, it simply fed into a psychiatric disorder or character flaw or some combination of the two that began to show signs of onset at about the same time.

He came very close to being killed in the accident. Initially, he made the sound decision to get on

with his life and make something of the second chance he had been given. For some reason he decided to throw that all away about 11 years ago. None of that has anything to do with the statutory limitation period. I find that the statutory limitation period for the institution of the present action has expired on December 30, 1983. The action is barred by the statutory limitation.

Finally, I turn to the question of whether the solicitors were negligent. The defendant, George Hately, was given a $300.00 retainer in exchange for an opinion on liability. He told the plaintiff that he would have to go to the scene of the accident. He was not required by the terms of his retainer to do anything more than that or to look at anything more than the materials he had. He did what he was retained to do and more. He spoke to the police who were co-operative because the plaintiff's passenger was the son of a Brantford police officer. He drove Rochon's route a number of times. He knew from Garn's father that young Garn, that's the plaintiff's passenger, remembered nothing about the accident. Mr. Hately considered the possibility that stuck me from my initial review of Exhibit Eight that Garn did not want to remember the accident because he did not want to give evidence against his friend. In any event, it was clear that Garn was of no help. Mr. Hately considered getting an accident reconstruction and discussed that topic with the plaintiff. He thought and still thinks that nothing would have

been gained thereby. Bert Raphael, a giant of the Tort Litigation Bar, agrees with him, so do I. Far from failing to meet the standard of care he went beyond it.

Mr. Wiacek was retained to conduct the action against Rochon. He and members of is firm reviewed the report of the treating physicians, interviewed such witnesses as he could find, followed up on leads to other potential witnesses and conducted the examination for discovery of Rochon. By the time they got the file it was too late to photograph Mr. Rochon's car. The police looked for skid marks and other physical evidence on the roadway the night of the accident and found none. They did not take any useful photographs and they did not note the location of debris. There was nothing Mr. Wiacek could do about this. Mr. Wiacek's most important work for the plaintiff involved the use of his judgment to give him advice. Again, rather than a departure from the standard of care of a competent solicitor, Mr. Wiacek's handling of the file reflects a careful and thorough treatment of the file that exceeded the requirements of the standard of care. As part of his brief Mr. Wiacek was required to consider what sort of evidence could be obtained and what use it might be. He was entitled to look at the available evidence and judge whether it was sufficient to give to an accident reconstructionist with a reasonable prospect of obtaining something

useful. He was entitled to do a cost benefit analysis.

I do not agree with Mr. Yuchetti that the decision in this case not to retain or recommend retaining an accident reconstruction expert was a departure from the standard of care. The hiring of experts in the prosecution and defence of civil cases was not unheard of in the 1970s but it was not common. It was common to pursue a motor vehicle claim with the testimony of a surveyor who would be hired to produce a survey of the accident scene and the investigating officer who would give measurements and assessments of speed and damage to vehicles. The extent to which forensic experts should be used was a matter of discussion in the profession at the time.

I find it impossible to say as Mr. Yuchetti did that the glaring lacuna in the physical and eyewitness evidence required the hiring of an expert. The expert's report would necessarily depend on the quality of the input available to him. The lack of objective evidence was a factor militating against, not for, the hiring of an expert. In the 1970s professionals were not as accustom as they are today to taking steps designed solely to help defend themselves from future negligence actions.

I disagree with Mr. Yuchetti's contention that with experts anything is possible. It is not difficult

to attack an expert opinion when the weakness of its underlying factual assumptions is evident. Mr. Hately's view was that while you might get an accident reconstruction expert to give an opinion you would be met by an opposing one which might be better. That is exactly what happened in this trial.

I do not accept that Mr. Wiacek departed from the standard of care in failing to pursue further evidence of head injury. He had the report of Dr. Stubs, the orthopaedic surgeon. According to Mr. Raphael it was the practice in the 1970s to proceed with such a report. I accept this. By May 6, 1976, Dr. Stubs reported that the plaintiff had made a reasonably good recovery. He might require further surgery on his knee and spine at some point. By December 31, 1977, when the settlement was executed, the plaintiff had been working full-time for a year and a half. There was no reason for Mr. Wiacek to pursue a claim for compensation for a head injury beyond that implicit in the comatose state in the initial period of hospitalization. He did not need to hire another doctor. I have seen the hospital records. Nothing in them would have given him reason to change his mind. Again, the liability problem was decisive as Mr. Wiacek deposed in his question number 164. There was no negligence, there are no damages, the action is statute barred. I give judgment for the defendants. The outstanding motions are dismissed as mute.

CERTIFICATION OF TRANSCRIPT

FORM 2

Certificate of Transcript

Evidence Act, Subsection 5(2)

I, Janice Black, certify that this document is a true and accurate transcription of the recording of Dale Poirier v. Bernard Wiacek et. al., in the Superior Court of Justice, held at 45 Main Street East, Hamilton, Ontario, taken from Recording No. 704-86/2008, which has been certified in Form 1

Jan. 23/09 — (Date)

J. Black — (Signature of Authorized Person)