Most Negative Treatment: Distinguished
Most Recent Distinguished: Perricone v. Baldassarra | 1994 CarswellOnt 45, [1994] O.J. No. 2199, 5 W.D.C.P. (2d) 519, 50 A.C.W.S. (3d) 672, 7 M.V.R. (3d) 91 | (Ont. Gen. Div., Sep 28, 1994)

1994 CarswellOnt 38
Ontario Court of Justice (General Division)

Buffa v. Gauvin

1994 CarswellOnt 38, [1994] O.J. No. 1158, 18 O.R. (3d) 725,
47 A.C.W.S. (3d) 1309, 5 M.V.R. (3d) 235, 5 W.D.C.P. (2d) 346

MARIO BUFFA, GIUSEPPINA BUFFA, VITO BUFFA, GASPARE BUFFA and ELESA BUFFA v. BRIAN G. GAUVIN and GEORGE H. GEORGIOU

Borins J.

Heard: May 4, 1994
Judgment: May 30, 1994
Docket: Doc. 92-CU-61378

Counsel: *D.F. Longley*, for plaintiffs (responding parties).
N.E. Kostyniuk, for defendant (moving party) Gauvin.
C.H. Horkins, for defendant (moving party) Georgiou.

Subject: Public; Insurance

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Insurance

XII Automobile insurance
XII.6 Catastrophic impairment
XII.6.c Practice and procedure

Headnote

Insurance --- Principles applicable to specific types of insurance — No fault automobile insurance benefits — Disability benefits (loss of income benefits) — Long-term disability

Insurance — Principles applicable to specific types of insurance — No-fault automobile insurance benefits — Section 266(3) of Insurance Act not affecting any change in usual practice applying to presentation and admissibility of evidence on motions — Motion by defendant pursuant to s. 266(3) for order that plaintiff's injuries do not come within exceptions in ss. 266(1)(a) or (b) of Insurance Act to be decided on affidavit evidence — Trial judge usually in better position to determine issues presented by s. 266(3) motion than motions judge — Motions judge can find for defendant on s. 266(3) motion only in clearest of cases where there are no conflicts in evidence — Otherwise, preferable course being to adjourn motion to trial judge — Insurance Act, R.S.O. 1990, c. I.8, s. 266.

The defendants moved pursuant to s. 266(3) of the *Insurance Act* (Ont.) for an order that the injuries sustained by the plaintiff in a motor vehicle accident did not come within the exceptions to the no-fault regime contained in ss.

266(1)(*a*) and (*b*) of the *Insurance Act*. They also moved under r. 20.01 of the *Ontario Rules of Civil Procedure* for an order dismissing the plaintiff's action in the event that they succeeded on their s. 266(3) motion.

Held:

The motion was adjourned to the trial judge.

It was conceded by counsel for the plaintiff that the plaintiff's injuries did not fall within the exception in s. 266(1)(*a*).

Whether or not a plaintiff has sustained "permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature" is a question of fact to be determined according to the evidence in each case. Section 266(3) did not change the usual practice applying to the presentation and admissibility of evidence on a motion. A motion under s. 266(3) will be determined on the basis of affidavit evidence (and possibly on evidence given on examination for discovery or on the cross-examination of the deponents of the affidavits, or on the basis of medical reports and hospital notes and records) without the motions judge having the opportunity to see the plaintiff and to hear him or her testify. Clearly, a trial judge would be in a much better position to determine the issues raised on a s. 266(3) motion than would a motions judge.

Section 266(3) has a potentially Draconian effect on a plaintiff's claim. If, on a motion by the defendant under s. 266(3), the plaintiff fails to satisfy the onus, he or she runs the risk of being deprived of his or her day in court. Except in the clearest of cases, it is difficult for a motions judge to determine whether a plaintiff's injuries fall within one or more of the s. 266(1) exceptions in the absence of viva voce evidence. It is a fundamental principle that a motions judge cannot resolve conflicts in evidence with respect to material facts. If the conflict arises in the context of a motion for summary judgment, a genuine issue exists which can be resolved by a trial judge only. Doctrinally, there can be no different result if similar circumstances arise in a pre-trial motion under s. 266(3).

On the evidence, it was impossible to make a determination whether or not the plaintiff's injuries came within the s. 266(1)(*b*) exception. The material contained in the record presented a genuine issue for trial. Accordingly, the proper course was to adjourn the motion to the trial judge, who would be in a better position to decide the issue after seeing and hearing the witnesses called by the parties.

Table of Authorities

Cases considered:

Dalgliesh v. Green (1993), 17 C.C.L.I. (2d) 52, 12 O.R. (3d) 40, 100 D.L.R. (4th) 390 (Gen. Div.), reversed (1993), (sub nom. *Meyer v. Bright*) 48 M.V.R. (2d) 1, 17 C.C.L.I. (2d) 1, 15 O.R. (3d) 129, 67 O.A.C. 134, 110 D.L.R. (4th) 354 (C.A.) — *considered*

Irving Ungerman Ltd. v. Galanis (1991), 1 C.P.C. (3d) 248, 4 O.R. (3d) 545, 83 D.L.R. (4th) 734, (sub nom. *Ungerman (Irving) Ltd. v. Galanis*) 50 O.A.C. 176 (C.A.) — *referred to*

Kunz v. Samuel (1993), 46 M.V.R. (2d) 187, 12 O.R. (3d) 732 (Gen. Div.) — *referred to*

Meyer v. Bright (1993), 48 M.V.R. (2d) 1, 17 C.C.L.I. (2d) 1, 15 O.R. (3d) 129, 67 O.A.C. 134, 110 D.L.R. (4th) 354 (C.A.) — *considered*

Zywina v. Hoard (March 28, 1994), Doc. Thunder Bay 3278/92, Wright J. (Ont. Gen. Div.), 5 W.D.C.P. (2d) 232 — *considered*

Statutes considered:

Evidence Act, R.S.O. 1990, c. E.23 —

s. 35

s. 52

Family Law Act, R.S.O. 1990, c. F.3 —

s. 61

Insurance Act, R.S.O. 1990, c. I.8 —

s. 266

s. 266(1)

s. 266(1)(*a*)

s. 266(1)(*b*)

s. 266(3)

s. 266(4)

s. 267.1 [en. S.O. 1993, c. 10, s. 25]

s. 267.1(3) [en. S.O. 1993, c. 10, s. 25]

s. 267.1(4) [en. S.O. 1993, c. 10, s. 25]

Rules considered:

Ontario, Rules of Civil Procedure —

r. 4.06(2)

r. 14.05

R. 20

r. 20.01(3)

r. 20.04(2)

r. 37.13(2)(*a*)

r. 37.13(2)(*b*)

r. 39.01(1)

r. 39.01(4)

r. 39.03

r. 39.03(4)

r. 39.04

Motion by defendants under s. 266(3) of *Insurance Act* (Ont.).

***Borins J.*:**

1 This is a motion brought by the defendants pursuant to s. 266(3) of the *Insurance Act*, R.S.O. 1990, c. I.8 for an order that the injuries sustained by the plaintiff Mario Buffa (the "plaintiff") do not come within the exceptions contained in ss. 266(1)(*a*) or (*b*) of the Act. The defendants also move under r. 20.01(3) of the *Rules of Civil Procedure* for an order dismissing the plaintiffs' action pursuant to r. 20.04(2) in the event that the defendants succeed on their motion under s. 266(3) of the Act. Therefore, the issue for determination is whether the plaintiff is precluded from recovering non-pecuniary damages by reason of s. 266(1) of the *Insurance Act*.

2 Because of the view which I hold in respect to the disposition of this motion it is unnecessary to engage in an extensive review of the background of this case. The plaintiff Mario Buffa, who is now 70 years of age, claims damages for injuries which he sustained on December 12, 1991, when he was struck by the defendant Gauvin's motor vehicle while he was standing on Highway 400 inspecting damages to his motor vehicle caused by the defendant Georgiou's motor vehicle. The claims of the other plaintiffs are brought under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3. Counsel for the defendants submit that because the *Family Law Act* claims are derivative claims they must necessarily be dismissed if the plaintiff Mario Buffa's claim is dismissed. This is not an issue which I have to decide because of my disposition of this motion.

3 The only evidence (in the proper sense of that word) of the plaintiff's injuries and their effect on his employment and his way of life is contained in his affidavit. There are other materials relating to these issues contained in medical and other reports and hospital records which the plaintiff and the defendants have placed before the court as exhibits to the plaintiff's affidavit and the affidavit of Joseph Rizzotto who is a lawyer with the firm representing the defendant Gauvin. However, these affidavits do not comply with the requirements of r. 39.01(4) in respect to these materials. All of the materials, which are voluminous, emanate from the plaintiff as the defendants have not asked that the plaintiff submit to a medical examination. Although examinations for discovery have been held no reference was made to the plaintiff's examination for discovery. The case has been the subject of a pre-trial conference and a trial date has been obtained for October 11, 1994.

4 Because motions under s. 266(3) of the *Insurance Act* have become common, it may be helpful to consider the "evidence" which generally forms part of the record on such motions. Rule 39.01(1) permits the parties to a motion to give evidence by affidavit. Although r. 4.06(2) confines the contents of an affidavit "to the statement of facts within the knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise," r. 39.01(4) extends the contents of an affidavit for use on a motion to "statements of the deponent's information and belief." Rule 39.04 permits the use of an examination for discovery in the proceeding on the hearing of a motion. Although invariably the record on a motion will consist of affidavit evidence supplemented, where appropriate, by evidence taken on examination for discovery or by cross-examination of the deponent, and on occasion by the examination of a witness on a pending motion under r. 39.03, on rare occasions leave is given by the presiding judge under r. 39.03(4) to examine a witness at the hearing of the motion. However, the *Rules of Civil Procedure* do not allow for the filing of medical reports and hospital notes and records or simply annexing them to an affidavit as in this case. Medical reports and hospital notes and records are inadmissible at trial or on a motion because they represent

hearsay evidence. However, reports of health professionals are made admissible and permitted into evidence at a trial, on notice to the opposing party and with the leave of the court, under s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23. Similarly, hospital notes and records are made admissible and permitted into evidence at a trial, on appropriate notice, as business records under s. 35 of the Act. As no argument was addressed as to whether or not s. 52 and s. 35 apply to the admissibility of evidence on a motion, I express no view on this question. The medical reports and hospital notes and records are before the court on this motion because they have been made exhibits to two affidavits and not as a result of the application of s. 52 or s. 35 of the *Evidence Act* or compliance with r. 39.01(4).

5 Assuming for the purpose of this motion that the medical reports and the hospital notes and records are properly before the court, the following is a summary of the injuries sustained by the plaintiff. He sustained a fracture of the right clavicle, a comminuted fracture of the mid-shaft of the left humerus, a fracture of the maxillary bones and left zygoma of the face, fractures of the sixth and seventh ribs, facial lacerations and lacerations of the right ear and scalp and a possible head injury. The plaintiff's orthopaedic injuries were managed uneventfully and have resulted in a complete recovery following physiotherapy and rehabilitative treatment. His major problems at this time are continuing headaches, dizziness, vertigo and depression, as well as a hearing loss. As a result of his injuries the plaintiff has been unable to return to his job as a yardman in the construction industry and he continues to receive disability payments from his automobile insurer. The plaintiff's age makes him an unlikely candidate for occupational retraining. It appears that he would have continued in his previous job as long as his age and health permitted. In his affidavit the plaintiff outlined the physical problems arising from the accident which he presently experiences and described how they have impaired his ability to stand, walk, lift and bend.

6 It is helpful to set out ss. 266(1), (3) and (4) of the *Insurance Act*:

> 266. — (1) In respect of loss or damage arising directly or indirectly from the use or operation, after the 21st day of June, 1990, of an automobile and despite any other Act, none of the owner of an automobile, the occupants of an automobile or any person present at the incident are liable in an action in Ontario for loss or damage from bodily injury arising from such use or operation in Canada, the United States of America or any other jurisdiction designated in the *No-Fault Benefits Schedule* involving the automobile unless, as a result of such use or operation, the injured person has died or has sustained,
>
> > (*a*) permanent serious disfigurement; or
> >
> > (*b*) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.
>
> . . . . .
>
> (3) In an action for loss or damage from bodily injury arising directly or indirectly from the use or operation of an automobile, a judge shall, on motion made before or at trial, determine if the injured person has, as a result of the accident, died or has sustained,
>
> > (*a*) permanent serious disfigurement; or
> >
> > (*b*) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.
>
> (4) Even though a defence motion under subsection (3) is denied, the defendant may, at trial, in the absence of the jury, and following the hearing of evidence, raise the defence provided in subsection (1).

It is to be noted that s. 266(4) provides that even though a "defence motion" under subs. (3) is denied the defendant is not deprived from raising the defence provided by subs. (1) at trial "following the hearing of evidence" and in the absence of the jury. It is for the trial judge, and not for the jury, to deal with this defence if raised by the defendant at trial. It

is also to be noted that s. 266(4) gives a defendant two opportunities to litigate the same defence — once, before trial, and again, at trial.

7 Section 266 applies only to injuries arising from automobile accidents occurring between June 21, 1990 and December 31, 1993. This is because of an amendment to the *Insurance Act*, S.O. 1993, c. 10, s. 25 which added s. 267.1. Section 267.1 is similar to s. 266 as its purpose is to limit recovery for non-pecuniary damages caused by motor vehicle accidents occurring after December 31, 1993. Thus, in Ontario a person injured in an automobile accident has a different remedy dependent upon when the injuries were sustained — prior to June 22, 1990; between June 22, 1990 and December 31, 1993; and after December 31, 1993 — a situation which has created problems for litigants, lawyers and judges in respect to both substantive and procedural issues. Section 267.1(3) is similar to s. 266(3) and reads as follows:

> (3) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, a judge shall, on motion made before trial with the consent of the parties or in accordance with an order of a judge who conducts a pre-trial conference, determine if, as a result of the use or operation of the automobile, the injured person has died or has sustained,
>
> (*a*) serious disfigurement; or
>
> (*b*) serious impairment of an important physical, mental or psychological function.

However, s. 267.1(3), unlike s. 266(3), refers to the motion being made before trial only, and only with the consent of the parties or where ordered by the pre-trial conference judge. Section 266(3) contemplates the motion being made before or at trial and no restrictions are placed on the bringing of the motion. Unlike s. 266(4), s. 267.1(4) provides that a determination by a judge on a motion under subs. (3) is binding on the parties at trial. Thus a determination in favour of the plaintiff on a s. 267.1(3) motion means that this issue is not to be re-litigated at trial. This, of course, is not the effect of a similar deter mination on a s. 266(3) motion by virtue of s. 266(4).

8 In *Meyer v. Bright* (1993), 15 O.R. (3d) 129, in the context of three appeals, the Court of Appeal interpreted s. 266(1). At p. 146 the court held that the onus rests upon the plaintiff to establish that his or her case comes within one or more of the s. 266(1) exceptions. It then went on to discuss on which party the onus rests when a pre-trial motion is brought under s. 266(3):

> A practical issue was raised about the application of the onus when the defendant makes a pre-trial motion pursuant to s. 266(3). It was argued that a defendant might launch a pre-trial motion early in the proceedings before the injured person's injuries had matured sufficiently to know whether they would constitute an exception within the meaning of s. 266(1)(*a*) or (*b*). We think the solution to such a problem is for the motions court judge to adjourn the motion until the plaintiff has sufficient time to know whether the injuries sustained fall within s. 266(1)(*a*) or (*b*). We do not think the solution is to place the onus upon the defendant to prove that the injuries do not fall within either cl. (*a*) or (*b*) if the defendant brings the pre-trial motion, but to place it on the plaintiff if it is a plaintiff's motion. Such a ruling would lead to unnecessary confusion and complication. When the court is called upon to decide, whether before or at trial, the issue of whether a particular plaintiff comes within s. 266(1)(*a*) or (*b*), the onus of proof rests upon that plaintiff.

In two of the cases considered by the Court of Appeal there was no s. 266(3) motion before trial and the trial judge made the determination under s. 266(1) at the conclusion of the evidence. In the third case, *Dalgliesh v. Green*, the determination was made on a s. 266(3) pre-trial motion. It is unclear from the reasons of the Court of Appeal or the reasons of the trial judge (reported at (1993), 12 O.R. (3d) 40 (Gen. Div.)) on what evidence the determination was made. The Court of Appeal did not address the issue of the evidence on which a pre-trial motion under s. 266(3) is to be decided.

9 In this case counsel for the plaintiff has conceded that the plaintiff's injuries do not fall within the exception found in s. 266(1)(*a*). However, he submits that the plaintiff has satisfied the onus of establishing that his injuries fall within the

exception found in s. 266(1)(*b*) as interpreted by the Court of Appeal in *Meyer v. Bright* at pp. 137-143. At p. 137 the court explained that the approach to be followed in respect to s. 266(1)(*b*) is to answer sequentially the following questions:

> 1. Has the injured person sustained permanent impairment of a bodily function caused by continuing injury which is physical in nature?
>
> 2. If the answer to question number 1 is yes, is the bodily function, which is permanently impaired, an important one?
>
> 3. If the answer to question number 2 is yes, is the impairment of the important bodily function serious?

10 With respect to the first question the court said at p. 138:

> While we will have more to say about subjective and objective standards or tests later in these reasons, we think it necessary to emphasize that in formulating its answer to the first question a court will decide the issue based upon its assessment of the medical and other evidence presented to it. Section 266(1) does not effect any change in the methods whereby the courts have traditionally determined whether a plaintiff has sustained a particular injury and, if so, what is its nature, cause and extent. Some injuries which are physical in nature can be diagnosed objectively, some can be diagnosed only upon the basis of a patient's subjective complaints and others are diagnosed on the basis of both objective observations and the patient's subjective complaints. *The courts have traditionally weighed and assessed such evidence and will continue to do so* when deciding whether an injured person has sustained permanent impairment of a bodily function caused by a continuing injury which is physical in nature. (Emphasis added.)

11 With respect to the second question the court entered into a lengthy discussion of the meaning of "important bodily function" and, at p. 140, stated: "Each case will essentially be one of fact." It concluded its discussion by stating at p. 140:

> The issue which the courts will have to determine in each case is whether the bodily function which has been impaired is an important one to the particular injured person. *It is an issue of fact to be determined according to the evidence in each case*. (Emphasis added.)

12 The court, in its lengthy discussion of the third question, again observed (at p. 142) that each case must be decided upon its own facts. The discussion of the third question concluded as follows at p. 143:

> The issue which the courts will have to determine in each case is whether the permanent impairment of an important bodily function is serious to the particular injured person. *It is an issue of fact to be determined according to the evidence in each case*. (Emphasis added.)

13 I have referred in some detail to the assistance provided by the Court of Appeal in *Meyer v. Bright* in determining whether a plaintiff has satisfied his or her onus to establish that injuries which he or she sustained come within the s. 266(1)(*b*) to underscore my difficulty in approaching the resolution of the issue presented by this motion. The Court of Appeal, in the passages which I have quoted, has said that whether or not a plaintiff has sustained "permanent serious impair ment of an important bodily function caused by continuing injury which is physical in nature" is a question of fact to be determined according to the evidence in each case. In respect to the first question which the court must consider the Court of Appeal referred to the traditional role of a trial court in weighing and assessing the evidence. It would appear, however, that it is the intention of the Legislature in enacting s. 266(3) that these questions be answered by a motions court judge on affidavit evidence and, possibly, on evidence given on examination for discovery or on the cross-examination of the deponents of the affidavits, and, possibly, on the basis of medical reports and hospital notes and records, without the opportunity of the motions court judge seeing the plaintiff and hearing him or her testify. Often, of course, the evidence put forward by the plaintiff and the defendant will be conflicting.

14 Nothing is stated in s. 266(3) about the nature of the evidence upon which a pre-trial motion to be decided. Earlier I reviewed the rules which apply to the presentation of evidence on a motion. It is my opinion that s. 266(3) does not affect any change in the usual practice that applies to the presentation and admissibility of evidence on a motion. The

result is that whereas a pre-trial motion brought under s. 266(3) is decided on affidavit evidence, supplemented, perhaps, by the other forms of evidence mentioned, if the motion is made at trial s. 266(4) requires that it be decided "following the hearing of evidence." Clearly a trial judge will be in a much better position to determine the issues presented by the motion than would a motions court judge.

15 My difficulty is quite simple. On the evidence and the other materials which constitute the record on this motion I am unable to make a determination whether or not the plaintiff's injuries come within the s. 266(1)(*b*) exception. In reaching this conclusion I appreciate that all of the evidence and the other material before the court emanate from the plaintiff and I have not lost sight of the submissions of counsel for the defendants that taking this evidence at its highest must necessarily result in the conclusion the plaintiff has failed to meet his onus. However, to analogize to a motion for summary judgment under R. 20, it is my view that the material contained in the record presents a genuine issue for trial as that term has been interpreted by the Court of Appeal in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545. It is clear to me in the context of the test which the plaintiff must satisfy to bring his claim within the s. 266(1)(*b*) exception that his claim is not spurious. It is my view that the record contains evidence and other materials which, if before a trial judge, would permit a trial judge, who will have had the advantage of seeing and hearing the parties and their witnesses, to conclude that the plaintiff's injuries come within the s. 266(1)(*b*) exception.

16 In my view, s. 266(3) has a potentially Draconian effect on a plaintiff's claim. If, on a motion by the defendant under s. 266(3), the plaintiff fails to satisfy its onus it runs the risk of being deprived of its day in court. I recognize that there will be cases where it will be clear and obvious on the evidence that the plaintiff's injuries are so insignificant that they will not come within the exceptions created by ss. 266(1)(*a*) and (*b*) and that there will be other cases where it is equally clear and obvious that the injuries do come within the exceptions. Perhaps it was the potentially Draconian outcome of a s. 266(3) motion in respect to a plaintiff's claim which caused the Legislature to severely limit the availability of a similar motion under s. 267.1(3) in respect to injuries caused by motor vehicle accidents occurring after December 31, 1993 or perhaps, the limitation resulted from the recognition of the difficulties encountered by motions court judges required to decide"close cases" — such as this case — on the basis of a "proper" record and the resulting unfairness to a plaintiff should he or she not be able to satisfy the required onus. As well, s. 267.1(4) was enacted to provide that the determination made on a pre-trial motion under s. 267.1(3), unlike a pre-trial motion under s. 266(3), is binding on the trial judge. This, together with the limited availability of motions under s. 267.1(3), suggests that s. 267.1(3) motions will be relatively rare.

17 As I have indicated, except in the clearest of cases, it is difficult for a motions court judge to determine whether a plaintiff's injuries fall within one or more of the s. 266(1) exceptions in the absence of viva voce evidence. Medical reports and clinical notes are not necessarily prepared with the requirements of ss. 266(1)(*a*) or (*b*) in mind. No opportunity exists on a motion to enhance, explain or dispel clinical findings or opinions contained in medical reports, clinical notes or hospital records. It is no more possible to resolve conflicts in medical reports than it is to resolve conflicting affidavit evidence or evidence obtained by cross-examining the deponents of the affidavits. It is a fundamental principle that a motions court judge cannot resolve conflicts in evidence in respect to material facts. If the conflict arises in the context of a motion for summary judgment a genuine issue exists which can be resolved by a trial judge only. If a similar conflict arises in the context of an application under r. 14.05, a trial of an issue will be ordered or the application will be converted into an action. In my view, doctrinally there can be no different result if similar circumstances arise in a pre-trial motion under ss. 266(3) or 267.1(3).

18 Although, strictly speaking, there may not be conflicting evidence in respect to the plaintiff's injuries, there is a conflict between the plaintiff's own perception of his injuries as expressed in his affidavit and the clinical findings and opinions expressed in the various medical and other reports and records. I do not feel that I am able to decide this motion on the basis of the motion record and hold the view that it should be adjourned to the trial judge who, like the trial judges in two of the cases considered by the Court of Appeal in *Meyer v. Bright*, will be in the best position to decide the issue after seeing and hearing the witnesses called by the parties. That this is an option open to me is clear from the passage from *Meyer v. Bright* at p. 146, which I quoted earlier. See, also, r. 37.13(2)(*b*) and *Kunz v. Samuel* (1993), 12 O.R. (3d) 732 (Gen. Div.). I appreciate that the option exists of directing that an issue be tried to determine whether the plaintiff

is able to satisfy his onus of establishing that his injuries come within the s. 266(1)(*b*) exception. However, functionally there is little, if anything, to be gained by exercising this option because it would no doubt replicate the evidence to be given at trial and if the plaintiff should succeed on the trial of the issue, absent agreement by the parties to the contrary, there would be nothing to prevent the defendant from bringing the motion again at trial under s. 266(4). In adjourning this motion to the trial judge I am mindful that one purpose of s. 266(3) is to obviate the need for a trial. However, as I have indicated, it is only in clear cases that this purpose may be achieved.

19 Subsequent to the hearing of this motion the reasons for judgment of John Wright J. in *Zywina v. Hoard*, released on March 28, 1994 [Doc. Thunder Bay 3278/92 (Ont. Gen. Div.), 5 W.D.C.P. (2d) 232], came to my attention. This was also a pre-trial motion by a defendant under s. 266(3) of the *Insurance Act*. One of the issues which Wright J. was asked to decide in relation to the plaintiff's onus was whether the plaintiff was required to establish that her injuries were within the exceptions or whether it would be sufficient to establish that the evidence in respect to her injuries raised a genuine issue for trial. In a preliminary ruling on this issue delivered on March 1, 1994, he concluded "that while the onus is on the plaintiff to bring herself within section 266, on a pre-trial motion under 266(3) it is sufficient that she establish a genuine issue for trial." In reaching this conclusion he was influenced by the effect of s. 266(4), noting that while a decision against the plaintiff would be binding on her and deprive her of her action, a decision in favour of the plaintiff was not binding on the defendant. Wright J. was of the view that if the plaintiff was required to establish more than a genuine issue for trial on a pre-trial motion the plaintiff would be required to "pull out all of the stops" and to adduce her entire case in respect to damages through viva voce evidence. He viewed this as undesirable as it created the potential of two trials in every case — one on the pre-trial motion and the other at trial.

20 Like this case, the *Zywina* case involved only the application of s. 266(1)(*b*). In his reasons of March 28, 1994 Wright J. referred to the analysis of this subsection in *Meyer v. Bright*, and noted that the Court of Appeal had emphasized that it is a question of fact whether or not a plaintiff's injuries come within the exceptions. It was for this reason that Wright J. was of the opinion that on a s. 266(3) pre-trial motion invoking s. 266(1)(*b*), a plaintiff meets his or her onus by adducing sufficient evidence to establish a genuine issue for trial with respect to each of eight pre-conditions which he listed. In concluding that the plaintiff had established a genuine issue for trial on each of the essential pre-conditions to the action and in dismissing the defendant's motion Wright J. stated:

> I am not the Trial Judge. It is not for me to assess the evidence and to determine whether the plaintiff has established her case according to the standard of proof applied after a trial.
>
> To hold plaintiffs, on a pre-trial motion, to a standard which will force them, in effect, to conduct a trial of the issues prior to the trial of the action is undesirable and is not in accordance with the fabric of our law.
>
> At this stage the evidence is necessarily incomplete. For example: the plaintiff complains that the defendant is relying, in part, upon reports produced by the plaintiff in accordance with her duty to disclose. The plaintiff submits that at the trial she would not have relied upon those reports and if the defendant had chosen to make the reports part of his case, as he does on this motion, she would have been able to cross-examine the authors of those reports to clarify or modify them. That potential clarification or modification is not before me.
>
> In my opinion a judge on a motion brought prior to trial under s. 266(3) must assess the evidence only to the extent of determining whether it is credible. In other words: Is there credible evidence upon which a Trial Judge, properly instructing him or herself, might find in favour of the plaintiff on each of the essential pre-conditions set out above. If there is, then there is a genuine issue for trial which allows the plaintiff to proceed to trial. On the other hand, if there is no such evidence on one or more of the essential pre-conditions set out above, then the action must be dismissed. It will be for the Trial Judge to take the evidence and finally ascertain the facts.

21 Thus, it can be seen that Wright J. and I encountered similar difficulties in dealing with the defendant's s. 266(3) pre-trial motion. Although our approaches to the motion were somewhat different, as were the resolutions which we reached, the functional effect of each resolution was the same. The determination of whether or not the plaintiff could

establish that his or her injuries came within the s. 266(1) exceptions was left to the trial judge. However, we each appear to agree that a pre-trial motion is not the best way to determine whether or not a plaintiff's injuries come within the exceptions found in s. 266(1).

22 Earlier I indicated that the defendants have moved both under s. 266(3) of the *Insurance Act* and R. 20 of the *Rules of Civil Procedure*, the summary judgment rule. Counsel for the defendant Gauvin stated that he required R. 20 in aid of s. 266(3) because even if the defendants' motion under s. 266(3) were to succeed that, in itself, would not put an end to the plaintiff's claim as it would only be a determination that the plaintiff's claim did not fall within the s. 266(1)(*b*) exception. Therefore, to obtain a judgment putting an end to the action the defendants were required to move under R. 20, relying on the result of the s. 266(3) motion to obtain summary judgment in their favour. This approach creates the problem of conflicting onuses as the onus on the s. 266(3) motion is on the plaintiff, while the onus on the R. 20 motion is on the defendants to establish that there is no genuine issue for trial. It also ignores r. 37.13(2)(*a*) which empowers a motions court judge "in a proper case" to "order that the motion be converted into a motion for judgment." This, in my view, would be the preferable approach on a motion where the defendant succeeds on a s. 266(3) motion and would eliminate any problem which may arise from the conflicting onuses.

23 In the result, this motion, together with its costs, is adjourned to the trial judge.

Motion adjourned to trial judge.

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