

 [Needham v. Economical Mutual Insurance Co.](#)

Alberta Judgments

Alberta Court of Queen's Bench

Judicial Centre Of Edmonton

J.A. Fagnan J.

January 18, 2019.

Action No.: 1803-07507

E-File No.: EVQ19NEEDHAMK

**[2019] A.J. No. 233**

Between Kyle Needham, Plaintiff, and Economical Mutual Insurance Company, Defendant

(61 paras.)

## **Case Summary**

---

**Insurance law — Payment of insurance proceeds — Advance payments — Application by the plaintiff Needham for an advance of \$60,000 allowed in part — Application by the defendant Economical Mutual Insurance Company to adduce new evidence relating to Needham's Facebook page dismissed — Needham filed a statement of claim alleging negligence by Potskins in relation to a motor vehicle collision — The new evidence was not served on Needham a reasonable time before the originating application was to be heard — Without an advance, Needham was likely to go without necessities and was unlikely to be able to prosecute his damages claim — He was granted an advance of \$40,000.**

**Insurance law — Actions — Practice and procedure — Evidence — Application by the plaintiff Needham for an advance of \$60,000 allowed in part — Application by the defendant Economical Mutual Insurance Company to adduce new evidence relating to Needham's Facebook page dismissed — Needham filed a statement of claim alleging negligence by Potskins in relation to a motor vehicle collision — The new evidence was not served on Needham a reasonable time before the originating application was to be heard — Without an advance, Needham was likely to go without necessities and was unlikely to be able to prosecute his damages claim — He was granted an advance of \$40,000.**

## **Statutes, Regulations and Rules Cited:**

---

Fair Practices Regulation, s. 5.6(3)

Insurance Act, s. 581

Rules of Court, Rule 3.11

## Counsel

---

J.A. Nagy, For K. Needham.

R.K. Saroya (Student-at-Law), For K. Needham.

M. Davis, For Economical Mutual Insurance Company.

---

## Decision

### J.A. FAGNAN J.

1 Now, I had said that I was going to rule on the additional affidavit evidence and I have decided not to allow it, and I'll explain in the course of my decision why that is. So I am prepared to give oral reasons right now.

2 Mr. Needham filed a statement of claim on June 7th, 2018 alleging negligence by Michael Potskins (phonetic) and failing to stop on a stop sign on June 20th, 2017, thus causing a motor vehicle collision with Mr. Needham who was travelling westbound on Highway 643. Mr. Needham submits that liability is not in issue, but it has not been formally admitted. He applies for an advance of \$60,000 under section 581 of the *Insurance Act* and section 5.6(3) of the *Fair Practices Regulation*.

3 Counsel for Mr. Needham cites *Simpson v. Cooperators General Insurance* for the proposition that trial grade evidence is not required at this stage of the proceedings on this type of application. Further, the evidentiary standard is a balance of probabilities, but Mr. Needham will probably meet the civil standard of proof at trial for the recovery he seeks. In other words, it must be demonstrated that it is probable that liability will be established on a balance of probabilities in relation to these injuries he claims.

4 Counsel says he has presented the best evidence available at this point in time. Mr. Needham deposes that he is 34 years old and has five children. Three live with him full-time and are aged 8 to (phonetic) 19 years and two aged 13 and 14 live with him part-time. Mr. Needham deposes that he has little income to support himself as a result of his injuries until trial and is unable to pay for the necessities of life. He says he has incurred and continues to incur significant debt as a result of the negligent tortfeasor insured by the respondent Economical Mutual Insurance.

**5** He attached an orthopedic report of Dr. Esmail (phonetic), a functional capacity evaluation report by Dr. Kashani (phonetic) and a report from Dr. LeFleur (phonetic), his family doctor. He states the accident caused, in particular, spinal stenosis and a bulged disc with associated pain as well as PTSD.

**6** Mr. Needham deposes that prior to the accident he was employed for 14 years as a cribber doing very heavy foundation and concrete work. He deposes that he only ever did physical work before the accident and he is no longer able to do such physically demanding work. He tried working as a scaffolder but it also resulted in increased pain. He also attests that his social life has suffered, including activities with his children and his partner.

**7** Mr. Needham outlined his and his partner's income and their expenses and debts. He is no longer receiving section B disability benefits or Manulife disability payments. He has incurred debts, has relied on money from family, has had to start with drawing from his pension and RSP, cannot make his maintenance enforcement payments, his bank account has been virtually depleted and his average monthly expenses exceed his income. He says he has a shortfall of \$3,700 per month and has incurred significant debt of \$20,250 for litigation.

**8** Mr. Needham submits that general damages alone for this type of injuries he has suffered range from 79,000 to \$185,000. He argues that although it is too early to obtain expert reports to accurately calculate past or future loss of income, there is evidence of some past and future income earning loss. As well, the functional capacity evaluation report details a significant cost of future care claim. He will likely have to change occupation.

**9** He submits that the amount of the requested advance is very conservative and there is no risk of overpayment and he agrees that a covenant to repay is standard and reasonable.

**10** The respondent applied to adduce new evidence relating to Mr. Needham from his Facebook page. This was evidence which was apparently obtained the night before this application and produced to Mr. Needham's counsel at 10 AM on the day of the application. Counsel for the respondent frankly stated that there was nothing preventing her from seeking this information between the date that Mr. Needham swore his affidavit, being November 27th, 2018, and last night. Rule 3.11 provides that affidavit evidence on an originating application must be served on the applicant a reasonable time before the originating application is to be heard. Civil practice note 2 sets out the time lines for submissions of materials. Materials filed after the deadline are not to be relied upon without leave of the judge. Given that no effort was made to obtain such information between the filing of Mr. Needham's November 27th, 2018 affidavit and the night before the application, I find that the affidavit evidence was not served on the applicant a reasonable time before the originating application was to be heard and I decline to allow counsel to rely on those additional materials.

**11** The respondent makes a further preliminary argument that there is no evidence that the defendant's in the tort action are insureds of the respondent covered by a policy under section 581 and section 5.6(3). Counsel filed a statement of defence in this matter. The affidavit of Chris Nydstrom (phonetic) sworn on January 3rd, 2019 indicates that Ms. Davis is lawyer of record for

Economic (sic) Mutual and, indeed, she appeared on -- on their behalf today. Counsel declined to reveal whether she filed the defence on behalf of Economical, stating that she filed it on behalf of the defendants, the Potskins. Counsel for Mr. Needham notes that, if she is acting for the Potskins, then he's wasting his time and could have been dealing with the fund. Counsel for the respondent out of concern to be frank with the Court advised that she is not stating that she acts for more than one insurer. It is highly unlikely that insurer would retain counsel to provide a brief on the substance of the application if the insurer is not at risk.

**12** I find the statement of defence and counsel's appearance on behalf of Economical and submissions is prima face evidence that the Potskins had a policy with Economical. In the absence of any evidence to the contrary and in light of counsel for the respondent's relatively vague position as to her involvement in the matter, I find that there is sufficient evidence that the defendants in the tort action are insureds of the respondent covered by a policy under section 581 and section 5.6(3).

**13** With respect to the substance of the application for an advance, the respondent says there is an insufficient evidentiary basis to establish that Mr. Needham is likely unable to work as a result of injuries sustained in the accident, pay for necessities, or things broadly analogous, or prosecute the tort action without an advance payment. Third, the respondent says the amount of the payment requested is too high in the circumstances.

**14** The respondent points to a diagnosis in early 2017 of a heart condition. Mr. Needham was put off scaffolding work, but cleared to return to activity in April 2017. He started work on May 29th, 2017. The motor vehicle accident occurred on June 20th, 2017. He had open heart surgery on August 11th, 2017 and was clear to return to work in November 2017 and worked until January 3rd, 2018. In March 2018, he was discharged from physiotherapy and clear to return to work without physical restrictions, but not psychologically cleared to return to work. He worked from April to August 2018 in scaffolding for two different companies, one job ending after three-and-a-half months and one ending after nine days due to lack of work.

**15** The respondent concedes that Mr. Needham's period of time off work at various points was accident related. She notes that he received section B disability period benefits during certain periods. And the respondent concedes that the period of time -- sorry, the respondent says there is no corroborating evidence that any of his unemployment is related to his accident injuries as opposed to the cyclical nature of construction work.

**16** The respondent notes, further, that Dr. Kashani is not a medical doctor and to some extent was relating what Mr. Needham had told him. Dr. Esmail said that he may continue with employment up to a medium intensity and this should be preferred to the vocational discussion in Dr. Kashani's report. The respondent says Mr. Needham has not provided evidence regarding his pre-accident earnings, his family's pre-accident standard of living or their pre-accident level of indebtedness or net worth.

**17** The respondent says that the information provided so far indicates that Mr. Needham did not have any income in 2014, limited income in 2015, the source of which is unknown, and the

cribbing work appears to have been cyclical. This is at odds with his evidence that he has worked as a cribber for the past 14 years, according to the respondent.

**18** The respondent also points to other health issues that Mr. Needham has dealt with over the years. The respondent points to a Go Fund Me campaign launched by Mr. Needham to assist his family with bills in relation to being out of work for one month following a medical procedure in 2016 and he asked in that campaign for 3,000 to help cover expenses. <sup>22</sup> The respondent argues that his month -- that Mr. Needham's monthly household income is 6,427 and that this appears sufficient to cover necessities and she is -- raises questions regarding certain expenses itemized by him in his affidavit. She also states that Mr. Needham has not provided any substantiating evidence related to his employment income post accident and he provided incomplete bank statements according to her.

**19** The respondent suggests that there are potential causation issues related to the lumbar disc bulge and the radiation of pain into the legs and in relation to his pre-existing depression. She points to a weeklong experience of back pain in March of 2017.

**20** The respondent submits general damages would only be in the 25,000 to \$45,000 range or a maximum of 30,000 if \$15,000 is backed out in light of the cap, and 7,000 to 12,500 for PTSD. The respondent says Mr. Needham may only have a minimal claim for past loss of income and it is impossible to assess his claim for loss of earning capacity on the current information. She says that Mr. Needham has had more than six months to collect evidence for this application and the information provided is insufficient to justify an advance.

**21** Section 5.6(3) of the *Fair Practices Regulation* provides that the Court may make an order on conditions it considers appropriate requiring the insurer to make a payment to a claim where the Court is satisfied that as a result of the injuries of the claimant the claimant is unable to pay for the necessities of life or the payment is otherwise appropriate. The test is conveniently summarized in *Shannon v. 1610635 Alberta Inc*, [\[2014\] A.J. No. 1309](#).

**22** The respondent did not submit that the circumstances of the accident would lead to a sharing of liability as between Mr. Needham and the defendants. The circumstances as described in his affidavit and the statement of claim support a conclusion that liability will not be an issue. Mr. Needham's counsel has put forward evidence in terms of expert reports, income and expenses noting that some of the previous income is no longer available. In my view, he has provided the very type of evidence one would expect, being reports of specialists and financial information. At a minimum, the evidence establishes that Mr. Needham will probably be able to establish causation and loss relating to the accident and that he is no longer able to do heavy labour which he had previously done in the past. He has given evidence of a debt of \$20,000, reliance on financial contributions from extended family and having had to resort to some pension monies to cover expenses.

**23** The respondent takes issue with certain evidence, inviting the Court to speculate as to alleged frailties in the evidence, to draw inferences from gaps in Mr. Needham's evidence and to accept alternative explanations for some of the income and expenses. No questioning was done

on Mr. Needham's affidavit. Mr. Needham's counsel indicated that he provided two opportunities for respondent's counsel to question Mr. Needham on his affidavit.

**24** I am mindful that at this stage the evidence is incomplete, however, I agree that trial grade evidence is not required on this application. It would be unrealistic to expect that type of evidence. I find that the defendant is probably liable to the plaintiff and without an advance Mr. Needham is likely to go without necessities or things broadly analogous, or unlikely to be able to prosecute his claim for damages. He has established that he will probably be able to establish various heads of loss on a balance of probabilities and that he will likely be able to establish entitlement to general damages, some loss of income and loss of earning capacity. He has also established that he will probably be able to establish on a balance of probabilities that he has incurred debt, relied on extended family financial contributions and that he has also relied on section B disability and Manulife disability payments which he is no longer receiving in order to cover his household expenses.

**25** I have considered the various cases referred to by counsel and the ranges of awards in roughly similar cases, including *Russell v. Turcotte*, *Siroccan v. Boucher* (phonetic), *Ali v. Padam*, [\[2017\] B.C.J. No. 2057](#); *Jiang v. Pappas*, [\[2016\] B.C.J. No. 1169](#); *G.P. v. W.B.*, *Sluth v. Kostyniuk*, [\[2004\] A.J. No. 1577](#); and *McLean v. Parmar*, [\[2015\] A.J. No. 214](#). In my view, an advance of \$40,000 in this case would result in little risk of overpayment, therefore I grant the application for an advance in the amount of \$40,000, \$20,000 to be payable forthwith and \$20,000 payable in monthly installments of \$1,500 per month. The terms will include a formal written covenant or undertaking on the part of Mr. Needham enforceable by the court to repay any ultimate overpayment with interest.

**26** Submissions on costs?

### **Submissions by Mr. Nagy (Costs)**

**27** MR. NAGY: Costs of the application for the successful party and I think costs be payable forthwith would certainly help out Mr. Needham in this application. And -- and no later than two weeks because it's really an advance on settlement funds and settlement funds are commonly provided in two weeks in a tort action.

**28** THE COURT: Sorry, are you speaking with respect to the costs, when the costs would be paid or the time line for --

**29** MR. NAGY: Oh, yeah. Sorry, I -- I kind of jumped ahead on that one.

**30** THE COURT: Okay.

**31** MR. NAGY: My apology.

**32** THE COURT: So you're saying the 20,000 would be payable within two weeks?

**33** MR. NAGY: The 20,000 be payable within two weeks, yes.

34 THE COURT: Okay. Thank you.

35 MR. NAGY: That would be the common standard.

36 THE COURT: All right.

**Submissions by Ms. Davis (Costs)**

37 MS. DAVIS: If I may, My Lady, speaking to costs I believe we would then be under column 1, up to 50,000. You've awarded 40,000 as an advance so costs of \$1,000, special chambers application. My friend agrees?

38 MR. NAGY: 40,000 is the number. I can't argue with my friend.

39 THE COURT: All right.

40 MS. DAVIS: So I think then my friend is then expecting a cheque for 21, or two cheques anyways, and then with respect to the -- the additional payments to be made, My Lady, I believe you said 1,500 --

41 THE COURT: Yes, per month.

42 MS. DAVIS: -- per month.

43 THE COURT: Yes. I'm not sure if --

44 MS. DAVIS: Is that to start in February or is that going to start in mid-February, late February, March?

45 THE COURT: Well, if the 20,000 is payable in two weeks, I don't have a calendar here. Hang on.

46 MS. DAVIS: Two weeks is probably going to get us to February.

47 THE COURT CLERK: February 1st.

**Ruling (Costs)**

48 THE COURT: Okay. So let's make the \$20,000 payable on February 1st and the 1,500 will start on March 1st. So costs in the amount of \$1,000 payable at the same time as the 20,000.

49 MR. NAGY: Understood. Thank you, My Lady.

50 THE COURT: Anything further?

**51** MS. DAVIS: I don't believe so, My Lady. Did you want to hold onto the additional copy of my affidavit and --

**52** THE COURT: I don't see it on the -- the court file so I don't know what -- do you need the copy you provided?

**53** MS. DAVIS: I don't believe I do. No.

**54** THE COURT: I will --

**55** MS. DAVIS: It can stay.

**56** THE COURT: If -- if it's --

**57** MS. DAVIS: I think it has -- it has the stamp and everything on it.

**58** THE COURT: Yes. It's -- it's stamped as filed so, if it's all right with you, I'll keep it on the court file for completeness. Thank you very much, counsel.

**59** MS. DAVIS: Thank you.

**60** MR. NAGY: Thank you.

**61** THE COURT CLERK: Order in court, please rise.