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LOWE V. GUARANTEE COMPANY OF NORTH AMERICA

COURT OF APPEAL FOR ONTARIO

ROSENBERG, MOLDAVER AND SIMMONS JJ.A.

B E T W E E N:	)	
	)	
STEPHEN ANDREW LOWE AND BERTHA PATRICIA LOWE	)	**Edward Goldentuler**
	)	**for the appellants**
	)	
	)	
Plaintiffs (Appellants)	)	
	)	
- and -	)	
	)	**Joe Fidilio**
	)	**for the respondents**
THE GUARANTEE COMPANY OF NORTH AMERICA, TERRY L. KAUFMAN, D. & G. TRUCKING, GENERAL MOTORS OF CANADA LIMITED, JOHN DOE, RICHMOND HILL REHABILITATION CENTRE, BRUCE K. MAKOS, SUSAN WAGAR, KATHLEEN CRILLY, SHARON MILLS, AND CHRISTOPHER MCKENZIE	)	**Richmond Hill Rehabilitation Centre, Bruce K. Makos**
	)	**Hugh R. Scher**
	)))))))	**for the intervener**
		The National ME/FM Action Net
	)	
Defendants (Respondents)	)	
	)	
	)	
	)	**Heard: December 1, 2004**

On appeal from the judgment of Justice G.D. Lane of the Superior Court of Justice dated September 2, 2003.

SIMMONS J.A.:

I. Overview

[1] The appellants appeal from an order of Lane J. dismissing their action against Richmond Hill Rehabilitation Centre (“Richmond Hill”) and two of its employees (the moving party respondents) on the grounds that, as against those defendants, their statement of claim fails to disclose a reasonable cause of action.

[2] Richmond Hill is a Designated Assessment Centre (DAC) under the *Statutory Accident Benefits Schedule-- Accidents on or after November 1, 1996*, O. Reg. 403/96 (“SABS”). In November 2001, two of its employees conducted a SABS assessment of the appellants and prepared a report concluding that certain treatments for which the appellants requested compensation were neither reasonable nor necessary.

[3] This appeal raises two main issues. First, is it plain and obvious that no cause of action lies against a DAC and its employees for conducting a prescribed assessment negligently and/or in bad faith? Second, is it plain and obvious that Richmond Hill and its employees are protected from suit by the doctrine of witness immunity?

[4] Insofar as the motion judge’s order purports to strike out the appellants’ claims against the moving party respondents that are based on breach of a duty of neutrality, I would answer no to both questions and I would set aside that portion of the motion judge’s order.

II. Background

[5] On February 27, 2001, the appellants were injured in an automobile accident in the United States. As a result of their injuries, the appellants applied to their insurer for statutory accident benefits. To determine whether certain rehabilitative expenses (a TENS machine, an orthopaedic mattress and chairs, chiropractic treatment and massage therapy) recommended by the appellants’ treating health care professionals were reasonable and necessary, the appellants’ insurer sent them to Richmond Hill for a DAC medical and rehabilitation assessment.

[6] As part of the assessment, several Richmond Hill employees examined the appellants, including Bruce K. Makos, a chiropractor, and Sharon Mills, an occupational therapist[1]. In their report, Makos and Mills determined that the costs of the recommended rehabilitative devices were neither reasonable nor necessary.

[7] After the DAC report was issued, the appellants’ commenced this action claiming that Makos and Mills prepared their DAC report negligently and in bad faith, that Richmond Hill operated as a DAC negligently and in bad faith, and that Richmond Hill is vicariously liable for the actions of its employees. In addition, the appellants claimed damages arising from the accident against their insurer, and against the owner, driver, and manufacturer of the truck that hit them.

[8] With respect to their claims against the moving party respondents, the appellants asserted that "[t]he medical rehabilitation DAC is designed to conduct assessments to determine entitlement to past, present and future medical benefits; as such … Richmond Hill, and their assessors[2] … owed the highest duty of care to [the appellants]". Further, the appellants pleaded various particulars of the moving party respondents' negligence, including claims framed as simple negligence (e.g. Makos and Mills rendered an opinion without conducting all of the appropriate tests) and claims alleging bad faith (e.g. Makos and Mills were biased and lacked neutrality in their examination, assessment and opinions respecting the appellants' injuries and entitlement to treatment).

[9] In addition, based on allegations that all three moving party respondents acted in a high-handed manner and in bad faith, the appellants claimed punitive, exemplary and aggravated damages.

[10] The moving party respondents defended the action and, after delivering their statement of defence, brought a motion for summary judgment, claiming that the appellants' statement of claim did not raise a genuine issue for trial. However, on the hearing date set for the motion, the parties agreed that the motion would proceed under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, meaning that the issue for determination was whether the statement of claim disclosed a reasonable cause of action assuming that the allegations pleaded were true.

III. The DAC Assessment Regime

[11] DACs were established under of s. 52 of the SABS[3]. The Ontario Insurance Commission Guidelines for Designated Assessments for Accidents on or after November 1, 1996, as amended, June 1998 ("OIC Guidelines") describe the purpose of DACs as follows:

Since January 1994, Designated Assessment Centres (DACs) have been in place across Ontario for insurance companies and claimants to use when they need a *neutral third-party* opinion about a claimant's injuries and the accident benefits that apply to those injuries. [emphasis added]

[12] The SABS specify four types of assessment that DACs may perform. In this case, the appellants were each referred for a medical and rehabilitation assessment. Section 38 of the SABS describes the circumstances in which such an assessment is required. In particular, ss. 38(12) of the SABS provides that in the event the insurer refuses to pay for any of the goods or services contemplated by a treatment plan prepared by the insured's health care professional, the insurer shall require the insured to be assessed by a DAC.

[13] Under the SABS, neither party selects the DAC that will conduct the assessment. Rather, s. 53(1) of the SABS requires that the assessment be

conducted at the DAC nearest to the insured person's residence. Further, like the health care professional who prepares the treatment plan on behalf of the insured[4], under s. 53(2) of the SABS, the DAC must give notice of any conflict of interest in relation to the assessment.

[14] Section 43(4) of the SABS requires that the DAC assessor prepare a report and provide a copy of that report to each of the insurer, the insured person and the insured person's health practitioner. Section 43(6) of the SABS requires that the report include a statement of whether, in the assessor's opinion, an expense in relation to a medical or rehabilitation benefit "is reasonable and necessary for the insured person's treatment or rehabilitation".

[15] Importantly, s. 38(14) of the SABS requires an insurer to pay for any expense which a DAC assessor opines is reasonable and necessary, but provides that the insurer is not required to pay for the expense if that opinion is not given. Further, the preamble to s. 38(14) makes the DAC assessment of the payment obligation "[s]ubject to the determination of a dispute relating to the expense in accordance with sections 279 to 283 of the *Insurance Act*." Those sections provide for mediation, arbitration and litigation. In effect therefore, s. 38(14) makes the DAC assessment final and binding unless one of the parties chooses to dispute it.

[16] In addition to the SABS provisions, the OIC Guidelines indicate that "to ensure that the health professionals are well-qualified" DAC health care professionals should have a minimum of three years of related experience in their particular field and that DACs may not use assessors who are not on the DAC team roster filed with the OIC. The OIC Guidelines also include the following provisions, highlighting the requirement for neutrality in the DAC assessment process and the significance of the assessments to insured persons:

CONFLICT OF INTEREST

To ensure that the assessment process remains independent and free of bias, the SABS provides conflict of interest rules for DACs. Assessment centres are responsible for establishing procedures to ensure that the conflicts of interest are identified early in the process. When a conflict of interest exists, the DACs must ensure that they are declared and resolved satisfactorily. DACS must adhere to the conflict of interest rules in section 53 of the SABS.

THE MEDICAL AND REHABILITATION PROCESS

Medical and rehabilitation assessments involve a range of assessments and diagnostic procedures to:

• Determine whether, as a result of the accident, the proposed treatment plan is reasonable and necessary, and

• Recommend future provision of medical treatment, or rehabilitation services, or both, necessary to help the claimant recover from an impairment following an automobile accident.

[17] It is important to note, that in addition to DAC assessments, the SABS also makes provision for Insurer Examinations. In particular, s. 42 of the SABS permits an insurer to give an insured person notice requiring the insured to submit to an examination by a health care professional or by "a person with expertise in vocational rehabilitation". The insurer may require examinations as often as reasonably necessary, "[f]or the purpose of determining whether the insured is entitled to a benefit."

[18] In contrast to the DAC assessment regime, under s. 42 of the SABS the insurer is entitled to specify who will conduct the insurer examination. Moreover, while the insurer is required to provide the insured with a copy of any insurer examination report, the examiner is required to submit her report only to the insurer.

[19] Finally, it is also noteworthy that on December 9, 2002, the *Insurance Act*, R.S.O. 1990 c. I. 9, was amended to include an immunity provision for DAC assessments conducted in good faith. Although this section was not in effect at the time the services in issue were performed, it is, nonetheless, informative. Section 268.4 of the *Insurance Act* provides as follows:

268.4 No action or other proceeding for damages may be commenced against any person for an act done or omitted in good faith in conducting an assessment by a designated assessment centre under the *Statutory Accident Benefits Schedule*.

IV. The Motion Judge's Findings

[20] The motion judge struck the appellants' claims against the moving party respondents, holding that it was "plain and obvious"[5] that they disclosed no reasonable cause of action. In particular, he rejected the premise that DAC personnel are to be equated to judges, arbitrators or quasi-judicial functionaries. He said, "[t]hey are health practitioners performing a statutorily mandated duty: to examine the insured and report to both parties on their findings."

[21] The motion judge noted that DAC reports are routinely filed with mediators, arbitrators and courts at later stages of the process. He noted that the dispute "already exists" at the time the assessment report is made and found that "The entire context is one of attempting consensual dispute resolution as a precondition to litigation". He concluded that DAC assessors are "independent expert witnesses in a statutory procedure to resolve a dispute over the SABS."

[22] Although the motion judge acknowledged that the DAC reports may be binding, he found that they are “only binding in an interim sense.” He said, “The insurer will adjust its payments to accord with the recommendations of the DAC, but the parties can still litigate the case after completion of the statutory procedure.”

[23] The motion judge reviewed a number of authorities relied on by the parties. He distinguished the cases relied on by the appellants, noting that they were cases in which a physician patient relationship was found to exist: *Kelly v. Lundgard* 2001 ABCA 185 (CanLII), (2001), 202 D.L.R. (4th) 385 (Alta. C.A.); and *Norberg v. Wynrib*, 1992 CanLII 65 (S.C.C.), [1992] 2 S.C.R. 226.

[24] Relying on the moving party respondents’ authorities[6], the motion judge noted that, “Uniformly [plaintiffs] are turned back at the gates when the only relationship with the defendant arises out of the litigation.” He found that in this case, “the only relationship between [the parties] is the assessment of, and report on, each of [the appellants] by one or both of [the moving party respondents] … in the context of a litigious situation where the dispute resolution process required [the moving party respondents] to intervene as they did”.

[25] The motion judge noted that one of the moving party respondents’ authorities[7] involved an allegation that a doctor conducting an independent medical assessment had deliberately misrepresented the plaintiff’s injuries and that there was still no cause of action. He concluded, “the cases show [the moving party respondents] cannot be sued for carrying out their statutory duty because their duty of care is not owed to the [appellants].”

[26] In addition, the motion judge held that the moving party respondents could not be sued for malpractice, because their contact with the plaintiffs was not sufficient to give rise to a medical duty of care; they could not be sued for breach of fiduciary duty because a duty to act in the appellants’ best interests would be inconsistent with their position as neutral third party assessors.

[27] Finally, relying on *Fabian v. Margulies*, *supra*, the motion judge determined that because the moving party respondents are expert witnesses, their reports and any subsequent testimony are protected by the doctrine of witness immunity and “cannot form the basis for a claim of any kind.”

V. Analysis

i) Is it plain and obvious that no cause of action lies against a DAC and its employees for conducting a prescribed assessment negligently and in bad faith?

a) Overview

[28] The appellants contend that DACs and their assessors owe two distinct but related duties of care to the persons they assess arising from the legislative framework under which they are created. First, they have a duty to carry out the assessment competently, in keeping with the professional standards of their discipline. Second, they have a duty to be neutral and free of bias, and to conduct their examinations and prepare their reports in good faith.

[29] Although the motion judge did not refer explicitly to the *Anns*[8]*/Kamloops*[9] test for determining whether a duty of care exists, his reasons indicate that he was satisfied, based on his review of the authorities, that it was plain and obvious that Richmond Hill and its employees were not in a sufficiently proximate relationship with the appellants to give rise to a duty of care. Further, while he treated the witness immunity rule as an independent basis for striking the appellants' claim, the motion judge's reliance on that rule might also be viewed as a policy reason for denying liability within the *Anns/Kamloops* analysis.

[30] For reasons that I will explain, I conclude that DACs have a materially different mandate from the categories of individuals considered by the motion judge. Moreover, after applying the *Anns/Kamloops* test to the facts as pleaded, I respectfully disagree with the motion judge's conclusion that it is plain and obvious that the appellants' statement of claim fails to disclose a reasonable cause of action.

b) The *Anns/Kamloops* test

[31] The *Anns/Kamloops* test for determining whether a duty of care exists and can form the basis of a claim in negligence requires consideration of the following two issues:

i) is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of one, carelessness on its part might cause damage to the other?

ii) if so, are there any considerations which ought to negative or limit (a) the scope of the duty, (b) the class of persons to whom the duty is owed, or (c) the damages caused by a breach of the duty?[10]

[32] In *Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 S.C.R. 537, the Supreme Court of Canada confirmed that the two-stage *Anns/Kamloops* test remains applicable in Canada and clarified the role of policy considerations at both stages of the test. Concerning the latter issue the court said the following at para. 30:

In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first

stage of the *Anns* test, two questions arise: 1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and 2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Counsel suggests in *Yuen Kun Yeu* that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

[33] In relation to the first branch of the test, the court noted that reasonable foreseeability must be supplemented by “proximity”, a term used “to characterize the type of relationship in which a duty may arise”. Relationships that are sufficiently proximate to give rise to a duty of care will generally be identified through the use of recognized categories. When a case falls within one of the recognized categories or an analogous category and reasonable foreseeability is established, a *prima facie*duty of care may be posited. However, the categories of negligence are not closed and new ones may be identified.

[34] The Supreme Court of Canada identified seven categories of cases in which a duty of care has been recognized. In this case, the appellants rely on negligent misstatement and misfeasance in public office as the recognized categories bearing the most similarity to the circumstances at hand.

[35] In *Cooper*, the Supreme Court of Canada discussed at paras. 33 and 34 the meaning of proximity and various factors that can be used in determining if a particular relationship meets the threshold of “sufficient proximity”:

As this Court stated in *Hercules Management Ltd. v. Ernst & Young*, 1997 CanLII 345 (S.C.C.), [1997] 2 S.C.R. 165, at para. 24, per La Forest J.:

The label proximity, as it was used by Lord Wilberforce in *Anns*, *supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff’s legitimate interests in conducting his or her affairs.

Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the

plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[36] As for the second branch of the test, the court noted that “residual policy considerations” were not concerned with the relationship between the parties but “with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally.” In this regard, the court posited several questions at para 37: “Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?” See also the companion case of*Edwards v. Law Society of Upper Canada*, 2001 SCC 80 (CanLII), [2001] 3 S.C.R. 562.

[37] Finally, I note that in the recent decision of *Haskett v. Equifax Canada Inc*. 2003 CanLII 32896 (ON C.A.), (2003), 63 O.R. (3rd) 577 (C.A.), leave to appeal to S.C.C. refused, 2003 S.C.C.A. No. 208, Feldman J.A. commented on the proper approach for applying the *Anns/Kamloops* test in the context of a Rule 21 motion. In particular, she noted that on a Rule 21 motion the issue is not whether a duty of care will be recognized; rather, the court applies the two-stage analysis to determine whether it is plain and obvious that no duty of care can be recognized. Feldman J.A. also considered the proper approach to dealing with policy concerns that might exclude liability:

If it is not plain and obvious then the action can proceed and the issue will be determined at trial. See *Hunt v. Carey Canada Inc.* [citation omitted]. In that context, the court may well recognize potential policy concerns at the second stage but should be circumspect in using those policy concerns to determine, without a Statement of Defence and without any evidence, that it is plain and obvious that there is no cause of action: *Hughes v. Sunbeam Corp.* (Canada) 2002 CanLII 45051 (ON C.A.), (2002), 61 O.R. (3rd) 433, 219 D.L.R. (4th) 467 (C.A.) at para. 35; *Anger v. Berkshire*, [2001] O.J. No. 379 [Q.L.], 141 O.A.C 301 (C.A.) at para. 8.

c) is it plain and obvious that there is no *prima facie* duty of care

[38] I accept the appellants’ submission that it is reasonably foreseeable that a biased or careless DAC assessment could cause harm to the person being assessed. Further, although the relationship between DAC assessors and the persons they assess does not fall squarely within one of the previously recognized categories of proximate relationships, I agree that it is at least arguable that the SABS legislative framework creates a relationship of sufficient proximity such that the relationship should be viewed as being similar to claims which have been allowed to proceed based on being analogous to negligent misrepresentation.

[39] Under the SABS, a DAC assessment serves a dual function. First, depending on whether either party decides to dispute the DAC opinion, the assessment determines the insured's entitlement to benefits, either permanently or on an interim basis. Second, if (and only if) one of the parties disputes the determination of entitlement, it can serve as expert evidence in the continuing dispute resolution process. In my view, it is in relation to the first function that reasonable foreseeability of harm and proximity may arise.

[40] Dealing first with reasonable foreseeability of harm, since the DAC assessment operates to actually determine the insured's entitlement to benefits on at least a preliminary basis, the risk of harm to the insured arises from the prospect that, in the event of a biased or careless assessment, benefits will be wrongfully withheld pending further action by the insured. Depending on the circumstances, the insured may incur economic losses by spending her own money or borrowing funds to pay for necessary treatments; alternatively, the insured's condition may deteriorate if treatment is delayed.

[41] Turning to proximity, in *Haskett,* this court considered whether a claim could proceed by way of analogy to negligent misrepresentation and set out the required elements for a successful negligent misrepresentation claim, citing *Hedley Byrne & Co. v. Heller & Partners Ltd*., [1963] 2 All E.R. 575 (H.L.) and *Queen v. Cognos Inc*., 1993 CanLII 146 (S.C.C.), [1993] 1 S.C.R. 87:

i) there must be a duty of care based on a "special relationship" between the representor and the representee;

ii) the representation must be untrue, inaccurate, or misleading;

iii) the representor must have acted negligently in making said representation;

iv) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

v) the reliance must have been detrimental to the representee in the sense that damages resulted.

[42] In *Haskett*, the appellant claimed that he was denied credit from credit grantors because the respondent credit reporting agencies "improperly and illegally included information in [his] credit report which [the agencies were] not entitled to report and which [was] inaccurate". The *Consumer Reporting Act*, R.S.O. 1990 c. C.33 prohibits including information concerning statute barred debts in consumer credit reports. The appellant alleged that when providing credit information, the respondents wrongfully included information concerning his pre-bankruptcy debts.

[43] Although the main issue on appeal in *Haskett* was whether policy considerations precluded a claim in negligence, this court nevertheless considered whether a *prima facie* duty of care arose. The court held that the case arguably did not fit within negligent misrepresentation but appeared analogous to it. The elements of negligent misrepresentation were present save for reliance by the affected consumer.

[44] At paragraph 33 of *Haskett*, this court noted that in his book *Economic Negligence: The Recovery of Pure Economic Loss*, 4th ed. (Scarborough: Carswell, 2000) at p. 131 Dean Feldthusen "makes the point that reliance on the representation by the plaintiff is not a necessary factor per se, but is required in the analysis to demonstrate the causal sequence leading to liability, and the effective assumption of responsibility by the representor."

[45] In *Haskett*, this court analogized the presenting circumstances to *Spring v. Guardian Assurance*, [1994] 3 All E.R. 129, involving an employer's liability to employees for the negligent preparation of letters of reference, and found that the credit reporting agency, as representor, had effectively assumed responsibility for the accuracy of the information because of the potential harm that could be caused to consumers by inaccurate information.

[46] In the alternative, this court held there was a basis for finding a duty of care as a new category because the relationship between the credit reporting agency and the consumer was one of proximity both in the relational and causal sense. This court relied on *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, 1992 CanLII 105 (S.C.C.), [1992] 1 S.C.R. 1021, in which McLachlin J. identified two components of proximity: sufficient proximity of relationship and proximity of causation of harm. She held at para. 258:

In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. And they will insist on sufficient special factors to avoid the imposition of indeterminate and unreasonable liability.

[47] In this case, the special relationship relied on by the appellants is the DAC's role in rendering an opinion, which, as a matter of statute, constitutes the preliminary determination of the appellants' entitlement to benefits. Although insured persons do not directly rely on the DAC "representation" and this case does not therefore fit precisely into the negligent misrepresentation category, it is significant that the DAC opinion determines an insured's entitlement to benefits at the assessment stage. As already noted, this determination will be final unless one of the parties chooses to dispute it. Moreover, it is reasonably foreseeable that, in the event of a careless or biased assessment, an insured will suffer an independent loss. Because of the consequences to both insurers and insureds

arising from their opinions, it is reasonable to require that DACs assume responsibility for the accuracy of their reports.

[48] In my view, their legislatively created decision-making function distinguishes DACs from expert witnesses, court appointed assessors, and the types of investigators considered by the motion judge and creates a close and direct relationship to the persons they assess. Viewed in this light, I do not agree that it is plain and obvious that the potential role of DAC assessors as expert witnesses should be viewed as the primary defining element of that relationship.

[49] Further, the legislative directives relating to conflict of interest and the administrative guidelines relating to professional experience underline the importance the legislature ascribes to neutrality and competence in conducting DAC assessments. These qualities may therefore serve to inform, to at least some extent, the nature of a common law duty of care.

[50] I conclude that, as in *Haskett*, there is some basis for holding the relationship in this case analogous to relationships that form the basis for negligent misrepresentation claims.

[51] In addition, although DAC assessments serve a larger public purpose *i.e*., facilitating the timely resolution of benefits disputes, because they play a direct and determinative statutorily mandated role in the question of whether and when an individual insured receives benefits, and because it is reasonably foreseeable that a careless or biased assessment may give rise to an independent loss, I conclude that it is at least arguable that the relationship between DACs and insured persons is one of both relational and causal proximity. Accordingly, even if not an analogous category, this relationship may constitute a new category in which a duty of care should be recognized.

[52] However, although I consider that the legislatively created decision making role performed by DACs creates a sufficiently proximate relationship to posit *prima facie* duties of both competence and neutrality, because the decision making role is carried out in the context of a dispute resolution process, I conclude, for two reasons, that policy considerations militate against recognizing a duty of competence.

[53] I rely first on the traditional immunity afforded to dispute resolution decision-makers. While I agree with the motion judge's conclusion that DAC assessors are experts, not to be equated with judges, arbitrators or quasi-judicial decision-makers who decide issues based on discretionary factors, after hearing submissions, and in accordance with the principles of natural justice, a common and significant feature of their respective roles is the duty of neutrality. In my view, although often focused on the discretionary nature of a decision, the authorities recognize that neutrality on the part of the decision-maker in the dispute resolution context is best enhanced by affording immunity for simple negligence

to the decision-maker. For example, see *Edwards v. Law Society of Upper Canada* reflex, (1998), 37 O.R. (3d) 279 at 285 (Gen. Div.), aff'd reflex, (2000), 48 O.R. (3d) 329 (C.A.), aff'd 2001 SCC 80 (CanLII), [2001] 3 S.C.R. 562.

[54] Second, the dispute resolution context in which the DAC opinion is rendered will provide relief for most, if not all, of any damages that an insured person is likely to suffer as the result of a careless assessment. While it is true that a careless assessment may create economic losses and/or delay an insured's recovery, the carelessness can be exposed during the continuing dispute resolution process; moreover, the losses will be substantially, if not wholly, recoverable against the insurer. In this context, permitting an independent cause of action against DAC assessors would complicate the dispute resolution process unnecessarily.

[55] However, the same considerations do not necessarily apply to a cause of action founded on a breach of a duty of neutrality. Non-judicial dispute resolution decision-makers are not typically afforded immunity for bad faith. Moreover, this type of claim could potentially give rise to aggravated or punitive damages that would not be available in a claim for simple negligence. Finally, because liability is posited only in relation to the insured person who was the subject of a DAC assessment, other residual policy concerns such as the spectre of unlimited liability do not arise.

[56] Based on the foregoing reasons, I conclude that to the extent that the appellants' claims against the respondents are grounded on allegations of breach of a duty to be neutral and free of bias, the motion judge erred in concluding that it is plain and obvious that no cause of action exists.

ii) Is it plain and obvious that Richmond Hill and its employees are protected from suit by the doctrine of witness immunity?

[57] Halsbury's Laws of England, Fourth Edition Reissue, 1997 Vol 28 at para . 97, describes the doctrine of witness immunity as follows:

Absolute privilege. No action lies, whether against judges, counsel, juries, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognized by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not. The privilege extends to documents properly used and regularly prepared for use in the proceedings. Advocates, judges and juries are covered by this privilege. However, a statement will not be protected if it is not uttered for the purpose of judicial proceedings by someone who has a duty to make statements in the course of the proceedings.

[58] In *Samuel Manu-Tech. Inc. v. Redipac Recycling Corp.*, [1999] O.J. 3242 (C.A.), Feldman J.A. confirmed at para. 20 that the doctrine of witness immunity "extends to any action, however framed, and is not limited to actions for defamation." Other authorities have held that the privilege extends not just to the testimony of witnesses in court, but also to "the acts of the witness in collecting or considering material on which he may be later called to give evidence." See *Carnahan v. Coates* 1990 CanLII 2299 (BC S.C.), (1990), 71 D.L.R. (4th) 464 (B.C.S.C.) at 474.

[59] Notwithstanding the broad scope of the doctrine of witness immunity, I am not persuaded that it is plain and obvious that it applies in this case. As already noted, the foundation of the appellants' claim is not the potential testimony of the respondents as witnesses nor their actions in collecting or considering material on which they may be called upon to testify. Rather, the appellants rely on the independent wrong occasioned by the respondents' conduct as decision-makers *i.e.* the delay in receiving the benefits to which they are otherwise entitled.

[60] In my view, to the extent that the respondents have a duty of care to the appellants arising from their statutory role as decision-makers, that may be viewed as constituting a free-standing basis for liability, separate and apart from their role as witnesses. In the circumstances, pending determination of the scope of their duty, it is not plain and obvious that they should be relieved of liability by virtue only of the fact that they may be called upon to testify in court.

VI. Disposition

[61] Based on the foregoing reasons, I would allow the appeal in part, set aside those portions of the motion judge's order striking out the appellants' claims for breach of a duty of neutrality and direct that the appellants deliver an amended statement of claim in conformity with these reasons within 21 days following their release. I would award costs of the appeal to the appellants on a partial indemnity basis fixed at $8,000 inclusive of disbursements and applicable G.S.T.

Released:

"MR" "Janet Simmons J.A"

"JUL 15 2005" "I agree M. Rosenberg J.A."

"I agree M. J. Moldaver J.A."

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[1] Makos and Mills were both moving parties on the motion in the Superior Court.

[2] Both appellants sued other Richmond Hill employees in addition to Makos and Mills. Stephen Lowe advanced a claim against Richmond Hill and Makos only; Patricia Lowe sued all three respondents.

[3] In December 2004, draft regulations were published that would eliminate the DAC system of assessment.

[4] See s. 38(3)(a) of the SABS.

[5] The motion judge relied on the test set out in *Hunt v. Carey Canada Inc*. 1990 CanLII 90 (S.C.C.), (1990), 74 D.L.R. (4th) 321 (S.C.C.).

[6] *Elliott v. Insurance Crime Prevention Bureau* (2002), 42 C.C.L.I. (3d) 59 (N.S.S.C.) in which the court held that the fire marshall's statutory duty to investigate and report on the cause of a fire was owed to the public as a whole and not a particular individual and that investigators retained by the insurance company owed a duty of care to the insurance company only; *Fabian v. Margulies* reflex, (1985), 53 O.R. (2nd) 380 (H.C.J.); aff'd 53 O.R. (2nd) 380 at 384 (C.A.); leave to appeal to S.C.C. refused, Nov. 6, 1986, S.C.C. in which it was held that the plaintiff could not sue a doctor who conducted a defence medical for malpractice and that the doctor's examination and report were absolutely privileged based on the doctrine of witness immunity;*Johnson v. State Farm Mutual Automobile Insurance Co.*, [1998] O.J. No. 3139, (Gen. Div.) in which, after referring to various authorities holding that a doctor performing a defence medical had no duty to the plaintiff other than to refrain from causing "damage" the court said "Although it is not clear exactly what the meaning of the word "damage" is in this context … it cannot mean damage alleged to have been suffered as a result of a breach of a non-existing duty; yet that is the only basis on which the plaintiff has advanced his claim"; and *X (Minors) v. Bedfordshire County Council*, [1995] 3 All E.R. 353 in which the court held that health care professionals retained to advise a local authority had no duty to the parents of the children who were examined.

[7] *Johnson*, *supra*.

[8] *Anns v. Merton London Borough Council*, [1978] A.C. 728.

[9] *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.

[10] *Kamloops*, *ibid*, at 6.