Date: 20000114
Docket: CA 155965

NOVA SCOTIA COURT OF APPEAL

[Cite as: Day v. Rice, 2000 NSCA 12]

Chipman, Roscoe and Pugsley, JJ.A.

BETWEEN:		)	
		)	
WANDA ELAINE DAY		)	Harvey M. McPhee
		)	and
	Appellant	)	Robin C.M. Gogan
		)	for the Appellant
- and -		)	
		)	
J. W. “BUD” RICE		)	S. Raymond Morse
		)	and Alain J. Bégin
	Respondent	)	for the Respondents
		)	
		)	
		)	Appeal Heard:
		)	January 14, 2000
		)	
		)	
		)	Judgment Delivered:
		)	January 14, 2000

THE COURT: The appeal and cross-appeal are dismissed with costs as per oral reasons for judgment of Roscoe, J.A.; Chipman and Pugsley, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

ROSCOE, J.A.:

[1] The appellant was injured when the car she was driving struck the respondent's stalled truck on June 24, 1992 in Sydney Mines, Nova Scotia. After a 10 day trial, the trial judge, Justice Frank C. Edwards, in a lengthy written decision, found that the appellant was 70% responsible for the collision because she was not maintaining a proper lookout while driving. (See: [1999] N.S.J. No. 254 (Q.L.)). He found the respondent 30% at fault on the basis that he created a serious traffic hazzard by attempting a left turn into his driveway when the truck was experiencing mechanical difficulty. The trial judge found that the appellant suffered a mild lumbar sprain as a result of the accident and assessed her general non-pecuniary damages at $15,000. He dismissed her claim for past and future loss of income.

[2] Although the appellant has experienced numerous physical and mental impairments over the last several years, the trial judge, after considering the general principles established in **Athey v. Leonati** (1996), 140 D.L.R. (4th) 235 (S.C.C.), was satisfied that "the motor vehicle accident of June 24, 1992 did not materially contribute to any of the continuing difficulties or problems" she experienced. The trial judge concluded on the basis of the expert medical evidence presented that:

. . .

Clearly the Defendant is not liable for any health problems or difficulties not caused

> by his negligence. The Plaintiff's emotional or mental health problems pre-dated the motor vehicle accident. These problems continued after the accident and have in and of themselves led to and perpetuated the Plaintiff's claim of chronic pain syndrome and depression and associated cognitive deficits. I specifically find that the Plaintiff has failed to prove on a balance of probabilities that any physical pain she may now suffer is the result of the motor vehicle accident.
>
> . . .
>
> . . . it is clear that a multitude of intervening events have occurred which would have had a negative impact upon the Plaintiff even if the motor vehicle accident had not occurred, impacting adversely upon her health, avocational and vocational activities just as such events had impacted upon the Plaintiff prior to the motor vehicle accident.
>
> . . .
>
> This case is an example of a classic crumbling skull scenario. The evidence establishes that the Plaintiff's pre-accident problems would have detrimentally affected the Plaintiff in future regardless of the Defendant's negligence.
>
> In short, I am satisfied that the motor vehicle accident is not responsible for Wanda Day's continuing problems or difficulties, her alleged chronic pain syndrome, her depression, or any associate cognitive deficit. The role of the motor vehicle accident was quite trivial when all of the relevant evidence is properly considered.

[3] The appellant submits that the trial judge made numerous errors of law and fact, specifically:

> Has the Learned Trial Judge ignored relevant evidence?
>
> Having regard to his findings of fact could the accident have occurred as the Learned Trial Judge found?
>
> Did the Learned Trial Judge err in finding that Ms. Day attempted to drive east on Pond Road while at the same time attempting to fix or adjust her floor mat and if so, that this was the primary reason that the accident occurred?
>
> Did the Learned Trial Judge err in applying a standard of driving perfection in finding Wanda Day should have seen the Rice truck in time to avoid the collision if she had been keeping a proper lookout?
>
> Did the Learned Trial Judge err in concluding that the weight of the evidence established that had Wanda Day been maintaining an appropriate lookout, Ms. Day would have seen the Defendant truck?
>
> Having regard to the foregoing and having regard to the particulars of negligence on the part of Ms. Day which were found by the Learned Trial Judge and the Learned Trial Judge's characterization thereof, did the Learned Trial Judge err in finding any liability on Ms. Day or,

> alternatively, in his apportionment of liability as between Ms. Day and Mr. Rice?
>
> Did the Learned Trial Judge err in law in finding that the Appellant did not establish on the balance of probabilities that the injuries suffered by the Appellant in the motor vehicle accident caused or materially contributed to the Appellant's chronic pain, cognitive difficulties and ongoing psychological problems and in so finding, was his decision contrary to the law and not in conformity with the weight and preponderance of evidence?
>
> Did the Learned Trial Judge err in law with respect to his decision on the amount of damages awarded to the Appellant and in finding that the Appellant should be awarded damages in the amount of $15,000.00, is his decision contrary to the law and not in conformity with the weight and preponderance of evidence?
>
> Did the Learned Trial Judge err in law with respect to his decision in refusing to award damages for quantum merit to the Appellant, on behalf of the Appellant's mother and husband, when there was sufficient evidence before the Learned Trial Judge on which to base such an award?
>
> Did the Learned Trial Judge err in law with respect to his finding that the Appellant failed to mitigate claim by not following Dr. Watt's recommendation for an exercise program and by failing to provide medical certificates or seek an extension of her leave of absence from her employer?

[4] The respondent has cross-appealed claiming that the apportionment of 30% liability to the respondent was contrary to the evidence and inconsistent with other findings.

[5] The following comments of Justice Freeman made in **Marinelli et al. v. Keigan et al.** (1999), 173 N.S.R. (2d) 56 after he listed the grounds of appeal and cross-appeal, are applicable to this case:

> These issues were addressed at length by counsel in thorough factums that would have been equally appropriate had this court been trying the matter de novo. They were obviously live issues before the trial judge, and the subject of considerable evidence. In some instances they were the subject of specific findings of fact, in others they were included inferentially in broader conclusions. It is not the role of this court to retry the case, but rather to review the evidence to determine whether it supports the conclusions of the trial judge.
>
> This court has consistently followed the principle that it will not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error; that is, the court will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it. See **Toneguzzo-Norvell et al. v. Savein and Burnaby Hospital**, [1994] 1 S.C.R. 114; 162 N.R.

> 161; 38 B.C.A.C. 193; 62 W.A.C. 193, at p. 121; **D.P. v. C.S.**, [1993] 4 S.C.R. 141; 159 N.R. 241; 58 Q.A.C. 1, at pp. 188-189; **Goodman Estate v. Geffen**, [1991] 2 S.C.R. 353; 127 N.R. 241; 125 A.R. 81; 14 W.A.C. 81; and **Stein Estate v. Ship Kathy K**, [1976] 2 S.C.R. 802; 6 N.R. 359, at pp. 806-808. The principle has been recently restated in **Delgamuukw et al. v. British Columbia et al.**, [1997] 3 S.C.R. 1010; 220 N.R. 161; 99 B.C.A.C. 161; 162 W.A.C. 161. Similar deference is to be accorded the trial judge's assessment of the credibility of expert witnesses; see **N.V. Bocimar S.A. v. Century Insurance Co. of Canada**, [1987] 1 S.C.R. 1247; 76 N.R. 212; **Watt v. Thomas**, [1947] 1 All E.R. 582.

[6] After reviewing the extensive record and hearing the able arguments advanced by counsel, it is our unanimous opinion that there was sufficient evidence before the trial judge to support all of the findings of fact and credibility he made, and to support the conclusions he reached. We have not been persuaded that he made any error in law in the determination of liability, the division of fault, the findings related to causation or in the assessment of damages.

[7] The appeal and the cross-appeal are therefore dismissed. Considering the divided success and the relative amounts involved in the appeal and the cross-appeal, the appellant shall pay the respondent costs in the amount of $2,000.00, plus disbursements.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.