

NOVA SCOTIA COURT OF APPEAL
Citation: *Szendroi v. Vogler*, 2011 NSCA 98

Date: 20111025
Docket: CA 343734
Registry: Halifax

Between:

Christopher Szendroi and Carole Sheehan

Appellants

v.

Richard Vogler

Respondent

Judges:

MacDonald, C.J.N.S.; Farrar and Bryson, J.J.A.

Appeal Heard:

October 17, 2011, in Halifax, Nova Scotia

Held:

Appeal dismissed per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Bryson, J.A. concurring.

Counsel:

Jean McKenna, for the appellants
Jason Gavras, for the respondent

Reasons for judgment:

[1] The appeal in this matter was heard on October 17, 2011. At the conclusion of oral argument by the appellant the panel dismissed the appeal with written reasons to follow. These are those written reasons.

[2] This is an appeal by the defendants from two aspects of the trial decision of Moir J., rendered after a five-day trial in March 2010 (reported as 2010 NSSC 390). The appeal challenges his assessment of general non-pecuniary damages at \$150,000.00, and his assessment of damages for loss of income earning capacity at \$180,000.00.

[3] The trial judge aptly summed up the factual background in his opening words:

[2] Richard Vogler, a very bright and popular twenty year old from Halifax, was asleep in the back seat with his seatbelt unbuckled when the gust from a passing tractor-trailer sent the mobile home into a fishtail. The driver could not keep control. Mr. Vogler was hurled from the car as it crashed.

[3] Mr. Vogler hit ground with the kind of violence that causes the brain to bang against the inside of the skull. Also, the skull was fractured, and his brain suffered blunt trauma from that. The flesh of Mr. Vogler's right forearm was horribly torn, and one eye was badly damaged. His right chest was punctured and his lung bruised. Ribs and the pelvis were fractured.

[4] For a time the question was whether Mr. Vogler would die. He lived. Then, the main question was what would be left of his faculties. He made a remarkable recovery thanks to good hospital care in the United States and Canada, to his parents' intense campaign of treatment involving professionals, family, and friends, to Mr. Vogler's own intellectual and spiritual strengths, and to sheer luck.

[5] That much said, Mr. Vogler suffered brain injuries that were severe in the beginning, and there are some lasting effects. The extent and consequences of those losses are the most controversial issues for assessing Mr. Vogler's damages.

[4] While acknowledging that the correct test is “palpable or overriding error”, the appellants’ argument is, in essence, really an attempt to second-guess the trial judge’s weighing of the evidence and to challenge his findings of fact. In particular, much of the appellants’ factum is taken up with references to evidence

that the trial judge either did not refer to, or touched upon lightly, while another large part of the factum attempts to draw inconsistencies within the evidence that the judge found persuasive.

[5] As such the appellants are doing nothing else than asking us to downgrade the credibility of certain witnesses and to re-weigh the evidence which is the exclusive province of the trial judge.

[6] The trial judge had very extensive medical and other evidence before him, and was in an ideal position to determine the severity of the injuries for assessment purposes. His assessment was \$150,000.00, for the combination of brain injury and loss of vision - each of which would alone command a significant award - and for the other injuries suffered. The appellants say this award is too high. We disagree. It is within the range of reasonable outcomes for the severe injuries suffered by the respondent.

[7] Regarding the assessment of damages for loss of future income, or income earning capacity, the trial judge acknowledged the challenging task and noted that it involved making educated guesses about the life trajectory that Mr. Vogler would have enjoyed, but for the accident, and comparing this to the life that he is currently living.

[8] On the basis of considerable evidence it was the trial judge's conclusion that the injuries have led to "information processing and memory deficits", and that but for the accident, Mr. Vogler would have been capable of "meaningful work". The result being that his injuries would probably translate into lower earnings in the future. Consistent with the case law, he opted to use a "global" rather than an actuarial approach and arrived at a figure for loss of future income earning capacity of \$180,000.00. The appellants argue that this assessment is contrary to the evidence. Again we disagree. There was more than ample evidence to support the trial judge's findings and conclusions in making his award of loss of future earning capacity.

Costs

[9] The respondent shall have his costs of this appeal which, as agreed by counsel, should be 40% of the trial costs. The trial costs were \$45,000 exclusive of

disbursements. However, the trial judge increased the costs at trial from \$34,750 (the amount payable pursuant to the Tariff) to \$45,000 because of an offer to settle which the respondent had made prior to trial and which was less than the amount awarded by the trial judge. For the purposes of calculating costs on this appeal the Tariff amount will be used. This results in a cost award of \$13,900. As well, the respondent is entitled to the costs of a stay motion before Bryson, J.A. in Chambers (2011 NSCA 37). On that motion, the appellants received a partial stay of the trial judgment with costs of the motion to be costs in the cause. The cost award above includes the costs of that motion. Finally, it also includes the respondent's disbursements on this appeal and the stay motion.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bryson, J.A.