Date: 19980204 Docket: C.A. 138655

NOVA SCOTIA COURT OF APPEAL
Cite as: Herman v. Woodworth, 1998 NSCA 34
Roscoe, Hallett and Flinn, JJ.A.

BETWEEN:

RICKY NOBLE HERMAN	)	R. Malcolm MacLeod, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Nancy G. Rubin
	)	for the Respondent
MARLON WOODWORTH	)	
	)	
Respondent	)	Appeal Heard:
	)	February 2, 1998
	)	
	)	
	)	Judgment Delivered:
	)	February 4, 1998
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THE COURT: Appeal allowed per reasons for judgment of Flinn, J.A.; Hallett and Roscoe, JJ.A. concurring.

FLINN, J.A.:

The appellant brought this proceeding, in the Supreme Court of Nova Scotia, against the respondent claiming damages for personal injuries suffered in an automobile collision. At the trial, and following the close of the appellant's case, counsel for the respondent made a non-suit motion pursuant to **Civil Procedure Rule 30.08**:

> At the close of the plaintiff's case, the defendant may, without being called upon to elect whether he will call evidence, move for the dismissal of the proceeding on the ground that upon the facts and the law no case has been made out.

The trial judge, Justice Hall, decided that the appellant "had not established a *prima facie* case in accordance with the law". He allowed the respondent's non-suit motion, and dismissed the appellant's action.

The appellant's position on this appeal is that there was sufficient evidence upon which a jury might find some liability, on the part of the respondent, for the collision and the resulting injuries to the appellant. As a result, the appellant submits the trial judge erred in law in granting the non-suit motion. The appellant seeks a new trial before a different judge.

In an application for a non-suit, following the close of the plaintiff's case at trial, the question as to whether the plaintiff has established a *prima facie* case is a question of law. As such, it is reviewable by this Court. The following passage from **The Law of Evidence in Civil Cases**, Sopinka and Lederman, 1974 at p. 521 has been cited with approval by this Court in **Wentzell v. Spidle** (1987), 81 N.S.R. (2d) 200; **Turner-Lienaux v. Nova Scotia (Attorney General)** (1993), 122 N.S.R. (2d) 119; and **Barrett et al v. Gaudet** (1994), 134 N.S.R. (2d) 349. (See also **The Law of Evidence in Canada,** Sopinka, Lederman and Bryant, 1992 at p. 130.)

> . . . If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it . This decision of the judge on the sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence which is a question of fact. Because it is a question of law, the judge's assessment of the probative sufficiency of the plaintiff's evidence, or the defendant's evidence on a counterclaim for that matter, is subject to review by the Court of Appeal.

(emphasis added)

The issue before this Court may be stated as follows: On the basis of the evidence which was before the trial judge, and **if** that evidence was believed, **could** a reasonable jury find some negligence, on the part of the respondent, which caused, or contributed to, the appellant's injuries?

The evidence, before the trial judge, disclosed as follows: On Saturday, August 25, 1990, around midnight, the appellant was driving his motor vehicle (a 1979 Oldsmobile Delta 88) along a gravel road, known as the Ohio Road, in Lunenburg County. His friend, Gary Rhyno, was with him in the front passenger seat. At the intersection of the Ohio Road and Highway # 208 (between Hemford and New Germany) the appellant was confronted with a "Yield" sign, requiring him to yield the right of way to traffic on Highway # 208. As the appellant was proceeding across Highway #208, his vehicle was struck (near the door on the driver's side) by the respondent's vehicle, which had been proceeding along Highway #208. The appellant received severe personal injuries as a result of this collision. He recalls nothing of the

circumstances of the collision.

The only other witness to the accident, who gave evidence on behalf of the appellant, was Mr. Rhyno, the passenger in the appellant's motor vehicle. Since Mr. Rhyno did not see the respondent's motor vehicle until immediately before the collision, he was unable to testify as to the manner of the respondent's driving prior to the collision. As a result, he could not testify as to any specific act of negligence on the part of the respondent. Included in his testimony, however, is the following:

> **Under Cross-Examination**
>
> **Q.** You're assuming you looked both ways.
>
> **A.** Because ... no. I remember looking both ways, because I didn't see nothing. There was nothing to see. And we pulled out into the intersection, when we got to the yellow line, there was two sets of lights coming at us.
>
> **Q.** Yeah, I heard you say that part, and we'll get to that later. But I want to get back to where you were looking. It's possible that you pulled out without looking to your left, and that's why you didn't see anything.
>
> **A.** It's possible.
>
> **Under further cross-examination**
>
> **Q.** I put it to you, Mr. Rhyno, that the only reason there was an accident that night is because Herman didn't yield the right of way. Do you agree with that?

A. No.

Q. That he was inattentive.

A. Pardon?

Q. He was inattentive?

A. What's that mean?

Q. He didn't pay attention.

A. No. He did everything right.

Q. He was impaired.

A. No.

Q. He was speeding.

A. No.

Q. He was driving with his lights off.

A. No.

Q. So you're telling us he did everything right.

A. Pardon me?

Q. You're telling us, basically, that Mr Herman did everything right, as he should.

A. Everything right to my knowledge. I would have did the same thing.

Under Direct Examination

A. I can remember coming to the yield sign. We slowed right down to a pretty near dead stop. No vehicles coming, but the only way we could ... we had to pretty well pull your vehicle right out into the intersection to see if anything was coming. We never seen anything until ... we was on the yellow line. I looked on Ricky's side, and I could see two sets of lights coming, and I just yelled, Ricky, there was a vehicle, and I

reached to grab onto something and that's when it all hit.

Q. And then you were in a collision. How far do you think you had advanced into the intersection before the very moment of impact?

A. The front end of the car was over the yellow line, because I looked on Ricky's side and I had to look by Ricky's head, and I could see the yellow line, and there was a light on one side of the yellow line and there was a light on the other side of the line ... and it hit us. ....

In summary, Mr. Rhyno testified:

1. that as the appellant's motor vehicle approached the yield sign, at the intersection of the Ohio Road and Highway 208, the appellant slowed down to "a pretty near dead stop";
2. that, at the yield sign, and before the appellant's motor vehicle entered the intersection, both Mr. Rhyno and the appellant looked both ways, and saw nothing, until such time as they were crossing the center line of Highway 208; and
3. that the front end of the appellant's motor vehicle had crossed over the center line of Highway 208 when it was struck by the respondent's motor vehicle.

If a jury chose to accept this testimony, and absent any explanation from the respondent, a reasonable inference could be drawn that the respondent failed to keep a proper look-out, or that the respondent was driving too fast for conditions, or both. As a result, a reasonable jury could find some negligence on the part of the respondent which caused, or contributed to, the appellant's injuries. Failure to keep a proper look-out, and excessive speed, were pleaded by the appellant, in his statement of claim, as particulars of the respondent's negligence.

Whether the testimony of Mr. Rhyno **is** accepted; and whether the inferences to which I have referred **ought** to be drawn, are not matters which are determined in conjunction with a non-suit motion. These matters are determined at the conclusion of the trial, after all of the evidence has been tendered.

Since a reasonable jury could find some negligence, on the part of the respondent, which caused, or contributed to, the appellant's injuries, the trial judge erred in allowing the non-suit motion and dismissing the appellant's action.

The appellant has requested a new trial before a different judge. The usual disposition of these matters is, as stated by Matthews, J.A. in **Barrett et al. v. Gaudet** (1995), 138 N.S.R. (2d) 178 at p. 186:

> .....the parties should be restored to their positions prior to the nonsuit motion and that the matter should proceed from that time as though the nonsuit motion had been denied.

If that course were followed here, the matter would be remitted to the judge who presided over the trial, to complete the trial.

As I have indicated previously in these reasons, in considering a motion for non-suit, the trial judge is not to assess the weight, or believability of the evidence. He must decide, on the assumption that the evidence on behalf of the plaintiff is believed, whether a reasonable jury could find some negligence on the part of the defendant which caused or contributed to the plaintiff's injuries.

The trial judge did not approach this non-suit motion in that manner. From a review of the trial judge's decision, it is clear that the trial judge did assess the weight and believability of the evidence, adduced on behalf of the appellant, in reaching his decision that the

appellant had not established a *prima facie* case. That being so, it would not be appropriate, in my view, to remit the matter to the trial judge to complete the trial, and the appellant should have a new trial before a different judge.

In coming to this conclusion I have also considered the fact that I would not be ordering a rehearing of a lengthy trial. The evidence, in the trial of the appellant's case against the respondent, took less than one day. A rehearing of that evidence would not, therefore, unduly burden the Court below.

In conclusion, I note, from my review of the proceedings in the Court below, the lack of assistance which the trial judge received from the appellant's trial counsel. The fact that a reasonable jury could draw an inference of contributory negligence on the part of the respondent, if it believed the evidence on behalf of the appellant, was not even raised. The issue was framed by trial counsel as one of *res ipsa loquitur*.

I would, therefore, allow this appeal. I would set aside the

order of the trial judge, dismissing the appellant's claim and ordering the appellant to pay the costs of the trial. I would further order that this matter be remitted to the Supreme Court of Nova Scotia for a new trial

before a different judge. Finally, I would order the respondent to pay the appellant's costs of this appeal which I would fix at $1,500.00 inclusive of disbursements.

Flinn, J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.

C.A. No. 138655

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

RICKY NOBLE HERMAN

Appellant

- and -

MARLON WOODWORTH

Respondent

REASONS FOR JUDGMENT BY:

FLINN, J.A.