Date: 19981110 Docket: C.A. 146260

NOVA SCOTIA COURT OF APPEAL
Cite as: Thomson v. Nova Scotia (Registrar of Motor Vehicles), 1998 NSCA 167
Bateman, Flinn and Cromwell, JJ.A.

BETWEEN:

ROBIN THOMSON	)	Jean A. McKenna
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	John Kulik
	)	for the Respondent
THE REGISTRAR OF MOTOR VEHICLES FOR THE PROVINCE OF NOVA SCOTIA	)	
	)	
Respondent	)	Appeal Heard:
	)	September 18, 1998
	)	
	)	Judgment Delivered:
	)	November 10, 1998

THE COURT: Appeal allowed per reasons for judgment of Flinn, J.A.; Bateman and Cromwell, JJ.A. concurring.

FLINN, J.A.:

This appeal is from an assessment of damages for personal injuries arising out of a motor vehicle collision.

On June 26th, 1995, the appellant was operating her motor vehicle on Robie Street in Halifax. While stopped at a red light, controlling the intersection of Robie and North Streets, the rear of her vehicle was struck by a motor vehicle travelling behind her. The driver and occupants of the other motor vehicle left the scene. They were never located, nor was the identity of the owner and operator of that other vehicle ever determined.

Pursuant to s. 256 of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293, the appellant brought this proceeding against the Registrar of Motor Vehicles for the Province of Nova Scotia (the respondent). Liability was not disputed. On an application to assess the appellant's damages, Justice Edwards assessed general damages for non-pecuniary loss at $12,000.00.

The appellant appeals to this Court claiming that the trial judge made errors of law, and that the award of general damages in this case is inordinately low.

In considering an appeal from a trial judge’s award of damages, this Court has consistently followed principles which have been reiterated by the

Supreme Court of Canada. Firstly, with respect to quantum of damages, before the appellate court can properly intervene it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous assessment of damages. **Woelk v. Halvorson**, [1980] 2 S.C.R. 430; 33 N.R. 232; 24 A.R. 620; [1981] 1 W.W.R. 289; 14 C.C.L.T. 181; 114 D.L.R. (3d) 385. Secondly, with respect to the trial judge's conclusions on matters of fact, an appellate court will only intervene if the trial judge has made a manifest error, or ignored conclusive or relevant evidence, has misunderstood the evidence or has drawn erroneous conclusions from it. **Toneguzzo-Norvel 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.

It is clear, from a review of the evidence in this case, that the trial judge, in reaching his conclusion on the assessment of damages, misstated, and ignored, or misconstrued, evidence. Further, he made some findings which are not supported by the evidence. In each case these are matters which are material to an assessment of damages for the appellant. As a result of those errors, the award of damages by the trial judge is inordinately low. This case is, therefore, one which calls for intervention by the Court of Appeal.

I refer, specifically, to four matters in the trial judge's decision:

1. In the course of his summary of the evidence, the trial judge said the following:

> In cross-examination Ms. Thomson acknowledged that she has had little back pain since May of 1996.

2. Also, in his summary of the evidence, the trial judge said:

> Because Ms. Thomson experienced some tingling sensations in both feet, she was referred to Dr. Douglas LeGay, an orthopaedic surgeon.

3. The trial judge made the following finding:

> Ms. Thomson had some interference with work and recreational activity for approximately one year.

4. The trial judge also made the following finding:

> Although Ms. Thomson complains that she is still intermittently troubled by pain, there is no medical evidence to support her contention.

I will deal with these four matters separately.

With respect to the first matter, it is a misstatement of the evidence for the trial judge to have said that the appellant acknowledged that she has had little back pain since May of 1996. A review of the evidence shows that the appellant did not make any such acknowledgement in her testimony.

Some confusion may have arisen by a comment, in the report of the appellant's family doctor, Dr. Stacey, dated May 13th, 1996, that "... she now has

little back pain". The appellant's counsel, in direct examination, referred to that comment in Dr. Stacey's report, and the following question and answer ensued:

> Q. She has little backache. Is that -- what's your present status as far as your backache is concerned?
>
> A. It's just a constant ache.

Counsel for the respondent, in his cross-examination of the appellant, put Dr. Stacey's comment to the appellant as well as the following exchange shows:

> MR. KULIK: That as of May 13th, She now has little backache. You have no reason to disagree with Dr. Stacey, do you?
>
> A. I have backache now, yes.
>
> Q. But at the time, he writes that you had little backache. And you have no reason to disagree --
>
> A. I wouldn't --
>
> Q. -- with that?
>
> A. --disagree with him, no.

The appellant testified that, at the time of the trial, she was experiencing back pain; that she was taking medication for that back pain; and that she required a back support in order to sit for prolonged periods. The only acknowledgement she made, on cross-examination, was that she had no disagreement with Dr. Stacey's observation that, at the time of his report (May 13th, 1996), she had little back ache.

With respect to the second matter, it is a significant understatement of the circumstances which prompted the appellant to consult with Dr. LeGay, to state that she "experienced some tingling sensations in both feet". In the

opening paragraph of Dr. LeGay's report, which was before the trial judge, Dr. LeGay presents a much more serious problem. He says the following:

> Robin was seen with regards to her back. She had a flare up of her symptoms in January with pain radiating down the left leg into the foot.

(My emphasis)

With respect to the third matter, it is contrary to the evidence for the trial judge to have concluded that the appellant's injuries only caused interference with recreational activities for approximately one year.

The appellant testified that prior to the accident she engaged in a variety of sporting activities such as touch football, volleyball and squash, and since the accident she has been unable to do so. She was, actually, involved in a touch football game immediately prior to the accident which gave rise to this proceeding. She had been involved in a touch football league and has not played touch football again because of the accident. Prior to the accident the appellant played competitive volleyball as a member of a team in the Nova Scotia Women's Senior League. She played at least two times a week. She has not played volleyball since, with the exception of a beach volleyball event during the summer before the trial. The appellant tried to play squash, on one occasion after the accident, and testified that "my back just tightened right up". She testified that although she would like to try to play squash again, she is not sure that she is ready to attempt it.

In considering this matter, it is important to note that neither the trial judge, nor counsel for the respondent, commented adversely on the appellant's credibility.

Further, Dr. Stacey, in his medical reports, stated that because of her injuries, the appellant is required to use a back support (Obus form) while sitting, otherwise she could not sit for more than half an hour without pain. In his report dated May 13th, 1996, Dr. Stacey wrote:

> ..... she still suffers symptomatology at the end of her day's work and this limits her from being as active in sporting events as she was in the past.

While Dr. Stacey continues "to see her slowly improving", the evidence is clear that the appellant is not yet free from the problems associated with the injuries she received in the automobile accident. It is hardly surprising, if the appellant cannot sit for more than half an hour without having back pain - unless she uses an Obus form back support - that she will not be able to participate in recreational activity such as volleyball squash and touch football. The trial judge, therefore, misunderstood, or misconstrued, the evidence in concluding that, the appellant's injuries only hampered her ability to participate in recreational activities for approximately one year after the accident.

The trial judge may have been misled by the appellant's answer to one question put to her in cross-examination by the respondent's counsel:

> Q. Thank you. Now your solicitor has filed a brief in this matter, and at

> page six of her brief, she write: "In the fall of 1996, she had returned to most of her recreational activities, with the exception of paddling." You agree with that.
>
> A. Yes.

Other evidence, on both direct and cross-examination, which the trial judge did not reject, makes it clear that the appellant could not participate in sports activities as she had prior to the accident.

The fourth matter deals with the trial judge's finding that there was no medical evidence to support the appellant's complaints that she is still intermittently troubled by pain.

The trial of this action took place on March 2nd, 1998. The most recent medical report, in evidence at the trial, was dated May 13th, 1996. Therefore, there was no up-to-date medical report available for the trial judge. The trial judge may have meant to say, only, that there was no <u>current</u> medical evidence to support the appellant's complaints that she was still intermittently troubled by pain. Even if that were so, the trial judge did not reject the appellant's evidence concerning her current problems with pain, and that evidence is not inconsistent with the medical reports that were available to the trial judge. While an up-to-date medical report would have been helpful, it was not necessary to establish that the appellant was experiencing pain at the time of the trial.

Dr. Stacey, in his report dated May 13th, 1996, documents her continuing complaints of pain: “she can sit for prolonged periods as long as she uses an Obus Form back support. She cannot sit without it however due to pain.” While Dr. Stacey sees the appellant’s condition improving, over time, he makes a point of noting that the improvement will come slowly. The appellant’s evidence concerning her pain, at the time of the trial, is completely consistent with Dr. Stacey’s medical report, and is supported by that medical report.

These four matters, to which I have referred, are significant because they demonstrate that the trial judge, in assessing the appellant’s damages, understated the seriousness of her injuries, as well as the limitations that she was experiencing at the time of the trial. Essentially, the trial judge’s conclusions were that the appellant had a soft tissue injury of a mild to moderate nature; she had some interference with work and recreational activity for approximately one year; and that she presently experiences some discomfort. This assessment is reflected in the trial judge’s award for non-pecuniary loss of $12,000.00.

Had the trial judge not made the errors to which I have referred, his assessment of her injuries, and the limitations which those injuries placed upon her, would obviously have been different.

The appellant was 23 years of age at the time of the accident and she was employed as an insurance agent. It was 8 o’clock in the evening of June 26th,

1995, when the accident happened. She was driving home from a touch football game, and wearing a seatbelt, at the time. The impact of the collision collapsed the retractable rear bumper of her motor vehicle and moved her motor vehicle slightly ahead. The appellant testified that she was jarred forward almost to the steering wheel. She described the force, of being hit from behind, as follows:

> I mean, when he hit me , it jarred me forward. Like, I went, like, almost, you know, almost hit my head on to the steering wheel, and I just jerked back again.

At the time of the accident she "felt a shot of pain right up my back, up my spine". She also felt pain in her shoulder area, the spinal column and in the shoulder blades. She drove herself to the Emergency Room of the Victoria General Hospital where she was advised to contact her family doctor. She stayed in bed the day following the accident and went to her family doctor, Dr. Stacey, the next day, June 28th, 1995.

The day after her first consultation with Dr. Stacey, the appellant commenced physiotherapy treatment - three or four times a week for an hour in the morning before work. When she stopped her physiotherapy she was given exercises to do at home - mainly stretching exercises - which she does. It was also recommended that she go swimming which she does two or three times a week.

The appellant testified that initially she had to limit her work day from 7:30 a.m. to 3 p.m. instead of from 7:30 a.m. to 5 or 6 p.m. because "I just found it very

painful to sit for a long period of time". She acquired an "Obus form" back support; and with that back support, which she requires, she can sit for longer periods. As a result, she was able to work a full day. She uses this Obus form back support all of the time, including when she goes on a long driving trip. Without that back support, as Dr. Stacey noted, "sitting would hurt by half an hour".

The appellant testified that she takes Ibuprofen for pain. She does not, necessarily take it on a daily basis. However, during a normal week she would take it seven times "one day I might have two and one day I might have none". She testified that she found the drug helpful.

She further testified that because she was having "numbness" in her leg again, she is taking further physiotherapy. She started two weeks before the trial and goes three times a week. She testified that an appointment is being made for her to see Dr. LeGay for a further consultation.

Counsel have referred the Court to several cases involving damage awards in somewhat similar circumstances. Not surprisingly, because of the unique factual circumstances in each case, they represent a broad range of awards for soft tissue injuries which do not involve permanent disability. The awards in these cases range from a low of $10,000.00 for injuries with the least serious consequence to a high of $30,000.00 for those which have more serious consequences.

It is unfortunate that a more current medical report was not available for the trial. It might have given a more definitive prognosis as to how long the appellant will continue to experience these problems. However, for the purpose of this appellate review, I am limited to the evidence which was before the trial judge. The medical evidence does not indicate any permanent disability. Dr. Stacey's opinion is that he "continues to see" the appellant's condition improving, albeit slowly, but, nevertheless, improving. Within four months of the accident, the appellant was able to return to work on a full time basis following extensive physiotherapy treatment (30 sessions for one hour each morning before work), her own exercise program, and a swimming exercise regime. However, more than three years after the accident, at the time of the trial, she was still experiencing pain, she could not sit for more than one hour, without experiencing pain, unless she used a back support; and she was still not able to participate in various sports as she had prior to the accident. At the time of the trial she had returned to physiotherapy, and was to have further consultation with the orthopaedic surgeon, Dr. LeGay, because of "numbness" in her leg.

I would assess the appellant's damages for non-pecuniary loss at $22,500.00. I believe that to be reasonable compensation for her injuries based on the evidence that was before the trial judge. The trial judge's award of $12,000.00 for damages for non-pecuniary loss is inordinately low, and I would vary it accordingly.

In conclusion, I would allow the appeal. I would vary the award of the trial judge for damages for non-pecuniary loss from $12,000.00 to $22,500.00. I would also vary the award of pre-judgment interest, accordingly.

Section 256(6) of the **Motor Vehicle Act, supra**, provides that no costs may be awarded against the respondent in this action.

Flinn, J.A.

Concurred in:

Bateman, J.A.

Cromwell, J.A.

C.A. No.146260

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ROBIN THOMSON

Appellant

- and -

THE REGISTRAR OF MOTOR VEHICLES FOR THE PROVINCE OF NOVA SCOTIA

Respondent

REASONS FOR JUDGMENT BY:

FLINN, J.A.