Date: 19990630
Docket: CA 153477

NOVA SCOTIA COURT OF APPEAL

Cite as: Exide Electronics Ltd. v. Webb, 1999 NSCA 102

Chipman, Freeman, Bateman, JJ.A.

BETWEEN:

EXIDE ELECTRONICS LIMITED and BERNARD JOSEPH WHITE	)	Robert L. Barnes, Q.C. for the appellants
Appellants	)	
- and -	)	
DAVID LEIGH WEBB	)	Karen A. Quigley for the respondent
Respondent	)	
	)	Appeal Heard: June 10, 1999
	)	Judgment Delivered: June 30, 1999

THE COURT: Appeal is dismissed as per reasons for judgment of Freeman, J.A., Chipman and Bateman, JJ.A., concurring.

FREEMAN, J.A.:

[1] The respondent plaintiff David Leigh Webb, born February 13, 1947, was injured September 21, 1993, when his 1/2-ton truck was knocked off a highway and over an embankment by a car driven by the appellant Bernard Joseph White and owned by his employer, the corporate appellant.

[2] Liability was admitted, but the appellants do not agree that Mr. Webb is permanently disabled and unable to perform gainful employment. His complaints involve soft-tissue injuries for which there is little objective support. Justice Tidman of the Supreme Court of Nova Scotia found him partially disabled and unable to return to his former occupation as a carpenter.

[3] He awarded him $90,000 for diminished earning capacity, $58,772 for past lost wages, $50,000 for past and future pain and suffering and loss of enjoyment of life, and $6,000 future drug costs, for a total of $204,772.00 plus pre-judgment interest and costs.

[4] The appellants say the trial judge erred in failing to take into account that the respondent was unemployed at the time of the accident, that the award for diminished earning capacity was inordinately high, and that Justice Tidman's assessment of Mr. Webb's credibility, when considered in light of Dr. David King's testimony, was a misdirection and otherwise perverse. This last ground bears on the other two so I will

address it first.

[5] Mr. Webb's credibility was a central issue on the appeal, just as it was before Justice Tidman. The appellants argued vigorously that he was caught lying at a number of points in his testimony. They submitted surveillance photos purporting to show him shingling a roof a year after the accident, pushing a power lawnmower when he said he was unable to do so, and carrying a large box after stating he could not take a carton of milk from the refrigerator.

[6] Lying under oath is always serious, but particularly so for the plaintiff in a case involving soft tissue injuries. The difficulty in obtaining objective evidence in such matters puts a premium on the reliability of the plaintiff's own testimony. Moreover the medical evidence, also critically important, is based in large measure on what the plaintiff tells the doctors.

[7] The appellants make the further point that the award for lost earning capacity is so high it suggests the trial judge did not apply an appropriate discount for the unreliability of the respondent's evidence.

[8] There can be no question that Mr. Webb was seriously injured by a driver who had been drinking. He suffered a fractured left knee cap and injuries to his back, neck and thumb. The question for the trial judge was whether he was disabled from working and if so, the extent of his disability and appropriate compensation.

[9] The respondent's factum describes the care he underwent following his initial treatment:

> ...The respondent reported to East Hants Physiotherapy in Enfield, Nova Scotia in October of 1993. There he began an intensive program and treatments including patient education, shoulder and neck range of motion exercises, range of motion and strengthening exercises for his knees, infrared laser, ice, TENS, bike, manual cervical traction, weight exercises, hydrofit strengthen, moist heat, ultrasound, treadmill and home exercises. He began attending sessions approximately three times per week and sometimes he would attend physiotherapy five times per week. After approximately one year of physiotherapy Mr. Webb had attended for approximately 160 sessions of physiotherapy treatment at the East Hants Physiotherapy Clinic.
>
> Some 16 months after the accident, approximately January, 1995 the Respondent had completed over 200 sessions of physiotherapy. He still reported significant tenderness in his neck and right shoulder. His right shoulder strength was slowly improving but continued to cause discomfort in his neck and shoulder after any active use. Although his overall hand strength had improved, prolonged gripping had caused numbness in his right thumb and index finger. He experienced increased endurance in walking and biking and general leg strength but was still unable to kneel and experienced increased discomfort with prolonged stair climbing and sitting.

[10] Between October 1993 and November 1997, the respondent saw a number of physicians, specialists and various health care workers including his family physicians, Dr. Angela Joynes and her successor Dr. Helinka Adams; Dr. Petrie and Dr. Yabsley, orthopedic surgeons; Dr. Holness, neurological surgeon; Ms. Monique Miller and Ms. Quigg, physiotherapists; Dr. Majaess, rehabilitation specialist, and Dr. David King, a neurologist. Dr. King was the only specialist who saw Mr. Webb on behalf of the appellants.

[11] Dr. Yabsley examined Mr. Webb at the request of his own section B insurers. He stated in a report dated January 16, 1995:

> Mr. Webb's left knee has now healed well. He lacks only a slight amount of full flexion. Beyond this, I think his knee is very functional and should continue to improve, and while he may continue to have low grade discomfort and symptomalogy in it for another year or so, I do not think this injury is compatible (sic.) with return to full function and an excellent prognosis.
>
> It is difficult, therefore, to be more certain about the symptoms of his neck and his right shoulder and arm. They have an aura of legitimacy. Mr. Webb himself is a creditable individual and I am inclined to think that for the moment he continues to be disabled from the accident, such that he cannot perform his normal occupation as that of a carpenter. He undoubtedly could perform less demanding jobs of less physical nature, and I would continue my efforts perhaps directed more along a work hardening type of line designed to get him into the work force, but I would give him more time--perhaps another six months or so to accomplish this. He may well be left with permanent distress down his right arm, especially in relation to the discomfort of his thumb and index finger, which I can see no ready way of resolving. It does not seem to be the sort of problem that should be amenable to any surgical, intervention or medical treatment beyond time. Hopefully this will resolve difficulties or make him more comfortable.

[12] As a result of this report the section B insurers directed Mr. Webb to alter his physiotherapy and he attended at the Burnside Physio-Clinic for several weeks without positive results. His family physician referred him to Dr. Majaess, chair of the musculoskeletal trauma program rehabilitation committee at the Nova Scotia Rehabilitation centre in March, 1995. Dr. Majaess treated him for a year, until March 1996, both as an outpatient and in the fall of 1995 as an in-house patient. Dr. Majaess provided reports dated March 10 and May 13, 1997, stating that Mr. Webb suffered from the following problems resulting from the motor vehicle accident, as summarized in the respondent's factum:

> 1. Neck pain, secondary to cervical sprain injury;
>
> 2. Right posterior superior shoulder girdle [myofascial] pain likely related to a strain injury that he sustained in the motor vehicle accident;
>
> 3. Right shoulder rotor cuff tendinopathy likely related to a strain injury;
>
> 4. Right forearm pain related to a combination of referred pain from the neck and shoulder girdle and lateral epicondylitis (tennis elbow);

5 Tension headache related to the cervical soft tissue irritability and occipital neuralgia;

6. Non-displaced fracture of the right patella;

[13] Injuries indicated by the medical reports believed resolved by the time of the referral to Dr. Majaess included:

1. Lumbar strain injury;

2. Right knee soft tissue injury;

3. Soft tissue injury of the right thumb and post dramatic(sic) carpal tunnel syndrome of the right hand;

[14] Dr. Majaess was familiar with the surveillance photos taken of Mr. Webb. His reports included the following statements:

> (March 10, 1997)As such I do feel that Mr. Webb's impairment prevent him from [returning] to his job as carpenter. Furthermore, he would be unable to tolerate lighter type of work. . . . Functionally he would be left with a work capacity level not exceeding sedentary type of work.
>
> (May 13, 1997) Based on Mr. Webb's clinical condition at the time of my involvement in his care, I should further add that I did not feel he was capable of tolerating any type of regular employment at the time including sedentary type of work.
>
> Due to his physical impairments including the extent of neck movements and pain in right [shoulder] and left knee pain, Mr. Webb would have difficulties climbing ladders and walking safely on narrow surfaces particularly above ground. Also, he would have difficulties tolerating kneeling and crouching as well as prolonged standing and walking. Therefore, it is my impression that he would not be able to work in a supervisory capacity at a construction site particularly where safety issues are taken into consideration.

[15] Mr. Webb's complaints have been consistent following the acute stage of his injuries. These were summarized in a report dated December 6, 1996, in a report to his family physician, Dr. Adams, from Heather MacAuley, physiotherapist at Burnside Physiotherapy:

> David is not able to elevate his arm much past 90 degrees, and he complains of a constant deep heavy pain in the arm with a C7 dermatome paraesthesia which occasionally also includes the ulnar two fingers. He is unable to find a position of relief for his arm. The anterior chest is tight and irritating his arm movements, and his neck feels painfully kinked.

[16] Ms. MacAuley observed muscle tension consistent with Mr. Webb's complaints and noted it was "a very problematic feature." His muscles were "profoundly reactive" and, while she considered there was scope for improvement, helping him would be a "challenge."

[17] Dr. King, the only medical expert called for the appellants, examined Mr. Webb during a 2 ½ hour interview on August 15, 1996 and produced a 20 page written report in which he reviewed all previous medical data, including the reports of the other physicians and health professionals. He stated in his conclusion:

> . . . My examination failed to disclose any evidence of a cervical radiculopathy at any level. Based upon the totality of the clinical evidence, one can exclude on-going neuropathic disease in his right arm and neck. The other thing that is striking about this man's case is he has made no effort that he admits to, to return to gainful employment. This man has significant experience in a supervisory capacity. He also has plans to start his own small contracting business. He is certainly capable of doing that at this point in time, even if he claims he has on-going chronic pain. He has made no effort to mitigate his financial circumstances.
>
> Certainly, the majority of the people who have examined this man considered his problem to be of soft tissue origin. Physicians with experience in this area realize the vagaries of this type of diagnosis. This is brought out forcibly in this man's history by the variation of the physical findings and in addition the generation of new diagnoses. He was considered at one time or another to have occipital neuralgia, epidondylitis of the right arm, a thoracic outlet syndrome, rotator cuff problem at the right shoulder, a C8 radiculopathy, a C5 radiculopathy, a cervical strain and an acromioclavicular joint strain.
>
> Again, I am struck by the variability of the physical examinations as performed by the various physicians who have seen him. For example, Ms. Monique Miller, on examining him later in the course of his illness had different findings from Dr. Majaess,

who had examined him a short time before.

....

The whole area of chronic on-going pain from soft tissue injuries is subject to controversy. A recent paper in Lancet, which I enclose for your perusal, suggests that in the absence of litigation or medical-legal considerations, a chronic whiplash syndrome does not exist. . . .

I think that the correct diagnostic formulation in the context of Mr. Webb's problem is that this man sustained a fracture to his left knee and a soft-tissue injury to his neck and shoulder with myotomic radiation to his right arm. I think his knee has healed, though he may have some residual discomfort on kneeling. I think his soft-tissue injury has also healed. I think the on-going pain from that is largely occasioned by the medical-legal ramifications and his current financial predicaments. I do not believe that there is any objective evidence to support an on-going chronic pain syndrome from physical factors.

[18] Dr. King also provided a four-page critical analysis of Ms. MacAuley's dated January 30, 1997 indicating disagreement with her conclusions.

[19] The trial judge considered the surveillance evidence provided by the appellants:

The defendant arranged for surreptitious surveillance of the plaintiff for a period of time in 1994/95. The surveillance was carried out by the private investigation firm of Michael Legault and Associates. Wade Lively, an investigator with that firm, in concert with others, conducted the surveillance. They followed the plaintiff when driving, they asked questions about the plaintiff in his neighborhood, and they videotaped and photographed his activities. The main surveillance evidence consists of the following:

1. Two photographs of a person standing on scaffolding adjacent to a house. Mr. Lively says he took the photograph on September 20, 1994.

2. A short videotape of the plaintiff lifting a parcel into his van. Mr. Lively says he took the video on March 14, 1995.

3. A short videotape of the plaintiff entering his van after checking its left front tire. Mr. Lively says he took the videotape on March 16, 1995.

4. A photograph of the plaintiff mowing the lawn at his estranged wife's property. Wayne Robinson, also an investigator with Michael Legault & Associates, says he took the photo on June 6, 1995.

[20] Mr. Lively had followed a person he thought was Mr. Webb to the home of his neighbour, Mr. Curry, who was installing a swimming pool. Both Mr. Webb and Mr. Curry denied he had any part in shingling the pool house roof, which the surveillance photos were purported to depict, although Mr. Curry said Mr. Webb told him how to cap the shingles at the peak of the roof. There was no place for Mr. Lively to hide so he had to park a distance away and hurriedly snap a number of still pictures, using a telephoto lens. While blurred, they show a man in blue coveralls standing on scaffolding, or a wall or a ladder, beside the roof of the pool house. One showed a hammer lying on the roof. Mr. Webb did not agree the man was himself. Vigorous cross-examination on the point centered on whether it was Mr. Webb, and whether he owned similar blue coveralls. He was not shown holding the hammer nor engaged in any activity. Justice Tidman acknowledged ”the person shown appears to be shingling a roof” but made no further finding on the point. He found as a fact the person was Mr. Webb.

[21] The second item is a surveillance video showing Mr. Webb, who had consistently stated he had trouble lifting a carton of milk from the refrigerator for a long time after the accident, carrying a large box from a store and placing it in his van. Mr. Webb agreed it was himself in the video; the box contained insulation for his mother-in-law's shower stall and weighed 13 pounds.

[22] Mr. Webb denied being able to push a power lawnmower, both in testimony and to his family doctor, but the photo taken during a seven or eight minute period of surveillance showed him pushing one. He testified that he subsequently used a lawn

tractor type of rider mower. Justice Tidman found:

> I find also that the plaintiff was less than frank when earlier asked if he could use a power lawnmower and answered no. The photograph of him using a mower at his estranged wife's property demonstrates that he is able to do so.

[23] However Justice Tidman found that although the two videotapes taken by Mr. Lively show definite head movement:

> ...they are not of much assistance to the court in determining the extent of the movements, nor in determining the plaintiff's ability to use his right shoulder, arm and hand. As Dr. Majaess pointed out in his testimony, when asked his opinion of the plaintiff's movements in the videotape, the plaintiff used his left not his right hand to grip the upper portion of the large box when he placed it in his van and further that the box which weighed 13 pounds was comparatively light for a box of that size. The videos do not clearly capture the extent of the neck and shoulder movements and the movements that can be seen could be consistent with the plaintiff's restricted movements reported by Dr. Majaess, that the plaintiff could turn his head to approximately 50 degrees of straight ahead.
>
> Also the videotapes could be misleading in that they show the plaintiff for only a short period of time without the repetition of movement which would be more useful in deciding credibility on this issue.

[24] The trial judge also stated:

> The court also had the benefit of observing a videotape of the plaintiff performing neck and other movements at Dr. King's direction. The defendant relies on the photographic evidence as corroboration of Dr. King's opinion that the plaintiff is exaggerating symptoms of his physical condition. . . .
>
> There is no question that the photos and videotapes show more neck movement than the virtually no movement at all described by Dr. King when he directed the plaintiff through the EMG tests at his office. However, the video taken by Dr. King before the EMG examination shows the plaintiff demonstrating much more neck movement than Dr. King described during the EMG. Since there was such an obvious difference in the degree of neck movement in those two tests and from what Dr. King observed during unguarded movements I am surprised that Dr. King did not at the time either comment on that to the plaintiff or make some effort to ensure that the plaintiff understood his instructions of what he was to do during the EMG.

[25] The appellants are represented by experienced trial counsel who was under no illusions as to the difficulty of challenging a trial judge's findings as to credibility, given the frequent pronouncements of courts on the subject. This court made the following observation in **Morash v. Morash Estate** (September 23, 1997):

> Concerning the trial judge's finding of the credibility of the respondent, with respect to the extent of his injuries, in **Travellers Indemnity Co. v. Kehoe** (1985), 66 N.S.R. (2d) 434, Macdonald J.A. said at p. 437:
>
> > This and other appellate courts have said time after time that the credibility of witnesses is a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses; of observing their demeanor and conduct, hearing their nuances of speech and subtlety of expression and generally is presented with those intangibles that so often must be weighed in determining whether or not a witness is truthful. These are the matters that are not capable of reflection in the written record and it is because of such factors that save strong and cogent reasons appellate tribunals are not justified in reversing a finding of credibility made by a trial judge. Particularly is that so where, as here, the case was heard by an experienced trial judge.

[26] Justice Flinn applied that statement in **Parker v. Parsons** 160 N.S.R. (2) 321.

[27] Justice Hallett, writing for the court, stated in **Partington et al. v. Musial et al.** (C.A. 142822--November 19, 1998) that:

> The scope of appellate review from a trial judges findings of fact and the drawing of conclusions from those findings is limited. The law has been crystalized by the Supreme Court of Canada in a number of recent decisions. In **Toneguzzo- Norvell**

v. Burnaby Hospital, [1994] 1 S.C.R. 114 at p. 121 MacLachlin, J., stated:

> It is by now well established that a Court of Appeal must not interfere with a trial judges conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal 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 **P.(D.) v. S.(C.)**, [1993] 4 S.C.R. 141, at pp. 188-89 (per LHeureux-Dubé J.), and all cases cited therein, as well as Geffen v. Goodman Estate, [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and Stein v. The Ship Kathy K, [1976] 2 S.C.R. 802, at pp. 806- 8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

In **Schwartz v. The Queen**, [1966] 1 S.C.R. 254, the Supreme Court of Canada stated that failure of a trier of fact to consider certain evidence is the type of error that can and will justify a reassessment of the balance of probabilities on factual issues but that in order to disturb the trial judge's findings of fact the appellate court must come to the conclusion that the evidence in question and the error by the trial judge in disregarding the evidence were overriding and determinative in the assessment of the balance of probabilities with respect to the factual issue.

The Supreme Court of Canada reaffirmed this view in **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010.

[28] The following passage from the appellants' factum summarizes their position respecting the respondent's credibility:

> In this case, it was established that the Respondent had lied about the severity of his injuries and his capacity for work. He had clearly misled his physicians, he had lied at discovery, and he was untruthful at trial. His credibility problems were noted but then largely discounted by the learned trial judge in the following passage:
>
> > Although the plaintiff made statements that go beyond the natural tendency of coloring events in one's own favour, I found his evidence generally to be credible and his description of his physical abilities to be consistent with what I observed of him in the courtroom over the course of the trial and also with the evidence given by the caregivers who observed him over longer periods of time.
>
> It is submitted that this holding is perverse and constitutes a manifest error because it is so obviously inconsistent with the evidence.

[29] The appellants then review the evidence in detail, emphasizing the points

discussed above and pointing out other inconsistencies and contradictions. Dr. King appeared to be of the same view.

[30] It is normally useful and appropriate for doctors giving evidence to state when they believe their patients and when they don't, and to give reasons. If the patient's perceived motivation was a factor in the reported symptoms, the doctor is obliged to say so. However, the trial judge considered that Dr. King went beyond the norm, and he was troubled by what he seems to have considered Dr. King's advocacy. The passages from Dr. King's reports selected by the trial judge as illustrative suggest the doctor was concerning himself with the ultimate issue rather than concentrating on providing the evidence upon which the trial judge would make the necessary decision . Justice Tidman wrote:

> However the probative value of Dr. King's opinion was lessened to some extent by including more than one would expect in a medical opinion. Dr. King gave testimony not only of his clinical findings, but went beyond his medical expertise by dealing with the plaintiff's perceived motivation.
>
> In his August 15 report at page 18 Dr. King states:
>
> > The other thing that is striking about this man's case is he has made no effort that he admits to, to return to gainful employment. This man had significant experience in a supervisory capacity. He also has plans to start his own small contracting business. He is certainly capable of doing that at this point in time, even if he claims he has on-going chronic pain. He has made no effort to mitigate his financial circumstances.
>
> and at page 17:
>
> > His course has been complicated by the legal process. I think that what has occurred here is that this man was placed in a position in which he couldn't return to work or his settlement he believed would be lessened and might be inadequate to cover his legal expenses. I think his frustration with the legal process aggravated his on-going neck and head pain producing a subjective pain syndrome beyond the physical findings. Surveillance indicates that he can do more than he claims. His physical examinations by other examiners have been variable. Varying diagnoses are entertained in an effort to explain his changing findings. He fails to

> respond to any therapy. His course has been one of objective improvement. My physical examination shows definite evidence of exaggeration. This all suggests that his original injury is embellished by secondary gain.

and at page 19:

> ...I am not in a position to say whether or not it is Mr. Webb on the roof doing the shingling. He denies it. On the other hand, the observations are that it was his van that was being driven to the scene, and the detectives indicate that it was him on the roof. I didn't have the actual videos, only the still photographs and I cannot say for certain. Certainly the person involved has a beard and is wearing coveralls similar to Mr. Webb's. In the Discovery transcript he does not categorically deny that it is him on the roof.

I do not for one moment question Dr. King's sincerity and integrity in putting forth his strongly held opinion of the plaintiff's medical condition. However, because of the emphasis Dr. King places on the plaintiff's motivations, I am left to wonder whether a preoccupation with motivation, at least, to some extent, coloured those strongly expressed opinions. After considerable wondering and deliberation I am not convinced that they do not.

[31] At that point in his decision the trial judge turned to the matters that were before him for determination. He found the respondent was not permanently and totally disabled, but could no longer work as a carpenter. In arriving at that key conclusion he appears to have carefully weighed the evidence before him:

> After consideration of the medical evidence I have concluded that the plaintiff is permanently disabled from returning to his former occupation as a carpenter. I have also concluded that he is able to do some sedentary type of work which does not require much head movement. I have reached those conclusions based on the evidence of all the plaintiff's doctors and health professionals who treated him over a long period of time. They all are of the opinion, after examining, treating and observing the plaintiff over a long period of time that the symptoms they have observed and the pain expressed by the plaintiff are genuine. Indeed, even Dr. King conceded that there may be some limitation on the plaintiff's pre-accident working ability.
>
> My conclusion is also supported by Dr. Majaess' opinion which I accept that it is not unusual for persons to complain of soft tissue injury pain without the source or cause of the pain being detected by diagnostic testing such as an EMG. I also prefer the medical opinions offered by the plainrtiff's experts over that of Dr. King because Dr. King observed the plaintiff over a comparatively short period of time and on only one occasion, while the others observed the plaintiff over a relatively long period of time.

Mr. Webb's complaints appear to have been consistent throughout the "long period of time" which extended from shortly after the accident in September, 1993 to the

trial in June of 1998. There were a variety of diagnoses to account for them, as Dr. King pointed out, but the complaints of pain and weakness remained basically similar. Caregivers other than Dr. King did not rely solely on what Mr. Webb told them, but were able to find some objective corroboration.

[32] In my view it was neither a contradiction nor a misdirection for the trial judge to have considered that while Mr. Webb made statements going beyond a natural tendency to color events in his own favour, his evidence was generally credible. Mr. Webb apparently had pretended to have a high school education but it came out in evidence that he had only grade eight, and had difficulty reading. While precision of expression may not be one of Mr. Webb's virtues, and the trial judge was clearly aware of the flaws in his evidence, Justice Tidman chose his language carefully and did not find Mr. Webb had been lying with fraudulent intent.

[33] The evidence of all the witnesses, including the experts, was before the trial judge for him to weigh. He was at liberty, in the exercise of his judicial judgment, to accept or reject or accept only parts of the evidence of any witness. He was entitled to make his own observations of the respondent during the assessment of damages, and he did so.

[34] The difficulty confronting the appellants is obvious in the excerpt from the trial judge's decision quoted above. Their argument on the point, with respect, is self-defeating. If the trial judge manifestly erred with respect to the evidence, it cannot be

said that he ignored or disregarded it. If he considered it, it is irrelevant if the appellant, or this court, agrees or disagrees with his conclusions. See **Schwartz**. He clearly found parts of the respondent's testimony untruthful. He was aware of the unreliability and made allowances for it. It was not self-misdirection for him to reject parts of the respondents testimony and accept other parts, nor to find him credible over all. This is the very essence of the art of the trial judge, to seek the kernel of truth in the chaff of poor quality evidence that may be contradictory or even false. If Mr. Webb lied, he was caught. I cannot conclude the trial judge was deceived by him. His findings are entitled to deference.

[35] As a cautionary note for those who do choose to lie to the courts, similar deference would be shown had the trial judge found Mr. Webb's entire claim to be unproven because his evidence was not trustworthy. As it was, Mr. Webb was unable to prove the total disability which he had claimed, and was found to be only partially disabled.

[36] In **Sekhon v. Gill** ,[1991] B.C.J. No. 3573 the British Columbia Court of Appeal considered the awards of damages to three plaintiffs who were found to be unworthy of belief as to the nature and extent of their injuries. Southin J.A., writing for the Court, refused to deprive a plaintiff compensation for damages from the negligence of a defendant as a result of a finding he lied about the extent of the injuries. However she expressed three principles to be considered in such circumstances:

1. A finding by a judge that he or she does not believe a witness "often is upon a knife-edge" and is not the equivalent to a finding that the witness has attempted a fraud on the court.

2. Abuse of the court may be better addressed by depriving the plaintiff of costs or, in extreme circumstances, by ordering the plaintiff to pay the costs of the defendant.

3. A defendant who desires to raise fraud as a bar to recovery must allege it in the court below, although the facts on which the allegation is based may become apparent too late to include it in pleadings.

[37] Southin J.A. found the trial judge "did not make any manifest error in not rejecting all Dr. Mohammed's evidence on the footing that it was based in part on what the plaintiff told him."

[38] However the matter was sent back for a reassessment of damages for lost wages because the plaintiff had not returned to work on the doctor's advice, and that advice was based on subjective symptoms about which the plaintiff had lied.

[39] In the present appeal, the trial costs awarded to the respondent are not in issue.

[40] In his assessment of damages Justice Tidman was obviously aware of the credibility issue. He had been able to assess the degree of skepticism with which the caregivers considered Mr. Webb's evidence, and their own findings of objective evidence in support. He made his own observations. The only thing the appellants can point to in suggesting that Justice Tidman erred in the complex task of weighing all of

the evidence in order to assess damages for diminished earning capacity is the amount of the award itself.

[41] The appellants suggest $90,000 is inordinately high, and should have been reduced because the evidence was unreliable. However it may be noted that the respondent sought considerably more based on his alleged inability to ever return to the workforce.

[42] Justice Tidman stated:

> . . . in assessing the plaintiff's credibility, I do not accept that his injuries are as debilitating as he states, nor, as I have also previously stated, do I accept Dr. King's opinion of the plaintiff's disability. The complaints and symptoms expressed to all of the plaintiff's caregivers have a high degree of consistency that leads me to conclude that he cannot do work that requires repetitive ability to squat, kneel, use the right arm and hand and raise that arm above his head. This rules out returning to his former occupation as a full time carpenter. ...

[43] Justice Tidman based his calculation that Mr. Webb had earned an income of $29,850 a year before the accident on actuarial evidence that took annual periods of unemployment into account. In the five years he considered, Mr. Webb's earning pattern was the same: earnings from employment in the range of $22,000 to $24,000 plus employment insurance earnings of $6,000 or $7,000. He would not have been entitled to employment insurance if he had not been able to work. There was actuarial evidence that an investment of $465,000 would be necessary to replace future earnings at the established level, but it did not form the basis of Justice Tidman's assessment of damages. He considered Mr. Webb's limited education and age in determining that he had restricted retraining or employment opportunities.

[44] The appellants argue, citing figures from case law, that loss of earning capacity, for which Mr. Webb was compensated, should be significantly less than compensation for loss of future income. Loss of earning capacity is loss of a capital asset; it can be compensated for even when it is not accompanied by a reduction in income. This can occur when an injured person is able to return to his or her job, but with a disability that restricts the scope of other employment that might become available in the future. The simplest illustration for an award to replace future income is total permanent disability, which requires an assessment based on earning expectations over the plaintiff's working lifetime. While the two concepts of compensation, lost earning capacity and lost future income, are distinct categories, each with its own rationale, in my view the actual amounts of damage awards to compensate for them may form a continuum. That is, in some cases the lost capital asset will have a dollar value similar in amount to months or years of lost income. While lost capacity awards may generally be lower due to circumstances and evidentiary considerations, it does not seem a sound practice to attempt to distinguish between them based on the amount of compensation awards alone.

[45] Mr. Webb lost his only means of earning a livelihood, his ability to work as a carpenter. While he had some supervisory experience, it would be unrealistic to consider that at fifty-four years of age, with a grade eight education, without a current relationship with employers after five years absence from the workforce with injuries, he would be likely to be hired in a managerial position. While theoretically capable of sedentary employment, the same considerations apply to his likelihood of obtaining it,

with or without retraining.

[46] Loss of his earning capacity as a carpenter was of great significance to Mr. Webb, and it cannot be said that the $90,000 award was inordinately high. The figure is equivalent to three years loss of income; Mr. Webb had not worked for some five years at the time of the trial.

[47] Mr. Webb had been unemployed for some time prior to the accident and his immediate prospects for employment were not bright. Justice Tidman found he had been disabled from any work for two years as a result of the accident, and awarded him $58,772 representing two years income. The caregivers were in general agreement that two years was the minimum required for Mr. Webb's recovery before returning to work. Given his past record for steady employment and his level of experience, the figure is not unreasonable and does not ignore his unemployment at the time of the accident.

[48] This court would not be justified in interfering with either of the damages awards at issue in this appeal on the principles expressed in **Whelk v. Halvorson** (1981), 114 D.L.R. (3d) 385 at 388:

> It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial Judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene. The well-known passage from the judgment of Viscount Simon in **Nance v.**

> **British Columbia Electric R. Co.,** [1951] 3 D.L.R. 705 at p. 713, [1951] A.C. 601 at p. 613, 2 W.W.R. (N.S.) 665, approved and applied in this Court in **Andrews et al. v. Grand & Toy Alberta Ltd. et al.** (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, provides ample authority for this proposition.

[49] I would dismiss the appeal with costs which, as customary in matters such as the present one, shall be 40 per cent of the costs at trial, plus disbursements.

Freeman, J.A.

Concurred in: Chipman, J.A.

Bateman, J.A.