Date: 19991207
Docket: C.A. 157445

NOVA SCOTIA COURT OF APPEAL

[Cite as: MacDonald v. MacPherson,1999 NSCA 154]

Pugsley, Bateman and Flinn, JJ.A.

BETWEEN:

BERNARD FRANCIS MacDONALD	)	John Kulik
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
JOHN A. MacPHERSON and	)	
JOHN G. MacPHERSON	)	Glenn R. Anderson
	)	for the respondents
Respondents	)	
	)	
	)	
	)	Appeal Heard:
	)	December 7, 1999
	)	
	)	Judgment Delivered:
	)	December 7, 1999
	)	
	)	

THE COURT: Appeal is dismissed with costs as per oral reasons of Bateman, J.A., Pugsley and Flinn, JJ.A., concurring

Bateman, J.A.: (Orally)

[1] This is an appeal from a decision of Justice David Gruchy of the Supreme Court dismissing the appellant's application in a personal injury action for interim payment pursuant to **Civil Procedure Rule 33.01(A)(1)**.

[2] This being a discretionary interlocutory order we will interfere only if a wrong principle of law has been applied or a patent injustice would result (**Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 (N.S.C.A.)).

[3] The appellant says that the Chambers judge erred in law "by failing to make a determination based on the evidence before him . . . of the damages which are likely to be recovered by the appellant so that a reasonable portion of such damages could be awarded to the appellant".

[4] While accepting that the appellant met the prerequisites of **Rule 33.01(A)(1)** Justice Gruchy was not satisfied on the affidavit evidence before him that he could estimate the damages that the appellant might recover. It was his finding that any estimate of damages on the circumstances before him would amount to "nothing more than a haphazard guess".

[5] We are satisfied that in so deciding he made no error. The alleged injuries resulted from a motor vehicle accident on January 11, 1997 when the appellant's truck was rear ended by the vehicle driven by the respondent. The damage to the appellant's

vehicle was in the order of $348. The affidavit evidence submitted by the respondents raised a serious issue as to whether the appellant had sustained any personal injury in the collision. There were significant credibility issues as well. Doctors' notes appended to the affidavit revealed that the appellant has a long history of physical complaints mirroring those alleged to have resulted from the collision. The appellant's statement of earnings provided to the insurers substantially overstated his weekly income, when compared to past income tax returns. His Section B benefits were terminated subsequent to the accident when video surveillance revealed him to be operating a snowplow and bowling on March 12, 1997. Both of these activities were inconsistent with the appellant's stated physical limitations resulting from the accident. There was other troublesome evidence.

[6] Justice Gruchy was mindful that on such an application he should avoid making credibility findings which might be prejudicial on the trial. He was of the view that a determination of the likely damages, if any, could not be made without such findings. In the circumstances of this case Justice Gruchy found that "any estimate of damages . . . would amount to nothing more than a haphazard guess". We are satisfied that he did not err at law in dismissing the application. Nor do we accept that, here, the fact that the appellant must now await the outcome of the trial before recovering damages, if any, results in a patent injustice.

[7] The appeal is dismissed with costs to the respondents, in any event of the

cause, which we fix at $1,200 inclusive of disbursements.

Bateman, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.