C.A. No. 117615

NOVA SCOTIA COURT OF APPEAL
Cite as: Pye v, MacLean, 1996 NSCA 75

Clarke, C.J.N.S., Matthews and Flinn, JJ.A.

**BETWEEN:**

| | | |
|---|---|---|
| LAURA PYE<br>Appellant | ) | John Ratchford<br>for the Appellant |
| - and - | ) | |
| KEVIN MACLEAN<br>Respondent | ) | Aidan Meade<br>for the Respondent |
| | ) | Appeal Heard:<br>April 12, 1996 |
| | ) | Judgment Delivered:<br>April 12, 1996 |

**THE COURT:** Appeal dismissed with costs to the respondent in the amount of $1000.00 inclusive of disbursements per oral reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Flinn, J.A. concurring.

The reasons for judgment of the Court were delivered orally by:

MATTHEWS, J.A.:

The parties were involved in a motor vehicle accident on Main Street, Sydney Mines on March 8, 1993. Ms. Pye sued Mr. MacLean for the injuries she suffered in that accident.

After trial, a judge of the Supreme Court divided liability equally and assessed damages.

Ms. Pye now appeals alleging that the trial judge made errors in finding her contributorily negligent and further that a new trial should be ordered because of "the failure of the learned trial judge to permit the calling of evidence of a material witness on the issue of liability, namely, the girlfriend of Kevin MacLean" who was a passenger in his vehicle at the time of the accident.

As to the issue respecting the division of fault, there was evidence, accepted by the trial judge, to support his findings. He made findings of fact and credibility in favour of Mr. MacLean and against Ms. Pye. Contrary to her testimony, he held that she stopped suddenly in the middle of the street before being struck in the rear of her vehicle by Mr. MacLean's car. It is of some relevance that Ms. Pye testified that she was not aware of any vehicles behind her and she did not check her rear view mirror prior to being struck.

After reviewing the record and hearing counsel it is our opinion that there was sufficient evidence before the trial judge to make the pertinent findings of fact and credibility he did. He made no error in law.

Where an appeal court and a trial judge do not differ as to the facts and the law there must be very strong and exceptional circumstances in order that a court of appeal vary the trial judge's apportionment of fault. **Sparks v. Thompson** (1974), 6 N.S.R. (2d) 481 (S.C.C.).

Further, it is not for this court to retry the case. We will only interfere if the trial judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it. There are

numerous authorities to this effect including **P(D) v. S(C)**, [1993] 4 S.C.R. 141 at 188 and **Toneguzzo-Norvel (Guardian ad litem of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at 121.

In respect to the final issue, at the conclusion of the appellant's case on the morning of the trial, counsel for the appellant informed the trial judge that he had subpoenaed another witness who he expected to have in court that afternoon. The trial judge reminded counsel that at the pre-trial conference he had indicated that he was calling the plaintiff "and possibly one witness". At that time on the trial, both had been called and the defendant was prepared to proceed. Counsel for the appellant offered no proof of service of the subpoena or that the witness would present relevant pertinent testimony or was material for the disposition of the case or why the person was only served with the subpoena the morning of the trial.

In these circumstances, in our opinion, the trial judge did not err in proceeding with the trial forthwith.

The appeal is dismissed with costs to the respondent in the amount of $1000.00 inclusive of disbursements.

J.A.

Concurred in:

Clarke, C.J.N.S.

Flinn, J.A.

C.A. No. 117615

NOVA SCOTIA COURT OF APPEAL

**BETWEEN**:

LAURA PYE

Appellant

- and -

KEVIN MACLEAN

Respondent

REASONS FOR JUDGMENT BY:

MATTHEWS, J.A.