C.A. No. 118453

NOVA SCOTIA COURT OF APPEAL
Cite as Slawter v. White, 1995 NSCA 5

BETWEEN:

EDGAR SLAWTER

W. Dale Dunlop
for the Appellant

Appellant

- and -

PERRY WHITE

Srinivasen P. Pillay and
E.A. Nelson Blackburn, Q.C.
for the Respondent

Respondent

Application Heard:
July 27, 1995

Decision Delivered:
July 28, 1995

BEFORE THE HONOURABLE JUSTICE FLINN IN CHAMBERS

FLINN, J.A.:

The respondent was injured in a motor vehicle accident over five years ago, on March 16th, 1990.

The appellant admitted liability for the accident which caused the respondent's injuries. The matter proceeded to trial in the Supreme Court of Nova Scotia on the sole issue of an assessment of the respondent's damages.

In a decision rendered June 12th, 1995, the trial judge made the following findings:

1. The respondent sustained a moderate to major acceleration-deceleration for flexion-extension soft tissue injury affecting the cervical lumbar spine and neck.
2. In addition, the respondent suffered a post traumatic stress disorder involving a loss of self esteem which led to or developed into a chronic pain disorder characterized by major psychological enhancement of his physical symptoms, especially pain in a number of somatic complaints.
3. The psychological enhancement of physical symptoms or symptom magnification has not been consciously overt on the respondent's part. The trial judge accepted the opinion of a psychiatrist that the respondent was not consciously malingering.
4. The respondent's injuries are totally disabling.
5. All of the injuries are a direct result of the accident.

The trial judge who heard the matter awarded damages to the respondent as follows:

(a) special damages -	336.62
(b) general damages: pain suffering and loss of amenities	$100,000
(c) general damages: loss of past income -	$181,760
(d)general damages - lost future earnings -	$550,000
(e) general damages: cost of future care -	$60,000.
Total	
$892,096.62	

The trial judge also ordered the appellant to pay pre-judgment interest and costs. The total of the damage award, taking into account pre-judgment interest and costs, exceeds $1,000,000.

The appellant has filed a notice of appeal from the decision of the trial judge; and has applied to this Court for a stay of execution of the judgment pending the hearing of the appeal. The appeal has been set down to be heard on January 16th, 1996.

The application for the stay of execution is made pursuant to **Rule 62.10** of the **Civil Procedure Rules**, the relevant provisions of which are as follows:

> "62.10 (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.
>
> (2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.
>
> (3) An order under rule 62.10(2) may be granted on such terms as the Judge deems just."

The decision of Hallett J.A. in **Fulton Insurance Agencies Limited v. Purdy** (1990), 100 N.S.R. (2d) 341 has been consistently approved by this Court as setting out the test that must be applied in determining whether or not to grant a stay.

Hallett J.A. said at p. 346-47:

> " A review of the cases indicates there is a trend towards applying what is in effect the **American Cyanamid** test for an interlocutory injunction in considering applications for stays of execution pending appeal. In my opinion, it is a proper test as it puts a fairly heavy burden on the appellant which is warranted on a stay application considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.
>
> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
>
> (1) satisfy the court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
>
> (2) failing to meet the primary test, satisfy the court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case."

The appellant raises several grounds of appeal. Without listing those grounds in detail, they allege that the award of general damages, considering the nature of the respondent's injuries, was so inordinantly high that it was wholly erroneous. It is also alleged that the trial judge applied wrong principles of law in his assessment of loss of income, both before trial and in the future. It is also alleged that the trial judge erred in law in his assessment of the cost of future care, and in his award of pre-judgment interest on future loss.

Without commenting on the validity of any of the appellant's grounds of appeal, I am satisfied that there is an "arguable issue" raised on this appeal. In **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171, Justice Freeman of this Court referred to an arguable issue as one that is "realistic" and "of sufficient substance".

In **Austin et al. v. Habitat Development Ltd. et al.** (1991), 109 N.S.R. (2d) 290 Justice Chipman of this Court used the expression "serious issues". In my opinion, at least some of the grounds of appeal advanced by the appellant do raise serious and realistic issues and in my opinion they are of substance.

As Justice Freeman said in **Coughlan** at pp. 174-175:

> "But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the Chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the Chambers judge is that the outcome of the appeal is in doubt: either side could be successful."

With respect to the other two points, of the three-fold primary test, namely: irreparable harm and balance of convenience, I do have some concerns.

There are two competing equities here.

On the one hand I have the submission of counsel for the appellant that if the total amount of the judgment were paid now, and if the appellant was successful in reducing the award on appeal, there is a real probability that the monies that would have to be repaid could not be repaid. Counsel refers to the fact that the respondent has not worked since the accident. The respondent has accumulated debts from family members, his girlfriend and her parents, all of whom will expect to be repaid out of the recovered funds. Reference was also made to the various lawyers who have represented the respondent and who would expect to be paid. No affidavit evidence to counter these concerns was put before me on behalf of the respondent. I have no evidence concerning the respondent's assets, nor what would happen to the judgment funds if paid.

On the other hand, the plain fact of the matter is that the respondent was injured in a car accident and the appellant has accepted responsibility. The only issue in the trial was the quantum of damages. Since the matter has been heard and determined by a judge

of the Supreme Court, the respondent should not be deprived of the fruits of litigation pending appeal. It has been five years since this accident and the respondent has, to this point in time, received nothing from the party who caused his injuries.

Counsel for the appellant suggested, during the course of argument, that a portion of the judgment ($100,000) be paid now, and the remainder, if any, be paid following disposition of the appeal. He further agreed that, to the extent that a balance remained unpaid following disposition of the appeal, the appellant would pay interest at the pre-judgment interest rate fixed by the trial judge (8%) as a condition of a stay being imposed on that balance. Counsel for the respondent indicated that the respondent's insurers, whom he represents, will pay that interest even if the payment of it results in payment beyond the limits of the policy. The purpose of the interest payment would be to put the respondent, as nearly as possible, in the same position as he would be if he had the funds now and could invest those funds himself.

Counsel for the respondent agreed with this concept; however, he suggested that the portion to be paid now should be $500,000.

The Chambers judge has a discretion, under **Civil Procedure Rule 62.10(3)**, to grant a stay on terms that the judge deems just.

It seems to me, on the basis of what is before me, to make good sense that I impose a stay on condition that the respondent receive a portion of his judgment now, and on the further condition that he receive interest at 8% on the balance owing following the disposition of the appeal.

Since the major portion of the respondent's damage award relates to loss of future care, if the respondent received $150,000, now, and interest on the balance pending disposition of the appeal, my concerns with respect to the competing equities here would be alleviated.

I wish to make it clear that I am not deciding that, in any case, I would grant a stay

on these terms. These terms are appropriate for this case. They may not be appropriate for another case.

I will order that the stay be granted on condition that the appellant pay the respondent the sum of $150,000 within two weeks. Further, I will require counsel for the appellant to file a letter with this Court, within two weeks, indicating the respondent's insurer's acknowledgement that it will pay interest, at 8%, on the balance (within policy limits) owing following the disposition of the appeal, even if that balance exceeds policy limits.

Under the circumstances each party should bear its own costs of this application.

Flinn, J.A.

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