**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *Ranson v. MacIntyre*, 2022 NSCA 50

**Date:** 20220720
**Docket:** CA 507178
**Registry:** Halifax

**Between:**

Robert Ranson

Appellant

v.

Tarra MacIntyre

Respondent

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|---|---|
| **Judge:** | The Honourable Justice Carole A. Beaton |
| **Appeal Heard:** | May 16, 2022, in Halifax, Nova Scotia |
| **Legislation:** | *Parenting and Support Act*, R.S.N.S. 1989, c. 160, s. 3; *Civil Procedure Rules* (*Rule* 55.14); |
| **Cases Considered:** | *Staples v. Callender*, 2010 NSCA 49; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *Van de Perre v. Edwards*, 2001 SCC 60; *Novak v. Novak*, 2020 NSCA 26; *Volcko v. Volcko*, 2020 NSCA 68; *Doncaster v. Field*, 2016 NSCA 25; *Smith v. Helppi*, 2011 NSCA 65; *MacLellan v. MacDonald*, 2010 NSCA 34; |
| **Sources Considered:** | *Spousal Support Advisory Guidelines* |
| **Subject:** | Application; Common law relationship; *CPR* 55.14; Family; Family – imputing income; Family – *Parenting and Support Act*; Physician's narrative; Spousal support. |
| **Summary:** | The appellant sought to overturn the judge's decision to impute only ten hours of employment income per week to the respondent, to whom he was ordered to pay spousal support. He also challenged the judge's determination as to |

the significance of post-separation events on the respondent's ability to earn employment income.

**Issues:** Did the judge misapprehend the evidence concerning:

i) The recipient's ability to work, which led the judge to improperly impute less income;

ii) the significance of the recipient's post-separation 2017 accident on her ability to work?

**Result:** The hearing judge did not misapprehend the evidence concerning the recipient's ability to work, her health condition, nor the impact of her 2017 post-separation accident upon her circumstances. The medical evidence provided supported the judge's conclusions. The discretionary decisions made by the judge were entitled to deference on appeal, absent any material error or error in law. The appeal was dismissed with costs of $3,000.00, in favour of the respondent.

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Respondent

| | |
|---|---|
| **Judges:** | Bryson, Van den Eynden and Beaton JJ.A. |
| **Appeal Heard:** | May 16, 2022, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed with costs, per reasons for judgment of Beaton J.A.; Bryson and Van den Eynden JJ.A. concurring |
| **Counsel:** | Darren Morgan, for the appellant<br>Nicholas E. Burke, for the respondent |

**Reasons for judgment:**

[1] The appellant Robert Ranson seeks to overturn a spousal support decision. The Honourable Justice Pamela Marche of the Supreme Court of Nova Scotia, Family Division ("the judge") ordered support to the respondent Tarra MacIntyre following a contested hearing in February 2021. For the reasons that follow, I would dismiss the appeal.

## Background

[2] The parties lived together in a common law relationship for over 16 years. By the end of their relationship in January 2016, Ms. MacIntyre had been in receipt of disability income since being declared medically disabled in 2010. Following the parties' separation, Ms. MacIntyre was injured in a motor vehicle accident in 2017 and later received a modest settlement. In January 2018 she applied to the court for, among other relief, spousal support retroactive to the date of separation.

[3] Following a two-day hearing, the judge rendered a written decision May 12, 2021(*TM v. RR*, 2021 NSSC 156) and an order was issued June 22, 2021.

[4] After determining the parties' annual incomes, pursuant to s. 3 of the *Parenting and Support Act*, R.S.N.S. 1989, c. 160 ("the *Act*") the judge ordered Mr. Ranson to pay spousal support of $1,307 per month based on an annual income of $62,550. Satisfied Ms. MacIntyre was not completely unable to work despite her medical challenges, the judge imputed income of $6,734 per year to her, in addition to her receipt of disability income of $8,295 per year.

[5] Applying the *Spousal Support Advisory Guidelines* ("*SSAG*"), the judge ordered support at the high end of the *SSAG* range for an indefinite period, reviewable upon the retirement of Mr. Ranson. She also directed the payment of $37,105 in retroactive spousal support for the period January 1, 2018 to May 1, 2021 in monthly installments of $500. The judge directed Mr. Ranson's support obligation be insured by the continued designation of Ms. MacIntyre as the beneficiary of his Manulife life insurance policy.

[6] In his written and oral materials, Mr. Ranson's submissions focus on an assertion the judge misapprehended medical evidence about the nature and extent of Ms. MacIntyre's disability and its impact on her employability. Mr. Ranson does not challenge Ms. MacIntyre's entitlement to support nor the judge's decision

to apply the high end of the *SSAG* range. However, he does maintain the judge's determination of Ms. MacIntyre's income, which then informed the quantum of prospective and retroactive support payable, was wrongly decided. In particular, Mr. Ranson says the judge misapprehended the evidence of Ms. MacIntyre's physician, Dr. Navin Patel, who testified on her behalf.

[7] Mr. Ranson asks the Court to vary his monthly obligation to the *SSAG* amount of $729 per month to reflect Ms. MacIntyre's employment income-earning potential as $35,200 per year, calculated as a 40-hour work week at $12.95 per hour.

[8] The essence of Mr. Ranson's argument is found in this passage from his factum:

> [43] In summary, Mr. Ranson does not contest the entitlement of Ms. MacIntyre to spousal maintenance - ongoing or retroactive - as part of the present appeal. However, as detailed herein, and with all respect, in determining quantum of spousal maintenance, Justice Marche significantly misapprehended the evidence, particularly that of Dr. Patel. Dr. Patel was clear in his evidence that the only factor affecting Ms. Maclntyre's ability to work a full-time job was the physical limitations imposed on her by her injuries sustained in the 2017 motor vehicle accident, and even with those, she can still work a full-time sedentary position.
>
> [44] In the face of this evidence, Justice Marche nevertheless held that Ms. MacIntyre was disabled by other dated factors not named by Dr. Patel, and incorporated that disability finding into her determination of Ms. MacIntyre' s level of annual income and consequently, her determination of quantum of spousal support payable by Mr. Ranson. With the greatest degree of respect, this finding was clearly erroneous in the face of Dr. Patel's evidence, and therefore it is respectfully requested that this Honourable Court vary the award of Justice Marche as requested herein, so as to correct the trial award to an appropriate quantum of maintenance payable in light of the evidence tendered.

[9] Mr. Ranson's argument of misapprehension of evidence has two components:

i. The judge misunderstood Dr. Patel's evidence about Ms. MacIntyre's ability to work, which led her to improperly impute less income to Ms. MacIntyre than the evidence would support; and

ii. The judge misunderstood the significance of Ms. MacIntyre's post-separation 2017 accident upon the determination of the quantum of support.

**Standard of Review**

[10] As discussed over a decade ago in this Court's decision in *Staples v. Callender*, 2010 NSCA 49:

> [6] The starting point on any appeal is to consider the standard upon which the judge's decision should be reviewed. It is difficult to express that standard in terms accessible to a lay person. At the risk of oversimplifying: an appeal to this Court is not an opportunity for three judges to retry the case on the basis of a written transcript. Our principal role is to ensure that the trial judge applied the correct legal principles in reaching a result. If the judge applied wrong principles which are material to the outcome then this Court is entitled to intervene. Where the question involved is a purely factual matter, significant respect is given to the findings of the trial judge who had the advantage of hearing and seeing the witnesses. Appellate intervention on factual issues is permitted only if the trial judge is shown to have made a clear factual error that has materially affected the result (**Leigh v. Milne**, 2010 NSCA 36 at para. 17). The Supreme Court of Canada has confirmed that this is the standard applicable to the review of support orders (**D.B.S. v. S.R.G**, [2006] 2 S.C.R. 231, 2006 SCC 37, at para. 136).

[11] It has been long recognized that owing to the discretionary nature of the exercise of determining support (both spousal and child), appellate courts are to apply a deferential standard of review. In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, the limitations on appellate review were explained:

> 10 When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> […]
>
> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review

> recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[12] Relying on the principles expressed in *Van de Perre v. Edwards*, 2001 SCC 60, in *Novak v. Novak*, 2020 NSCA 26 this Court reviewed the requirements that a party must demonstrate in order to obtain appellate intervention for an allegation of misapprehension of evidence:

> [8] It is not just any misapprehension of evidence that warrants appellate intervention. The appellant must demonstrate that there was a material misapprehension of the evidence that could reasonably have affected the result. As noted in *D.M. v. S.J.*, 2019 BCSC 850 in the criminal law context this test was articulated in *R. v. Loher*, 2004 SCC 80 at para. 2:
>
> > [2] ... The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".
>
> [9] As noted by Justice Ker in *D.M. v. S.J.*:
>
> > [64] Transposed to the context of family law proceedings, a trial judge's misapprehension of the evidence will only vitiate the decision and underlying order if the error was a central element of the judge's reasoning process: *Kane* at para. 42. In other words, the misapprehension must play an essential part in the end result.
> >
> > ...
> >
> > [66] A further legal principle that informs the analysis is that reasons for judgment must be read as a whole and not parsed or subjected to microscopic dissection: ...

See also *Volcko v. Volcko*, 2020 NSCA 68, at para. 23.

[13] Furthermore, the Court has also recognized the trial judge's exercise of discretion to impute income is entitled to deference, barring an error in principle, a significant misapprehension of the evidence or an award that is clearly wrong (*Doncaster v. Field*, 2016 NSCA 25, at para. 21).

[14] Neither party disputes we may only intervene on these bases. Against these standards, I will consider whether the judge misapprehended the evidence concerning Ms. MacIntyre's circumstances. Before doing so, I wish to comment on the characterization of Dr. Patel's evidence in the hearing.

[15] A January 29, 2021 consent Order for Production required Dr. Patel's file to be produced to Mr. Ranson's lawyer, who was to provide copies to Ms. MacIntyre and the court. At the hearing, counsel for Mr. Ranson confirmed he received a copy of Dr. Patel's file, but through inadvertence had not distributed copies. With agreement of the judge and the parties, a copy of the file was entered as an exhibit in the hearing. There was no indication what use Mr. Ranson was asking the court to make of Ms. MacIntyre's medical records, nor the purpose for which they were being offered, although the records were referred to several times in cross-examination of Ms. MacIntyre.

[16] In addition, counsel for Mr. Ranson agreed at the outset of Dr. Patel's testimony that he was "qualified", although there is no indication as to what opinion evidence the doctor was qualified to give. It would have been of assistance to have had a record that included confirmation of the nature and extent of Dr. Patel's qualification. Having such agreements captured on the record at the outset of a witness' evidence provides clarity. In submissions before us, the parties reported they had confirmed prior to commencement of the hearing that Dr. Patel's evidence would be offered in his capacity as a general practitioner of family medicine.

[17] Regarding Dr. Patel's evidence, the judge found:

> [62] RR claims TM has failed to meet the evidentiary burden of proving that she is disabled and is not, therefore, entitled to spousal support. RR argues that TM failed to provide a medical report compliant with *NS Civil Procedure Rule* (*CPR*)-*Rule* 55. RR acknowledges that TM made her family physician, Dr. P, available for examination during the hearing but claims Dr. P's evidence does not support TM's claim to be disabled.
>
> [63] I have considered the decision in *Downey v. Burroughs*, 2021 NSSC 147.

> [64] Counsel for RR is correct. Dr. P did not provide an expert report compliant with *CPR 55.04*. In fact, Dr. P testified that he was not able to provide an expert opinion in relation to TM's ability to work. Counsel for RR argues the analysis ends there: TM did not meet the evidentiary burden to proving her disability.
>
> [65] Dr. P did, however, provide a complete copy of his medical file in relation to TM. TM's medical records from Dr. P were filed with the Court at the request of RR. Counsel for RR agreed the contents of the medical file should be admitted into evidence and relied on portions of the medical file to highlight perceived misconduct by TM.
>
> [66] I am satisfied that this medical file constitutes a treating physician's narrative in compliance with *CPR 55.14*. Dr. P's records where prepared for the predominant purpose of treating TM and they provide a narrative of the relevant facts observed and the findings made by Dr. P during his treatment of TM. As confirmed in *Downey v. Burroughs*, *supra*, at paragraph 16, it is presumed that the facts and observations made by a physician during treatment will be objective and reliable.

[18] Neither party challenges the judge's decision, post-hearing, to treat the contents of Dr. Patel's file as a physician's narrative pursuant to *Civil Procedure Rule* 55.14 without having received submissions on the point. While it does not impact the outcome of our decision, the judge's use of the file contents as a physician's narrative is questionable, as the material did not, strictly speaking, meet the requirements of *Rule* 55.14. However, the judge did indicate in her decision that she had focused on what Dr. Patel had opined in his testimony, confirmed by portions of his file, concerning his treatment of Ms. MacIntyre (as opposed to the role of any others involved in her medical care).

[19] Taking Dr. Patel's evidence and some of the contents of his file into account, the judge reached the following conclusions about Ms. MacIntyre's disability:

> [67] Beginning in 2007 and continuing throughout the medical file, Dr. P made notes about TM struggling with anxiety and depression. He also made notes about TM suffering from fibromyalgia and essential tremors. Dr. P made note on several occasions that these issues had prevented TM from working. Over the course of his treatment of TM, Dr. P prescribed medications to address these conditions and he referred TM at various times to psychiatrists, physiotherapists, and a pain management clinic.
>
> [68] The documents authored by Dr. P in support of TM's disability claims were also filed with the Court. These documents were prepared for the purpose of supporting TM's claim for disability benefits and do not, therefore, qualify as a narrative prepared for the predominant purpose of treating TM. The content of

> these documents, therefore, have been given very little weight in my overall analysis of Dr. P's evidence.
>
> [69] Having thoroughly reviewed Dr. P's treating physician's narrative, **I am satisfied, on a balance of probabilities, that TM has been experiencing mental health issues, related to anxiety and depression and physical incapacity, related to fibromyalgia, since 2007. This finding, coupled with the objective fact that TM has been in receipt of disability benefits in one form or another since 2010, satisfies me that TM is disabled.**
>
> [70] **I accept that TM's physical impairment was likely exacerbated in 2017 because of a motor vehicle accident. The nature of TM's disability may have evolved since the date of separation. This, however, has not affected TM's income which has remained relatively the same since 2010, five years before the separation.** [Emphasis added]

[20] These findings formed the factual foundation upon which the judge provided her reasons as to determination of income, the categorization of support entitlement, and the quantum and duration of support. In doing so, she considered the issues of imputation of income and intervening post-separation events. As noted earlier, these two matters form the basis of Mr. Ranson's arguments the judge erred.

*Imputing of income*

[21] While characterized by Mr. Ranson as being, overall, a misapprehension of evidence by the judge, his argument effectively challenges her decision to impute income to Ms. MacIntyre on the basis of ten hours of employment per week at $12.50 per hour, or $6,734 per year. He says the judge's figures are unreasonably modest.

[22] As noted earlier, the exercise of imputing income is a discretionary one. As *Staples v. Callender* reminds us, absent a suggestion it was done arbitrarily, the Court will not interfere. Deference reflects the advantage over this Court of the judge who sees and hears the witnesses (*Smith v. Helppi*, 2011 NSCA 65).

[23] Mr. Ranson maintains the judge disregarded Dr. Patel's evidence and focused instead on dated entries in his file which documented her condition in the years prior to the parties' separation. Mr. Ranson says the judge erred in preferring the earlier file entries to the very clear evidence of Dr. Patel that Ms. MacIntyre could perform sedentary work. He says it was not within the judge's "scope" to conclude on the evidence that Ms. MacIntyre is disabled, as doing so substituted

for what Dr. Patel said was Ms. MacIntyre's capacity for work of a sedentary nature.

[24] As Ms. MacIntyre was self-represented, the judge posed a series of questions to Dr. Patel, at the outset of his evidence, to assist Ms. MacIntyre by demonstrating what questions were relevant to the issues before the court. In response to the judge's question, Dr. Patel testified:

> **Q:** I see. Okay. And so how do, do these two conditions impact, if they impact at all, on her ability to work and earn an income?
>
> **A:** The (inaudible...mumbling) so she couldn't function mentally.
>
> **Q:** What does that look like? Can you tell me more about that?
>
> **A:** I think it's a long standing problem and prognosis are not good that she will recover completely. The psychiatrist who tell her for so many years, she's still on the medications.
>
> **Q:** Okay. And how does that impact on her ability to earn an income?
>
> **A:** Her ability to earn, again, for a job is not appropriate. She, she cannot find a job. Nobody will hire her.
>
> **Q:** Because?
>
> **A:** Because of mental disability. And she can not also do any physical work because of her chronic back pains.
>
> **Q:** Okay. Can you tell me more about that?
>
> **A:** It's difficult for her to bend down, or lifting. She cannot stand too long in one spot.
>
> **Q:** What about sitting?
>
> **A:** Sitting is okay.
>
> **Q:** Okay. Do you have a sense of the kind of questions?
>
> **MS. MACINTYRE:** Hmm mmm.
>
> **THE COURT:** Alright, do you want to give it a try again? I'll ask one more question before she...
>
> **MR. MORGAN:** Sure.
>
> **THE COURT:** What is her prognosis with respect to her back pain?
>
> **A:** As I said, she has been going to pain clinic for years and she's still taking the pain medicine.
>
> **Q:** Okay.

> **A:** So to me looks like it's a chronic, permanent issue. [Emphasis added]

[25] Mr. Ranson says this evidence makes clear that Dr. Patel is of the view that Ms. MacIntyre can work 40 hours per week. Mr. Ranson says Dr. Patel provided evidence about the number of hours Ms. MacIntyre could work, which evidence the judge misapprehended when she imputed income based on only ten hours of work per week.

[26] In direct evidence, Dr. Patel replied to Ms. MacIntyre's question on the same point:

> **MS. MACINTYRE:** Do you think that there is any job that I am capable of working at 40 hours a week?
>
> **A:** Anything which is not in all physical work I think you can do it.

[27] Mr. Ranson says the judge ignored Dr. Patel's evidence that Ms. MacIntyre's back pain stemmed from her 2017 accident, and that she could work a 40-hour week in a sedentary role. Mr. Ranson maintains Dr. Patel's evidence makes clear that while Ms. MacIntyre cannot do physically demanding work, she is nonetheless able to work. I note the question was never asked of Dr. Patel exactly how many hours per week of sedentary work Ms. MacIntyre would be able to perform.

[28] The judge obviously accepted Dr. Patel's evidence that Ms. MacIntyre could only do sedentary work, but it was within the judge's discretion to assign a monetary significance to that evidence in terms of how it informed her conclusions about the parties' incomes, and ultimately, the quantum of support. That task belonged exclusively to the judge, not Dr. Patel, as Mr. Ranson would have us accept.

[29] Ms. MacIntyre argues that because Dr. Patel was never asked any further or other details about the type of sedentary work or the number of hours per week she could perform such work, the judge's imputation of income equivalent to ten hours of work per week was not inappropriate. I agree. I am satisfied there was an evidentiary basis for what the judge decided.

[30] Mr. Ranson also disputes the judge's finding that Ms. MacIntyre suffered a disability as far back as 2007. While Mr. Ranson does not disagree Dr. Patel's file contained entries with respect to her conditions of anxiety and fibromyalgia, he points to Ms. MacIntyre's 2018 Record of Employment ("ROE") which was also

before the judge. Ms. MacIntyre briefly returned to work in that year; the ROE indicates she was terminated. Mr. Ranson argues the issuing of the ROE permitted the judge to infer Ms. MacIntyre was fired from her job.

[31] Ms. MacIntyre counters the ROE put before the judge contains no comments as to the nature of her dismissal. She argues the only evidence the judge had on that point, in addition to the ROE, was that of Ms. MacIntyre herself, who testified the employer was unable to provide part-time hours or any other accommodation of her disability. I see no reversible error in the judge having weighed the evidence in the manner she did.

[32] Ms. MacIntyre asserts the judge's decision reflects a consideration of various factors in reaching her conclusions as to the quantum of support, including those of Ms. MacIntyre's age, her work history, and her level of education. In my view, the judge's approach was appropriate. It took a holistic view of Ms. MacIntyre's circumstances, beyond her health limitations, in determining whether to impute income (*Smith v. Helppi*, at para. 16) and how much income to impute. The judge is presumed to know the law. Her use of the high end of the *SSAG* range permits the reasonable conclusion the judge balanced all of the factors before her concerning Ms. MacIntyre's circumstances in situating the support obligation at that end of the range.

[33] Beyond that conclusion, the judge's decision leaves no doubt she did so. She found:

> [76] TM has a grade 10 education. She worked for the first 10 years of her relationship with RR as a labourer in a fish plant, a clerk in a retail store and at a call centre. Since 2010 however, TM's income has been primarily limited to disability benefits.
>
> [77] In 2018 TM attempted, unsuccessfully, to re-enter the workforce by participating in a back to work program. The record of employment from the call centre where she worked reported that TM was terminated from her position during the probationary period. TM testified she discontinued her employment with the call centre because there was no part-time work or modified work hours available to accommodate her disability.
>
> [78] TM's testimony suggests an acknowledgement of her ability to work part-time or modified hours. Considering TM's age, health, education, and employment history, I have determined it is reasonable and fair in the circumstances to impute income to TM at minimum wage ($12.95) but only on a limited, part-time basis of 10 hours per week. TM would need to be accommodated at any job that she would be able to secure and her employment

> options are extremely limited given her lack of education, age, length of time out of the workforce and health issues. Therefore, I have imputed income to TM in the amount of $6,734 per annum.
>
> [….]
>
> [82] However, even taking into consideration TM's successful claim against the home held by RR, I find that TM is entitled to spousal support on a non-compensatory basis, based on need. There is significant disparity between the income of TM and RR. Disparity alone does not establish necessity. Having an income of $15,000, however, is a pretty good indicator of need. [Emphasis added]

[34] The judge was entitled to reach those conclusions, drawn from the available evidence put before her.

*The significance of post-separation events*

[35] Mr. Ranson also argues the judge placed too much weight on irrelevant factors, as the only health-related employment limitations on Ms. MacIntyre were those that resulted from events occurring after the parties' separation. Mr. Ranson says the judge misapprehended Dr. Patel's evidence about Ms. MacIntyre's ability to work, by failing to consider how Ms. MacIntyre's 2017 accident should inform the quantification of support.

[36] Her decision reflects the judge did consider how the 2017 accident informed the analysis. She said:

> [85] The prospective amount of support ordered is at the high range of the Spousal Support Advisory Guidelines to reflect the fact that TM has a disability and limited means or ability to support herself. I have also considered in my assessment that TM has already received a small monetary settlement in relation to the motor vehicle accident and that matter is now settled.

[37] Mr. Ranson places significant emphasis on the following statement in the judge's findings, repeated from para. 19 herein:

> [69] […] TM has been experiencing mental health issues, related to anxiety and depression and physical incapacity, related to fibromyalgia, since 2007. […]

[38] Mr. Ranson says the judge's use of the phrase "physical incapacity" establishes she erroneously preferred (at best) the notations in Dr. Patel's file or ignored (at worst) his *viva voce* evidence. Mr. Ranson says the only thing that disabled Ms. MacIntyre was her 2017 accident and resultant back problems. He

argues Ms. MacIntyre's circumstances pertaining to her disability have nothing to do with the parties' relationship. With respect, this assertion contradicts Mr. Ranson's position that he does not challenge the judge's finding of Ms. MacIntyre's entitlement to support.

[39] Ms. MacIntyre says it is significant that Dr. Patel, her physician of many years, was never asked how her mental health might impact her ability to work. She maintains not only was she disabled before the parties' separation, but the judge could also consider injuries sustained post-separation in arriving at the appropriate quantum of support.

[40] Ms. MacIntyre relies on the following evidence of Dr. Patel in cross-examination:

> **Q:** Okay. And how, if it all, does the chronic back impact on her ability to work?
>
> **A:** Okay. What happened that since then she was attending a pain clinic in North Sydney, the doctor was Doctor Harry Pollett. So I was not doing anything for her and for chronic depression she will see a psychiatrist.
>
> **Q:** And who was the psychiatrist?
>
> **A:** So I did play very little role in this two conditions to treat her.
>
> **Q:** Hmm mmmm.
>
> **A:** Until they both retired and then she start coming to me.
>
> **Q:** I see. Okay. And so how do, do these two conditions impact, if they impact at all, on her ability to work and earn an income?
>
> **A:** The (inaudible ... mumbling) so she couldn't function mentally.
>
> **Q:** What does that look like? Can you tell me more about that?
>
> **A:** I think it's a <u>long standing problem and prognosis are not good</u> that she will recover completely. The psychiatrist who tell her for so many years, she's still on the medications.
>
> **Q:** Okay. And <u>how does that impact on her ability to earn an income</u>?
>
> **A:** <u>Her ability to earn, again, for a job is not appropriate. She, she cannot find a job. Nobody will hire her</u>. [Emphasis added]

[41] Ms. MacIntyre says this evidence of mental health conditions and chronic back pain supports the judge's finding of disability, one which was within the judge's purview to make. Ms. MacIntyre says the judge made a global assessment of Ms. MacIntyre's situation in reaching her decision:

> [78] TM's testimony suggests an acknowledgement of her ability to work part-time or modified hours. Considering TM's age, health, education, and employment history, I have determined it is reasonable and fair in the circumstances to impute income to TM at minimum wage ($12.95) but only on a limited, part-time basis of 10 hours per week. TM would need to be accommodated at any job that she would be able to secure and her employment options are extremely limited given her lack of education, age, length of time out of the workforce and health issues. Therefore, I have imputed income to TM in the amount of $6,734 per annum.

[42] Ms. MacIntyre maintains the judge's conclusion, on the evidence before her, was that on a balance of probabilities Ms. MacIntyre has been experiencing mental health and physical challenges since 2007 and has received disability benefits related to those conditions since 2010. Ms. MacIntyre argues her 2017 accident exacerbated matters, but is not indicative of when her disability began. It is clear from her decision the judge reached that same conclusion, one which was open to her based on the evidence before her. She then considered that evidence in exercising her discretion to apply the *SSAG*.

[43] The judge was satisfied, and Dr. Patel's evidence supported, Ms. MacIntyre had health difficulties that pre-existed the 2017 accident which occurred approximately one year after the date of separation. However, it was not the only factor upon which the judge based Ms. MacIntyre's entitlement to support, nor the quantum. Furthermore, the judge's finding of Ms. MacIntyre's disability was a finding in terms of Ms. MacIntyre's ability to pursue self-sufficiency. The judge distinguished her observations from those of other medical personnel as chronicled in Dr. Patel's file.

[44] In *MacLellan v. MacDonald*, 2010 NSCA 34, this Court cautioned against reweighing evidence on appeal:

> [49] As to the weight the judge gave to the evidence, that is squarely within her jurisdiction, not ours. It is not for us to retry the case and re-weigh the evidence. The judge clearly considered all of the evidence that was before her including the evidence that the father's 2008 income was based on 49 week's work. The evidence previously referred to allowed the judge to infer, as she did, that the father's overtime income in 2009 was uncertain and would be less than it was in 2008.

[45] Those comments resonate here, in light of Mr. Ranson's assertions we should adjust the figure of ten hours per week imputed income to forty hours per week imputed income. I am not persuaded the judge was without an evidentiary

basis upon which to impute to Ms. MacIntyre the income that she did, and it would be improper to now interfere with her exercise of discretion in that regard.

[46] Mr. Ranson's submissions challenge the factual determinations of the judge in relation to what she found was the modest underemployment of Ms. MacIntyre. His argument is embedded in the notion of entitlement, which Mr. Ranson does not dispute. Thus, his position is narrowed to asserting factual error by the judge, which I do not see made out on the record put before the Court.

[47] I am not persuaded there is any basis upon which to interfere with the judge's exercise of discretion to impute income and to assess the quantum of support in the manner she did. The judge was entitled to reach her conclusions, grounded in the evidence she accepted. There is no basis upon which to conclude a misapprehension of evidence by the judge, much less one which could be described as material, or that could have affected the result.

[48] I would dismiss the appeal.

[49] As the successful party, Ms. MacIntyre is entitled to costs. She was self-represented at trial; counsel report the judge awarded her $3,000 representing her "actual" costs. Ms. MacIntyre has counsel on this appeal. Mr. Ranson shall pay her costs in the amount of $3,000, inclusive of disbursements.

Beaton J.A.

Concurred in:

Bryson J.A.

Van den Eynden J.A.