C.A. No. 105605

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Roscoe, JJ.A.

Cite as: Newman v. LaMarche, 1994 NSCA 193

BETWEEN:	)	
	)	
ANITA NEWMAN, an infant, by her guardian ad litem, Donna Fraser, ADAM WENDELL FRASER, Appellant, an infant, by his guardian ad litem, Donna Fraser, CHARLES JOSEPH MACLEOD, an infant, by his guardian ad litem, Florence MacLeod, WENDELL FRASER and DONNA FRASER	)	M. Joseph Rizzetto for the Anita Newman
Appellants	)	
- and -	)	
RACHELLE LAMARCHE and ALLISON A. BLACK	)	Christopher C. Robinson for the Respondents
Respondents	)	
	)	Appeal Heard: September 22, 1994
	)	Judgment Delivered: October 6, 1994

THE COURT: The appeal is dismissed as per reasons for judgment of Chipman, J.A.; Hallett and Roscoe, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal by Anita Newman from a portion of an assessment of damages for injuries sustained by her in an automobile mishap which occurred on

May 26, 1992.

The appellant, then age 15, was one of four passengers in a vehicle owned by the respondent Black and driven by respondent LaMarche which left the road at approximately 7:30 p.m. on Hinchey Avenue, New Waterford.

The appellants' action against the respondents was tried in Supreme Court in May, 1994 by Goodfellow, J. In his subsequent decision, he found the respondent LaMarche negligent in the driving of the vehicle and found the appellant contributorily negligent to the extent of ten per cent for failing to wear a seat belt. He then assessed the appellant's damages for the very serious injuries which she suffered in the mishap.

Immediately following the accident, the appellant was without sensation in her lower limbs. She was taken to Sydney City Hospital where it was found that she had a comminuted fracture of her thoracic spine involving T5. The initial diagnosis was of paraplegia with an indication that the prospect of walking again was slim. On June 1, recovery was complicated by a pulmonary embolus. This was treated successfully. Some weeks later, the appellant began to be able to move one of her toes and from then on she had a remarkable recovery so that she now has the use of her legs and is able to walk unaided.

On August 25, 1992 she was transferred from the Sydney City Hospital to the Rehabilitation Unit at Harbour View Hospital where she remained until her discharge home on October 16, 1992.

Although her recovery from a very severe initial injury was remarkable, the appellant was left with pain and limitation of movement in her back and legs. Goodfellow, J. assessed her non-pecuniary damages in the amount of $53,000 and her future pecuniary loss at $26,000.

The appellant limits her appeal to a challenge of the award of $26,000 for future pecuniary loss contending that it was inordinately low. It is necessary to review the nature of her injury and its likely impact in the future in greater detail in order to

address this issue.

Some six months prior to the accident, the appellant had given birth to a male child. This child was being brought up in the appellant's home where she lived with her mother and stepfather. She was attending school and was in grade 10. She engaged in the usual teenage activities of going about with her friends and participating in such sports as skating, roller skating, soccer and cheerleading. Some of these activities were suspended during the period of her pregnancy, but she intended to resume them following the accident.

The appellant's mother and stepfather had been planning to adopt the appellant's child because they did not want her progress to be impeded. Her mother said that she was an active and determined young lady. The appellant is now giving some consideration to keeping the child herself. Despite her lengthy hospitalization following the accident, she was able to return to school without missing any grades. At the time of the trial she was in grade 12. In her first set of examinations in that grade she obtained a mark of 72% which is consistent with her pre-accident scholastic standing. She had always harboured the ambition to become a school teacher and still hopes to do so.

Medical evidence was provided at the trial by way of hospital records, reports from Dr. H. G. Malik, a neurosurgeon, Dr. R. O. Holness, a neurosurgeon and the **viva voce** testimony of Dr. Douglas A. Watt, a specialist in physical medicine and rehabilitation practicing in Sydney Mines. The appellant's diagnosis on admission to hospital was a severely comminuted fracture of the body and posterior elements of the fifth thoracic vertebra (T5) with minor compression fractures of T4 and T6. Conservative treatment was administered, and following prolonged bed rest to allow stabilization of her fractures, she was allowed to sit up. She gradually recovered sensation in her lower limbs and at the time of her admission to the rehabilitation unit on August 25, 1992, she was mobile but required minimal assistance in standing and

sitting. By the time of her discharge on October 16, 1992 she had improved strength in her legs but had sufficient weakness that she could still not walk normally. She had an abnormal gait and required a rail to hold onto when doing stairs.

By December 17, 1992, Dr. Watt found her to be walking and doing stairs without assistance. She was still not able to run.

When Dr. Watt examined her in May of 1993 he found weakness in the lower limbs ranging from mild to moderate. She walked with an abnormal gait and suffered weakness and pain in her back and legs. Dr. Watt considered that there were two areas which required consideration.

First, dealing with the spine, she is most likely to develop degenerative changes in the area of her injury. This will happen over a period of years. Pain was not a major problem at the time of examination, but will likely become so in the future. Although not a function limiting problem now, the pain due to underlying degenerative changes in the spine could well be "functionally limiting" in the future. As to whether further surgery was advisable, Dr. Watt said that an opinion from a neurosurgeon should be sought.

Second, considering the neurological injury, it is highly likely, in Dr. Watt's opinion, that she will be left with some weakness of her lower extremities, particularly for hip abduction. While it is difficult to predict precisely what her functional limitations will be in the future, Dr. Watt expected that she would be independent for self-care, and able to walk. She would, however, have problems with activities requiring greater strengths such as climbing ladders and doing stairs repeatedly. She would most likely not be able to run well and would thus have difficulty participating in sports. Pain would be a cause of greater functional limitation as well.

Dr. Malik prepared a report dated December 15, 1992. He last saw the appellant on November 24 for follow up purposes. He details the history of the appellant's recovery and the extent of her present disability. She limped with the left

leg after walking a short distance; she was unable to feel water temperature on the right side of her torso and right leg; there was discomfort at the site of her injury at the T5 level; she walked fairly well but with a noticeable limp. He found weakness predominantly on the left leg, analgesia on the right leg and on the right side of the torso up to the level of the injury. He did not comment on what the future held for her.

Dr. Holness provided a report dated March 11, 1993 in which he detailed that the appellant was left with decreased pain and temperature sensation over the right half of her body below the T5 level. She has a mild weakness of her lower extremities and exaggeration of all her reflexes. There was some atrophy of the spinal cord; this is to say it had become smaller at the site of the injury. The spinal canal, however, was adequate in size and did not require further surgical intervention. No specific treatment was required at this time.

Dr. Holness concluded that the deficits from which she now suffers are permanent. The prognosis in terms of deterioration in function and ability to carry out every day activities is excellent.

> "Her deficits as outlined above are permanent. When she attended my office she had no pain though it is possible with the passage of time and increased activity she may develop back pain. The prognosis in terms of deterioration in function and ability to carry out her everyday activities is excellent. However she would be limited in the type of work she can do, for instance I would not suggest that it would be wise for her to engage in any activities that would expose her to another injury. Thus labouring type activity, prolonged standing, bending, and twisting etc. would be contraindicated. She should probably avoid downhill skiing, skating, riding on a bicycle or motorcycle or skidoo, or climbing activities etc., anything that would predispose her to another significant fall. She should be very careful in applying a three point fixation when operating or being driven in a motor vehicle. These precautions however should not prevent her from living a normal life."

The trial judge reviewed this evidence and the case law and after awarding $53,000.00 for non-pecuniary general damages, he addressed the issue of damages for loss of earning capacity in the future. He said:

> "I have had the benefit of observing and listening to her. I get the feeling that her youthful exuberance overshadows a recognition of any real limitations in future employment. This is substantially due to her pre-accident intention to become a teacher career (hope) she still intends to pursue and one which her drive and determination may well permit her to achieve. She is very young, her scholastic record has not been impaired and to the extent a person her age can make a determination of a career (hope) has not been derailed by the consequences of her injuries. It will be more difficult and areas of teaching activity involving sports, handling infants, etc. etc. will be beyond her and other teacher related activities very difficult. Prior to the accident she had a very broad horizon of future employment capacity. Many types of employment such as court reporter, bank teller, sales clerk, waitress, filing and administrative work, bus driver, etc. etc. are either beyond her reduced capacity or questionably open to her on a competitive basis.
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> Balancing her uninterrupted somewhat limited career plan (hope) with the diminution of options against her determination, enthusiasm and drive which may see her succeed I allow $26,000.00 for interference with her broad horizon of future employment capacity."

The appellant submits that this latter part of the award is inordinately low and simply fails to compensate for the reduced earning capacity from which she will suffer over an expected span of nearly 50 years until she attains the age of 65, the usual age for terminating employment.

It is important to remember at the outset the limitations imposed upon this Court in reviewing a damage award. First, as to any of the trial judge's findings of fact, we must not interfere with them unless there is palpable or overriding error on the trial court's part in arriving at them. As to the amount of any award, we cannot interfere unless it has been reached by the application of wrong principles or is so inordinately low or high as to be a wholly erroneous estimate of the damage.

No fault can be found at the trial judge's fact-finding process. The evidence amply supports the conclusions he drew as to the extent of the appellant's injury, the disability it has produced and the extent to which it is likely to impair her earning ability in the future. The only question that remains is whether the number he finally selected was so inordinately low as to be a wholly erroneous estimate of proper

compensation for this injury.

We must keep in mind this is not an award for loss of earnings but as distinct therefrom it is compensation for loss of earning capacity. It is awarded as part of the general damages and unlike an award for loss of earnings, it is not something that can be measured precisely. It could be compensation for a loss which may never in fact occur. All that need be established is that the earning capacity be diminished so that there is a chance that at some time in the future the victim will actually suffer pecuniary loss.

As Davison, J. said in **Gaudet v. Doucet et al** 101 N.S.R.(2d) 309 (N.S.S.C.T.D.) at p. 331:

> "In my view, there are generally two ways to prove loss of future income. Where the evidence permits, definitive findings can be made by a trial judge based on a comparison of the income that would have been earned had the victim been permitted to continue in his normal employment with the income, if any, the injured party can reasonably expect following his injuries. In these situations, there is usually evidence of employment history before the accident and evidence of the extent of the present limitations on employment. In these situations, actuarial evidence is helpful as a guide to the court.
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> In many cases, the plaintiff will not be able to show, on the balance of probabilities, the extent of his loss and this is particulary true of young victims who have not had the opportunity to develop an employment history or plans for a future career. Similar difficulties will be encountered where the injuries do not represent a total disability and it is impossible to determine with any arithmetic precision the extent of the loss. In these circumstances, it is my opinion, that the loss should be considered as the loss of an asset - a diminution in capacity to earn income in the future. In seeking damages for future loss, the burden on the plaintiff is not as stringent as that which exist when he attempts to prove losses which occurred in the past. In **Mallett v. McMonagle**, [1970] A.C. 166, Lord Diplock stated at p. 176:
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> > 'The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities.

> Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.'
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> This passage received the approval of the Supreme Court of Canada in **Janiak v. Ippolito,** [1985] 1 S.C.R. 146; 57 N.R. 241, and was referred to by our Appeal Division in **MacKay v. Rovers,** supra, at p. 242."

In making an award for loss of future earning capacity the court must, of necessity, involve itself in considerable guesswork. Indeed, in many cases where there is less than total disability and the loss of earning capacity cannot be calculated on the basis of firm figures, the diminution of earning capacity is compensated for by including it as an element of the non-pecuniary award. See **Yang et al v. Dangov et al** (1992), 111 N.S.R. (2d) 109 at 126; **Armsworthy - Wilson v. Sears Canada Inc.** (1994), 128 N.S.R. (2d) 345 at 355. It is thus a difficult exercise to begin with and from the point of view of an appeal court it is very difficult to say that such an award is inordinately high or inordinately low except in the most obvious of cases.

I have reviewed a number of cases involving awards for loss of earning capacity in recent years, mostly decided in this province. Many of them are less helpful because they deal with a loss of earning capacity that had come into existence by the time of trial. In all of them, it was clear that the court was of necessity doing little more than making an educated guess. The facts in all of them were quite different from those which are before us. See **Tonequzzo-Norvell et al v. Savein and Burnaby Hospital** (1984), 62 N.R. 162 (S.C.C.); **Brougham - O'Keefe v. Taylor** (1991), 102 N.S.R. (2d) 68 (N.S.S.C.T.D.); **Gaudet v. Doucette et al** (1991), 101 N.S.R. (2d) 309 (N.S.S.C.T.D.); **Benson v. Jamieson** (1991), 106 N.S.R. (2d) 335 (N.S.S.C.T.D.); **Brown v. Matheson and von Kintzel** (1990), 97 N.S.R. (2d) 429 (N.S.C.A.); **Bezanson**

v. Boutilier (1993), 126 N.S.R. (2d) (N.S.S.C.T.D.); **Skeffington v. McDonough and Vanamburg** (1992), 111 N.S.R. (2d) 52 (N.S.S.C.T.D.); **Poirier v. Dyer and Dyer** (1989), 91 N.S.R. (2d) 119 (N.S.S.C.T.D.); **Clayton v. Clayton** (1991), 106 N.S.R. (2d) 335 (N.S.S.C.T.D.); **Tucker v. Asleson et al** (1993), 102 D.L.R. (4th) 518 (B.C.C.A.); and **Bogusinski et al v. Rashidagich** (1974), 5 W.W.R. 53 (B.C.S.C.).

I keep in mind the fact that any loss to be sustained by the appellant would occur some time into the future and perhaps never. Conceivably, the more sedentary lifestyle imposed upon her will lead to greater development of her mental faculties which in the end would put her in a more favourable pecuniary position than might otherwise be the case. This is but one of the many chances and contingencies, both negative and positive, that the trial judge was called upon to assess. The exercise performed by him was of necessity a very difficult one and I am, on consideration, unable to say that the award arrived at by him was inordinately low.

I would dismiss the appeal.

As it was confined to a very narrow compass, costs should not be related to the costs of trial. I would fix them at $500.00, plus disbursements to be taxed.

Chipman, J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.