

NOVA SCOTIA COURT OF APPEAL

Citation: *Kern v. Steele*, 2003 NSCA 147

Date: 20031223

Docket: CA189894

Registry: Halifax

Between:

Lisa Anne Meredith Kern

Appellant
Cross-Respondent

v.

Darrell J. Steele and Theresa W. Steele

Respondents
Cross-Appellants

Judges: Oland, J.A.
Cromwell, J.A. (Dissenting in part)

Appeal Heard: May 27 and 28, 2003

Subject: **Causation. Non-pecuniary damages. Global awards. Loss of earning capacity. Contingencies. Mitigation. Loss of housekeeping capacity.**

Summary: At trial the respondents were found liable for injuries suffered by the appellant following a motor vehicle accident. The appellant received awards for, among other things, "fully mitigated pain, suffering and loss of amenities" and loss of housekeeping capacity. The trial judge reduced his assessment for her loss of future income by imposing negative contingencies of 35 per cent for the possibility that she would not have become a presswoman, 25 per cent for the possibility of a return to work and 25 per cent for failure to mitigate.

The appellant appealed the awards for non-pecuniary damages and loss of earning capacity. The cross-appellants submitted that her fibromyalgia was neither caused by nor contributed to by the accident

and appealed the awards for non-pecuniary damages, past and future loss of income, and loss of housekeeping capacity.

- Issue:**
- (1) whether the trial judge erred on the evidence in finding that the accident caused or contributed to the appellant's fibromyalgia;
 - (2) whether in assessing her non-pecuniary loss: his assessment was so inordinately low as to be a wholly erroneous assessment of damages; or he failed to take into account her failure to mitigate;
 - (3) whether in assessing loss of future income, he erred by: using a mathematical rather than a global approach; imposing the contingency deductions he did on the award for lost earning capacity; deciding upon evidence that was speculative; or failing to properly assess her failure to mitigate and her residual earnings capacity;
 - (4) whether he erred on the evidence and in law in making any award for loss of housekeeping capacity (and consequent award for gross-up).

Result: The appeal was allowed only to the extent of removing the 25 per cent negative contingency for failure to mitigate. The cross-appeal was dismissed.

There was evidence to support the trial judge's finding regarding causation of the appellant's fibromyalgia. He did not err by disregarding material evidence nor by failing to give weight or sufficient weight to any relevant evidence.

In making his assessment for non-pecuniary damages the trial judge did not make any error warranting intervention by this court. His award was not so inordinately low as to be wholly erroneous.

The circumstances of this case were not such as to oblige the trial judge to take a global rather than an actuarial approach to damages.

Critical assumptions in the actuarial report were established in the evidence or based on evidence which he had not rejected.

While the trial judge's recounting of the evidence of a medical expert was mistaken, it did not amount to a palpable and overriding error. He strayed into speculation regarding the studies underlying a medical opinion on the possibility of the appellant returning to work but there was evidence to support his negative contingency in that regard. However, he erred in law in assessing any negative contingency for failure to mitigate.

There was sufficient evidence at trial to support the trial judge's award for loss of housekeeping capacity.

Cromwell, J.A., while concurring in all other respects would have increased the non-pecuniary damages.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 39 pages.