NOVA SCOTIA COURT OF APPEAL

Citation: ***Gillis v. MacKeigan***, 2010 NSCA 101

Date: 20101210
Docket: CA 328060
Registry: Halifax

Between:

John Lloyd Gillis

Appellant

v.

David MacKeigan, Jr.

Respondent

Revised decision: The text of the original decision has been corrected according to the erratum dated February 8, 2011. The text of the erratum is appended to this decision.

Judges: Hamilton, Farrar and Bryson, JJ.A.

Appeal Heard: November 10, 2010, in Halifax, Nova Scotia

Held: Appeal allowed and matter remitted to trial judge to assess damages per reasons for judgment of Farrar, J.A.; Hamilton and Bryson, JJ.A. concurring.

Counsel: Derrick J. Kimball, Nash T. Brogan and Sharon L. Cochrane, for the appellant
Respondent in person

Reasons for judgment:

Background

[1] This is an appeal from the April 6, 2010, addendum (reported as 2010 NSSC 109) to the assessment of damages decision of the Honourable Justice Frank C. Edwards dated January 25, 2010 (reported as 2010 NSSC 22). In his original decision he awarded the appellant $75,000 in general damages. In the addendum, he reduced the original general damage award to $2,500. In doing so, he found that the appellant's injury was a "minor injury" under Section 113B(1) of the **Insurance Act**, R.S.N.S. 1989, s. 231.

Facts

[2] The appellant's action arises out of a pedestrian/motor vehicle accident which occurred on June 12, 2005. Mr. Gillis was standing in a driveway in North Sydney, Nova Scotia, when the respondent, who was driving a 1995 GMC truck, backed his vehicle down the driveway and struck the plaintiff, knocking him to the ground.

[3] Mr. Gillis suffered injuries to his pelvis and right hip and a fracture of his right hand. He also had numerous abrasions.

[4] The appellant commenced action against the respondent on February 23, 2006. No defence was filed and on October 9, 2007, a default order with damages to be assessed was issued by the Supreme Court.

[5] The assessment of damages trial took place on January 12, 2010. In a decision dated January 25, 2010, the trial judge assessed Mr. Gillis' general damages at $75,000. He also awarded damages under several other heads of damages, however, those damages are not at issue in this appeal.

[6] Prior to signing the final order, the trial judge invited counsel to submit a post hearing brief on whether the general damages were subject to the $2,500 maximum award under the Automobile Insurance Tort Recovery Limitation Regulations ("Regulations") made pursuant to s. 113B(4) of the **Insurance Act**.

[7] On April 6, 2010, following receipt of the post trial submissions, the trial judge issued an addendum to his decision of January 25, 2010, reducing Mr. Gillis' general damages to $2,500.

[8] Mr. Gillis appeals from that decision, alleging that the trial judge erred in his interpretation of s. 113B(1)(a) of the **Insurance Act**.

[9] For the reasons that I will develop I would allow the appeal and remit the matter to the trial judge to assess damages having regard to the correct interpretation of the **Insurance Act** and Regulations.

Issue

[10] The only issue for consideration on this appeal is as follows:

> Whether the trial judge erred in law in finding the Appellant's injury was a minor injury under s. 113B (1)(a) of the *Insurance Act*, specifically when he failed to consider whether the Appellant's injuries were excluded under s. 113B (1)(a)(ii) of the *Act*?

Standard of Review

[11] This appeal involves the proper interpretation of provisions of the **Insurance Act** and Regulations. On questions of law the trial judge must be right. The standard of review is correctness. **MacPhee v. Gwynne-Timothy**, 2005 NSCA 80.

Analysis

[12] Section 2(1) of the Regulations contains various definitions for purposes of s. 113B of the **Act**. The definition of personal injury does not define what <u>is</u> a personal injury but rather, what <u>is not</u> a personal injury. Section 2(1) provides:

> 2(1) For the purposes of Section 113B of the Insurance Act and these regulations,
>
> (d) "personal injury" does not include

(i) a coma resulting in a continuing serious impairment of an important bodily function,

(ii) chronic pain that

(A) is diagnosed and established as chronic pain by a medical specialist appropriately trained in the diagnosis and management of pain disorders,

(B) is a direct result of a physical injury sustained in the motor vehicle accident with respect to which the claim is brought,

(C) results in a continuous serious-impairment of an important bodily function, and

(D) is moderately severe or severe pain, as classified in the American Medical Association *Guides to the Evaluation of Permanent Impairment*, 5th edition,

(iii) a burn resulting in serious disfigurement,

(iv) an amputation of a major limb

[13] Even though an injury may be a personal injury because it does not fit within one of the four above noted categories, it may still be excluded as a minor injury under s. 113B(1) of the **Act**. The definition of "minor injury" is defined (once again) not by what it is but rather by what it is not. Section 113B(1) provides:

In this Section,

(a) "minor injury" means a personal injury that

(i) does not result in a permanent serious disfigurement,

(ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and

(iii) resolves within twelve months following the accident;

(b) "serious impairment" means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment.

[14] Through the interaction of s. 113B(4) of the **Act** and s. 3 of the Regulations the maximum general damage award for a minor injury arising out of a motor vehicle accident is $2,500.00.

[15] Section 113B(1)(a), above, provides that personal injuries can be minor injuries but not all personal injuries are minor injuries. Let me explain.

[16] Section 2(1)(d) of the Regulations provides for specific injuries which are deemed not to be personal injuries and, therefore, by definition are not minor injuries. They are:

1. a coma resulting in a continuing serious impairment of an important bodily function;

2. chronic pain as defined in s. 2(1)(d)(ii);

3. a burn resulting in serious disfigurement; and

4. an amputation of a major limb.

[17] All other injuries may be personal injuries within the meaning of the definition. Some personal injuries will be minor injuries and, therefore, subject to the $2,500.00 maximum award. Others will not. (s. 113B(1)(a) of the **Act**.)

[18] There are two categories of personal injury that will not be considered minor injuries. They are (1) a "permanent serious disfigurement" (ss. 1(a)(i)), (which the appellant acknowledges is inapplicable to the facts of this case), or (2) a "permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature" (ss. 1(a)(ii)). This category calls for a factual assessment of impairment and function in the given circumstance. This is the category of personal injury within which the appellant says his injuries may fall.

[19] In his decision the trial judge focused his analysis solely on the injuries excluded from the definition of personal injury in s. 2(1)(d) of the Regulations and, in particular, s. 2(1)(d)(ii) which addresses chronic pain. He found that the appellant suffered from chronic pain. However, because it did not meet the criteria set out in s. 2(1)(d)(ii) the judge concluded the injury was not excluded and was, therefore, a minor injury. In making this determination he did not err. The trial judge, however, mistakenly defines the issue before him as follows:

> [9] It is not relevant that no attempt was made at the January 12, 2010 hearing "to prove chronic pain in the manner required in that subsection". The onus is now on the Plaintiff to prove that his chronic pain is not excluded by Section 2(1)(d) of the regulations. The Plaintiff has failed to do that.
>
> (My emphasis)

[20] I believe the trial judge meant to say that the onus was on the plaintiff to prove his chronic pain was excluded by s. 2(1)(d) of the Regulations. As noted earlier, if an injury falls within that section, it is excluded from the definition of minor injury. In any event, it is clear when reading the decision as a whole, that the trial judge was considering whether the appellant's chronic pain met the definition in s. 2(1)(d)(ii). The trial judge's error was in determining the issue turned solely on whether the appellant could bring himself within s. 2(1)(d)(ii) of the Regulation.

[21] With respect, the analysis does not end simply because the appellant did not fall within one of the categories of excluded injuries set out in s. 2(1)(d) of the Regulation. The trial judge erroneously concluded that if the injury did not fall within s. 2(1)(d) of the Regulations it was, by definition, a "minor injury". In other words, unless the plaintiff had one of the four categories of injury in s. 2(1)(d) his general damages would be limited to $2,500.

[22] As a result of misinterpreting the Regulations, the trial judge failed to consider whether the appellant's personal injuries were excluded from the definition of minor injury pursuant to s. 113B(1) of the **Act**. In particular, the trial judge was required to determine whether the appellant's injuries resulted in a permanent serious impairment of an important bodily function caused by a continuing injury, which is physical in nature and did not resolve within 12 months following the accident.

[23] Associate Chief Justice Smith in **Farrell v. Casavant**, 2009 NSSC 233 sets out a useful approach to be taken in determining whether an injury is to be excluded from the definition of a minor injury. At ¶167 she sets out the questions which informs the analysis:

1. Did the Plaintiff suffer a "personal injury"?

2. If so, did the personal injury result in a permanent serious disfigurement?

3. Did the personal injury result in permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature?

4. Did the personal injury resolve within twelve months following the accident?

[24] The appellant acknowledges the second question as set out by Associate Chief Justice Smith is not relevant to the appellant's circumstances, however, the other questions need to be answered before a determination can be made on whether his injury is a minor injury.

[25] The trial judge concluded his analysis with a determination that Mr. Gillis' injuries did fall not within s. 2(1)(d)(ii) of the Regulations. As previously noted, s. 2(1)(d) simply sets out those types of injuries that are not personal injuries and, therefore, can never be minor injuries. It does not attempt to define all injuries that would be excluded from the operation of s. 113B(1) of the **Insurance Act**. The trial judge was in error in interpreting of the **Act** and Regulations in this manner.

Remedy

[26] The appellant asks us to set aside the Addendum dated April 6, 2010 and re-instate the general damage award of $75,000 in the trial judge's January 25, 2010, award. With respect, we cannot grant the remedy requested. Although Mr. Gillis' injuries are not excluded, solely, by the operation of s. 2(1)(d) of the Regulations, his injuries may still be a "minor injury" under s. 113B(1) of the

Insurance Act. The record before us is insufficient to allow us to undertake the analysis mandated by s. 113B(1) and to make the findings of fact required.

[27] The issue with respect to the **Insurance Act** and Regulations was not a live issue at the time of the trial in this matter. Further, the trial judge limited his analysis to whether the plaintiff suffered from chronic pain as defined in s. 2(1)(d)(ii) of the Regulations. Neither counsel nor the trial judge at the time of the hearing turned their minds to the factual determinations that needed to be made under s. 113B(1) of the **Insurance Act** and the trial judge, because of his error, did not address it after receiving the post-hearing brief. As a result, it may be necessary for further evidence to be led on the issue. However, that is not for us to determine but rather, for counsel and the trial judge.

[28] As a result, the matter is remitted to the trial judge to assess damages taking into consideration the correct interpretation of the **Insurance Act** and Regulations.

Costs

[29] The respondent, although present at the appeal, was unrepresented and did not file a factum or make representations with respect to the merits of the appeal.

[30] The appellant did not seek costs of the appeal but rather, sought the reinstatement of the trial judge's January 25, 2010, decision. Given the outcome of this appeal, I would fix costs in the amount of $2,500 including disbursements. If the appellant is successful in having the his injuries excluded from the definition of minor injury before the trial judge, costs of this appeal in that amount shall be awarded to the appellant. If the appellant is not successful, there shall be no costs of this appeal.

Farrar, J.A.

Concurred in:
Hamilton, J.A.
Bryson, J.A.

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Respondent

Revised Judgment:	**The text of the original judgment has been corrected according to this erratum dated February 8, 2011**
Judges:	Hamilton, Farrar and Bryson, JJ.A.
Appeal Heard:	November 10, 2010, in Halifax, Nova Scotia
Held:	Appeal allowed and matter remitted to trial judge to assess damages per reasons for judgment of Farrar, J.A.; Hamilton and Bryson, JJ.A. concurring.
Counsel:	Derrick J. Kimball, Nash T. Brogan and Sharon L. Cochrane, for the appellant Respondent in person

Reasons for judgment:

[31] Paragraph [18], line 2, change “personal serious disfigurement” to read “permanent serious disfigurement”.