Date: 20020325
Docket: CA 173256

NOVA SCOTIA COURT OF APPEAL
[Cite as: Langille v. Midway Motors Ltd., 2002 NSCA 39]

Roscoe, Freeman and Oland, JJ.A.

BETWEEN:

BERTHA JUNE LANGILLE

Appellant

- and -

MIDWAY MOTORS LIMITED, and CATHERINE AUBRECHT, Administratrix of the Estate of KARL FRANCIS AUBRECHT, deceased, and GUARDIAN INSURANCE COMPANY OF CANADA and WILLIAM VINCENT PARIS

Respondents

REASONS FOR JUDGMENT

Counsel: Milton J. Veniot, Q.C. for the appellant
A. Jean McKenna for the respondent Guardian Insurance Co. of Canada

Appeal Heard: March 21, 2002

Judgment Delivered: March 25, 2002

THE COURT: Appeal dismissed per reasons for judgment of Roscoe, J.A.; Freeman and Oland, JJ.A. concurring.

ROSCOE, J.A.:

[1] This is an appeal from a decision of Chief Justice Joseph Kennedy denying the appellant's claim of entitlement to Section B benefits and ordering the repayment of amounts previously paid by the respondent.

[2] Bertha Langille, the appellant, while a passenger in a van operated by her common law husband Vincent Paris, was seriously injured in a motor vehicle accident, on October 9, 1993. The respondent, the insurer of the vehicle, paid the appellant income replacement benefits pursuant to section B of the policy for two and one-half years, and then claimed that the appellant was then able to work at some occupation. When the appellant sued for the continuation of the benefits, the respondent claimed that she had not been employed at the time of the accident and sought recovery of all amounts previously paid. The trial judge found that the appellant was not employed within the meaning of the policy and ordered repayment to the respondent.

[3] The relevant sections of the policy, Schedule "B" to Part VI of the **Insurance Act**, R.S.N.S., 1989, c. 231, state:

Part II - Loss of Income

> Subject to the provisions of this Part, a weekly payment for the loss of income from employment for the period during which the insured person suffers substantial inability to perform the essential duties of his occupation or employment, provided,
>
> (a) such person was employed at the date of the accident;
>
> ...
>
> For the purposes of this Part,
>
> . . .
>
> (3) a person shall be deemed to be employed,
>
> (a) if actively engaged in an occupation or employment for wages or profit at the date of the accident; or
>
> (b) if 18 years of age or over and under the age of 65 years, so engaged for any six months out of the preceding 12 months and in these circumstances shall be deemed to have suffered loss of income at a rate equal to that of his most recent employment earnings;

[4] The evidence clearly established that the appellant did not work for six out of the preceding 12 months, so the main issue before the trial judge was whether she was employed for wages at the date of the accident.

[5] The appellant claimed that she was employed full time, 40 hours a week, at the time of the accident by Vincent Paris in the operation of his mobile canteen, and had been so engaged for nine weeks during 1993. A statement from Human Resources Development Canada shows that she was in receipt of employment insurance benefits from January 1 to June 20 and from July 18 to August 15, 1993. The appellant also claimed to work part time as a house cleaner at the time of the accident.

[6] In his decision, the trial judge reviewed the evidence, and concluded that neither the appellant nor Mr. Paris, who was called by the respondent, was a credible witness. He did not believe that the appellant worked on the mobile canteen at the date of the accident. Furthermore, he was not persuaded that she was doing any housekeeping for income at the time of the accident.

[7] On appeal, the appellant contends that the trial judge erred in finding that the appellant was not employed at the time of the accident, in rejecting her evidence, in ordering the repayment of the benefits, and that he lost jurisdiction by failing to comply with s. 34(d) of the **Judicature Act**, R.S.N.S. 1989, c. 240, in that the decision was reserved for a period of time exceeding six months.

[8] Dealing with the last issue first, the appellant seeks a declaration that there was a loss of jurisdiction and an order for a new trial. The last day of trial was May 21, 1999. The cover page of the written decision contains two dates: “Decision: November 20, 1999" and “Decision Released: November 22, 1999". We have no explanation for the different dates. Assuming without deciding that the decision in this case was reserved for longer than the six months permitted by s. 34 of the **Judicature Act**, we do not agree that there was a loss of jurisdiction in the circumstances. The time limit should not be considered to be mandatory but rather strongly directory. The appropriate remedy for failure to deliver a judgement after trial within six months, should be an order for *mandamus*, not an order for a new trial. Since the decision has now been delivered, no order is required.

[9] The principal issue at trial and on appeal is whether the appellant proved that she was engaged in an occupation or employed for wages at the time of the accident on October 9, 1993. The credibility of the appellant was severely undermined by inconsistencies between her statements given to the adjuster, her evidence given at discovery and at trial, contradictions between her evidence and Mr. Paris’ statements and evidence, the fact that she admitted to not reporting income from housekeeping for tax and unemployment insurance purposes, and her admission that she made false statements on applications for unemployment insurance benefits. Furthermore, there was no independent credible evidence that at the time of the accident the mobile canteen was still in operation, that the appellant was working on it, or that she was paid for working on it.

[10] After reviewing the record and hearing the arguments advanced by counsel, it is our unanimous opinion that there was sufficient evidence before the trial judge to support all of the findings of credibility he made, and to support the conclusions of fact and law that he reached, on both the issues of non-entitlement to the benefits and the order for repayment. This Court has repeatedly stated, with respect to findings of fact, that the appellate court should only interfere where the trial judge has made a palpable or overriding error which affected his assessment of the facts. Further, the credibility of witnesses is a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses, and of observing their demeanor and conduct. Because of these factors, unless strong and cogent reasons are given, appellate courts are not justified in reversing a finding of credibility made by a trial judge. See: **Cole et al v. Cole Estate** (1994), 131 N.S.R. (2d) 296, **Stein v. The Ship "Kathy K"**, [1976] 2 S.C.R. 802; and **Travellers Indemnity Co. of Canada v. Kehoe** (1985), 66 N.S.R. (2d) 434.

[11] Since, in our unanimous opinion, no reversible error was made by the trial judge, the appeal is dismissed. The respondent is awarded costs on appeal of $2,000.00, plus its disbursements.

Roscoe, J.A.

Concurred in:
Freeman, J.A.
Oland, J.A.