NOVA SCOTIA COURT OF APPEAL
Citation: Whey v. Halifax (Regional Municipality), 2006 NSCA 107

Date: 20060928
Docket: CA 262254
Registry: Halifax

Between:

Halifax Regional Municipality, a body corporate,
Cunningham Lindsey Canada Ltd., a body corporate,
and Michael Alwyn

Appellants

v.

Barbara Whey and Eric Whey

Respondents

Judge(s):	Cromwell, Saunders & Hamilton, JJ.A.
Appeal Heard:	September 27, 2006, in Halifax, Nova Scotia
Written Judgment:	September 28, 2006
Held:	Appeal dismissed, as per oral reasons for judgment of Saunders, J.A., Cromwell & Hamilton, JJ.A. concurring.
Counsel:	Jean McKenna, for the appellants David W. Richey, for the respondents

Reasons for judgment: (Orally)

[1] After a four day trial on the issue of liability only, **(2005) 239 N.S.R. (2d) 239**, Nova Scotia Supreme Court Justice Gregory M. Warner found the appellant, Halifax Regional Municipality, negligent in the operation of its Route 66 Metro bus. Warner, J. found that the bus driver was upset and distracted by an abusive passenger on board, with the result that he was careless and driving too fast when turning the bus sharply to the right whereby the back wheels of the bus struck a curb, knocking the respondent from her seat and on to the floor. She is said to have suffered significant and lasting injuries. The extent of her loss and damages will be determined in a subsequent proceeding. The trial judge rejected the appellants' pleas of contributory negligence and inevitable accident.

[2] In their Notice of Appeal the appellants list twenty-five grounds of appeal (thirty-six when sub-grounds are taken into account). It will not be necessary for us to consider each of the appellants' assertions. Each is convincingly refuted in the excellent factum filed by Mr. Richey.

[3] The principal issues for Justice Warner to decide were these: first, how was Mrs. Whey injured; second, was that injury caused by the appellants' conduct; third, did the appellants' conduct amount to negligence - which of course involves a consideration of the standard of care and the duty of care owed to a paying passenger by a public carrier; fourth, was the appellants' conduct the proximate cause of Mrs. Whey's loss; fifth, matters of credibility or other conflicts in the evidence; and finally, was Mrs. Whey's own conduct such that it would bar or reduce her entitlement to recovery. See Allen M. Linden, **Canadian Tort Law**, Sixth Edition (Butterworths: 1997).

[4] In a clear and thorough analysis comprising some 60 pages, Justice Warner painstakingly reviewed the record, resolved conflicts in the testimony when deciding the facts; and carefully weighed the evidence as he was obliged to do. With respect, it seems to us that the appellants' attack on the trial judge's findings is an invitation to this court to retry the case. Of course that is not our role.

[5] There was ample evidence in the record to support the trial judge's findings. He did not fail to consider critical evidence, nor take into account inadmissible evidence. He understood and applied the correct legal principles in deciding every issue that required determination. There is nothing which would warrant our

intervention. Contrary to the appellants' submissions we do not read the trial judge's reasons as making any finding of inadequacy in the design of the bus, or that his findings of negligence were premised on any inadequacy in design. See generally **H.L. v. Canada (Attorney General),** [2005] S.C.J. No. 24; **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **Campbell MacIsaac v. Deveaux & Lombard**, 2004 N.S.C.A. 87; and **McPhee v. Gwynne-Timothy**, 2005 N.S.C.A. 80.

[6] We would dismiss the appeal with costs of $3,000 payable to the respondents, plus disbursements as agreed or taxed, which are attributable only to the appeal on the merits and not in relation to interlocutory applications, other than to set down the appeal.

Saunders, J.A.

Concurred in:

Cromwell, J.A.

Hamilton, J.A.