Date: 20011123
Docket: S.N. 109050

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: *Hillier v. Mann*, 2001 NSSC 180]

Between:

GARY HILLIER

Plaintiff

- and -

ELEANOR B. MANN

Defendant

D E C I S I O N

HEARD BEFORE: The Honourable Justice John M. Davison

PLACE HEARD: Sydney, Nova Scotia

DATE HEARD: October 9-17, 2001

DECISION: November 23, 2001

COUNSEL: Hugh R. McLeod
for the Plaintiff

C. Patricia Mitchell
for the Defendant

DAVISON J.:

[1] The plaintiff suffered injury in a motor vehicle accident which occurred on October 2, 1997. In this proceeding the defendant admitted liability for the damages to the plaintiff caused by the accident.

[2] In the action a party gave notice of a trial by jury. It was agreed that the jury should decide the extent to which the defendant is liable to the plaintiff for non-pecuniary damages, loss of past earnings and loss of future earnings. It was agreed the trial judge should decide the issues of special damages and an issue relating to Section B of an insurance policy.

[3] Trial before the jury took place in Sydney, Nova Scotia between October 9, 2001 and October 17, 2001. The questions put to the jury and answers of the jury are:

1. Q. Did the negligence of the defendant in the motor vehicle accident which occurred on October 2, 1997 cause or contribute to injuries to the plaintiff?

   A. Yes ☒ No ☐

2. Q. If the answer to question 1 is "yes", at what amount do you assess the total damages of the plaintiff in the following categories?

   A. (1) General damages for pain, injury, suffering, loss of enjoyment of life, past and future

   $ 30,000.00

   (2) Financial loss

   (a) Past loss of income from October 2, 1997 until today, if any

   $ 59,873.00

   (b) Future loss of income, if any

   $ 28,126.00

PRELIMINARY ISSUES

[4] While the jury was deliberating after all the evidence had been presented, submission of counsel had been made and the charge given, the court raised with counsel the extent of the documents which would be required by the court for determination of questions the solicitors agreed should be answered by the judge sitting alone.

[5] At that point there seemed to be a misunderstanding on the items I was to determine. I indicated I had to consider certain special damages and an issue under Section B of an insurance policy. The counsel for the defendants agreed those were the issues for me to decide, but Mr. McLeod, counsel for the plaintiff, advised that I was also to consider a loss with respect to the expense the plaintiff would have in the future in purchasing drugs because of injuries suffered in the accident. Mr. McLeod put a figure of $87,660 on this item.

[6] On October 4th a pre-trial conference was held by telephone and I prepared a memorandum setting out matters discussed at that conference. A portion of that memorandum read:

> On the question of special damages, there is a sum which was paid under section "B" - $8,403.50. It was agreed this should be deducted from any special damages and this should not be a matter which should go to the jury.
>
> On the issue of future loss of income, it is decided that if a jury awards something for future loss of income, counsel will submit before the trial judge any deductions that may be made by reason of the benefits that were paid by the insurer of the defendants.
>
> Thus the damages to be decided by the jury are his past loss of income, future loss of income and general damages.
>
> To be decided by the trial judge are the following special damages:

Dr. H.F.L. Pollett (treatments from April 1998 to April 2001)	$1,014.50
Prescription drugs (to be repaid to Social Services)	7,074.55
Transportation fees (not paid by section "B" insurer)	6,399.00
Property	10,765.87

There was no reference in the memorandum to cost of drugs in the future. This memorandum went to counsel with my letter of October 5, 2001, the content of which reads:

> Dear Counsel:
>
> I enclose a memorandum of the discussions of the pre-trial conference held by telephone. If I have made any errors or omissions, I could be advised at trial.

I received no indication of errors or omissions.

[7] I raise this matter because of a comment in the written brief of Mr. McLeod on matters that were left for me to decide. He has raised the issue in his argument, and I must deal with it. He wrote:

> This court made a ruling that future drug expenses in the amount of $87,660.00 was **not to be considered**. If the court was right in making such a ruling, it can't be right in making a ruling which is just the opposite in order to help the defence. ["Emphasis Mr. McLeod"]

[8] The issue that the court should decide the loss of future damages and drug expense was raised by Mr. McLeod during the time the jury was deliberating on its verdict. This claim was a claim for future care. The jury was not given a question involving future care. It was to decide future loss of income. The only answer the jury would make to future loss of income was the jury's opinion on the quantum of that loss. In my view it would be inappropriate for both the judge and the jury to determine the extent of a period of time a future loss caused by the motor vehicle accident would occur. The two triers of fact would probably be acting at crossed purposes. If I had been asked to determine the amount for future care, I would have refused and would indicate the matter should be decided by the jury.

[9] I made these points when the issue was raised and Mr. McLeod said the jury should be recalled and asked to determine the question. The case was closed. The submissions were made. The jury questions were agreed by counsel. There was no future loss of care put to the jury. Counsel for the parties did not address that issue in their summations. As stated, the memorandum of the pre-trial conference said:

> Thus the damages to be decided by the jury are his past loss of income, future loss of income and general damages.

The trial went forward on that basis and concluded on that basis.

[10] There are other preliminary points on which the court should comment based on the language of Mr. McLeod in his written submission. He submits the court "be mindful of its duty of fairness" and that "the court be mindful of the great lengths that it went to assure that the defence was not prejudiced by actuarial evidence". After further comments Mr. McLeod states "it is respectfully requested that the Plaintiff's right be jealously guarded to the same degree that the Defendant's rights were - that is, the Plaintiff's right to fairness."

[11] These preliminary points are significant because counsel for the plaintiff is suggesting a burden of proof of special damages different from the standard of proof required in civil actions - the balance of probabilities. That position has to be rejected.

[12] On the issue of special damages I refer to *Halsbury Laws of England* (3d) ed. Vol. 11 at p. 218.

> In contrast to general damages special damages must be claimed specifically and proved strictly.

[13] Where it is unfair to apply the "but for" test the plaintiff's burden extends to whether the defendant's negligence "materially contributed" to the occurrence of the injury. *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647. The case is not of assistance in advising how you determine what is "materially contributed", but material is defined in *Black's Law Dictionary* 5th ed. as follows:

> **Material.** Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. Representation relating to matter which is so substantial and important as to influence party to whom made is "material."

[14] There is also a duty on an injured party to take all reasonable steps to mitigate his or her loss. Reference is made to *Corkum v. Sawatsky* (1993), 126 N.S.R. (2d) 317 (N.S.C.A.).

[15] Mr. McLeod comments that I went to "great lengths" to assure the defendant was not prejudiced by actuarial evidence. I gave reasons for my ruling at the trial. I do not have a copy of those reasons, but it is my recollection that I clearly stated that I had no difficulty in determining a good portion of the

actuary's report, and some of the evidence to be advanced through the actuary had a prejudicial effect on the defendant which surpassed its probative value. There was a jury who had no experience in assessment of damages. There was a witness, an actuary who advanced a curriculum vitae which included giving evidence before the Supreme Court of Nova Scotia 41 times, before the Supreme Court of Newfoundland 13 times, before the Court of Queen's Bench of New Brunswick 27 times and before the Supreme Court of Prince Edward Island 2 times. The witness who, at the time of preparing an extensive report, received all of her information from the plaintiff or the plaintiff's counsel. The witness heard no significant evidence during the trial and was in the court room only on the day she testified. She produced a report which, in my opinion, in addition to its prejudicial effect was complex to the point it would only add confusion to the jury's deliberations and would interfere with attaining a verdict that was reasonable to the extent it complied with the evidence before the court.

[16] In my reasons for restraining the evidence that should go before the jury, I referred to *R. v. D.D.*, [2000] 2 S.C.R. 275. In my charge, as I recall it, I gave the jury options which included the option advanced by the actuary in her evidence to the jury.

[17] It is the duty on the trial judge to determine and prevent evidence of a prejudicial nature to the extent it exceeds its probative value going to the jury. My finding on the actuarial evidence was based on the balance of probabilities, and I was convinced introduction of the actuarial evidence that counsel for the plaintiff advanced was extremely prejudicial. I did not have to proceed "at great lengths" to make that finding.

[18] My concern with the comments of counsel for the plaintiff is that he expects I should exercise a burden of proof which requires me to proceed at "great lengths" to determine factual findings in favour of the plaintiff. This will not be done. I will implement the appropriate standard of proof for civil action as, in my view, I did in my ruling on the evidence of the actuary.

THE TREATMENT OF DR. POLLETT AND DRUGS PRESCRIBED BY DR. POLLETT

[19] In assessing special damages it is my view I must consider the verdict of the jury. There are reasonable inferences that can be drawn from the answer to the jury questions without delving into the area of speculation. The jury awarded a large sum for past loss of wages. The defendants admitted the plaintiff suffered some injuries in the motor vehicle accident, but submitted

the residual effects would not have lasted more than a year or two from the date of the motor vehicle accident. The jury did not accept that position, nor did the jury find the plaintiff was totally disabled by the motor vehicle accident. It would not be speculative to infer the jury found damages which extended in time past the date of trial. Otherwise they would not have awarded $28,126 for future loss of wages.

[20] It is my recollection from the evidence that the only medical witness who expressed the view the plaintiff was totally disabled was Dr. Pollett who was a specialist in pain management. He expressed that view at trial notwithstanding his opinion, which was shared by other doctors who testified, that the plaintiff exaggerates his injuries and that Dr. Pollett "did not necessarily believe him". This made it, according to Dr. Pollett, particularly difficult to diagnose his ailments.

[21] Nevertheless, it would appear from Dr. Pollett's reports that he treated him with drugs and injections and the purpose must have been for relief of pain he believed the plaintiff was experiencing. He first saw the plaintiff six months after the accident and the jury must have found the injuries prohibited the plaintiff from working at that time. This would justify a recovery of the cost of treatments from Dr. Pollett during this time and some further time which I cannot determine.

[22] There is sufficient proof of this item of damage to support recovery of cost of treatment by Dr. Pollett and drugs prescribed by Dr. Pollett. In view of the finding of the jury on past lost wages I would find the full amount of these items have been proved subject to any deduction with respect to Section B benefits in the insurance policy. The figures advanced are $1,014.50 for the treatments and $7,074.85 for the drugs. The defendant agrees with the quantum of these items.

[23] It is true that there was a difference of opinion among the doctors who testified with respect to the effectiveness of an instrument called a photonic stimulator which was used by Dr. Pollett in treating the plaintiff's soft tissue injuries, but the plaintiff was liable for the expense of the use of this equipment which use was prescribed by a doctor treating him for pain. It would be reasonable for the plaintiff to agree to its use and any cost connected to its use. The findings of the jury do not permit me to reject the plaintiff's claim for $205 which is part of the treatment expense.

PROPERTY CLAIM

[24] The plaintiff advances a claim for the value of equipment used in his landscaping business. It is alleged that if he had known he would be totally disabled, he could have sold the equipment for at least $10,765.87, and that is the extent of the claim for this item. It is apparently 66 2/3 percent of the market value. The jury determined the plaintiff suffered a loss of past wages and some loss of future wages. The plaintiff seeks this further claim in addition to that awarded by the jury.

[25] What evidence does the plaintiff advance to prove a loss of this nature was caused by the accident? The plaintiff has the equipment. It could be sold. We have no evidence of the price that would be obtained. The video shown to the jury indicates he was using equipment in 1999. There was filed documents of Trans Canada Credit Corporation dated April 1995 which related to financing of sprayers and a tiller.

[26] A year later, on April 10, 1996 and before the accident, a consolidation order was issued by the Supreme Court of Nova Scotia. It revealed outstanding indebtedness of the plaintiff at $20,978.76 of which $4,410.89 related to the contract with Trans Canada Credit. For this item an amount of $4,478.56 is claimed against the defendant which indicates little was paid with respect to the sprayers and tiller in a year. This order was granted about one and a half years before the accident.

[27] There was evidence at trial of a proposed movement by the plaintiff to Ontario or further west to pursue employment.

[28] In *Iverson v. Onland*, [1992] B.C.J. No. 1698 there was a claim for money owing on his truck which was used in the plaintiff's business as a courier. Holmes J. stated at p. 14:

> I do not find the plaintiff's separate claim for a remaining balance owing after resale of his truck to be a compensable loss. It is a claim apparently based upon the plaintiff's impecuniosity which I find neither foreseeable nor resulted from the defendant's negligence. In my view the plaintiff was about to be terminated from employment as a courier at the time of the accident in any event and would have been without employment income. Further I am not satisfied the plaintiff made any reasonable attempt to alleviate short term financing difficulties by loan or lease postponement.

[29] In the proceeding before me the plaintiff was in financial difficulties before the accident, had made few payments on the equipment, did not work for at least a year before the accident and still has the equipment. The loss was not foreseeable.

[30] What is the causal relationship between the motor vehicle accident and the loss with respect to the landscaping equipment? In *Walker Estate v. York-Finch General Hospital, (supra)* it was determined the proper test for causation is whether the defendant's negligence "materially contributed to the occurrence of the loss." It is my view that when I consider his payment of debts program in April 1996 with notice of default in August 1996, the fact the business made little money in 1997, that he did not work for a period of over a year before the accident and no evidence he made the payments on the equipment before the motor vehicle accident, it could not be said the accident materially contributed to the loss of the equipment. The plaintiff has not proved the accident caused the loss with respect to the alleged damage to the property. The evidence indicates the plaintiff's problems in paying for this equipment occurred prior to the accident and was not caused by the accident.

[31] Finally it can be said that the motor vehicle accident interfered to some extent with the plaintiff's employment. He could have sold the equipment and still can sell the equipment. The plaintiff has failed to mitigate. Reference is made to the decision of the Nova Scotia Court of Appeal in *Corkum v. Sawatsky* (1993), N.S.J. No. 490 at p. 9:

> 46 In rejecting the appellant's contention that the respondents should maintain the losses of his business until normal retirement age, the trial judge pointed out that to give an award based on such an hypothesis would enable the appellant to receive his award, liquidate his property, and in effect be doubly enriched. The appellant, as a victim, was entitled to be compensated for the damage suffered but no more. It was with this basic principle in mind that the trial judge approached the issue of just what the appellant ought as a reasonable person to do once he was confronted with the inability to manage his property.

TRANSPORTATION EXPENSE

[32] The plaintiff advances a claim of $6,399 for transportation expenses which consist of taxi fares to the Northside General Hospital for treatment by Dr. Pollett. The dates of the trips extend from July 1999 to August 2001.

[33] The defendant's position is that these claims are exorbitant. They amount to $36 a trip, and it is submitted public transportation could have been taken.

[34] There was no evidence presented to support this claim. I agree the amount claimed is excessive and there is no evidence to indicate the necessity for the manner of transportation or the cost. The best I can do is to award an amount of $2,500 for transportation costs.

SECTION B

[35] From comments in written briefs to the court, there seemed to be reliance on allegations of lack of evidence with respect to some issues. I advised counsel that I would hear them on December 3, 2001 if they wished to submit further evidence. Both sides indicated they did not require me to hear further evidence.

[36] It seems that the argument with respect to Section B of the plaintiff's policy of insurance centres around s. 146(2) of the *Insurance Act* R.S., c. 231, s. 1 and that section reads:

Entitlement constitutes release of claim

(2) Where a claimant is entitled to the benefit of insurance within the scope of Section 140, this, to the extent of payments made or available to the claimant thereunder, constitutes a release by the claimant of any claim against the person liable to the claimant.

[37] The defendant does not suggest there should be any deductions made for any future losses, and I am not certain why counsel for the plaintiff advances arguments that deductions should not be made for future losses. The defendant's counsel does submit there should be deductions with respect to amounts awarded for expenses involving the treatments of Dr. Pollett, the drugs prescribed by Dr. Pollett and the transportation expenses.

[38] Counsel for the plaintiff relies on a letter from the insurer dated June 17, 1999 which it is said refuses the claims advanced for the treatment, the drugs and the transportation expenses. The letter was directed to Mr. McLeod, and the full text is as follows:

June 17, 1999

Our insured : Gary Hillier
Our Claim No. : R101036/970004/CBS
Date of Loss : 2 October, 1997

Dear Sir:

Your correspondence of June 9, 1999, with enclosure from J.A. Collicutt dated May 4, 1999, is acknowledged.

Please be advised, based on the enclosed video, any and all further Section B claims for your client under the above date of loss are hereby denied.

> A further note has also been brought to our attention that Marquis leasing and Marquis Development are one in the same, however, we have been receiving and have paid taxi invoices on behalf of your client in the amount of $2,633.02 to date.
>
> Yours truly,
>
> Susan Slaunwhite, AIIC
>
> Claims Adjuster

[39] Mr. McLeod refers to *MacKay v. Rovers* (1987), 79 N.S.R. (2d) 237 where Hart J.A. stated at p. 250:

> If it is alleged by a defendant that the damages which he would otherwise have to pay would be reduced by the amount the plaintiff could have recovered under the no-fault provisions of an insurance policy, the burden rests firstly with the defendant to show that such a policy exists. **If the defendant is able to show that such payments have been made or that they are available to a plaintiff entitled thereto then the defendant should succeed unless the plaintiff is able to establish that such payments have been claimed and refused.** It is not necessary for the plaintiff to show that the issue between the plaintiff and the insurance company has been litigated but only that the insurer has taken the position that the plaintiff is not entitled to recover. In this case, the defendant ceases to be entitled to deduct the Section B benefits from the damage award against him. [Emphasis Mr. McLeod]

Mr. McLeod submits that the claims for the drugs and taxis have been refused as is clear from the letter dated June 17, 1999 and that "it is not necessary that anything be produced other than the letter ...".

[40] Counsel for the defendant puts her position as follows:

> On this point, the Defendant is making two separate arguments:
>
> 1. It is open to the Court to issue a decision to the effect that if it is determined the Plaintiff is entitled to monies under issues 1, 2 and 3 as laid out above, then based on Section 146(2) of the *Insurance Act*, the remainder of the $25,000 medical/rehabilitation amount available to the Plaintiff under Section B of the policy must be deducted from whatever amount is found due and owing by the Defendant. In approaching it this way, the Court does not need to be made aware of the exact amount that is left owing under the $25,000 expense limit. However, as has been previously indicated, there is a letter in existence that clearly stipulates this that could be provided to His Lordship if he wished to see it.

> 2. Either in conjunction with the above or in the alternative, it is also the understanding of defence counsel that the Section B insurer is prepared to make a payment to the Plaintiff of any amounts pursuant to items 1, 2 and 3 above that are determined by this Court to be owing. If the Court determines that the Plaintiff is entitled to these amounts, then these amounts would be "available to the claimant" through the Section B insurer which would then again constitute a release in favour of Mrs. Mann and again be deducted.

[41] It is submitted any amount paid to the plaintiff or made available to the plaintiff by the Section B insurer would constitute a release against the defendant.

[42] In my view there probably is need for further evidence, but both counsel have rejected my invitation to call further evidence. The counsel for the defendant says the burden is on the plaintiff to show the payments under Section B "have been claimed and refused" and the burden has not been met by the filing of the letter dated June 17, 1999. Counsel for the defence also states in that portion of the submission to which I have referred that "the Section B insurer is prepared to make a payment to the plaintiff of any amounts pursuant to items 1, 2 and 3 above that are determined by the court to be owing." There is no evidence of that before the court.

[43] Notwithstanding this lack of evidence it is desirable that these matters be concluded.

[44] The defendant's counsel in recent correspondence says that except for $300 the full amount of items 1, 2 and 3 representing the treatment of Dr. Pollett, the drugs he prescribed and the taxi fares were incurred following June 17, 1999. It is said the amounts were never submitted to the Section B insurer and have never been refused.

[45] In my view the position advanced goes further by stating that even if the claims had been refused in June 1999 and the Section B insurer, at this time, is prepared to pay amounts determined by the court, the amounts are "available" to the plaintiff and a release by the plaintiff to the defendant should exist.

[46] I am prepared to approve of the arrangement submitted by defence counsel that the claims be submitted to the Section B insurer. If the insurer refuses to pay, the defendant can pay the appropriate amount to the plaintiff. If the Section B insurer accepts the claims, the defendant need not pay the claim.

J.