

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Lush v. Thompson, 2003 NSSC 249

Date: 20031217

Docket: S.H. No. 196539

Registry: Halifax

Between:

Imelda Lush

Plaintiff

v.

Adam Thompson

Defendant

Judge:

The Honourable Justice Donald M. Hall

Heard:

In Halifax, Nova Scotia, December 10, 2003

Counsel:

Gordon Allen, Esq., Counsel for the plaintiff
Margot J. Ferguson, Counsel for the defendant

By the Court:

[1] The applicant has applied for summary judgment pursuant to rule 13 and for an interim payment respecting damages pursuant to rule 33.01 of the **Civil Procedure Rules**.

[2] The issues are first, whether summary judgment should be granted and secondly, if so, whether an interim payment should be ordered and in what amount.

[3] The plaintiff was a passenger in a motor vehicle that was involved in an accident with a vehicle operated by the defendant, Adam Thompson, and owned by his father, Craig Thompson, on the MacKay bridge exit ramp at Dartmouth on August 14, 2001. The accident may be classified as a sideswipe but only the left side rear view mirror of the defendant's vehicle struck the vehicle that the plaintiff was riding in. The accident is described in the affidavit of the defendant, Adam Thompson, as follows:

2. . . . When I looked ahead again, I was over the centre line and there was a car coming toward me from the opposite direction.

3. As soon as I saw the approaching vehicle, I turned my steering wheel hard to the right. I was unable to completely avoid the other vehicle and my driver's side mirror made a black mark along the other vehicle's driver's side rear door and onto the rear quarter panel. I did not see any other damage to the other vehicle.

4. My speed was approximately 10 - 15 km/h at the point of impact. I was well into the turn on the off-ramp when the impact occurred. the other vehicle appeared to brake hard and move to its right as I approached it. However, the impact did not cause my vehicle to jolt or spin out of its line of travel nor did it appear to cause the other vehicle to jolt or spin out of its line of travel.
- [4] The vehicle that the plaintiff was in was damaged to some extent with the cost of repairs totalling \$772.33.
- [5] The plaintiff did not seek medical attention immediately following the accident. On August 18, 2001, however, she attended at "The Family Focus After Hours Medical Clinic" complaining of neck pain and so forth. On August 19th she attended at the Dartmouth General Hospital, presumably at the out patient department complaining of pain. She was seen again at the Dartmouth General Hospital, physiotherapy department, on August 21, 2001. She was subsequently seen by her family physician, Dr. Gerbre Heywot, with respect to her ongoing pain. He subsequently referred her to physiotherapy. In addition the plaintiff was seen by dental specialists, Dr. Andrew Thompson and Dr. Ben Davis, the latter on June 27, 2002.
- [6] At the time of the accident the plaintiff was not employed. She was subsequently, on two occasions, employed for relatively short periods of time as a clerk in retail stores but had to quit, according to her, due to pain.
- [7] In a consent order granted September 22, 2003, the defence acknowledged that the defendant, Adam Thompson, was negligent in the operation of the

defendant's motor vehicle and at fault for the accident and that he was driving the vehicle with the consent of the owner, the defendant, Craig Thompson. The order also expressly stated that the defendants did not acknowledge liability for any damages which the plaintiff claims she experienced as a result of the accident.

[8] Mr. Allen, on behalf of the plaintiff, submitted that since the defendant had admitted liability the plaintiff is entitled to summary judgment. Further, he argued the evidence supports the plaintiff's contention that she was injured in the course of the accident which caused the serious health problems she has since experienced. Accordingly, he submits that the plaintiff is entitled to receive an interim payment of \$15,000.00 pursuant to rule 33.01(A).

[9] Ms. Ferguson, on the other hand, on behalf of the defendants, acknowledges that the plaintiff is entitled to summary judgment. She argues, however, that an interim payment should not be ordered at this time because the evidence does not establish with sufficient certainty that the physical complaints that the plaintiff purports to be experiencing resulted from the accident. As well, she contends that the application for an interim payment is premature in that all of the medical experts have not been discovered and an independent medical examination has not been completed. She further contends that the

plaintiff's credibility is seriously in issue. She says, therefore, that it is not an appropriate case for an interim payment to be made.

[10] Rule 33.01(A)(1) of the **Civil Procedure Rules** is as follows:

Notwithstanding the provisions of rule 33.01, the court may order the defendant to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set off, cross-claim or counter-claim on which the defendant may be entitled to rely, if the court is satisfied

(a) that the defendant against whom the order is sought has admitted liability for the plaintiff's damages, or

(b) the plaintiff has obtained judgment against the defendant for damages to be assessed.

[11] In view of the acknowledgement of the defence, the plaintiff may enter summary judgment against the defendant with damages to be assessed.

[12] As to the application for an interim payment, the evidence indicates that the plaintiff first sought medical attention on August 18, 2001, four days after the accident, when she attended at the "Family Focus After Hours Medical Clinic" complaining of neck pain. Again the following day she attended at the Dartmouth General Hospital complaining of numbness along her left shoulder blade, tightness of the jaw and back pain. She was again seen at the Dartmouth General Hospital, Physiotherapy Department on August 21st.

The report from that department indicates that her chief complaint was neck pain, but also notes "TMJ" under other symptoms. The report indicated under "Problems Identified On Assessment", (1) intermittent pain, constant tightness, (2) occasional sore TMJ, (3) poor posture, (4) painful limited ROM, C/T spine. She was subsequently seen by her family physician, Dr. Heywot. He subsequently referred her to physiotherapy. In addition the plaintiff was seen by dental specialists, Dr. Thompson and Dr. Ben Davis. She was examined by the latter on June 27, 2002. In his report dated June 28, 2002, Dr. Davis noted, "She did suffer whiplash injury." He stated that his "tentative diagnosis" was "a combination of myofascial pain dysfunction and perhaps inflammation of the joint, likely retrodiscitis, or capsulitis." and prescribed medication.

- [13] The plaintiff continued to consult Dr. Heywot on a fairly regular basis respecting her ongoing complaints of pain and discomfort. In a report Dr. Heywot expressed the opinion that the plaintiff "suffered soft tissue injury to her neck and upper chest as a result of a motor vehicle accident injury".
- [14] Based on this evidence it seems to me that it has been established with reasonable certainty that the plaintiff did experience a whiplash type of

injury in the course of the accident and that the subsequent pain and disability that she experienced resulted from the injuries in that accident.

[15] As to the suggestion that the application is premature, I do not accept that proposition. The accident occurred more than two years ago and defence has had ample opportunity to discover the plaintiff's medical experts and to obtain an independent medical examination. Their failure to act more promptly in this regard does not justify delaying the application for an interim payment.

[16] With regard to the question of the credibility of the plaintiff being in issue, as counsel submitted, that is a question for the trial judge and not a chambers judge on an application of this nature. A defendant, however, may not thwart an application under rule 33.1(A) by simply stating that the applicant-plaintiff's credibility is in issue. If that were the case, a plaintiff claiming damages for a personal injury could never succeed on such an application. In this case, however, there is ample medical evidence to support the plaintiff's contention that her medical problems that are the subject of this action resulted from the accident.

[17] Counsel have referred me to a number of cases including: **Bogaczewicz v. Faulkner**, [1999] N.S.J. No. 237 (S.C.); **Mahoney v. Amelco Leasing Ltd.**,

[1999] N.S.J. No. 390 (S.C.); **MacDonald v. MacPherson**, [1999] N.S.J. No 238 (S.C.); **MacDonald v. MacPherson**, [1999] N.S.J. No. 445 (C.A.) and **Carter v. Anderson** (1998) 168 N.S.R.(2d) 297.

[18] It was suggested by Ms. Ferguson that some of these cases stand for the proposition that if the chambers judge is unable to determine with reasonable certainty the amount of damages that are likely to be recovered by the plaintiff, an interim payment should not be ordered. If that is so, I must respectfully disagree. By rule 33.01(A) the court is authorized to order an interim payment of such an amount "as it thinks just", but not to exceed a reasonable proportion of the damages it considers the plaintiff is likely to recover after taking into account certain offsets. The rule does not require the court to fix the likely amount of the recovery. Rather, it must be careful not to order an interim payment that exceeds the minimum amount that is likely to be recovered. Based on the limited evidence before me, I do not purport to have an opinion as to the ultimate amount of damages the plaintiff may recover. I am satisfied, however, that the evidence presented establishes with reasonable certainty that the plaintiff suffered a soft tissue injury which has resulted in the pain she has been experiencing and the

resultant limitations on her physical activities and employment opportunities.

[19] In **Smith v. Stubbart** (1992) 117 N.S.R.(2d) 118, Chipman, J.A., writing for the majority of our Court of Appeal stated at page 127, (para 33) in referring to general damages for soft tissue injuries, "In broad terms the range for nonpecuniary damage awards for such persistently troubling but not totally disabling injury is from \$18,000.00 to \$40,000.00." That range has since been somewhat increased to take into account factors such as inflation. In my opinion, it is likely that the plaintiff would at least recover the minimum amount in this range. In addition, there will likely be some recovery for lost wages.

[20] That being the case, in my opinion, an interim payment of \$15,000.00 would be just and will be ordered.

[21] I will hear counsel further with respect to costs if they are unable to agree.

Donald M. Hall, J.