Docket.: CA 161786
Date: 20000608

NOVA SCOTIA COURT OF APPEAL

[Cite as: Rogers v. Young, 2000 NSCA 77]

Freeman, Bateman and Flinn, JJ.A.

BETWEEN:

DAVID BRIAN ROGERS

Appellant

- and -

DAVID YOUNG

Respondent

REASONS FOR JUDGMENT

Counsel:	Anna Marie Butler and Brenda A. Roberts for the appellant David P.S. Farrar, R. Dan Harasemchuk and Kendrick Douglas, a summer student, for the respondent
Appeal Heard:	June 5, 2000
Judgment Delivered:	June 8, 2000
THE COURT:	Appeal dismissed per reasons for judgment of Freeman, J.A.; Bateman and Flinn, JJ.A. concurring.

Freeman, J.A.:

[1] A jury awarded the appellant, David Rogers, $5,000. general damages and $7,500. for lost income as the result of injuries suffered in an accident when his motorcycle was struck from behind while he was waiting at a stoplight on May 26, 1990. The driver of the car admitted liability for the accident.

[2] The appellant has appealed from the jury's assessment of damages on grounds that it is so inordinately low "no jury reading the evidence as a whole and acting judicially could have reached such a conclusion". He also alleges three errors by the trial judge, Justice Davison, on evidentiary rulings and four errors in jury instructions.

[3] Dr. Thomas D. Loane, a specialist in physical medicine and rehabilitation, was the principal medical expert. He saw Mr. Rogers on a number of occasions beginning in December, 1991, and prepared a number of reports. He initially felt Mr. Rogers had "suffered an extension sprain to the lumbar spine with facet joint irritation and also injured the right sacroiliac joint with early degenerative changes".

[4] In Dr. Loane's most recent report dated February 14, 1999, he did not consider that Mr. Rogers, then 39 years old, was "disabled for medium to heavy intensity physical work (carpentry) although he may continue to have flare ups of back discomfort if he engages in this type of work".

[5] He stated in summary:

> The sacroiliac joint injury has healed without any residual instability or signs of arthritis. He continues to find findings of lumbar facet joint irritation producing episodic flare ups of back pain. However, as this is extremely common in the general population, it cannot be stated with any certainty that his current status relates directly to the injuries suffered in May of 1990.

[6] Mr. Rogers had suffered a broken neck in a motorcycle accident in June, 1989 which had healed well. He had some training as a carpenter and cabinet maker, and just prior to the accident appears to have been supporting himself doing carpentry jobs for his mother, who owned several buildings, and making furniture to sell. His income ranged from $1,793. to $6,221.76 during the years 1983 to 1989. He testified that his income tax returns were not always accurate, with some unreported earnings. The respondent argued that he inflated his 1990 earnings in order to claim $11,960. in Section B benefits from the insurer.

[7] He claimed that pain from the injuries suffered in 1990 prevented him from working, but he had informed Dr. Loane in December, 1991, that his tolerance for working, especially carrying and lifting, was at 65 to 70 per cent of normal. He had begun renovating a house at that time, but subsequently had to give it up. Dr. Loane considered him able to cope with light carpentry and cabinetry in January, 1993, but noted in March, 1994 that he had not been working in two years.

[8] There was evidence of a number of incidents between the accident and the trial when the appellant engaged in strenuous activities, inconsistent with inability to work, sometimes aggravating his back pain. There was evidence from which the jury

could have drawn inferences adverse to Mr. Rogers' credibility.

[9] The first ground of appeal alleges that the awards for general damages and lost income were unreasonably low, perverse and unsupported by the evidence, and that the jury's decisions, not to make awards for loss of valuable services and lost earning capacity, were unreasonable, perverse and unsupported by the evidence.

[10] A review of the evidence suggests it was neither unreasonable nor perverse for the jury to have concluded that the appellant failed to discharge his burden of proving his right to higher awards for general damages or lost income, or for damages for loss of services or earning capacity. It is not for this court to reweigh the evidence or substitute its findings of facts for those of the jury. See **Smith v. Stubbert** (1992), 117 N.S.R. (2d) 118; **Piercey v. Lunenburg County District School Board** (1998), 167 N.S.R. (2d) 68; **Mailman v. Dartmouth Yacht Club** (1992), 114 N.S.R. (2d) 441.

[11] In my view the appellant has not met the burden on appeal of convincing this court that the verdict was "so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it". See **Piercey v. Lunenburg County District School Board**, *supra.*

[12] The appellant admitted to having a criminal record that included convictions for marijuana possession and break and enter; he had been acquitted on a charge of

assault. All occurred after the accident. Justice Davison permitted evidence as to the weight of bags of soil carried by the appellant in growing marijuana, and the weight of a bed lifted with his 110 pound girlfriend on it during the alleged assault. The purpose of the evidence was to show the appellant was capable of physical activity inconsistent with his alleged inability to work. In my view evidence admitted for such a purpose is relevant and not unfair to the appellant.

[13] The second evidentiary ground related to the trial judge's refusal to admit the updated expert report of Dr. Hayes which was filed December 21, 1999, a few days before the trial began January 4, 2000, and long after the filing period prescribed by the ***Civil Procedure Rules***. Justice Davison did not accept reasons for the late filing, which he considered prejudicial to the defence. In my view his discretion to reject it was properly exercised.

[14] The appellant's counsel alleges she was cut off by the trial judge in her cross-examination of Kelly MacRae, a former girlfriend of Mr. Rogers, who testified he had pushed her down on a bed before throwing the bed with her on it against the wall. When she referred to the assault charge in her opening question to Ms. MacRae, defence counsel objected that he had not been permitted to mention it. Justice Davison reminded her she had advised him she didn't want that charge brought up, "and now you're bringing it up". He said he knew, and the jury knew, Mr. Rogers had been acquitted. Counsel did not persist but switched to another line of questioning, asking Ms. MacRae if she had a criminal record, and sat down. Damaging evidence had been

given by Ms. MacRae, including a statement by Mr. Rogers that it had been a “small” accident, but “he was going to take it for all that it was worth". Ms. MacRae also said she had known Mr. Rogers since she was 15, and the only job he had ever had was working for a traveling carnival when he was 16. Counsel left these statements unchallenged, and Ms. MacRae’s credibility unchallenged, by cross-examination, except for the question as to her criminal record. That was her decision, not Justice Davison’s. She was not cut off except with specific reference to the assault charge which had previously been discussed between counsel and the judge.

[15] The appellant alleges errors in the jury charge relating to Dr. Loane’s evidence, instructions as to past loss of income, the claim for lost wages and earning capacity, and the distinction between earning capacity and loss of future income.

[16] At the conclusion of Justice Davison’s charge to the jury, after the jury had retired, he asked counsel for their remarks. Counsel for the appellant replied that she had none, indicating the jury charge had met with her satisfaction. In **Royal Bank of Canada v. Wilton et al,** (1995), 123 D.L.R. (4th) 266 at p. 275 the Alberta Court of Appeal held:

> In a civil jury trial, lack of objections with respect to the jury charge and the questions put to the jury are a strong factor against finding that a jury charge was faulty and that a new trial should be ordered. (citations omitted) Indeed, only a serious miscarriage of justice would warrant the setting aside of a jury’s verdict and the ordering of a new trial.

[17] A careful reading of Justice Davison’s charge to the jury shows it to be thorough and fair, with repeated admonitions to the jury that they were sole judges of

the facts with a duty to rely on their own conclusions rather than remarks of the trial judge. In particular, he warned the jury against reducing any damages to which the appellant was entitled "just because he has committed criminal acts".

[18] In **R. v. Evans** (1993), 82 C.C.C. 338 at p. 346 the Supreme Court of Canada stated:

> At the outset, it is worth repeating that a jury charge should not be microscopically examined and parsed. There is no such thing as a perfect jury charge. Rather, the directions to the jury must be looked at as a whole to determine if there has been any error.

[19] We are not persuaded that any error has occurred which could have resulted in a miscarriage of justice or which would warrant the setting aside the jury's verdict and the ordering of a new trial. The appeal is dismissed with costs which I would fix at $1,500. inclusive of disbursements.

Freeman, J.A.

Concurred in:

Bateman, J.A.

Flinn, J.A.