Date:19991203
CA 156375

NOVA SCOTIA COURT OF APPEAL

[Cite as: Cameron v. Gabriel, 1999 NSCA No. 153]

Bateman, Hallett and Cromwell, JJ.A.

BETWEEN:

DANIEL LEROY GABRIEL and BARBARA GABRIEL Appellants	)	Jonathan Westphal for the appellants
- and -	)	
DEREK CLARENCE CAMERON Respondent	)	Bruce Gillis, Q.C. for the respondent
	)	Appeal heard: December 3, 1999
	)	Judgment delivered: December 3, 1999

THE COURT: Appeal dismissed per oral reasons for judgment of Cromwell, J.A.; Hallett and Bateman, JJ.A. concurring.

<u>CROMWELL J.A.</u>: (Orally)

[1] This is an appeal from the judgment of Justice Haliburton assessing the plaintiff's damages arising from a motor vehicle accident. The plaintiff's action was not defended, default judgments were issued against each defendant for damages to be assessed and no one appeared on behalf of the defendants at the assessment giving rise to the judgment now under appeal. Not only was proper notice of the assessment given to the defendants and to an insurance adjuster employed by their insurer, numerous medical reports were also provided to the adjuster over the months intervening between the accident and the assessment of damages. Various interim payments were made by the insurer on behalf of the defendants and an offer of settlement in excess of $100,000 was made on behalf of the defendants and rejected. The damages, as assessed, including costs and pre-judgment interest totalled $165,199.25, not including the interim payments.

[2] After the judgment was obtained, an application was made in the Supreme Court on behalf of the defendants to set aside the assessment of damages. That application was dismissed.

[3] On appeal, the defendants now raise various arguments concerning the trial judge's assessment of the evidence and his award of interest. In addition, new evidence is sought to be introduced, particularly surveillance evidence commissioned after the judgment had been entered.

[4] In our view, while the Court of Appeal has jurisdiction to hear this appeal, the proper procedure for the defendants to follow in these circumstances was an application under **Rule** 30.01(3). That having been done and the application dismissed, we should only interfere with the assessment if satisfied that failure to do so would likely result in a substantial injustice.

[5] The only excuse offered for not appearing on the assessment is carelessness on the part of the adjuster. Our review of the record, including the proposed fresh evidence, and the submissions made on behalf of the appellants, far from persuade us that there is any likelihood of a substantial injustice here if we do not intervene.

[6] The appeal is dismissed with costs fixed at 40% of the costs awarded at trial, plus disbursements.

Cromwell, J.A.

Concurred in:

Hallett, J.A.

Bateman, J.A.