1998 S.H. No. 146076

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

BERNARD FRANCIS MacDONALD

Applicant/Plaintiff

- and -

JOHN A. MacPHERSON and JOHN G. MacPHERSON

Respondents/Defendants

DECISION

HEARD BEFORE:	The Honourable Justice David W. Gruchy at Halifax, Nova Scotia in Chambers
DATE(S) HEARD:	June 16, 1999
DECISION DATE:	June 16, 1999 (Orally)
WRITTEN RELEASE OF DECISION:	July 2, 1999
COUNSEL:	John Kulik for the Applicant/Plaintiff
	Glenn Anderson for the Respondent/Defendant

GRUCHY, J.: (oral)

The plaintiff has applied in this case for a summary judgment pursuant to *Civil Procedure Rule* 13 and for interim payment pursuant to *Civil Procedure Rule* 33.01(A)(1). The parties are agreed that this action arose from a rear-end collision in circumstances where the plaintiff cannot be implicated for any negligence. In other words, the defendants have admitted to the negligence in the operation of the motor vehicle and that such negligence was the sole cause of the accident.

It is logical first to deal with the summary judgment application. While the burden is clearly on the plaintiff to bring forward a case whereby his claim of negligence on the defendants part has been proven that burden in this case has been met by the plaintiff's evidence and the defendants' admissions. The defendants, however, have taken the position that the judgment should not be entered as the plaintiff has not met the burden of showing that he has suffered any damages.

It is clear that liability cannot exist for no damages. In effect the defendants say the plaintiff has not suffered any injury as a result of the accident. The defendant says that as there have been no damages liability cannot attach to them and no summary judgment should be entered. But that is not the case here, the defendants have filed the affidavit of a claims representative of the defendants' insurer who has admitted that the plaintiff's motor vehicle was damaged only to the extent of $348.00. That fact, coupled with the admission by defendants' counsel that the defendants do not deny negligence in causing the collision is sufficient to enter the summary judgment.

The defendant says the plaintiff has not claimed the special damages for the damage to the vehicle in this application. That is correct but the fact remains that the statement of claim sets forth special damages unspecified and the defendants admit that at least damages have been incurred in the amount of $348.00. The defendants have not put forward any facts to deny liability *simpliciter.* Their defence is centered totally around

the issue of the question of the matter of the quantum of damages arising from the injuries allegedly suffered by the plaintiff in the accident. No good defence has been disclosed except possibly with respect to the aspect of damages. The defendants have not met the onus envisaged by such cases are *Carl B. Potter v. Antil Canada Ltd. and Mercantile Bank of Canada* (1976), 15 N.S.R. (2d) 408 (S.C.A.C.), *and Royal Bank of Canada v. Malouf* and *Xerox Canada Inc. v. L & R Equities Ltd.* (1988), 86 N.S.R. (2d) 75 (S.C.T.D.).

The second aspect of the application causes much more difficulty. That is whether an interim payment should be ordered pursuant to Civil Procedure Rule 33.01(a)(1). Goodfellow, J. described the court's function in an application such as this in *Bogaczewicz v. Faulkner*, [1997] N.S.J. No. 237 and I will not read the quotation as it is set forth in the briefs. Accordingly, I must look to the evidence submitted without benefit of examination or cross-examination to attempt to decide what is likely to be recovered by the plaintiff. The plaintiff blames this action for resulting injuries including disability, whether short-term or long-term is not certain, pain and suffering, loss of income and loss of business. He relates his visits to his family doctor commencing three days after the accident in which very little damage was done to his vehicle.

His family doctor, Dr. Poirier, attributes his present condition virtually and totally to the accident. But the medical evidence from various specialists outlines a long history of physical and psychiatric problems, the former resulting in almost identical symptoms as he now complains of. These specialists including, Drs. Englund and Buhr speak of his long medical history including a spinal fusion some years previous to the accident.

The defendants' insurer's representative also provided affidavit evidence of that long medical history particularly of back pain and related problems. Similarly there is evidence that the plaintiff had been injured at work and is presently receiving a Workers' Compensation Board Pension for an injured back. The defendant has said and has drawn

to my attention certain potential evidentiary problems with both income and particularly about credibility. I do not think it is the function of a court in determining the matter of an interim payment to make findings of credibility or even to dwell on them. That might ultimately be for a trial judge at an assessment of damages in this case. But I do have to say that findings of loss of income and findings of credibility will be very much live issues in this case. Without the benefits of findings of fact and credibility in this case any estimate of damages the plaintiff might recover would indeed be a difficult task and in my view would amount in this case to nothing more than a haphazard guess. Such an exercise might well be a disservice to both parties.

Accordingly, I decline to order an interim payment. I do order however that summary judgement will be entered against the defendants with damages to be assessed.

J.