7 O.R. (2d) 711

1975 CarswellOnt 975

Nash v. Glickman

Nash v. Glickman and Gibson

Ontario Court of Appeal

Evans, J.A., Arnup, J.A., Houlden, J.A.

Oral reasons: February 19, 1975
Docket: None given.

Counsel: Alvin B. Rosenberg, Q.C., for plaintiff, appellant

Gary Neinstein, for defendant, Ernest Glickman, respondent

G. William McKechnie, for defendant, Helen Mary Gibson, respondent

Evans, J.A.:

1 This is an appeal by the plaintiff from the judgment pronounced by His Honour Judge Phelan, on October 31, 1973. After a seven-day trial, His Honour discharged the jury, and awarded damages in favour of the plaintiff against the defendant, Glickman, in the amount of $7,482.94 plus costs and dismissed the action against the defendant Gibson, with costs.

2 The action arises out of a motor vehicle accident which occurred on October 13, 1970. A vehicle was stopped at a cross-walk on Oriole Parkway when it was struck in the rear by the defendant Gibson's vehicle; this vehicle in turn was struck by the Katz vehicle, in which the plaintiff was a passenger; and that vehicle was in turn struck by the Glickman vehicle. The plaintiff Nash, a passenger in the Katz vehicle, sued Gibson and Glickman for injuries sustained in the accident. Her main injury was a whiplash which occasioned her considerable trouble.

3 At the commencement of the appeal, counsel for the appellant sought leave to introduce new evidence of a psychiatric nature, which he submitted was not available at the time of trial, and which proposed evidence was conclusive on the subject-matter as to whether the plaintiff was malingering. We refused to grant leave as, in our view, the proposed evidence did not come within the case law as to when new evidence is received. It was also pointed out to counsel the impropriety of filing the material for which leave is sought before the application for leave has been heard.

4 The trial Judge, after counsel had addressed the jury, on his own motion, took the case from the jury and proceeded to dispose of the issues of liability and damage. He did not call upon counsel to argue the matter. While in ordinary circumstances, the trial Judge, before dispensing with the jury, should give counsel an opportunity to be heard on that issue and on the further issue whether a new trial should be directed or the present trial continued without a jury, there were exceptional and unusual circumstances in this case brought about by the action of counsel for the plaintiff and counsel for the defendant Glickman, which, in our view, rendered unnecessary compliance with the ordinary and usual procedure. An agreement had been entered into, the nature of which was to guarantee a certain minimum recovery by the plaintiff and a certain maximum liability against the defendant Glickman. The defendant Gibson was not party to the agreement for obvious reasons.

5 At the commencement of the trial, the trial Judge was made aware of the terms of the agreement, and with some doubt allowed the trial to proceed before the jury

on the understanding that the agreement would in no way affect the manner in which the trial was to be conducted.

6 The addresses by counsel for the plaintiff and the defendant Glickman made it perfectly clear that both these counsel were attempting to place full responsibility for the accident, and the damages resulting therefrom, upon the defendant Gibson. Counsel for the plaintiff stated that he was not seeking recovery from the defendant Glickman (with whom he already had an agreement), and that defendant in turn did not contest the issue of damages in any substantial manner.

7 The learned trial Judge realized that this conduct was at variance from the manner in which he had been led to believe the trial would proceed, and was working to the distinct prejudice of the defendant Gibson. After considering the matter overnight, he stated the reasons for his proposed action, took the case from the jury and proceeded to determine liability and assess damages.

8 The trial Judge was placed in a very unfortunate position. The trial had lasted for a period of seven days with many witnesses, including one from Wales. To direct a new trial at this juncture would be costly and inconvenient, and would not remove the potential problems inherent in the agreement. We are satisfied that in the circumstances then existing, he adopted the best course open to him. His choices had been limited by the action of counsel for the plaintiff and the defendant Glickman and we are not prepared to disagree with the exercise of his discretion in continuing on with the trial.

9 With respect to the merits of the appeal, we are satisfied that the trial Judge correctly determined the issue of liability. He was confronted with conflicting evidence and we see no basis for interference with his assessment of the relative credibility of the various witnesses and the weight to be attached to their evidence.

10 On the issue of damages, counsel for the appellant submits that the trial Judge was unduly influenced by the damage figure contained in the agreement referred to earlier. We do not believe that counsel has demonstrated his point. This extremely able and experienced trial Judge went to some length in explaining the manner in which he arrived at his assessment. The situation confronting him, is not, in our view, analogous to the case in which the amount of payment into Court becomes known before judgment is rendered. The agreement was before the Court at the very commencement of trial. We are not convinced that the award falls within that category of awards which on the authorities requires intervention by an appellate Court. We are satisfied that the plaintiff has had a fair trial and that substantial justice has been done to all the parties.

11 The appeal will be dismissed with costs to the respondent Gibson against the appellant Nash. There will be no costs either for or against the defendant Glickman. We make no order relative to the money in Court.

12 *Appeal dismissed*.