

In the Court of Appeal of Alberta

Citation: Tavakoli v. Junghans, 2010 ABCA 391

Date: 20101215
Docket: 1001-0081-AC
Registry: Calgary

Between:

Akbar Tavakoli

Appellant
(Plaintiff)

- and -

Alysa R. Junghans

Respondent
(Defendant)

The Court:

**The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Karen Horner**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Judgment by
The Honourable Mr. Justice P.M. Clark
Dated the 21st day of December, 2009
(2009 ABQB 756, Docket: 0401-02291)

**Memorandum of Judgment
Delivered from the Bench**

Slatter J.A. (for the Court):

[1] The appellant appeals the dismissal of his action for damages for personal injuries suffered in a motor vehicle accident. The appellant was rear-ended by the respondent, who acknowledged liability for the accident.

[2] Numerous medical and lay witnesses testified during this 14-day trial. The appellant testified that his injuries had evolved into constant debilitating pain in many parts of his body, and that he was unable to work at all. A number of the medical experts testified that there was no physical source for the appellant's pain, and that his problems were psychiatric. He was diagnosed by some as having a Somatoform or Pain Disorder, and with tending to be histrionic about and exaggerate his symptoms. Other doctors thought that the appellant was deliberately exaggerating his symptoms, and was malingering with a view to secondary financial gain.

[3] The trial judge gave lengthy and detailed reasons dismissing the action entirely: *Tavakoli v. Junghans*, 2009 ABQB 756. He found that the appellant's reports of his injuries were unreliable and "tainted", and that any expert reports that depended on them were also unreliable. He found that the appellant's description of his symptoms were inconsistent with surveillance videotapes, which showed the appellant "carrying out his daily activities in a normal, apparently pain-free manner". The trial judge concluded that there was no independent objective evidence to support the claim, the appellant was malingering, his evidence was unreliable, and that he had not met the burden of proving that he suffered any injuries that were caused by the motor vehicle accident.

[4] The appellant now appeals, arguing that the trial judge erred in not finding him a credible witness, overlooked the objective evidence, erred in his overall assessment of the evidence, and was biased.

[5] This appeal essentially challenges the findings of fact and credibility of the trial judge. Such findings are entitled to considerable deference on appeal, and they will only be overturned if they reflect palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Findings of credibility are a part of the fact finding process, and are subject to the same standard of review. Inferences drawn from the facts are also reviewed for palpable and overriding error. If the inference drawn by the trial judge is reasonable, an appellate court should not intervene just because other inferences could also have been reasonably drawn: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 at para. 74. The trial judge's preference for the evidence of some experts over others is reviewed on the standard of reasonableness: *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678 at para. 63; *R. v. Molodowic*, 2000 SCC 16, [2000] 1 S.C.R. 420 at paras. 7-8; *Freyberg v. Fletcher Challenge Oil and Gas Inc.*, 2005 ABCA 46, 42 Alta. L.R. (4th) 41, 363 A.R. 35 at para. 43.

[6] There was a great deal of conflicting evidence at the trial. It was the responsibility of the trial judge to resolve those conflicts. All of his conclusions can find support in the record, and his decision discloses no reviewable error. Just because the trial judge disbelieves a litigant and finds against him does not make the judge biased. The appeal is dismissed.

Appeal heard on December 10, 2010

Memorandum filed at Calgary, Alberta
this 15th day of December, 2010

Slatter J.A.

Appearances:

S.M.K. Hope
for the Appellant

D.M. Pick
for the Respondent