In the Court of Appeal of Alberta

Citation: Sorochan v Bouchier, 2015 ABCA 212

Date: 20150622
Docket: 1403-0040-AC
Registry: Edmonton

Between:

Elaine Sorochan

Appellant
(Plaintiff)

- and -

Vernon Wayne Bouchier and
Direct Integrated Transportation Inc.

Respondents
(Defendants)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Madam Justice Myra Bielby
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice R.P. Belzil
Dated the 20th day of January, 2014
Filed on the 31st day of January, 2014
(2014 ABQB 37, Docket: 0703 09610)

Memorandum of Judgment

The Court:

I. Background

[1] The appellant, Mrs. Sorochan, was a 57-year old teacher from Two Hills in August of 2005 when her car was struck from behind by a large flatbed delivery truck driven by the individual respondent. Although the appellant did not experience any immediate pain or seek medical attention, she soon experienced severe lower back pain which she has suffered ever since the accident despite medical treatment and physiotherapy.

[2] The appellant sued in negligence and sought pecuniary damages for medical expenses, loss of income and housekeeping services, as well as non-pecuniary damages for pain and suffering in the amount of $125,000. Negligence was admitted; but quantum and certain items in the appellant's claim were disputed. It was that dispute which went to trial.

[3] The trial judge found that the appellant suffered a 21% permanent partial disability following the accident. He also found that the appellant had a pre-existing condition (degenerative stenosis or narrowing of the lumbar spine) which could lead to back problems. But, he found that the accident was a "triggering event such that the Plaintiff's previous asymptomatic condition became symptomatic": *Sorochan v Bouchier*, 2014 ABQB 37 at para 182 (CanLII).

[4] The trial judge concluded that the respondent had caused the appellant to be permanently partially disabled. However, he only attributed one-half of the appellant's disability to the accident. The other half he attributed to her pre-existing condition.

[5] The appellant challenges this division of causation which was based on the opinion of an orthopedic surgeon, Dr. Michel Lavoie, whose opinion the trial judge accepted. The operative part of the orthopedic surgeon's opinion was as follows:

> I reaffirm my opinion that responsibility for the clinical impairment at Ms. Sorochan's lumbosacral spine (as assess[ed] by Dr. van Zuiden) should be apportioned to a fifty-fifty basis between her pre-existing condition and the crash of 17 August 2005.
>
> It is my opinion that it is more likely than not that Ms. Sorochan would **not** have gone on to develop disabling lower back pain and neurogenic claudication had she not been injured in the crash on 17 August 2005.

> On the other hand, if Ms. Sorochan had not been afflicted with relatively asymptomatic lumbar spondylosis at the time of the crash on 17 August 2005 the injury sustained would probably have been of lesser magnitude. [emphasis in original]

[6] Having attributed only a half of the appellant's permanent partial disability to the accident, the trial judge awarded the appellant $75,000 in non-pecuniary damages based on the nature and extent of the appellant's injuries as well as their duration. The trial judge also expressly based his award on the impact of the appellant's injuries on her life.

[7] The accident occurred in the summer of 2005. In the fall of 2005, the appellant went back teaching school (Grades 4 and 5) in Two Hills. However, she quickly experienced extreme pain and after teaching for a couple of days decided to take some time off. She returned at the end of October working only half days. Shortly thereafter she began working full days. In March of the following year, 2006, the appellant stopped working completely on the advice of her physician following a CT-scan which disclosed a bulging lumbar disc. In the summer of 2006, the appellant underwent intensive rehabilitation, driving to Edmonton three days a week for six weeks. She returned to teaching in September, but a month later decided that she would retire at the end of 2006. The appellant officially retired effective December 31, 2006 at age 58, but continued to work full-time on a contract basis until the end of the school year in June of 2007.

[8] The appellant maintained that but for the injury she suffered in the accident she would have continued teaching another six years (2007 to 2013) until she was 65. The respondents argued that the appellant retired voluntarily and thus she had no claim for loss of income after June 30, 2007 when her contract teaching position terminated. Nor, argued the respondents, could the appellant claim for the increased pension benefits she might have been entitled to had she worked to age 65.

[9] The trial judge found that the appellant's decision to retire was hers and hers alone. He gave reasons for his finding and pointed to evidence supporting that finding. As a consequence, the trial judge dismissed the appellant's claim for loss of income for the period July 1, 2007 to June 8, 2013 when she would have turned 65. He also dismissed her claim for the loss of pension benefits she would have received by virtue of the contributions she would have made over the years 2007 to 2013.

[10] The trial judge also dismissed the appellant's claim that but for the accident she would have become Assistant Principal of her school when the position became vacant in the Spring of 2007. With respect to the greater income the appellant might have earned had she been promoted to Assistant Principal, the trial judge found that even if the appellant's retirement had not been voluntary (i.e., had been forced upon her by the pain of the accident), he would have dismissed her claim for loss of income as Assistant Principal because the evidence did not

demonstrate, on a balance of probabilities, that she would have got the position. Again, the trial judge gave reasons for the finding.

II. Appellant's Arguments

[11] The appellant argues that the trial judge erred in law by misapplying the principles of causation thereby reducing her damages for her pre-existing condition.

[12] The appellant also argues that in assessing her general damages the trial judge failed to consider the effect that the injuries arising out of the accident had on the appellant's life.

[13] She also argues that the trial judge made a palpable and overriding error in finding that the appellant's decision to retire from her employment was voluntary and unrelated to the injuries she sustained in the accident.

[14] Finally, the appellant argues that the trial judge erred in assessing the appellant's damages for future loss of housekeeping capacity.

III. Standard of Review

[15] The standard of review on appeal for questions of law is correctness. For questions of fact and questions of mixed fact and law, the standard is palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

[16] On the issue of causation or the trial judge's application of the principles of causation to the facts, the standard of review is correctness because the issues of fact and law are extricable.

[17] The other issues raise questions of fact or questions of mixed fact and law for which the standard of review is palpable and overriding error.

IV. Analysis

A. Causation

[18] The appellant argues that the trial judge committed an error of law in failing to hold the respondents liable for the full extent of her disability. As previously indicated, the trial judge held the respondents liable for only one-half of her disability because she had a pre-existing degenerative condition. The appellant argues that the pre-existing condition was asymptomatic. It had not yet manifested itself and might never manifest itself. On the authority of *Athey v Leonati*, [1996] 3 SCR 458, 140 DLR (4th) 235, the appellant argues that once it is proven that a tortfeasor's negligence "triggered" or materially contributed to a plaintiff's injury, there can be no reduction of what would otherwise be an appropriate award of damages to reflect the existence of non-tortious background causes.

[19] We agree. The principles enunciated in *Athey v Leonati* are applicable in the present case. The presence of non-tortious contributing causes of the appellant's injuries (i.e., her pre-existing condition) does not reduce the extent of the respondents' liability. The respondents' liability is for any injuries caused or contributed to by the negligence.

[20] The foregoing reasoning also applies to the quantification of the appellant's other losses and damages.

B. Trial Judge's General Damages Assessment

[21] The appellant claimed $125,000 in damages for non-pecuniary losses and asserts that the award of $75,000 was in error because it was based on only one-half of her 21% permanent disability. The respondents counter that, notwithstanding the trial judge's failure to attribute all of the appellant's disability to the accident, $75,000 is what the appellant would have been entitled to if the trial judge had attributed 100% of her impairment to the respondents' negligence.

[22] We agree. The amount claimed by the Plaintiff (i.e., $125,000) was available to the trial judge on the facts. And, if one were to apply the judicially-mandated cap which limits awards for non-pecuniary damages as enunciated in *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229, 83 DLR (3d) 452, and update the cap for inflation (about $350,000, see generally *Afonina v Jansson*, 2015 BCSC 10 at para 143 (CanLII)), a permanent impairment of 21% yields an award of approximately $75,000. So, although the trial judge may have erred in failing to hold the respondents fully liable for the appellant's injuries, the error did not manifest itself in the general damages award.

[23] The appellant also argues that the trial judge erred in calculating those damages by focusing entirely upon the nature and extent of the appellant's injuries and failing to consider the effect of those injuries on her lifestyle. This is incorrect. At paragraph 186 of his judgment the trial judge made it clear that he considered the impact of the appellant's injuries on her life.

C. Housekeeping Losses

[24] The trial judge reduced the appellant's claim for loss of housekeeping up to the time of trial by 25% because he was of the view that although the appellant had suffered a 21% permanent disability, only half of this permanent disability was attributable to the motor vehicle accident. As discussed above, the trial judge's failure to attribute all of the appellant's disability to the accident was in error and where the 25% came from was not clear.

[25] So with respect to the loss of housekeeping services up to the date of trial, we would allow the appeal and award the appellant the entire amount ($8,546.00) she paid for housekeeping services.

[26] The trial judge also reduced what he would otherwise have awarded for future loss of housekeeping services, only this time the reduction appears to have been 50%:

> Bearing in mind the Plaintiff's age and that she has 10.5% permanent partial disability unrelated to the accident, I have awarded the Plaintiff the sum of $10,000 for future housekeeping assistance which amount has been discounted for present value using a discount rate of 3.5%.

[27] Again, this needs to be corrected and we award her $20,000 for the future cost of housekeeping services.

[28] We reject the appellant's argument that the appellant is entitled to be compensated for her loss of capacity to perform household chores. There is no loss of capacity when a substitute is employed: *Daly v General Steam Navigation Co Ltd*, [1980] 3 All ER 696 cited with approval by this Court in *Benstead v Murphy* (1994), 157 AR 198, 23 Alta LR (3d) 251. And when a substitute cannot be employed or a substitute is no real substitute for the appellant's own fastidiousness, we accept the respondents' argument that compensation for this loss is to be found in the trial judge's general damages award.

D. Loss of Future Income

[29] We conclude that the trial judge made a palpable and overriding error in deciding that there was an insufficient evidentiary base at trial to award the appellant compensation for her loss of future income. We find that the appellant proved this loss and award her compensation in the sum of $50,820 as a result.

[30] The evidence at trial established that the appellant was aged 57 when she was injured in August of 2005, and aged 58 when she retired December 31, 2006. She worked on a full-time contract basis for the following six months, until the end of the school year in June of 2007. She was then 59 years old. She testified that but for the accident, she had planned to work until age 65. Her husband testified that prior to the accident she wanted to continue teaching. The loss of income she would have earned between age 59 and 65 thus forms the basis of this claim.

[31] The time period in dispute is the date she last worked, June 2007, to the date upon which she claims she would have retired from teaching at age 65, June 2013. She led expert evidence to show that she received $50,820 less in employment income than she would have received had she continued to work to age 65.

[32] The trial judge concluded that the appellant's decision to retire was voluntary and that she failed to prove she would have retired at a later date had she not been injured in the August, 2005 motor vehicle accident. He made a palpable and overriding error in arriving at this conclusion. This is so because, first, he applied evidence as to the appellant's retirement plans post-accident as if they were admissions applying to her intention had she not been injured in

that accident. Further, he drew a negative inference from her failure to apply for Long Term Disability Benefits rather than retire where that inference was not available on the evidence. Finally, he supported his conclusion through reference to statistical data that was insufficiently precise for that purpose.

[33] In arriving at his conclusion that the appellant had not proven a loss of future income, the trial judge found there was no evidence that she had been asked to retire by her employer, no evidence of any complaints about the quality of her teaching, and no evidence that her employer considered her unfit for full-time teaching after the accident. Indeed, he noted that her employer would not likely have asked her to complete the teaching year under contract post-retirement had there been any concerns about her ability to continue teaching. Further, the trial judge found there was no evidence that any physician recommended that she retire, or that she consulted any physician about that decision in advance, or that she was under pressure to retire.

[34] The trial judge went on to conclude, however, that the appellant would have retired on December 31, 2006, as she did, even had she not been injured in the accident. He gave a number of reasons. We have dealt with his three most cogent reasons.

[35] First, the appellant told Dr. McKean in March 2007 that she would retire that year. However, the trial judge erred in interpreting her statement to Dr. McKean, wherein the appellant was merely recounting events that had already happened. She was already retired at the time of that conversation, and working under a contract that would expire in June 2007. In any event, the trial judge misinterpreted this evidence. The trial judge also pointed to the fact that the appellant told the respondent's insurance adjuster shortly after the accident that she wanted to work at least two more years. However, the appellant did not say that she intended to retire in two years, but rather that this was the minimum period she wanted to continue to work.

[36] Second, the trial judge drew a negative inference from the appellant's failure to apply for Long Term Disability Benefits rather than retire. He stated:

> Had she applied for and received further LTD benefits, this would have given her the option of remaining on LTD, pursuing additional rehabilitation and then return to teaching.
>
> It is impossible to reconcile the Plaintiff's failure to apply for further LTD benefits with her testimony that she wanted to retire at age 65 given that there was absolutely no risk involved in applying for them...
>
> On this evidentiary record, the failure to apply for these further benefits can only be justified because she had already decided to retire and could not certify that she was willing to return to teaching with the assistance of additional rehabilitation treatments.

[37] An inference can be drawn only where the evidence supports no other reasonable conclusion. Where the evidence supports two or more available inferences, it does not establish the truth of any one of them. As more than one inference was available on the evidence before the trial judge, he made a palpable and overriding error in concluding that the appellant's failure to apply for Long Term Disability Benefits supported the inference that she would have retired at age 59 even had the accident not occurred.

[38] While the evidence established that the appellant had not applied for Long Term Disability Benefits, she had suffered a serious injury of the same nature and type experienced by the plaintiff in the milestone authority of *Athey v Leonati*. The trial judge concluded she sustained a 10.5% permanent disability which left her with lumbar pain, pain radiating down her legs, and waiting for surgery in discomfort (though mobile) as of the time of trial at age 66, some nine years post-accident.

[39] Thus, another equally plausible inference is that, given her age and the permanent and significant nature of her disability, it was not reasonable for the appellant to apply for Long Term Disability Benefits and meet its rehabilitation requirements with a view to someday returning to the classroom. It is far from certain that she would ever recover to the point of being able to resume the physical demands placed on an elementary school teacher, even after taking rehabilitation treatment. Such a conclusion would not have been unreasonable given her circumstances.

[40] Third, the trial judge considered statistical evidence that the appellant's retirement at age 59 is in accord with average retirement ages for elementary school teachers in Alberta, although he observed that this was merely one factor to be considered in the context of all of the evidence. His conclusion arises from a misreading of the expert report of Darren Benning, the source of that statistic. Mr. Benning, rather, stated in his report:

> [W]e note that Ms. Sorochan's with-accident retirement planning is consistent with the typical behaviour of Teachers in Alberta. In this regard, we consulted a document found on the Alberta Teachers' Retirement Fund (ATRF) website, entitled 'Teachers' Pension Plan Funding Sustainability and Contribution Rates'. An excerpt from this publication is given below:
>
> > Today, teachers retire on average at age 59 and will collect a pension for about 30 years.
>
> The average given above pertains to both females and males. Given that males on average retire at a later age relative to females, this suggests that the average retirement age for female Teachers is earlier than 59. Thus, Ms. Sorochan's with-accident retirement at her age 59.1 was somewhat later than the expected average retirement age for female Teachers in Alberta.

[41] Mr. Benning's report gives no authority to support his assertion that males on average retire later than females. He does not appear to have examined whether that statement is as likely to apply to a female teacher as to another worker, or to any worker with a pension as compared to one without. While the evidence does not disclose whether the appellant lost contribution time to her pension because of absences for maternity purposes, that factor may result in female workers with pensions working longer than males who do not need to make up this missed time so as to maximize pension entitlement.

[42] Mr. Benning also attempts to support his conclusions by reference to data extracted from the 2006 Census regarding the work patterns for teachers, which shows that in Alberta there were just over 1,600 female kindergarten/elementary school teachers aged 55 - 59, but just under 400 aged 60 - 64, and almost none aged 65 - 69. (This would not have been the most recent census information available to him at the time he prepared his report dated September 2013.) However, this census data also illustrates that there was some likelihood that the appellant would work beyond age 59 to become one of the 400 female elementary/kindergarten teachers still working in Alberta at age 60 and beyond. Other evidence supports the suggestion that she may well have been.

[43] The trial judge gives a number of other reasons for his finding that Mrs. Sorochan's decision to retire was voluntary. But none of them, with the exception of the fact that Mrs. Sorochan continued to teach following her official retirement, deal with her pain. By way of examples, the fact that there was no medical evidence of unfitness to teach, that her employer considered her fit to teach or the fact that she sought no medical advice prior to making the decision to retire does not address the fact that she found it too painful to continue to teach as she had done before. And there was no suggestion that Mrs. Sorochan was not in pain.

[44] The appellant appears to have been a high-energy person, prepared to concurrently carry out duties as a full-time teacher and as a town counselor for the municipality of Two Hills from 2001 onward. After her retirement and notwithstanding the nature of her ongoing permanent disability, she ran for and was elected mayor of Two Hills for a three-year term starting in October 2010. This supports our conclusion that she would have taught beyond her actual retirement date had she not been injured, as does her attempts to return to full-time teaching after the accident, her willingness to come back to the school on contract to complete the school year after her retirement, as well as a common-sense assessment of the effect of her injuries.

[45] That said, the appellant's testimony that she planned to teach to age 65 had she not been injured must be discounted to some degree to reflect the reality that negative contingencies would have been more likely than positive contingencies to arise and to result in retirement at an earlier age than 65.

[46] One such contingency was her election as mayor in October 2010. The new duties imposed by that position, in combination with the nature of the physical demands placed on her

as an elementary teacher as she aged, form the best of the evidence led as to what degree of reduction should attach to her future loss of income claim. We conclude that she would have retired as a teacher when she was elected mayor in October 2010, some 2.5 years before she attained the age of 65. As a result, we award damages for loss of future income on the basis that the appellant would have worked from age 59 to age 62.5 had the accident not occurred, 3.5 years longer than she did.

[47] These damages can be calculated as follows. Totaling the amounts lost for each year, inclusive of judgment interest, as evidenced in the expert report prepared by Christopher Bruce and Laura Weirset set out in the Appellant's Extracts of Key Evidence at A103, we have $8,729 (in 2007) + $16,884 (in 2008) + $12,856 (in 2009) + $12,351 (in 2010, this being ¾ of $16,468 to reflect the part that Mrs. Sorochan is assumed to have worked that period, had she not been injured) for a total of $50,820. This sum does not need to be discounted to present-day value since the appellant had already attained the age of 65 by the time of trial. It also attracts post-judgment interest, as does the balance of the sums awarded in judgment at the legislated rate.

[48] We thus award the appellant $50,820 as compensation for her loss of future employment income arising from her injuries caused in this accident.

[49] With respect to her claim for loss of pension benefits because of more years of service and a slightly higher average salary, we have attempted to quantify same in the absence of what we consider to be satisfactory evidence. The $101,829 claimed addressed only the loss she would have experienced had she retired at age 65 in 2013 and included a number of assumptions which would not necessarily hold true once her retirement age had been determined to be October of 2010. Nevertheless, we have had some regard to the economic assessment evidence which Mrs. Sorochan's experts put before the trial judge. On that basis, we find that Mrs. Sorochan is entitled, on a present worth basis, to a globalized award of $15,000 for loss of pension benefits as an elementary school teacher.

[50] We dismiss the argument that the future income loss award should be augmented to reflect the possibility that the appellant would have increased her income in future years as a result of being appointed an assistant principal. She had never held such a position during her career, although she had taken some training for an administrative position a number of years prior to the accident. While she testified that but for her injuries she would have applied for a assistant principal position that came open at her school in 2007, the trial judge concluded that on a balance of probabilities she had not established that she would have obtained that position had she applied for it. He made no error in so concluding.

V. Conclusion

[51] The appeal is allowed in part. We award the appellant $50,820 for loss of future income and increase housekeeping damages to the extent set out at paras 25 and 27. The balance of the appeal must be dismissed.

Appeal heard on November 28, 2014

Memorandum filed at Edmonton, Alberta
this 22nd day of June, 2015

Authorized to sign for: Berger J.A.

Authorized to sign for: Bielby J.A.

O'Ferrall J.A.

Appearances:

R.C. Murray
for the Appellant

W.A. Hanson
J.E. Halloran
for the Respondents