COURT OF APPEAL FOR ONTARIO

CITATION: Hansen v. Williams, 2014 ONCA 118
DATE: 20140212
DOCKET: C57098

Gillese, Rouleau and Tulloch JJ.A.

BETWEEN

Kristen Hansen, Randy Cheynowski and Callum Cheynowski, a minor by his litigation guardian Kristen Hansen

Plaintiffs (Respondents)

and

Robert D. Williams

Defendant (Appellant)

Alan Rachlin, for the appellants

Christopher Richard and Katharine Book, for the respondent

Heard: February 10, 2014

On appeal from the judgment of Justice Wendy L. MacPherson of the Superior Court of Justice, dated April 23, 2013.

ENDORSEMENT

[1] The appellant appeals from the judgment entered following a jury verdict in a personal injury matter. The appellant contends that:

1. the trial judge erred in her charge to the jury with respect to the assessment of non-pecuniary general damages, and

2. the jury award of $200,000 for non-pecuniary damages is inordinately high and warrants appellate intervention.

BACKGROUND

[2] Kristen Hansen brought an action following a motor vehicle accident that occurred on July 19, 2007. She claimed damages for a thoracic outlet syndrome (neck, shoulder and arm injuries) and headaches. Hansen testified that these injuries affected her housework, recreational activities, social life, family interactions and employment as a court clerk. Liability was admitted. The only issues to be decided at trial were the injuries sustained and the appropriate damages.

[3] In his closing submissions, counsel for the plaintiffs (respondents in the appeal) addressed the question of non-pecuniary general damages as follows:

> Now, counsel for the defendant has suggested a sum to you, he suggested somewhere between five and $10,000.00 [for non-pecuniary damages]. I suspect you'll agree with me that that sum is [woefully] inadequate if we consider the full extent of [the respondent's] loss. His assessment on that is based upon assumptions about her injuries that have been disproved by the evidence in this case.
>
> If [counsel for the defendant is] assessing the damages for pain and suffering at five to $10,000.00, based on the assumption that she only had three to six months' worth of symptoms arising from this accident then I think we're fair to extrapolate that if we disagree with that assumption and we think that she's still experiencing those symptoms because of the car accident today. In counsel for the defendant's view, six months is valued at five to $10,000.00, what's the rest of [the respondent's] life worth?

[4] The appellant's trial counsel objected to this aspect of the respondents' closing submission. He expressed concern that the approach put to the jury by the respondents' counsel – extrapolating a figure over Hansen's entire lifetime – would result in an excessive damages award. He asked the trial judge to address this concern in her charge to the jury.

[5] The trial judge accepted this submission and charged the jury as follows:

> In closing submissions the defendant's counsel suggested a range of damages of $5,000 to $10,000. In cases of this kind, the law does permit counsel to suggest possible ranges of damage. You are not bound to accept the range suggested, however, if you accept the submissions of the defendant's counsel you may well conclude that the range of damages he suggested to be appropriate.
>
> The plaintiff's counsel did not suggest a possible range of damages but he did suggest one approach would be to extrapolate that if $10,000.00 was appropriate for injuries lasting six months then you should look at that in determining the value over the plaintiff's lifetime.
>
> This is not a mathematical calculation and that should not be the approach that you take in dealing with general damages. You and you alone determine the amount that is appropriate to reasonably compensate the plaintiff for her pain and suffering, and loss of amenities of life that have arisen as a result of the motor vehicle accident and in your deliberations you must do so, so as to arrive at an amount that is fair to both parties.

[6] After the jury had been charged, the appellant's trial counsel objected again, saying that the jury had not been given enough guidance as to the level of general damages that would be appropriate in the circumstances.

[7] The trial judge did not recharge the jury.

[8] The jury returned a verdict of $200,000 for non-pecuniary general damages; $5,600 for past housekeeping expenses; and $28,000 for future housekeeping expenses. The jury awarded no damages for income loss or loss of care, guidance and companionship.

ANALYSIS

1. **Did the trial judge err in her charge to the jury with respect to the assessment of damages?**

[9] If there was an error in the respondents' closing submissions, it was corrected by the trial judge's charge. The trial judge expressly directed the jury to not undertake a mathematical calculation of the kind suggested by counsel for the respondents in his closing argument.

[10] As this court has recognized in the past, the trial judge is uniquely placed to evaluate errors and determine whether they can be corrected: see *Fiddler v. Chiavetti*, 2010 ONCA 210, 317 D.L.R. (4th) 385, at para. 48. In our view, the trial judge adequately corrected any error that may have been created by the respondents' closing submission in respect of quantifying non-pecuniary general damages.

[11] The trial judge's charge did not need to be perfect. Absent an error that amounts to a substantial wrong or a miscarriage of justice, or circumstances where the interests of justice otherwise so require, a new trial will not be ordered: *Brochu v. Pond* (2002), 62 O.R. (3d) 722 (C.A.), at para. 68. Here, the trial judge provided the jury with adequate guidance on how to assess damages. There is no requirement that the trial judge provide the jury with a range of damages. Section 118 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 – providing that the trial judge may give guidance to the jury on the amount of damages – is permissive, not mandatory. In this regard, it is worthy of note that the trial judge told counsel that she would not be giving the jury a range for non-pecuniary damages and counsel made their closing submissions with that knowledge.

2. Should the court intervene to reduce the non-pecuniary damage award of $200,000?

[12] An appellate court is not to interfere with a jury's damage award unless the award is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it: *McLean v. McCannell*, [1937] S.C.R. 341, at p. 343; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 30. This is a very high threshold. Appellate courts are not entitled to substitute their own awards in place of jury awards simply because they would have arrived at a different amount: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 158.

[13] While the award may be high, this court was given very little Ontario jurisprudence involving cases of thoracic outlet syndrome. A significant number of British Columbia cases were provided, but those cases suggest that this is an evolving area rather than one in which a range has been established. Moreover, the record before this court is thin on Ms. Hansen's injuries and the consequences of those injuries to her. This makes it particularly difficult to compare the case at bar with the cases that were relied on, when dealing with the appellant's submission that the non-pecuniary damage award is so far outside the range as to warrant appellate intervention.

[14] Accordingly, we are unable to accede to the appellant's submission that the award is so plainly unreasonable and unjust that this court should intervene.

DISPOSITION

[15] For these reasons, the appeal is dismissed with costs to the respondents fixed at $12,500, all inclusive.

"E.E. Gillese J.A."
"Paul Rouleau J.A."
"M. Tulloch J.A."