COURT OF APPEAL FOR ONTARIO

CITATION: Butler v. Royal Victoria Hospital, 2018 ONCA 409
DATE: 20180501
DOCKET: C63898

LaForme, Epstein and Pardu JJ.A.

BETWEEN

Sarah Butler, Luke Butler, James Butler and Isaac Butler, minors by their Litigation Guardian Jaye Butler and Robert Butler and the said Jaye Butler

Plaintiffs (Respondents)

and

Royal Victoria Hospital, P. Bates, K. Rina, K. Corvari, W. Dekleyne, A. Fenton, A.M. Cichowicz, T. Haney, J. Stuart, E. Reyes, C. Stewart, S. Causey, T. Whitty, V. Ho and M. Hazlett

Defendants (Appellants)

Valerie Wise and Rozmin Mediratta, for the appellants

Gavin MacKenzie and Brooke MacKenzie, for the respondents

Heard: April 9, 2018

On appeal from the judgment of Justice John R. McCarthy of the Superior Court of Justice, dated May 5, 2017, and the costs decision, dated October 2, 2017.

REASONS FOR DECISION

BACKGROUND

[1] In September 2008, Sarah Butler was diagnosed with hypotonic cerebral palsy. Sarah's condition was caused by hospital nurses' negligent artificial rupture of her membranes at the birth of her and her twin brother on January 26, 2007.

[2] Sarah's impairments and deficits affect gross and fine motor skills, speech, cognition, learning and behaviour — they are serious and permanent. In order to cope with her disabilities and to enhance her quality of life, Sarah will require physiotherapy, speech-language therapy, occupational therapy and equipment and various other forms of assistance for the balance of her life.

[3] Only at the beginning of the trial did the appellants admit they fell below the standard of care. That admission left the issues of causation and damages to be determined. In particular, the appellants submitted Sarah's cognitive and behavioural issues were not entirely caused by the birth injury and that the claims under various heads of damages were excessive.

[4] The parties agreed to file reports from their respective expert economists and argued the issue of damages for the loss of future income without calling *viva voce* evidence of these experts. Accordingly, neither expert testified nor was cross-examined, and the trial judge was tasked with assessing their evidence through their written reports.

[5] After a five-and-a-half-week trial, in comprehensive reasons for judgment the trial judge held that the birth injury was the sole cause of the numerous conditions that were negatively affecting Sarah. He awarded the respondents $5,568,393 in damages, which included $1,881,846 for future loss of income.[1] The trial judge, in separate reasons for decision, fixed the respondents' costs in the amount of $2,201,259 inclusive of fees, HST, and disbursements. The fee portion of the costs award totaled $1,503,466.

ANALYSIS

[6] The trial judge's findings involving causation and that Sarah will not be employable are not challenged by the appellants on appeal. What is challenged is his decision with respect to the award for future loss of income and the issue of costs.

[7] Specifically, the appellants submit the trial judge erred in two respects when deciding the issue of Sarah's future income loss, namely: (i) his finding that Sarah would have completed college; and (ii) his approach to contingencies. The appellants submit the loss of future income portion of the award of $1,881,846 should be reduced to $821,109. They also seek leave to appeal the fee portion, $1,503,466, of the trial judge's award of costs.

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[1] The award was revised from $5,236,693.29 to $5,568,393.00 in Supplementary Reasons for Judgment dated September 29, 2017.

[8] As we will explain, we reject the appellants' submissions that the trial judge erred. We see no reason to interfere with the exercise of his discretion in the assessment of damages or in his determination of costs.

[9] First, the trial judge's finding that there was a real and substantial possibility that Sarah would have graduated from college, but not university, and would have been employed full time if it were not for the birth injuries she sustained is entirely reasonable. In making this finding, the trial judge properly weighed the evidence and neither ignored relevant evidence nor failed to consider a relevant factor in a legal test. There was ample evidence before him to support his conclusion that Sarah probably would have completed college but for the appellants' negligence. The appellants have failed to demonstrate any reason why this court should disturb his conclusion.

[10] Second, the appellants' submit that the expert statistics the trial judge relied on are based upon the wrong average earnings and do not include any negative contingencies. They rely on their expert's criticism of the respondents' expert evidence that they say was ignored or misapprehended by the trial judge. We disagree.

[11] Although trial judges are entitled to adjust an award for future loss of income to account for general contingencies—whether upwards or downwards—it is not an error of law for the trial judge to decline to do so: see *Graham v. Rourke*, 75

O.R. (2d) 622 at p. 636; *Gerula v Flores*, [1995] O.J. No. 2300, at para. 41. In any case, we are not satisfied that the references the appellants referred us to, said to illustrate the trial judge's error, are as clear and obvious as they contend. It is certainly arguable that an inference is available that both positive and general contingencies could be drawn from all the evidence: see *Beldycki Estate v. Jaipargas*, 2012 ONCA 537, 295 O.A.C. 100; *Gerula*, at para. 41.

[12] While the trial judge based his assessment on the plaintiffs' expert's starting point of female average full time earnings to age 65, it was open to him to conclude that temporary absences from the workforce would be offset by benefit programs such as employment or disability insurance. He was not obliged to make a further deduction for non-participation in the workforce. Calculation of the future loss of income of any child, let alone one born profoundly disabled is not an exact science.

[13] Here the trial judge was required to determine the correct inferences to be drawn from the evidence of expert witnesses whose credibility was not in issue, and who, by party agreement, did not testify. These circumstances, however, do not change the need to show deference to the trial judge's findings of fact. As Sopinka and Gelowtiz put it in *The Conduct of An Appeal*, 3rd ed. (Markham: LexisNexis Canada, 2012) at pp. 74-75:

> This traditional principle of the English courts – that an appellate court is as well-placed to draw inferences from primary facts as the trial court….has been displaced by the view that an appellate court should not readily

> interfere with inferences drawn from established facts by trial courts. On several occasions, the Supreme Court of Canada has emphasized that restraint should be exercised when appellate courts contemplate interfering with the factual findings of a trial judge based solely on differing inferences or conclusions drawn from uncontradicted facts.

[14] It is not the role of this court to substitute its award of damages for that of the trial judge unless there is an error of law or a wholly erroneous estimate of the damages: see *Gerula*. The appellants have not convinced us that this has occurred in this case.

COSTS

[15] The appellants accept the trial judge's methodology, however, they submit that he erred in principle or that the costs award was plainly wrong. We find no error in principle, nor can we conclude that the award is plainly wrong.

[16] The parties addressed the issue of costs by way of written submissions in respect of a complex trial that lasted five weeks. The trial judge noted that this case involved more than eight years of litigation leading up to trial, which included days of examinations for discovery, multiple pre-trials, and countless exchanges of correspondence.

[17] As we noted earlier, the appellants' accept the trial judge's methodology in deciding the costs issue. However, they submit that he erred: (i) in applying a 27% factor for substantial indemnity costs; and (ii) in failing to consider that

respondents' trial counsel had devoted more time to the matter before the offer to settle than after. We disagree.

[18] The trial judge was not required to adopt a weighted average of partial indemnity and substantial indemnity costs. It is worth repeating that a costs award does not have to be measured with exactitude; rather, it should reflect a fair and reasonable amount that should be paid by the unsuccessful parties: *Zesta Engineering Ltd v. Cloutier* (2002), 21 C.C.E.L. (3d) 161, at para. 4.

[19] Leave to appeal a costs order will not be granted except in obvious cases where the party seeking leave convinces the court there are "strong grounds upon which the appellate court could find that the judge erred in exercising his discretion": *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 OAC 315, at para. 22. We are not persuaded that this is an appropriate case for granting leave

DISPOSITION

[20] The appeal is dismissed and leave to appeal costs is denied. Costs of the appeal are awarded to the respondents in the amount of $37,500, inclusive of disbursements and HST.

"H.S. LaForme J.A."
"Gloria Epstein J.A."
"G. Pardu J.A."