Court of Appeal File No. CA46728
Supreme Court File No. 14 4097
Supreme Court Registry: Victoria Registry

COURT OF APPEAL

BETWEEN:

PATRICIA DAWN ELLIOTT

Respondent
(Plaintiff)

AND:

RYAN MCCLIGGOT and SLEGG CONSTRUCTION MATERIALS LTD.

Appellants
(Defendants)

APPELLANTS' REPLY FACTUM

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REPLY

Reply to Respondent's Position on the Jury Charge

1. At para. 3, the Respondent asserts the judge delivered to the jury "substantially the full CIVJI charge on non-pecuniary damages". In Appendix A, the Respondent concedes that CIVJI Part 12.03 (4) was omitted and it is reasonable for the Appellants to submit it should have been included.

2. As set out at para. 63 of the Appellants' factum, the omitted section in the charge references the oft-cited list of factors to be considered in assessing non-pecuniary damages from *Stapley v. Hejslet*, 2006 BCCA 34 [*Stapley*] at para. 46. Without knowing what factors to consider in assessing this head of damages, the jury was at a significant disadvantage in its deliberations. The lack of guidance provided to the jury on the fundamental legal principles required for the assessment of non-pecuniary damages was an error of law.

The Respondent's Pain

3. The Respondent says at para. 4 that the Appellants' statement of facts "de-emphasizes the severity, chronicity, and impact of the respondent's injuries". She says that while her injuries are not catastrophic, she is in constant, aching discomfort.

4. In her examination in chief, the Respondent stated she experiences a pulling and ache in her mid-back, shoulders, and neck, and a headache at the base of her skull, which fluctuates in intensity. She stated that on a daily basis "...it sits at about a 1 or 2. So noticeable but not debilitating. I can work through it." She stated that "…probably once per month" her symptoms flare to approach "…a 5 or 6…" and she experiences some numbness and tingling in her right arm and first two fingers on her right hand and facial pain. She confirmed the tingling and numbness pain is "…not painful. It's just noticeable and slightly uncomfortable." She stated her pain was at the worst, "…between a 7 and a 9" in the four months immediately following the accident until "…the beginning of March of 2013" (T., p. 75, ln 42-45 to p. 77, ln 19).

Respondent's Opening Concession

5. At para. 10 of the Respondent's argument, it is conceded that although greater deference is owed to the award of a jury as opposed to that of a judge sitting alone, that mere principle is not enough to save this jury's award to Ms. Elliott from some interference by this Court.

Moskaleva* or *Stapley

6. The Respondent asserts at para. 13 that the test for the necessary threshold to interfere with a jury's damage award is set out at para. 127 of *Moskaleva v. Laurie*, 2009 BCCA 260 [*Moskaleva*], as being "wholly disproportionate or shockingly unreasonable." It is asserted by the Respondent that the test set out in *Moskaleva* is more settled than the test contained in *Stapley*. With respect, the Appellants say that the test relied on by the Respondent seems little different from paras. 40 – 41 of *Stapley*, cited at para. 62 of the Appellants' factum.

7. The Appellants say that the tests for appellate review of an award for non-pecuniary damages, set out in in both *Stapley* and *Moskaleva*, are virtually identical. The Appellants do not wholly disagree with the enunciated test set out at para. 13 of the Respondent's factum; however, we emphasize that the test as enunciated in *Moskaleva* includes whether the award would "…shock the court's conscience and sense of justice" (emphasis added) (*Moskaleva* at para. 116 citing *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC) at para. 159 and *White v. Pilot Insurance Co*., 2002 SCC 18 at para. 108). A sense of justice is of import, as it speaks to ensuring fairness between the parties in the administration of justice. While arguably civil juries provide educational value to the court that does not mean the appellate court should not retain its jurisdiction to provide a corrective, oversight function to ensure the proper administration of justice as between the parties when appropriate.

8. At bottom, it is clear on the authorities that it is not enough that a jury award is simply inordinately high or inordinately low, but rather it must be "wholly out of all proportion" (*Stapley*) or "wholly disproportionate or shockingly unreasonable"

(*Moskaleva*). With respect, "wholly disproportionate" seem simply a different way of stating that the award must be "wholly out of proportion".

9. The Respondent places reliance on the very recent decision of this Court in *Little v. Schlyecher*, 2020 BCCA 381 [*Little*], where a jury award was reduced first from $447,000 to the upper limit of $375,000, and then further down to $250,000 by this Court. The reasons for judgment are relatively parsimonious but the description of the plaintiff's injuries set out at para. 7 of the reasons for judgment are indicative of significantly worse physical and emotional injuries than those sustained by the plaintiff in the case at bar. Fenlon, J.A., reduced the award to $250,000.

10. The Respondent then asks at para. 19 of her factum, why she should be treated any differently than Ms. Little and concludes she should not be. The answer is said by the Respondent to lie in a 2006 decision of the Supreme Court of Canada, in *Young v. Bella*, 2006 SCC 3 [*Young*], which requires the jury award to be "shockingly unreasonable". At para. 25 of her factum, the Respondent then relies on *Thomas v. Foskett*, 2020 BCCA 322 [*Thomas*] at para. 47, for the proposition that a jury's verdict on damages will not be set aside unless it 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.

11. In *Thomas*, a jury awarded $15,000 for non-pecuniary damages to a plaintiff who sustained a significant shoulder injury with chronic pain and ongoing functional limitation (para. 59). Fenlon, J.A., accepted that the awards for cost of future care and loss of earning capacity yielded the inference that the plaintiff sustained a significant shoulder injury (para. 63). The court compared the award of non-pecuniary damages to judge alone decisions dealing with awards for similar injuries and concluded that the amount was one that no jury reviewing the evidence as a whole and acting judicially could have reached increasing non-pecuniary damages to $60,000.

12. As Garson J.A. stated in *Taraviras v. Lovig*, 2011 BCCA 200 at para. 43: "As to what deviation would shock the court's conscience, I do find other appellate cases to be

a useful guide." The Appellants say if it is "shocking to the court's conscience" that a jury should award $15,000 in a case where $60,000 is substituted by this Court, it seems equally "shockingly unreasonable" and "wholly disproportionate" that a jury should award $350,000 in a case where $90,000 would be the upper limit of the anticipated quantification by a judge sitting alone, as here. It is a lottery win.

The Comparative Test Should Remain

13. At para. 28 of the Respondent's factum, she argues "[a]ny notion of proportionality is meaningless without some mathematical relationship between two quantities". For this reason, she suggests the comparative approach should be abolished in favour of asking the *Stapley/Moskaleva* questions as to whether the jury's award shocks the court's conscience in the sense that no jury reviewing the evidence as a whole and acting judicially could have reached the verdict it did. With respect, for nearly two decades that has been the hurdle to overcome to warrant appellate review of a jury award. So long as an award is not wholly disproportionate or wholly out of proportion, or shocking to the court's conscience and sense of justice, it will survive appellate scrutiny. No new threshold test is warranted.

14. However, the Respondent fails to address the remaining issue, which is how this Court should assess what award is just in the circumstances once it decides the jury's award does shock the court's conscience. As stated in *Taraviras* at para. 43, the Appellants' submit this Court should assume that the jury found the facts most favourable to the plaintiff, compare the awards to judge alone assessments in a generous way, and assess the appropriate margin of deviation by considering other appellate cases as a useful guide.

15. At para. 58 of the Respondent's factum it is asserted the Appellants contended a reasonable range of judge alone awards would be $90,000-$130,000 for non-pecuniary loss. In fact, at para. 67 of the Appellants' factum the range was said to be $80,000-$90,000. The Respondent cites no cases in support of the comparative approach and it is therefore assumed that she takes no issue with the decisions relied upon in the Appellants' argument.

The Importance of Dissents

16. In the Respondent's factum from paras. 47-50, she emphasizes the dissents of Gibbs, J.A., in *Cory v. Marsh*, 1993 CanLii 1150, and Chief Justice Finch, in *Stapley*. It is always important to consider the reasoning behind dissenting opinions; however, in the years since *Cory* and *Stapley*, these dissents have been reviewed, considered, and analyzed in multiple decisions. Indeed, it is the reasoning and concerns expressed in these decisions that have led the courts to raise the bar for appellate review of jury awards to the present level. It is in that context that Justice Thackray, J.A., expressed reservations about the use of the comparative test but ultimately endorsed it (*White v. Gait*, 2004 BCCA 517). A rethink is not required.

The Pecuniary Awards

17. In submissions to the jury the Respondent had only requested $11,045 for cost of future care and $8865.73 for past loss of income, whereas the jury awarded $15,000 for cost of future care and $46,500 for past loss of earning capacity. It is asserted by the Respondent that on the charge to the jury it was open to them to award what they considered appropriate. The Respondent then says the totality of the pecuniary component of the jury award was only $7,000 over the amount sought.

18. The Appellants say it is not the totality of the amounts awarded but rather the individual awards, based on the evidence, for cost of future care, and past loss of income that is significant. When the jury awards almost six times the amount of past loss of income argued for by the plaintiff, on a questionable factual basis for such an award, this drives home the fact that the award is wholly out of all proportion or is wholly disproportionate. It must be recalled that the plaintiff was only off work for a few months following the accident before she returned to better paying employment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: March 17, 2021

"Robert C. Brun"

Robert C. Brun, Q.C. and Jennifer J.L. Brun

Lawyers for the Appellants

LIST OF AUTHORITIES