COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Steward v. Berezan,***
2007 BCCA 150

Date: 20070314
Docket: CA033727

Between:

Martin Clive Steward

Respondent
(Plaintiff)

And

Ronald Glen Berezan and
Gold Key Pontiac Buick (1984) Ltd.

Appellants
(Defendants)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson

M. Wright and J. W. Joudrey	Counsel for the Appellants
F. A. Schroeder	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 5 March 2007
Place and Date of Judgment:	Vancouver, British Columbia 14 March 2007

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] This is an appeal by the defendants from the award of damages for past and future income loss in the judgment of Satanove J. pronounced 30 December 2005: 2005 BCSC 1812.

[2] The plaintiff's claim arose from a motor vehicle accident on 26 March 2001 at an intersection in Surrey. The judge found that the defendant driver entered the intersection against a red light. The defendants do not appeal the finding of liability against them or the non-pecuniary damage award of $90,000.00.

[3] The defendants allege the judge erred in law by awarding $70,000.00 for past income loss and $50,000.00 for diminished future earning capacity. The error in each category is said to be in the application of incorrect legal principles.

[4] In the case of past loss, the defendants argue the judge did not hold the plaintiff to the burden of proving the fact of the loss and the amount. In the case of future loss, the defendants argue that the judge predicated the award on a theoretical rather than an actual basis.

[5] I would not give effect to the first ground of appeal. With respect, I see it as a thinly disguised effort to have this Court re-try the facts and substitute our judgment for the judge's view of the matter. This is not our role on appellate review.

[6] The burden of proof error is said to be manifest by an absence of reasons. The defendants' factum puts it this way:

> 31. A plaintiff (here, the Respondent) bears the burden to show: (1) the fact of the loss and (2) the amount of the loss; and must prove both on the balance of probabilities. The trial judge's reasons do not indicate that the learned trial judge held the Respondent to that burden in those two respects. If the trial judge had held the Respondent to that legal burden, the awards for past income loss could not have been given. Accordingly, it is submitted that the trial judge erred in law.

[7] As to this submission, I say first that the evidence does not compel the conclusion that the result could only have been arrived at by an erroneous approach to the burden of proof. The plaintiff is a realtor who suffered a serious injury disabling him from performing as well as his peers in the same office for about four years. The amounts awarded for each of the years in question are not linked to any particular lost opportunities or evaluated by reference to a defined formula but, as hypothetical past losses, they had to be estimated rather than calculated. Generally speaking, the plaintiff did not enjoy the same increase in his earnings in a rising market as the other realtors used for comparison. There was a sufficient basis in the record supporting the plaintiff's claim for past loss in the amount awarded.

[8] Second, the first ground is based in part on an absence of reasons. The reasons relating to the past loss are brief. The failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. The omission is only a "material error" if it gives rise to the "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected [the] conclusion": ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33 ¶ 39, 72, quoting from ***Van de Perre v. Edwards***, [2001] 2 S.C.R. 1014, 2001 SCC 60 ¶ 15. That test is not satisfied in this appeal.

[9] Turning to the attack on the future loss award, the defendants articulate their position in this way:

> 50. Here, the trial judge awarded $50,000, as “compensation for the impairment of his earning capacity in other occupations that may now be closed to him” (Reasons para. 45, A.R. p. 32). But there was no suggestion that the Respondent had any intention to go into a career in which his injuries would be an impediment. So, the award appears to be compensation for a mere theoretical loss. Also, there was no indication of a substantial possibility of actual future loss. Indeed, the rise of income between 2001-2004 suggests that the future does not hold in store a risk of reduced income-earning capacity. Thus, to have awarded any damage for future loss of earning capacity was an error of law (or at best an error of mixed fact and law).

[10] The judge's reasons under this head are also brief and I set them out in full:

> [44] In my view, this was not a case where it would be appropriate to calculate potential loss of earnings for the plaintiff in the future. It appears that the plaintiff may earn as much in the future as he would have if not injured.
>
> [45] This does not mean, however, that the plaintiff is not entitled to compensation for the impairment of his earning capacity in other occupations that may now be closed to him. It is impossible to say at this juncture that the residual injuries to his back, neck and arm will not harm his income earning capacity over the rest of his working life. (***Parypa v. Wickware*** (1999), 169 DLR 4th 661, 1999 BCCA 88).
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> [46] The plaintiff seeks $50,000.00 for the loss of this capital asset, which I think is fair and reasonable compensation in the circumstances.

[11] When the judge refers to "other occupations that may now be closed to him" she must mean the plaintiff's former occupation as a journeyman carpenter. The record discloses no other realistic alternative. The evidence is that the plaintiff left carpentry 20 years prior to the trial to work as a realtor. He was 55 years old at trial. He built a home for his family in 1991 and made home improvements and repairs for

his own benefit from time to time before the accident. The medical evidence suggests that the plaintiff's residual disability from the accident would interfere with strenuous physical work but no one, including the plaintiff, testified that a return to carpentry was in contemplation.

[12] The plaintiff's claim for diminished capacity was in relation to the real estate business, not carpentry. Counsel for the plaintiff made that clear in his reply to the submissions of the defendants below:

> MR. SCHROEDER: Just one -- one comment, My Lady. I'm not sure that my friend understands the plaintiff's loss of capacity claim. It's not based on not being able to move to a physical job like a carpenter. It's based on a reduced capacity to -- to earn money as a realtor. He does not have the same capacity, energy, so his -- his -- his economic capital asset has been reduced. He can't make as much money as if he had been free of what remains of the effects of these injuries. That's -- that's what the capacity claim is. Thank you.

[13] Counsel before us expresses regret that his remarks may have unduly restricted the plaintiff's position but he nevertheless asserts there is a basis in the evidence for the award.

[14] With respect, I think counsel's argument below fairly reflected the case that went before the judge. No attention was paid to the prospect of the plaintiff's return to the construction trade. At his age and with his successful experience in real estate, it seems highly unlikely that, if for some reason the plaintiff wanted or had to leave real estate sales, he would take up carpentry again. There is nothing in the evidence to suggest that he would.

[15] The judge said in her reasons, at paragraph 45, "It is impossible to say at this juncture that the residual injuries to his back, neck and arm will not harm his income earning capacity over the rest of his working life." The defendants submit that this is the wrong test and it led the judge to arrive at an erroneous award. I agree with that submission.

[16] The judge appears to have lifted the phraseology "it is impossible to say..." from the judgment of Southin J.A. in ***Palmer v. Goodall*** (1991), 53 B.C.L.R. (2d) 44 at 59, quoted in ***Parypa v. Wickware***, 169 D.L.R. (4th) 661, 1999 BCCA 88:

> [63] This passage makes clear the principle that it is not the lost earnings themselves that must be compensated, but loss of earning capacity as a capital asset that requires compensation. There are several cases in this court which confirm that the capital asset approach is correct: *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380; *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44; and *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393. The significance of compensating earning capacity as a capital asset as opposed to projected future earnings is seen in the following passage from *Palmer*, *supra*, at 59:
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> > Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning capacity.
> >
> > [Emphasis added.]

[17] But the language in question there was used in the context of appellate review and, with respect, it cannot be transposed to an original analysis at the trial level. The claimant bears the onus to prove at trial a substantial possibility of a

future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur: ***Parypa*** ¶ 65.

[18] When the record is examined according to that approach, I cannot see the basis for a substantial possibility giving rise to compensation for diminished earning capacity. There being no other realistic alternative occupation that would be impaired by the plaintiff's accident injuries, the claim for future loss must fail.

[19] I would allow the appeal to the extent of reducing the award by $50,000.00.

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Chiasson"