

CANADA / JUDGMENT

Andrist & Others v. Mason

2006 BCSC 1762

COURT

Supreme Court of British Columbia

DECIDED

29 November 2006

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2006 BCSC 1762 Andrist & Others v. Mason

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Andrist & Others v. Mason,

2006 BCSC 1762

Date: 20061129

Docket: 18360/03

Registry: Prince George

Between:

Shelley Ann Andrist, Personal Representative of Trent Steven Andrist, Deceased, and Kieren William James Andrist, Deceased, for her benefit and that of the child, Gage Matthew Andrist and Alta Lenard

Plaintiffs

And

Timothy John Mason

Defendant

Before: The Honourable Mr. Justice Parrett

Reasons for Judgment

In Chambers

Counsel for the plaintiffs:

G.A. Wright

Counsel for the defendant:

No Appearance

Date and Place of Trial/Hearing:

June 5, 2006

Prince George, B.C.

INTRODUCTION

- [1] In the present application the plaintiffs seek an order approving settlement of an infant claim pursuant to s. 40(1)(b) of the Infants Act, R.S.B.C. 1996, c. 223, and amendments, together with the usual ancillary orders implementing the settlement as approved.

BACKGROUND

- [2] On March 29, 2002, the Andrist family was returning to their home in Houston, B.C. from a trip to Prince George. Mr. Trent Andrist (age 34) was driving with his wife, Shelley Ann Andrist (age 32) in the front right passenger seat while the couple's two sons, Kieren (age 9) and Gage (age 7) were rear seat passengers seated on the left and right respectively.
- [3] As the Andrist family proceeded west towards their home in Houston, the defendant, Timothy John Mason, attempted to overtake and pass a loaded B-train travelling east ahead of him. As he attempted to pass the loaded truck he struck the Andrist vehicle head on. Trent Andrist and his son Kieren were killed instantly. Shelley Andrist suffered significant injuries but survived. The infant plaintiff Gage received no physical injuries but has had ongoing psychological problems since the collision.

THE FAMILY COMPENSATION ACT CLAIM

- [4] Gage was born on September 19, 1994. At the time of the accident he was seven years of age. He is now 11 years old.
- [5] Gage's father Trent was the primary breadwinner for the family and worked full time at a Canfor sawmill located near Houston, B.C., where he worked 40 hours per week at \$21.08 per hour. He also averaged 8 hours of overtime per month.
- [6] A report prepared by Associated Economic Consultants Ltd. quantified Gage's claim under the Family Compensation Act at \$120,662.00. The calculation presented the claim in this way:

Past Loss of Dependency

\$ 2,050.00

Future Loss of Dependency

23,980.00

\$26,030.00

Past Loss of Household Services

\$ 9,750.00

Future Loss of Household Services

71,040.00

Less 20%

(16,158.00)

\$ 64,632.00

Loss of Care and Guidance

\$ 30,000.00

TOTAL

\$120,662.00

- [7] Liability was not in issue and in a series of discussions counsel for the plaintiff negotiated a settlement of this aspect of Gage's claim for \$105,000.00 less the Part VII death benefits already paid to Gage's credit, leaving a net settlement of \$100,360.00 plus taxable costs and disbursements.
- [8] In the discussions, the Insurance Corporation of British Columbia ("ICBC") agreed to a form of structured settlement and, on August 20, 2004, they proceeded to fund the structured settlement.
- [9] In the event the settlement is not approved the annuity will be collapsed and the funds returned to ICBC.

PUBLIC GUARDIAN AND TRUSTEE'S REPORT

- [10] The Public Guardian and Trustee has provided the court with their comments under s. 42 of the Act. In their comments they specifically decline to approve the settlement for two reasons:
- a) that none of the indivisible expenditures have been allocated to the child, and
 - b) that there is a lack of explanation regarding the compromise reached on loss of childcare and household expenditures.

- [11] As the Public Trustee notes in their comments as well ". . . of somewhat less concern, is the failure to provide even a nominal amount for loss of inheritance". The report goes on to note that:

The Public Guardian and Trustee is also unable to support the proposed structure for two reasons. Firstly, we would want to be reassured that Shelley Andrist knows that the loss of financial support and loss of services are available to assist her in raising Gage and states she doesn't require the funds to raise before we would agree to these funds being paid out to Gage after he turns 19.

Secondly, the law normally provides that a young person is to receive their compensation in a lump sum when they attain their majority. Loss of Trent Andrist's love, guidance and affection is Gage's very personal loss. He is entitled at law to receive it at age 19 in a lump sum.

SUBMISSIONS

- [12] At the heart of the dispute in the present application is the dispute over the appropriateness of a structured settlement which would provide a stream of payments to the infant plaintiff commencing in the year he turns 19 and guaranteed for a minimum period of 30 years.
- [13] The applicant submits that this settlement is in the best interest of the infant plaintiff providing a tax free income stream which is, as counsel put it, "secure and idiot proof". In contrast, he submits payment of the funds to the Public Guardian and Trustee would result in significant fees and charges being levied against the fund both initially and/or on an annual basis.
- [14] Mr. Wright went on to make submissions with respect to each of the Public Trustee's express concerns. In dealing with these other specific concerns Mr. Wright acknowledges that in this case he allocated the indivisible expenses 100% to the mother and that such an allocation creates a risk if the mother predeceases the infant reaching the age of majority. He submits that any such difficulty could be addressed by use of some form of impressed trust.

DISCUSSION

- [15] The allocation of the indivisible expenditures to all family members is the approach taken in *Tomkins v. Byspalko*, (May 12, 1993, Smithers Registry No. 5983) a decision of Spencer J. His careful analysis details the proper approach to such claims and considers the various authorities including that of our Court of Appeal in *Grant v. Jackson* (1985), 68 B.C.L.R. 212 (B.C.C.A.).
- [16] The 20% reduction of the claim for household services, in my view, has been adequately explained by both counsel and the expert retained to provide his opinion.

- [17] The absence of a claim for loss of inheritance is also adequately explained by a proposal which would yield an accelerated receipt of benefits, and an estate which left everything to the deceased's wife. These factors, coupled with the absence of any established pattern of savings, would not preclude the approval of the proposed settlement.
- [18] The difficulty, in my view, does not stem from those areas of concern but from the appropriateness of a structured settlement in the circumstances of this case.
- [19] While there are a good many authorities that deal with the approval of infant settlements there seem to be relatively few that consider the legislation in more general terms. More importantly, I was referred to no decisions which considered the circumstances in which a structured settlement should be approved to take effect after an infant achieves his majority.
- [20] One decision which is of some assistance is found in *Rothwell v. Scruton*, [1997] B.C.J. No. 453, in which Huddart J.A. (in chambers) had before her an appeal from a decision refusing approval of an infant settlement.
- [21] In considering what was then s. 31 and s. 32 of the Infants Act (now s. 40), Huddart J.A. writes at para. 11:

11 The Act does not provide guidelines for the exercise of the guardian's discretion, the fulfilment of the Public Trustee's duty, or the court's power of approval. Counsel advise me that the question of the court's duty to an infant plaintiff whose next friend wanted to discontinue an action he had begun on the infant's behalf was first considered by a British Columbia court in *Howe v. Vancouver (City of)* (1957), 22 W.W.R. 385 (S.C.) by Sullivan J. His consideration of the authorities led to the conclusion (at 388) that "the court will not approve settlement or compromise of an infant plaintiff's claim unless the settlement proposed is one which is beneficial to the infant". Thus, a next friend was not permitted to dismiss an action to provide relief from his liability for costs where there was no benefit to the infant on whose behalf he had commenced the action. However, neither was he required to continue to prosecute the lawsuit. A reluctant next friend was not thought to be in the interest of the infant. Sullivan J. Concluded (at 389):

I fully appreciate that the order which I have decided to make herein will not be acceptable to the defendant corporation whose officials will justifiably complain of prejudice to its defence by a long delay. I can see no other way out of my difficulty, however, than to refuse defendant's request for approval of the settlement or compromise of the infant plaintiff's claim upon the basis suggested. In the result (and subject to such directions as I sincerely hope will be made by the Court of Appeal in this matter) the action will be stayed until (a) the next friend decides to proceed, or (b) another next friend consents to act and the court appoints him in the place and stead of the present next friend upon application made for that purpose, or (c) the infant plaintiff attains his majority and has capacity to continue the action in his own name.

- [22] A similar expression of the test to be applied is found in a decision of Baker J. in *Tyrell (Guardian ad litem of) v. Allen*, [1998] B.C.J. No. 1705, where at para. 21 she writes:

21 In summary, I am satisfied that the proposed settlement will fairly compensate the infant plaintiff for her injuries and that it is in the plaintiff's best interests to resolve this claim at this time and in this manner. The proposed settlement is approved, and the parties may file a consent order.

[23] I accept that this passage sets out the proper test to be applied in this court's consideration of the approval of an infant's settlement.

[24] In considering that test and its application in the present circumstances there arises a second issue. That issue is - Under what circumstances should the court approve a settlement that puts the proceeds of the litigation beyond the infant's reach upon his achieving his majority?

[25] An approval of this settlement will result in a stream of payments being made to the infant following his 19th birthday. The payments would begin with a monthly payment of \$496.78 in the first year, rising to a monthly payment of \$882.19 in its 30th year at age 48. The life annuity is guaranteed for a minimum period of 30 years and the initial payment is indexed at 2% per annum compounded annually and commencing on September 19, 2013.

[26] There are two important attributes of this plan. Firstly, the funds are inaccessible to the infant during his infancy. Secondly, the settlement funds are payable as a structured settlement over his adult lifetime, a scheme which effectively comes into force after he has achieved adulthood.

[27] In these circumstances a number of possible difficulties emerge. Although the infant's mother fully intends to provide for him during his infancy, the question of what would happen if she predeceases him arises.

[28] In addition the question of what should be required to keep an infant who has achieved his majority from receiving the fruits of his litigation (or the compensation for his loss) he is legally entitled to receive, arises.

[29] In my respectful view there must be, at a minimum, some basis in the facts which would justify the court in concluding that such a result was in the individual's best interest.

[30] I very much regret the conclusion I have reached, for I do not for a moment doubt the good faith or the bona fides of Ms. Andrist or counsel representing her.

[31] After anxious consideration I am unable to find that this proposed settlement will (a) fairly compensate the infant plaintiff and (b) that it is in the infant plaintiff's best interest to resolve this claim at this time and in this manner.

- [32] In reaching this conclusion I am mindful of the inaccessibility of the funds during the plaintiff's infancy, the presumption of his entitlement to receive the proceeds upon reaching his majority, the potential exposure in the event of his mother's death, the absence of any real reason for imposing a structure that takes effect during his adulthood, and the opposition outlined in the correspondence from the Public Guardian and Trustee.
- [33] In all of the circumstances of this case I am not prepared to approve the settlement as presented.

"W.G. Parrett, J."

The Honourable Mr. Justice W.G. Parrett

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