

CANADA / JUDGMENT

Ediger v. Johnston

2013 BCCA 525

COURT

British Columbia Court of Appeal

DECIDED

2 December 2013

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2013 BCCA 525 Ediger v. Johnston COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Ediger v. Johnston, 2013 BCCA 525 Date: 20131202 Docket: CA037058 Between: Cassidy Alexis Ediger, an infant by her Guardian Ad Litem, Carolyn Grace Ediger Respondent/Appellant on Cross Appeal (Plaintiff) And William G. Johnston Appellant/Respondent on Cross Appeal (Defendant) And Fraser Health Authority, Lisa B. Jeppesen, Jane Doe 1 and Jane Doe 2 Defendants Correction: The text of the front page was corrected on January 14, 2014. Before: The Honourable Madam Justice Saunders The Honourable Madam Justice D. Smith The Honourable Mr. Justice Groberman On appeal from: Supreme Court of British Columbia, March 24, 2009 (Ediger v. Johnston, 2009 BCSC 386, Vancouver Registry No. S036344) Oral Reasons for Judgment Counsel for the Appellant: J.M. Lepp, Q.C. and M.G. Thomas Counsel for the Respondent: V.R.K. Orchard, Q.C. P.T. McGivern S. Hoyer S.K. Raab Place and Date of Hearing: Vancouver, British Columbia December 2, 2013 Place and Date of Judgment: Vancouver, British Columbia December 2, 2013 Summary: The infant's cross-appeal of the damages award is allowed on the terms settled by the parties. Given the terms of the order which enhance the order made after the trial, the fully explained rationale for each item affected by the settlement, the fact that the Public Guardian and Trustee knows of the settlement, and on the authority of the Court of Appeal to dispose of the appeal, the order sought is appropriate.

- [1] SAUNDERS J.A.: This case returns to us pursuant to the order of the Supreme Court of Canada. When this matter first came before us, we allowed the appeal on the issue of liability, and we did not address damages issues, particularly the cross appeal of the infant plaintiff. The Supreme Court of Canada allowed the appeal from our order, and remitted the case to us for determination of the cross appeal.
- [2] The cross appeal of the infant plaintiff, through her litigation guardian, is of an award of damages for personal injuries suffered at her birth.
- [3] Counsel have appeared before us today asking that we approve a settlement of the cross appeal, and allow the cross appeal, to the extent of increasing the award of damages in favour of the infant plaintiff by an amount of at least \$575,000. I say at least, because an adjustment for interest and other matters, on the plus side for the infant plaintiff, are required, the amounts to be determined, if the settlement is approved, by the trial judge.

- [4] The proposed settlement of the cross appeal requires us to set aside the damages portions of the order at trial, paragraph 1, and to substitute therefore an order that damages in the following amount be paid by the defendant, William G. Johnston, to the plaintiff:
- a) \$323,000 damages for non-pecuniary loss;
 - b) \$40,000 for special damages;
 - c) \$2,305,000 for cost of future care;
 - d) \$209,000 for accommodation and renovations;
 - e) \$175,000 for a past in-trust claim for services by the Plaintiff's parents;
 - f) \$157,000 for future in-trust claim for services by the Plaintiff's parents;
 - g) \$590,000 for loss of earning capacity; and
 - h) \$443,035 for tax gross up, management and committee fees.
- [5] In addition, it has been proposed other matters be remitted to the trial judge, Madam Justice Holmes, for determination, they being:
- 1. the additional quantum (if any) payable by the defendant William G. Johnston to the plaintiff as damages for tax gross-up, management fees and committee fees;
 - 2. the amount payable by the defendant William G. Johnston to compensate the plaintiff for interest charges incurred to finance her assessable disbursements;
 - 3. the amount payable by the defendant William G. Johnston as post-judgment interest on the judgment and post-judgment interest on tariff items; and
 - 4. approval of the fee account of Borden Ladner Gervais LLP for services rendered to the infant Plaintiff in the conduct of this case.
- [6] Further, it is proposed that this Court today: Order that the appellant/respondent on cross appeal pay the respondent/appellant on cross appeal her costs of the cross appeal, with the costs of the appeal and cross appeal assessed as costs on Scale 2 in accordance with Appendix B of the Court of Appeal Rules, B.C. Reg. 297/2001.
- [7] All of that has been put in writing and we have reviewed the form of order. It is appropriate.
- [8] We also have been provided with a fully argued memorandum explaining the advantages of the order to the infant plaintiff.
- [9] The first question is whether this compromise of the cross appeal is a matter that properly comes before us, given s. 40 of the Infants Act, R.S.B.C. 1996 c. 233. The issue of our jurisdiction to approve an abandonment of an appeal by an infant plaintiff of dismissal of the infant's claim was addressed in *Lotocky v. Markle*, 2010 BCCA 75. As said in para. 23 of that decision, having this Court approve infant settlements at the appellant level is consistent with the scheme of the Infants Act, as it is this Court that is charged with

disposing of the appeal (see s. 17 of the Court of Appeal Act, R.S.B.C. 1996, c. 77).

- [10] A question arises as to the role of the Public Guardian and Trustee in matters before our Court. Lotocky addressed that issue, of course in the content of that case, and indicated that the participation of the Public Guardian and Trustee in this Court was to be determined on a case by case basis.
- [11] We have been provided with a copy of a letter from the Public Guardian and Trustee acknowledging awareness of today's motion which is, as I have said, to enhance the court order in favour of the plaintiff, and there is no suggestion the Public Guardian and Trustee's attendance is required today.
- [12] Given the favourable terms of the settlement to the infant plaintiff, and the letter presented, I consider it is not necessary to engage the Public Guardian and Trustee further in the appeal today.
- [13] The memorandum we have been provided with details the rationale for the various adjustments to the damages award to enhance the infant plaintiff's position. In view of the contents of the memorandum, I speak for this division of the Court in saying it is appropriate that the cross appeal be allowed on the terms presented today, which I have related.
- [14] D. SMITH J.A.: I agree.
- [15] GROBERMAN J.A.: I agree.
- [16] SAUNDERS J.A.: The settlement is approved. Paragraph 1 of the order of the trial judge is set aside and the order in the terms I have indicated substituted therefore.
- [17] I will say to all counsel, in what has been a very difficult case, that we appreciate the efforts you have made in bringing this to us in the form you have today.
- [18] Thank you. "The Honourable Madam Justice Saunders"

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