
CANADA / JUDGMENT

Estphanous v. McLeod and Stirling

2001 BCSC 331

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Ruling

Mr. Justice E.R.A. Edwards

February 8, 2001

Docket No. S050649

BETWEEN:

SUZY ESTPHANOUS

PLAINTIFF

AND:

AUDREY McLEOD

DEFENDANT

Docket No. S063080

BETWEEN:

SUZY ESTPHANOUS

PLAINTIFF

AND:

CRAIG STIRLING

DEFENDANT

Counsel for Plaintiff J. Kaminsky

Counsel for Defendants P. Armitage

[1] THE COURT: At the outset of this trial, counsel for the plaintiff asked me to instruct the jury on an "appropriate" range for an award of non-pecuniary damages. I pointed out the decision of the Court of Appeal in *Foster v. Foreman*, (2001) B.C.C.A. 26 to counsel and asked for submissions.

[2] The plaintiff's counsel adopted the reasons for judgment of Mr. Justice Lambert in that case. The defendants' counsel asked to be permitted further submissions if I was inclined to instruct the jury as to an appropriate range for non-pecuniary damages.

[3] Mr. Justice Lambert gave lengthy reasons in *Foster*. He acknowledged that his analysis was obiter dicta. Madam Justice Saunders made the observation that:

Of course the prevailing scope of instructions to the jury does not include instructions on the appropriate range of damages.

Mr. Justice Braidwood agreed with both Mr. Justice Lambert and Madam Justice Saunders.

[4] I am not bound by the obiter dicta in *Foster* to instruct a jury on an "appropriate" range of non-pecuniary damages.

Instructing a jury in this way would not preclude a jury from making an award outside the range.

[5] One rationale for giving such an instruction is to increase consistency between jury awards and judge made awards. Another rationale is that such instructions might preclude appeals. I find it difficult to accept that such an instruction would reduce appeals from jury awards. It could foster appeals.

- [6] The current law is that jury awards can be overturned on appeal only if they are inordinately high or inordinately low, not if they are outside an "appropriate" range. The only instruction which could avoid appeals would not be one as to the appropriate range but an instruction to the effect that the jury is precluded by law from awarding above or below an inordinately high or low figure given by the judge. Mr. Justice Lambert does not suggest such an instruction.
- [7] Unless the Court of Appeal were to change the law and decide that jury awards could be overturned on appeal if they are outside the range instructed by a trial judge, then the scope of appeal would of course remain unaltered, that is, that the award could only be overturned if it were inordinately high or inordinately low.
- [8] If an instruction as to the "appropriate" range was routinely given, a new avenue of appeal would inevitably arise. The question on appeal would not be whether the jury award was inordinately high or low, but whether the trial judge instructed on the right or wrong range.
- [9] If the appropriateness of the range, and therefore of the award, becomes the question on an appeal, the question of whether the award is appropriate ceases to be a question of fact for the jury, and becomes a question of law for the Court of Appeal to ultimately determine. This is antithetical to the reason for juries, namely that their awards should reflect "common sense" community views and values on determinations of fact.
- [10] Mr. Justice Lambert in *Foster* endorsed the adoption of the practice in Saskatchewan whereby counsel make submissions to the judge as to the appropriate range and the judge then decides on a range and instructs the jury as to that range.
- [11] In my view, this practice involves the judge usurping at least in part the jury's fact finding role, since in a typical case there may be conflicting evidence on the severity of an injury or the likely duration of the injury. No range could be set without considering what the jury would or should find as facts in regard to such questions.
- [12] It seems to me as well that the matter is further complicated in the case before me, since the defence will be arguing that the plaintiff should not be believed and in fact was not injured at all by the two low impact rear-end motor vehicle accidents for which the defendants admit liability.
- [13] If I were to instruct on a range, it would have to be one from zero to some upper limit. But more properly, the instruction would be that the jury should award zero if they do not believe the plaintiff was injured or they should make an award in the range of X\$ to Y\$ for non-pecuniary damages if they do believe the plaintiff was injured. This instruction would be necessary to avoid a verdict like that rendered by the jury in *Balla v. ICBC* 2001 BCCA 62. In that case the Court of Appeal held it was "illogical" for a jury to find injury and grant special damages but no non-pecuniary damages.

- [14] This instruction would however dictate the reasoning of the jury and preclude jurors from compromising to reach a verdict. In effect, the instruction would be: "If you unanimously disbelieve that the plaintiff was injured, you should award zero. If you unanimously believe she was injured, you should make an award in this range."
- [15] In my view, this sort of instruction in a case where the defence says the plaintiff should not be believed would inappropriately interfere with the jury's authority to reach a verdict by compromise.
- [16] A jury must be unanimous in its ultimate verdict and not in its reasoning to reach the verdict. Indeed, civil juries may be exhorted to compromise. It would be wrong in my view to instruct jurors that they must unanimously award zero or unanimously award a figure in a specified range because such an instruction would prevent the jury from compromising on an award between zero and one in the range. This could potentially deprive the plaintiff of any recovery by resulting in a hung jury.
- [17] A hypothetical example serves to illustrate this. Say, for example, four jurors concluded that an award of zero was appropriate, and four others each concluded that different amounts in the suggested range were appropriate. The eight then compromised by averaging and arrived at an award in the range, or at least one that is not inordinately low, as their verdict. That award would be perfectly acceptable and certainly not appealable.
- [18] But the instruction that I would be required to give, according to the analysis that I have just outlined, would prevent the jury from reaching that verdict, because they would be instructed that their reasoning must be unanimous to reach zero or to reach some figure in the range.
- [19] Such an instruction would make it no more likely that the jurors would reach an appropriate verdict than simply leaving them, as judges have done hitherto in this province, to do so on the basis of their own collective reasoning. It could result in no verdict if the jurors failed to reach unanimity in their reasoning.
- [20] In short, I am not satisfied that an instruction as to the "appropriate" range would provide any benefit and I have concluded that it would unnecessarily complicate the juror's deliberations in the circumstances in this case, by precluding a compromise which might occur and produce an award of non-pecuniary damages which would be perfectly acceptable and in the range that might be suggested.
- [21] So accordingly, I am going to decline the request that the jury be instructed as to an appropriate range of non-pecuniary damages in this case and I trust that counsel will make no reference to such a range in their addresses to the jury.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

NOTE: After asking for clarification of what bodily harm meant in the question "Did the plaintiff suffer bodily harm as a result of either accident?" and several hours of deliberation, the jury answered the question "No" and awarded no damages.

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