

CANADA / JUDGMENT

Kim v. Morier

2014 BCCA 63

COURT

British Columbia Court of Appeal

DECIDED

7 February 2014

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COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Kim v. Morier, 2014 BCCA 63 Date: 20140207 Docket: CA040868 Between: Sung Hee Kim Respondent (Plaintiff) And David Morier and Andrei Tigounov Appellants (Defendants) Correction: The cover of the judgment was corrected on March 10, 2014. Before: The Honourable Madam Justice Newbury The Honourable Madam Justice Saunders The Honourable Mr. Justice Lowry On an appeal from: An order of the Supreme Court of British Columbia, dated April 18, 2013 (Kim v. Morier, 2013 BCSC 673, New Westminster Registry M122061) Oral Reasons for Judgment Counsel for the Appellant: M.-H. Wright Counsel for the Respondent: C.J. Carta Place and Date of Hearing: Vancouver, British Columbia February 7, 2014 Place and Date of Judgment: Vancouver, British Columbia February 7, 2014 Summary: Appeal of award for diminished earning capacity due to personal injury allowed. The appellant had not shown "real possibility" of diminished ability to compete in marketplace, as opposed to loss of confidence.

- [1] NEWBURY J.A.: This appeal raises a very discrete question in the context of a case involving two car accidents in which the plaintiff was injured. While she was recovering from the first she was then hit again, exacerbating pain in her right lower back and hip that was still unresolved at trial. The pain has not responded to treatment and according to Dr. Chu, who was the only expert to testify, the plaintiff will continue to suffer pain indefinitely. Dr. Chu also said Ms. Kim's degree of disability would be mild, that her level of disability is "fairly small" and that Ms. Kim is not at increased risk of degenerative changes in future due to the accidents.
- [2] The plaintiff is age 30 and had been a physically active person prior to the accidents. She works as a floor plan technician, which involves being on her feet all day and sometimes kneeling or bending to take measurements. The trial judge made no award for loss of past income in light of Ms. Kim's failure to prove any lost working time, and indeed noted that she has continued to work 12-15 hours per day. Ms. Kim was awarded \$25,000.00 to compensate her for a delay of one year in entering the workforce, which delay was found to be partly attributable to her injuries. In respect of non-pecuniary damages she was awarded \$55,000.00.

- [3] It is in respect of the award for reduced earning capacity that this appeal was brought. Ms. Kim testified as to her fear that if her employer expands his business, he will hire someone else to fulfill the requirements of attending at construction sites. This fear is one example of the anxiety that characterized her view of her future. The trial judge did not accept that these fears were fully justified. He noted that Ms. Kim had not provided any evidence that she might be forced to leave a commercial job or a construction site because she finds steel toed boots uncomfortable, or that her employer plans to expand its commercial clientele.
- [4] The trial judge correctly noted the two methods of determining a claim for diminished earning capacity, namely the 'loss of capital asset' approach and the 'earnings' approach. In connection with the former, which was obviously preferable in this case, he noted the four criteria set out in *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353 (S.C.), the last of which is whether the plaintiff "is less valuable to herself as a person capable of earning income in a competitive labour market".
- [5] The trial judge stated:
- [106] The capital asset approach seems more appropriate for this case since it would be difficult to postulate a minimum annual income loss for the plaintiff's remaining years of work and I do not have expert evidence to assist me in that regard.
- [107] The plaintiff has suggested \$75,000.00 is a reasonable estimate of what she would lose over her work life by virtue of the pain caused by her injuries. She projects that the steel toed boots will continue to interfere with her ability to work on commercial construction sites, where she can earn more than she can earn on residential sites. Ms. Kim further bases this claim on her alleged loss of 27 commercial jobs a year.
- [108] I am not aware of any particular jobs that she has lost as a result of being unable to attire herself correctly to attend a construction site. It has not been suggested to me that someone else has been hired to do the work she is unable to perform. As well, I have no reliable evidence on the estimated amount of commercial work that would likely become available to Ms. Kim over the years ahead.
- [109] I am reminded of the fact that Ms. Kim has not missed any work and she can work 12 to 15 hours per day.
- [110] Her ambition appears to mean that she will continue to achieve at her job despite her pain. This should not result in a lower award than would be given to an injured plaintiff who complains constantly. However, to some degree, I must take her continuing ability to do her job as a limit on her claim for future wage loss.
- [111] Given the nature of her continuing pain, I find that she is entitled to some amount for her loss of a capital asset, namely her own perception that she is less valuable as an employee.

- [112] However, in view of the vague and uncertain nature of the evidence available to me under this head of damages, I limit her award to a nominal amount. [Emphasis added.] The amount awarded was \$10,000.00. The judge then added:
- [114] I find that as she ages, she may be less capable of maintaining her disciplined approach to work.
- [6] On appeal, the defendant submits that the Court erred in making an award under this head in the absence of a finding of a "real and substantial possibility" that Ms. Kim's earnings in future would be impaired. The defendant relies in particular on *Roberts v. Kidd* (1998), 52 B.C.L.R. (3d) (C.A.), where Mr. Justice Hollinrake for the majority noted that it is not sufficient for an award under this head for the plaintiff to testify as to a loss of confidence or ability to project herself without showing a "functional" element. (Mr. Justice Lambert dissented on this point.) In the result in *Roberts*, this Court set aside the award for diminished income and incapacity.
- [7] More recently, in *Perren v. Lalari*, 2010 BCCA 140, 3 B.C.L.R. (5th) 303, this court emphasized at paras. 21, 32, and 33 the requirement for the plaintiff to meet the onus of showing at least a "real possibility" of future loss, as opposed to a theoretical loss. Similarly, in *Steward v. Berezan*, 2007 BCCA 150, 64 B.C.L.R. (4th) 152, the Court discussed the comment of Madam Justice Southin in *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44, to the effect that it was "impossible to say" the plaintiff in that instance would not suffer reduced earning capacity in the future. Mr. Justice Donald wrote in *Steward* at para. 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 v. Wickware*, 1998 BCCA 88, 169 D.L.R. (4th) 661¶ 65. This is not a heavy onus, but it must be met for a pecuniary award to be justified.
- [8] In my view, the trial judge here did err in equating the loss of capital asset here with the plaintiff's own perception. As the cases demonstrate, that is not enough. The plaintiff must show that it is a realistic possibility she will be less able to compete in the marketplace - with economic consequences, not merely psychological ones. In my view as well, the trial judge's statement made after the award was pronounced, that Ms. Kim "may" be less capable of maintaining her disciplined approach to work also fell short. As we suggested to counsel this morning, the word "may" is essentially speculative and does not equate to a finding of a real possibility.
- [9] Mr. Carta said all that could be said in support of the award, but I agree with the defendants that as a matter of principle the findings here did not support an award for loss of earning capacity.

[10] I would allow the appeal and set aside the award under this head. I would also order that the parties bear their own costs, given that this appeal was brought as a matter of principle.

[11] SAUNDERS J.A.: I agree.

[12] LOWRY J.A.: I agree. "The Honourable Madam Justice Newbury"

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