
CANADA / JUDGMENT

Laxdal v. Robbins

2010 BCCA 565

COURT

British Columbia Court of Appeal

DECIDED

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2010 BCCA 565 Laxdal v. Robbins

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Laxdal v. Robbins,

2010 BCCA 565

Date: 20101210

Docket: CA037218

Between:

Linda Laxdal

Respondent

(Plaintiff)

And

Haley Robbins

Appellant

(Defendant)

Before:

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Low

The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, May 26, 2009,

(Laxdal v. Robbins, 2009 BCSC 1074

Nanaimo Docket No. M54286)

Counsel for the Appellant:

Terrence L. Robertson, Q.C. and W.S. Taylor

Counsel for the Respondent:

D.G. Cowper, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

November 22, 2010

Place and Date of Judgment:

Vancouver, British Columbia

December 10, 2010

Written Reasons by:

The Honourable Mr. Justice Hinkson

Concurred in by:

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

Introduction

- [1] On September 11, 2006, the respondent was injured in a motor vehicle collision with a vehicle owned and driven by the appellant. Liability for the collision was admitted by the appellant.
- [2] The respondent is a care aide worker. She earned income in that capacity in 2006, both before and after the motor vehicle collision that gave rise to these proceedings. Following the collision, she was off work until October 22, 2006, and thus lost income amounting to \$4,132.80. During her absence from work the respondent received sick leave benefits of \$826.56.
- [3] On May 26, 2009 the respondent was awarded judgment against the appellant in the amount of \$18,381.24, made up of \$15,000.00 for general damages, \$3,306.24 for past wage loss and \$75.00 for special damages. The award for past wage loss was arrived at by deducting only the sick benefits received by the respondent from her lost income.

- [4] The appellant appeals only the portion of the damage award pertaining to past wage loss, seeking a reduction in the award under that head of damage.

Issue on Appeal

- [5] The sole issue on this appeal is the effect of ss. 95 and 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 on an award of damages for past income loss arising from a motor vehicle collision in British Columbia.

Standard of Review

- [6] As the issue is statutory interpretation of the Insurance (Vehicle) Act, it is a question of law, and the standard of review is that of correctness; see *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

Discussion

- [7] While the tax consequences to the respondent in the calculation of her past wage loss are modest, the appeal raises the question of the appropriate treatment of the tax consequences on an award of past income loss for income earners injured in motor vehicle collisions in British Columbia.
- [8] At common law, awards for past income loss and loss of future earning capacity were not subject to a deduction for tax; *Gehrmann v. Lavoie*, [1976] 2 S.C.R. 561. Legislation which is now in the form of ss. 95 and 98 of the Insurance (Vehicle) Act, altered the common law as it relates to those involved in motor vehicle collisions in British Columbia by providing that:

95 In this Part:

...

"net income loss", in relation to a person who suffered loss of income as a result of an accident is, for any period,

- (a) if the person is a person referred to in section 2 (1) of the Income Tax Act, the gross income that the person lost in that period less the amount that would have been payable on that gross income for the following:
- (i) income tax under the Income Tax Act, as that Act read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, calculated in accordance with the regulations and with reference to prescribed deductions and tax credits;
- (ii) income tax under the Income Tax Act (Canada) as that Act read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, calculated in accordance with the regulations under, and with reference to deductions and tax credits prescribed under, this Act;

(iii) premiums under the Employment Insurance Act (Canada), as that Act read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, or

...

98 Despite any other enactment or rule of law but subject to this Part, a person who suffers a loss of income as a result of an accident or, if deceased, his or her personal representative, is entitled to recover from designated defendants, as damages for the income loss suffered after the accident and before the first day of trial of any action brought in relation to it, not more than the net income loss that the person suffered in that period as a result of the accident.

[9] The language of these two sections has been variously described as legislation that could have been drafted with greater precision, and legislation that can produce anomalous results. The issue raised in this appeal is yet another example of why there is a need for Legislative re-examination of the wording of the two sections.

[10] In *Hudniuk v. Warkentin*, 2003 BCSC 62, Mr. Justice Pitfield considered the circumstances of a plaintiff who had recovered damages from a jury for income lost as a consequence of two motor vehicle accidents. The parties in that case applied for directions regarding the determination of the plaintiff's "net income loss" for purposes of s. 54 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 (now s. 98 of the Insurance (Vehicle) Act, B.C. Reg. 166/2006, effective June 1, 2007). The term "net income" was defined by s. 52 of the same Insurance (Motor Vehicle) Act (now s. 95 of the renamed Act). At paras. 40-41, Pitfield J. held:

In my opinion, the reasonable interpretation of s. 54 of the Act and the definition of net income loss consistent with the underlying substance of a jury award which is an assessment of damages and not a mechanical calculation, is that the Act requires a determination of tax on the award determined as if the past income had all been earned at the effective date of the jury's assessment namely, the first day of trial. As that determination occurs before a calendar year end, and therefore quite possibly in advance of finalization of income rules for that year, tax is computed on that amount in accordance with the provisions of the Income Tax Act of British Columbia, the Income Tax Act of Canada or the Employment Insurance Act of Canada applicable to the calendar year ending before the year of assessment.

In this case, as an example, because the jury assessed the gross income loss in August 2002, the tax will be calculated as if that were the only income earned for income tax purposes and the calculation will be made in accordance with the tax rules in force at December 31, 2001.

[11] The decision in *Hudniuk* was applied in numerous subsequent authorities, but as Tysoe J.A. observed in *Lines v. Gordon*, 2009 BCCA 106 at para. 167, some of the judges who followed it expressed reservations about the results that it created. Indeed, in some cases the reasoning in *Hudniuk* worked a hardship to those injured in motor vehicle collisions in British Columbia by subjecting their awards for income loss to artificially high marginal tax rates. *Hudniuk* was ultimately reviewed by this Court in *Lines*, where Tysoe J. A. said at paras.

181-186:

- [181] Although the wording of ss. 95 and 98 contemplates the possibility of calculating net income loss for multiple periods between the date of the accident and the date of trial, it is my opinion that the Legislature did not intend to require in every case that gross past income loss be allocated to each of the calendar years between the date of the accident and the date of trial and to never allow net income loss to be calculated on the basis that the compensation for it was all received on the first day of trial. If the Legislature had so intended, it would not have used the words "for any period" in the introductory portion of the s. 95 definition of "net income loss". Rather, if that had been the intention, the Legislature would have used words to the effect of "for each calendar year".
- [182] In my opinion, the Legislature recognized that there may be difficulties in allocating gross income loss to particular periods between the date of the accident and the date of trial. For example, as in *Hudniuk*, a jury may make a finding as to the gross income loss without being asked to allocate the loss to any calendar year or other period, and the judge may consider it inappropriate to speculate on the jury's reasoning process. The difficulty could be compounded if, again as in *Hudniuk*, the tax rules applicable to the income earned in a particular year are different from the tax rules applicable to the income allocated to that year.
- [183] Another example is a situation where the plaintiff was unemployed at the time of the accident and had no imminent prospects of employment. The judge or jury could make an award for loss of past earning capacity, but it would be artificial to allocate it among different periods.
- [184] In my opinion, by the use of the phrase "for any period", it was the intention of the Legislature to give a discretion to the judge to determine what period or periods are appropriate for the determination of net income loss in all of the circumstances. In the two examples I have given, it would be appropriate for the judge to use only one period for the calculation of net income loss (namely, the entire period from the date of the accident to the first day of trial). In such a case, net income loss would be calculated as if the gross income award was received by the plaintiff on the first day of trial.
- [185] By way of contrast to the two examples I have given, in the situation where, at the time of injury, the plaintiff was working at a job and returned to that job after sufficiently recovering from the injuries, it would be appropriate, absent any complications, for the judge to allocate the gross income loss to the calendar years between the date of the accident and the date of trial as if the plaintiff had continued working. This would accord with the principle that, insofar as is possible, the plaintiff should be put in the position he or she would have been in if not for the injuries caused by the defendant's negligence.

- [186] There will be a wide variety of circumstances facing trial judges. In each case, the trial judge will have to decide whether it is appropriate in the circumstances before him or her to calculate net income loss on the basis of one period, calendar-year periods or other multiple periods. In making a decision in this regard, the trial judge should consider all of the circumstances and apply s. 98 in a manner that is most consistent with the principles of damage assessment to which I have referred.
- [12] It is well recognized that a fundamental objective of tort law is to compensate an injured person for the full amount of his or her loss, but not for more than that loss; *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at para. 32.
- [13] The appellant is clearly a designated defendant pursuant to the Insurance (Vehicle) Act, and the respondent "a person referred to in section 2(1) of the Income Tax Act". In the result, the respondent was entitled to an award of her "net" past earning loss from the appellant. The discrete issue raised on this appeal was not resolved in *Lines*, as in that case, the plaintiff earned no other income following the accident.
- [14] In the case before us, the trial judge quite properly determined that all of the income that the respondent lost was lost in 2006. She then exempted the entire past income loss award from the impact of tax. After referring to both *Hudniuk* and *Lines*, she concluded, at para 34:

In my view, the authorities support the conclusion that where the gross award is at or below the amount exempt from taxation, there would be no tax payable so that the net past income loss would be the same as the gross past income loss: *MacLaren v. Kucharek*, 2008 BCSC 1396; *Crichton v. McNaughton*, 2008 BCSC 556 at para. 74; and *Moore v. Brown*, 2009 BCSC 190 at para. 7. Accordingly, there will be no deduction for income tax as the amount of past wage loss is below the personal exemption. In 2006 the personal exemption was \$8,858 and has increased since then.

- [15] The appellant argued that the trial judge erred by not including the past income loss awarded to the respondent with the remainder of her earnings for 2006 with the balance of her income for that year in order to determine her net past income loss. The result, the appellant argued, was that the plaintiff was overcompensated by having no account taken for tax on her award for past loss of income.
- [16] As observed by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26:

In *Elmer Driedger's* definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

- [17] The respondent argued that a plain reading of the reference in s. 95 of the Insurance (Vehicle) Act to only "the gross income that the person lost in that period less the amount that would have been payable on that gross income" compels one to the conclusion that the past income loss award is to be taxed without reference to taxes otherwise payable during the same taxation year. In my view, such a reading of s. 95 is not harmonious with s. 98 of the Act, as amended, which seeks to award "damages for the income loss suffered after the accident and before the first day of trial of any action brought in relation to it, [of] not more than the net income loss that the person suffered in that period as a result of the accident".
- [18] I have concluded that the trial judge was incorrect in interpreting ss. 95 and 98 of the Insurance (Vehicle) Act as not requiring a reduction in her award for past loss of income to reflect the tax consequences when that loss is combined with earned income during the same period. The words of those sections must be read in their grammatical and ordinary sense.
- [19] Having found that the losses all occurred in 2006, the trial judge ought to have combined the respondent's 2006 income with the past income loss award for the purpose of determining the income she would have earned for income tax purposes "as if she had continued working" (as per Tysoe J.A. at para. 185 of Lines). To achieve this result, the appellant proposed the use of what has been referred to as the "stacking approach".
- [20] I am satisfied that, where an income loss can be attributed to a particular tax year or years, the language of ss. 95 and 98 of the Insurance (Vehicle) Act requires a resort to the stacking approach. Although Tysoe J.A. explained in the examples he referred to in Lines that "it was the intention of the Legislature to give a discretion to the judge to determine what period or periods are appropriate for the determination of net income loss in all of the circumstances", once that determination is made, the legislation requires a deduction from the gross income loss to take into account the provisions of the Income Tax Act of British Columbia, the Income Tax Act of Canada and the Employment Insurance Act of Canada for the relevant year or years.

[21] In England, where only net earnings after income tax are recoverable in tort, the stacking approach has been used to determine net income loss. In *Lynndale Fashion Manufacturers v. Rich*, [1973] 1 W.L.R. 73; 1 All E.R. 33, the Court of Appeal approved of the stacking approach stating at paras. 79-80:

... whether having arrived at a net taxable income it is proper to divide the total tax bill rateably between the loss of capacity and the other income or whether the loss of capacity falls to be treated at the top part of the income and thus attracting to itself the higher rates of tax applicable in the assumed assessment.

In my judgment, the question which on the authorities has to be posed, namely, how much larger would the tax have been if the (loss of capacity) had been received as additional (income) admits of only one answer. For, if a comparison is to be made between a given income and that income with something added, the addition must be treated as the top part of the income. To treat it otherwise would not produce the true amount of the additional tax since it is the increase in income which attracts the higher rates of tax.

This approach was subsequently adopted by the House of Lords in *Hodgson v. Trapp*, [1989] A.C. 807.

[22] As Tysoe J.A. observed in *Lines* at para. 180:

... It does seem somewhat odd for the income loss allocated to a particular year to be reduced according to one set of tax rules (i.e., the tax rules for the preceding year), while the plaintiff's actual earnings for that year are taxed according to a different set of tax rules (i.e., the tax rules for the year in which the income was earned).

[23] The application of the stacking approach in accordance with the legislation will result in the combination of the award for past income loss with the other income earned for the same year, but the application of the enumerated legislation from the preceding year to only that portion of the total income for that year represented by the award. While the result is a cumbersome calculation, I see no need to resort to any exceptional construction of the legislation, as discussed by Lamer J., as he then was, in *R. v. Paul*, [1982] 1 S.C.R. 621 at 662, in order to achieve the legislative intent of ss. 95 and 98 of the Insurance (Vehicle) Act. Section 95(a) of the Insurance (Vehicle) Act refers in each of its subsections to taxes or premiums as the enumerated Acts "read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined". In my view, this wording accommodates awards for either single or multiple years of income loss by permitting a judge to allocate the loss as discussed at para. 184 of *Lines*, and to then subject the award for that year or years to the effect of the specified legislation based on their provisions for the preceding year.

[24] A feature of the present legislation that does not arise in this case is the inability of a person injured in a motor vehicle collision to take advantage of any tax planning, such as a contribution to a Registered Retirement Savings Plan. In *Lines* Tysoe J.A. concluded at

paras. 190-194 that such a notional contribution could not be allowed when calculating net income loss under ss. 95 and 98. While the inability to take advantage of such tax planning will not place the injured person in the same position that he or she would have been in, but for the accident, the application of the stacking approach will come as close to so doing as possible, while at the same time giving effect to the intent of the Legislature.

[25] In this case, the respondent's total reported income for the year 2006 was \$40,175.00. The respondent paid \$6,024.05 for federal and provincial income tax that year, which represented an overpayment of \$202.26.

[26] I conclude that the appropriate means by which to arrive at the respondent's net past income loss is:

- a) to determine her income from other sources during 2006 (\$40,175.00);
- b) add that figure to her income loss after taking into account the sick benefits she received (\$3,306.24);
- c) determine the tax that would be payable on \$43,481.24, based upon the 2005 income tax rules and regulations by computing the amount in accordance with the provisions of the Income Tax Act of British Columbia, the Income Tax Act of Canada and the Employment Insurance Act of Canada applicable to the calendar year ending December 31, 2005 and on \$40,175.00 based upon the 2006 income tax rules and regulations by computing the amount in accordance with the provisions of the Income Tax Act of British Columbia, the Income Tax Act of Canada and the Employment Insurance Act of Canada;
- d) subtract the difference between the two tax figures determined in c, above;
- e) then deduct d from the income loss award, net of sick benefits that she received.

Costs

[27] We were advised by counsel for the appellant that the Insurance Corporation of British Columbia was funding both sides of this appeal, so there is no need to make any order as to costs, and I would not do so.

"The Honourable Mr. Justice Hinkson"

I agree:

"The Honourable Madam Justice Prowse"

I agree:

"The Honourable Mr. Justice Low"

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