

CANADA / JUDGMENT

Little v. Schlyecher

2020 BCCA 381

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 381 Little v. Schlyecher COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Little v. Schlyecher, 2020 BCCA 381 Date: 20201218 Dockets: CA45307; CA45308 Docket: CA45307 Between: Kellyanne Little also known as Kellyanne Scott Little Respondent/ Appellant on Cross Appeal (Plaintiff) And Robert Schlyecher Appellant/ Respondent on Cross Appeal (Defendant)

- and - Docket: CA45308 Between: Kellyanne Little Respondent (Plaintiff) And Ashley Jonal Robert Gunn and Richard Douglas Williams Appellants (Defendants) Before: The Honourable Madam Justice Fenlon The Honourable Madam Justice Griffin The Honourable Mr. Justice Voith On appeal from: An order of the Supreme Court of British Columbia, dated April 27, 2018 (Little v. Schlyecher, Vancouver Dockets M121907 and M125700). Oral Reasons for Judgment Counsel for Robert Schlyecher, Ashley Jonal Robert Gunn, and Richard Douglas Williams, appearing via videoconference: G. Ritchey Counsel for Kellyanne Little, appearing via videoconference: G.J. Kehler Place and Date of Hearing: Vancouver, British Columbia December 15, 2020 Place and Date of Judgment: Vancouver, British Columbia December 18, 2020 Summary: The respondent was injured in two motor vehicle accidents in 2010. A jury awarded non-pecuniary damages of \$447,000, in excess of the upper limit for such damages which, adjusted for inflation, was \$375,000 when the trial took place. Held: Appeal allowed in part. The trial judge erred in not reducing the non-pecuniary damages to the upper limit of \$375,000 before entering the verdict. Even that sum was wholly disproportionate and should be further reduced on appeal to \$250,000, a sum which reflects the deference owed to jury awards and the greater margin of deviation allowed in such cases.

[1] FENLON J.A.: The respondent, Kellyanne Little, was injured in two car accidents in 2010. In 2018, a jury awarded Ms. Little non-pecuniary damages of \$447,000 for pain, suffering, and loss of amenities, an amount which exceeded the upper limit on such damages set by the Supreme Court of Canada in *Andrews v. Grand & Toy*, [1978] 2 S.C.R. 229. The parties agree that, adjusted for inflation, the upper limit is approximately \$375,000 in 2018 dollars.

[2] The appellants, defendants at trial, raise two grounds of appeal:

1. Did the judge err in failing to reduce the jury's award for non-pecuniary damages to the upper limit for such damages?
2. Should the award of the upper limit for non-pecuniary damages be reduced?
1. Did the judge err in failing to reduce the jury's award for non-pecuniary damages to the upper limit for such damages?
- [3] The first ground of appeal is not opposed by the plaintiff. In *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, Sopinka J. said:

[114] Whether the jury is or is not advised of the upper limit, if the award exceeds the limit, the trial judge should reduce the award to conform with the "cap" set out in the trilogy and adjusted for inflation. While a trial judge does not sit in appeal of a jury award, the trilogy has imposed as a rule of law a legal limit to non-pecuniary damages in these cases. It would be wrong for the trial judge to enter judgment for an amount that as a matter of law is excessive.
- [4] In *Andrews*, the Court left open the possibility that "in exceptional circumstances" this upper limit might not apply (at 265), but there is no suggestion that this is such a case. Accordingly, the judge erred in not reducing the non-pecuniary award to the upper limit or "cap" before entering the verdict. In fairness to the judge, I note that neither counsel requested that she do so.
2. Should the award of the upper limit for non-pecuniary damages be reduced?
- [5] Given that non-pecuniary damages in this case could not exceed \$375,000 and that a verdict in that amount should have been entered, the question before us is whether the award must be reduced further.
- [6] A jury's award of damages is a finding of fact entitled to substantial deference on appeal. Appellate intervention is warranted only where the award is "wholly disproportionate" or "shockingly unreasonable": *Moskaleva v. Laurie*, 2009 BCCA 260 at para. 127; *Taraviras v. Lovig*, 2011 BCCA 200 at para. 32. This standard of review is more deferential than the standard of review applied to damage awards made by judges alone, which require an assessment of whether the award is "inordinately" high or low: *Taraviras* at para. 33.
- [7] Ms. Little's injuries include chronic myofascial neck pain, mechanical back pain, left shoulder pain, and chronic post-traumatic cervicogenic headaches. In addition, she experienced an increase in the frequency of migraine headaches as well as a somatic symptom disorder (a pattern of chronic pain), and an adjustment disorder with depressed mood. The defendants acknowledge that Ms. Little experiences limitations due to her injuries that will continue throughout her life and negatively impact both her vocational and avocational activities.

- [8] It is evident from the record before us that prior to the accidents, Ms. Little was an extraordinarily creative and effective homemaker and mother of four young children. She was involved in home upkeep, decorating, and renovations; active in her church, her children's school; engaged in rollerblading, hiking, running, swing dancing; and attended a gym. Although Ms. Little continued to participate in many of these activities after the accidents, she did so with greater difficulty and to a lesser degree.
- [9] Ms. Little does not suggest that she suffered catastrophic injuries of the kind that would justify an award at the upper limit. She acknowledges that the award for non-pecuniary damages must be reduced to some extent and submits that an award of \$250,000 is appropriate. She points to judge-alone awards for non-pecuniary damages in comparable cases of between \$147,000 and \$171,000: *Bellaisac v. Mara*, 2015 BCSC 1247; *Cumpf v. Barbuta*, 2014 BCSC 1898; *Chow v. Goodman*, 2016 BCSC 1486.
- [10] The defendants contend that judge-alone awards support non-pecuniary damages of \$115,000, relying on *Evans v. Keill*, 2018 BCSC 1651; *Elpel v. Glover*, 2018 BCSC 1404; *Crozier v. Insurance Corporation of British Columbia*, 2019 BCSC 160; and *Scelsa v. Taylor*, 2016 BCSC 1122.
- [11] Although it is appropriate and logical to use judge-alone awards as a rough guide to assist the Court on appellate review, a jury award ought not to be set aside only because it fails to conform to those awards. To do so would be to ignore the more deferential standard of review applicable to jury awards, which can only be set aside if they are "wholly disproportionate" and "shockingly unreasonable": *Taraviras* at para. 40.
- [12] In *Taraviras*, Garson J.A. described the process to be followed on an appeal of this kind, saying:
- [43] Thus, I view the task on appellate review of an award alleged to be inordinately high is to assume that the jury found the facts most favourable to the plaintiff, and then to first compare the award to judge alone assessments in a generous way, and then to assess the appropriate "margin of deviation" applying the *Moskaleva* test - that is, whether the award would "shock the court's conscience and sense of justice". As to what deviation would shock the court's conscience, I do find other appellate cases to be a useful guide. It is clear from the authorities discussed that considerable deference must be accorded a jury verdict and even where on appellate review the award must be reduced, such reduction should continue to reflect the views of the jury implicit in the verdict. [Emphasis added.]
- [13] The defendants submit that the direction in *Taraviras*--to assume the jury found the facts most favourable to the plaintiff--should not be followed in the present case. They say to do so would be to ignore the view of the jury reflected in the awards they made for the other heads of damages claimed--awards the appellants say suggest the jury did not accept the plaintiff's evidence about the extent of her injuries and their impact on her life. The defendants point to the disparity between what the plaintiff sought under each head of damages and the sums awarded by the jury: • The plaintiff claimed past loss of income of \$103,000; the jury awarded

\$30,800. · The plaintiff sought a loss of future earning capacity award of \$795,000; the jury awarded \$125,000. · The plaintiff sought damages for cost of future care in the range of \$273,000 to \$505,000; the jury awarded \$207,000.

- [14] Without deciding that such comparisons could never be relevant, I am not persuaded that they are helpful in this case. That is so because there are reasons other than findings unfavourable to the plaintiff that could explain the jury's decision to award the sums it did. For example, the plaintiff had not worked outside the home, focusing on homemaking and homestay students, but her claim for loss of future earning capacity assumed that, but for the accidents, she would have obtained an education degree and worked as a teacher. By the time of trial eight years' post-accident, Ms. Little had taken only a few courses towards obtaining a degree in education. In these circumstances, the jury could reasonably have concluded that it was unlikely that the plaintiff would have chosen to enter the workforce as a teacher, and decided on an award that reflected that view of the evidence.
- [15] I return now to the question before us. In my view, an award of non-pecuniary damages at the upper limit of \$375,000 is wholly disproportionate. The real question is whether the reduction of \$125,000 proposed by the plaintiff--leaving an award of \$250,000--is appropriate.
- [16] This Court faced a similar question in *Dilello v. Montgomery*, 2005 BCCA 56, a case in which a 19-year-old plaintiff suffered multiple fractures of the vertebrae in her neck, injury to her cervical spinal cord, a soft tissue neck injury extending into her back, a vestibular inner ear injury, and a mild traumatic brain injury. The jury awarded \$362,000 for non-pecuniary damages that the judge reduced to \$281,000, which, at that time, was the inflation-adjusted value of the upper limit.
- [17] On appeal, this Court reduced the award to \$200,000: the amount the plaintiff submitted was appropriate. Finch C.J.B.C., writing for the Court, said:
- [48] I am not persuaded that the Court should make any further reduction in that award. The jury heard all of the evidence in this case, including that of the plaintiff. Unfettered by the artificial upper limit, the jury was asked to apply its best judgement to the amount of proper compensation for the plaintiff's injuries and their consequences. The jury obviously thought the case deserving of a substantial award. Considering the evidence of injury and loss summarized above at paras. 6-11 and 15-18, I am not prepared to say the jury award is inordinately high.
- [49] Non-pecuniary awards are inherently arbitrary and, because of this, the jury members' subjective appreciation of the plaintiff's pain, suffering and loss of amenities is not necessarily wrong if the award does not fall into the range of awards that have been made by trial judges in similar cases. As Mr. Justice Smith noted in *Boyd v. Harris* [2004 BCCA 146], *supra*:

- [42] [I]n determining whether the award falls so far outside the acceptable range as to justify appellate interference, we must make allowance for the fact that the award was assessed by a jury. Requiring a greater margin of deviation in the case of a jury award respects the parties' original choice to have the damages assessed by a jury rather than a trial judge. It also promotes the instructional function of jury awards, in the sense that, to some extent, departure from the conventional range established by trial judges may serve as a corrective to the views of trial judges by shifting the range so that it more accurately reflects current community standards. [Emphasis added.]
- [18] The jury in the present case heard the lay and medical evidence describing Ms. Little's life both before and after the accident. They heard evidence about the value she placed on her role as mother and homemaker, the exceptional skill and energy she brought to that role, and the impact of her injuries on that important aspect of her life.
- [19] Applying the two guidelines--deference to the jury's view of an appropriate award and judge-alone awards in comparable cases--I cannot say that an award of \$250,000 would shock the Court's conscience and sense of justice. It would, in my view, meet the lower standard of review applicable to judge-alone awards of being inordinately high, but that is not the standard to be applied here. I conclude that an award of \$250,000 falls within "the greater margin of deviation in the case of a jury award," which "respects the parties' original choice to have the damages assessed by a jury rather than a trial judge": *Boyd v. Harris*, 2004 BCCA 146 at para. 42.
- [20] I would accordingly reduce the award for non-pecuniary damages to \$250,000.
- [21] A cross-appeal brought by Ms. Little was abandoned at the hearing, but it remains to address the plaintiff's argument that the award of \$447,000 could be left intact on the basis that the jury's non-pecuniary award must have included a pecuniary award for loss of homemaking capacity. Counsel for Ms. Little did not press this argument on appeal, and I will deal with it only briefly here.
- [22] In my view, there is no merit to this submission for three reasons. First, juries are presumed to follow the instructions given to them. The judge charged the jury to determine an award of non-pecuniary damages for pain, suffering, and loss of amenities of life. There is no reason to assume that the jury, on their own initiative, decided to include a pecuniary award for loss of homemaking capacity in that award. Second, counsel did not, in his closing submissions, suggest to the jury that the plaintiff was seeking compensation for loss of homemaking capacity. Third, the plaintiff sought a pecuniary award to cover the cost of paying for housekeeping assistance, home maintenance, and gardening as part of her claim for future care.
- [23] In summary, I would allow the appeal, set aside the award of \$447,000 for non-pecuniary damages, and replace it with an award of \$250,000.
- [24] GRIFFIN J.A.: I agree.

[25] VOITH J.A.: I agree.

[26] FENLON J.A.: The appeal is allowed to the extent stated in my reasons. "The Honourable Madam Justice Fenlon"

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