

CANADA / JUDGMENT

M.R. v. British Columbia

2005 BCCA 158

COURT

British Columbia Court of Appeal

DECIDED

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2005 BCCA 158 Rodgers v. British Columbia COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Rodgers v. British Columbia, 2005 BCCA 158 Date: 20050323 Docket: CA030414 Between: Marilyn Rodgers Respondent/Appellant by Cross Appeal (Plaintiff) And Her Majesty the Queen in Right of the Province of British Columbia, Florence Pleasance and Reginald Pleasance Appellants/ Respondents by Cross Appeal (Defendants) Before: The Honourable Madam Justice Southin The Honourable Mr. Justice Mackenzie The Honourable Mr. Justice Smith S.J. Harper Counsel for the Appellants/ Respondents by Cross Appeal G.M. Dickson, Q.C. Counsel for the Respondent/ Appellant by Cross Appeal Place and Date of Hearing: Vancouver, British Columbia January 24, 2005 Place and Date of Judgment: Vancouver, British Columbia March 23, 2005 Written Reasons by: The Honourable Mr. Justice Mackenzie Concurring in by: The Honourable Madam Justice Southin The Honourable Mr. Justice Smith Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

- [1] This is an appeal by the Crown in Right of the Province of British Columbia from a general damages award of \$50,000 to the respondent for sexual assault by her foster parent and a foster brother between 1964 and 1971. The trial judge found liability on the basis of a non-delegable duty of the Crown to children in foster care, relying on the decision of this Court in *K.L.B. v. British Columbia* (2001), 197 D.L.R. (4th) 431, 2001 BCCA 221. That decision was reversed by the Supreme Court of Canada in *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC. 51, after the trial of this action.
- [2] The respondent concedes that the judgment cannot stand on the ground of non-delegable duty. The respondent submits however, that the judgment can be supported on the ground of the direct negligence of the social workers in their failure to properly supervise the respondent's foster care placement. The respondent also cross appeals on the issue of damages.

Background

- [3] The respondent was apprehended and placed in the care of the Superintendent of Child Welfare as a Crown ward in 1957, before she was two years old. In 1961, she was placed in the home of Reginald and Florence Pleasance as a long-term placement, and she remained

in that home until July 1975 when she completed high school at age 17. The trial judge found that Reginald Pleasance had sexually abused the respondent frequently between the ages of 8 and 15. She was also sexually abused by a foster brother in the home during part of the time that she was being abused by Mr. Pleasance.

- [4] The respondent commenced this action in July 1997 and added the claim relating to abuse by her foster brother by amendment in 2002. Mr. Pleasance has died and Mrs. Pleasance is an 89 year old resident of an extended care facility. She did not file an appearance in the proceedings.
- [5] The respondent submits that it is unnecessary to remit the case back to the trial court because the evidence is conclusive that the Pleasance home was not suitable for long-term placements and the social workers were negligent in their long-term placement of her in the home. Coincidentally, the Pleasance home was one of two foster homes in issue in K.L.B. and the respondent relies on observations in the reasons for judgment of Chief Justice McLachlin with respect to the Pleasance home, as follows: 4 Prior to placing the children in the Pleasance home, Ministry social workers had interviewed Mrs. Pleasance. They judged her to be cooperative and caring. Her file, however, contained a 1959 report stating that she was dishonest and insincere about what went on in her home. It also contained repeated warnings from subsequent years that placements should only be made in her home on a short-term basis. The social workers disregarded these warnings because they believed it was most important to keep children from the same family together and the Pleasance home was one of the few homes that would take all of them. The Pleasances normally took on up to eight foster children, four times what was regarded as the ideal number. ...Social workers visited the home only infrequently, sometimes not for several months, because of personnel shortages. The respondent accepts that these observations are not res judicata in the present case, but she contends that the evidence before the trial judge here leads inexorably to the same conclusion. The standard of care is that of "a prudent parent solicitous for the welfare of his or her child"; K.L.B., para. 14. The Ministry's running records specifically referable to the respondent contain only five entries for the entire fourteen-year period she was in the Pleasance home.
- [6] The Crown contends that different evidence was before the trial judge in this case and there were more extensive Ministry records, both running records for other foster children in the Pleasance home and resource records of inspections of the Pleasance home generally. While there are gaps in the resource records and the running records of other children present a mixed picture at best, the Crown submits that it is not clear that the social workers were negligent in not closing the Pleasance home to long-term placements, particularly having regard to the difficulty in finding homes for foster children in that era. The Crown contends that there are more than five references to the respondent in the records and social workers did not routinely record all their contacts with foster children in care, particularly those like the respondent who appeared to be doing well. The respondent apparently did not complain of abuse while she was in the Pleasance home and she did not disclose her sexual abuse to

anyone until ten years after she had left foster care. In K.L.B., the incident of sexual abuse in issue occurred in a second foster home and the only complaints with respect to the Pleasance home related to physical abuse. The Crown argues that the records and recollections of other foster children in the present case are more equivocal with respect to that physical "abuse". The Crown's position is that it remains open to a trier of fact on the evidence in this case to conclude that the social workers were not negligent in making long-term placements to the Pleasance home. The issue therefore, should be remitted back to the trial court for that purpose as this Court is not in a position to find the necessary facts in view of subtleties and conflicts in the testimony of witnesses. The Crown notes that the trial judge has already heard the evidence and should be able to address the direct negligence issue without a prolonged hearing or delay.

- [7] The trial judge did not make findings of fact that determine the direct negligence issue. The evidence is different and more extensive than the evidence in K.L.B. and the trial judge has an obvious advantage in weighing that evidence and drawing inferences. With some regret because of the length and cost of these proceedings, I have concluded that the judgment in K.L.B. does not foreclose the issue on the evidence in this case. Accordingly, I would return the direct negligence issue to the trial court for determination. The Crown Immunity Issue
- [8] The Crown asks to raise an issue of Crown immunity, not pleaded or raised before the trial judge. The torts in this case all occurred before 1 August 1974, the date that the Crown Proceeding Act, R.S.B.C. 1996, c. 89 came into force and abolished Crown immunity from suit in tort. In *B.(K.L.) v. British Columbia* (1999), 64 B.C.L.R. (3d) 23, 1999 BCCA 210, ("K.L.B. No. 1"), a majority of this Court concluded that pre-1974 torts may be actionable against the provincial Crown based on discoverability principles. The Court has recently agreed to revisit this question in *Arishenkoff v. British Columbia*, CA30026, but the hearing of this appeal has been adjourned.
- [9] The issue is hypothetical at this stage. K.L.B. No. 1 remains the law unless and until it is overturned. In my view, it is premature to anticipate the eventual outcome in *Arishenkoff* and this case should be remitted to the trial court on the basis of the law as stated in K.L.B. No. 1. If the law changes before a final disposition of this litigation, the implications may be considered at that time. I note, however, that the purpose of the Crown Proceeding Act was to remedy the perceived injustice of Crown immunity from suit and the sense of injustice would be compounded in this case if the Crown was permitted to successfully advance immunity at the end of this litigation when it was not raised at the outset. The Cross Appeal
- [10] The trial judge awarded the appellant \$50,000 as general non-pecuniary damages. He dismissed claims for past wage loss and future earning capacity. He also dismissed the claim for cost of future care.
- [11] The trial judge's reasons on damages are brief. His award for pecuniary damages was based on his finding that "Ms. Rodgers has dealt with her past extremely well." I do not think there is any purpose to be served by reviewing that past in detail. In my view, it is sufficient to

conclude that the judge's finding can be supported by the evidence. There is no error of law or principle, or any material misapprehension of the evidence. It is perhaps ironic that tort victims who through force of will or otherwise succeed in making a good recovery from trauma receive less compensation than those who are less successful, but that is unavoidable in the assessment for pain, suffering and loss of amenities which necessarily varies with the individual plaintiff. There is no claim against the Crown for punitive damages and the circumstances of the sexual abuse, while reprehensible, did not involve violence or otherwise support a claim for aggravated damages. The question then becomes whether the award is so inordinately low that it cannot be sustained: *Nance v. B.C Electric Railway Co.*, [1951] A.C. 601, [1951] 3 D.L.R. 705 (P.C). In my view, the award is not a "wholly erroneous estimate of the damage" required to meet that test, and it therefore cannot be disturbed in this Court.

- [12] As to the claims for past wage loss and loss of future earning capacity, the trial judge stated that there was "absolutely no evidence" to support past or future earnings claims caused by the sexual abuse. He noted that the respondent was employed by the Province as a liquor store manager. He referred to difficulties that the respondent has suffered as a result of a bipolar disorder but he concluded that disorder was unrelated to the sexual abuse. That conclusion can be supported by the evidence and in my view we cannot interfere with his determination that no claim for past or future earnings can be connected to the abuse.
- [13] The respondent's claim for cost of future care was limited to counselling fees. Notwithstanding a psychiatric opinion that the respondent would require future counselling, the trial judge concluded from the respondent's evidence that he was not satisfied that she would require future counselling. He observed that she was in a stable relationship and "she deals well with her day to day existence". Again, I think that conclusion was open to the trial judge on the evidence and I would not disturb it.

Conclusion

- [14] I would allow the appeal and direct a new trial on the issue of liability. I would dismiss the cross appeal. "The Honourable Mr. Justice Mackenzie" I AGREE: "The Honourable Madam Justice Southin" I AGREE: "The Honourable Mr. Justice Smith"

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