

CANADA / JUDGMENT

MacFarlane v. Gustafson

2024 BCCA 400

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 400 MacFarlane v. Gustafson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

MacFarlane v. Gustafson,

2024 BCCA 400

Date: 20241204

Dockets: CA48702; CA49362

Docket: CA48702

Between:

Doreen MacFarlane

Appellant

Respondent on Cross Appeal

(Defendant)

And

Sharlene Gustafson

Respondent

Appellant on Cross Appeal

(Plaintiff)

- and -

Docket: CA49362

Between:

Sharlene Gustafson

Appellant

Respondent on Cross Appeal

(Plaintiff)

And

Doreen MacFarlane

Respondent

Appellant on Cross Appeal

(Defendant)

Before:

The Honourable Chief Justice Marchand

The Honourable Mr. Justice Butler

The Honourable Justice Iyer

On appeal from: Orders of the Supreme Court of British Columbia, dated

October 26, 2022, August 30, 2023 and December 6, 2023 (Gustafson v. MacFarlane, 2022 BCSC 1872, 2023 BCSC 1524 and 2023 BCSC 2159,

Vancouver Docket S199677).

Counsel for Doreen MacFarlane:

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J.M. Kindrachuk

Place and Date of Hearing:

Vancouver, British Columbia

October 15, 2024

Place and Date of Judgment:

Vancouver, British Columbia

December 4, 2024

Written Reasons by:

The Honourable Justice Iyer

Concurred in by:

The Honourable Chief Justice Marchand

The Honourable Mr. Justice Butler

Summary:

The plaintiff and defendant each appeal and cross appeal the decisions of the trial court arising out of a personal injury claim. The trial judge found Ms. MacFarlane 100% negligent in an accident that caused Ms. Gustafson catastrophic injuries. He discounted the personal care component of the cost of future care award based on the contingency that the plaintiff's spouse would provide overnight care. He awarded double costs to the plaintiff from the date on which he found the defendant should have accepted a reasonable settlement offer. In her appeal, Ms. MacFarlane argues that Ms. Gustafson was contributorily negligent, and in her cross appeal, Ms. MacFarlane challenges the double costs award. Ms. Gustafson abandoned her main appeal; however, her cross appeal challenges the contingency deduction on the personal care component of the cost of future care award. Held: Appeal and cross appeals dismissed. Applying a deferential standard of review, there is no basis to interfere with the findings of the trial judge on any of the grounds raised.

Reasons for Judgment of the Honourable Justice Iyer:

Overview

- [1] This appeal arises from a tragic accident. The plaintiff, Ms. Gustafson, suffered catastrophic injuries when she was struck by a farm utility vehicle driven by the defendant, Ms. MacFarlane. The parties lived in separate dwellings on a farm acreage owned by Ms. MacFarlane. In exchange for reduced rent, Ms. Gustafson and her common law spouse, Mr. Blanes, did some yard work on the property.
- [2] On July 14, 2019, the parties were clearing a pile of debris near Ms. Gustafson's and Mr. Blanes' home. The accident occurred when the small utility vehicle Ms. MacFarlane was driving suddenly reversed and struck Ms. Gustafson, who was behind it.
- [3] Ms. Gustafson's injuries were severe. She now uses an electric wheelchair, has a reduced life expectancy, and requires round-the-clock care. In part, this is necessary to mitigate the risks of unpredictable life-threatening changes in her blood pressure.

- [4] Ms. Gustafson sued Ms. MacFarlane in negligence.
- [5] The trial judge issued his reasons on October 26, 2022: 2022 BCSC 1872 [Reasons]. With respect to liability, the judge found Ms. MacFarlane 100% negligent, rejecting her claim that Ms. Gustafson had been contributorily negligent.
- [6] With respect to damages, the judge awarded a total of just under \$5.4 million, not including the cost of accommodative housing. He made an award for the cost of future care, including the provision of personal care, but reduced it by 10% to address the contingency that Mr. Blanes would provide some of that care voluntarily.
- [7] The judge allowed the parties to continue the trial and adduce further evidence on the cost of accommodative housing. In supplementary reasons on that issue, indexed as 2023 BCSC 1524, he awarded \$493,000 for accommodative housing.
- [8] The trial judge also heard the parties on costs. In his reasons on costs, indexed as 2023 BCSC 2159 [Costs Reasons], he awarded Ms. Gustafson double costs from the date on which he determined Ms. MacFarlane ought to have accepted Ms. Gustafson's settlement offer of \$3.4 million.
- [9] The parties appealed and cross appealed various awards made by the judge. However, during the hearing of the appeal both parties withdrew their challenges to the judge's accommodative housing award. As a result, three issues remain:
- a) Was Ms. Gustafson contributorily negligent?
 - b) Should the personal care award have been discounted based on the contingency that Mr. Blanes would provide some unpaid personal care?
 - c) Should double costs have been ordered?
- [10] For the reasons that follow, I would dismiss the appeal.

Standard of Review

- [11] The standard of review for findings of contributory negligence depends on the nature of the error alleged. If the judge misconstrued the law, the correctness standard applies. If the judge correctly stated the law but misapplied it to the facts, the standard is "palpable and overriding error": *Tellini v. Bell Alliance*, 2022 BCCA 106 at para. 37.
- [12] A trial judge's assessment of damages is entitled to deference. It should not be disturbed unless the judge applied a wrong legal principle or the amount awarded is so high or low that it is a "wholly erroneous estimate of the damage": *Reilly v. Lynn*, 2003 BCCA 49 at para. 99, leave to appeal to SCC ref'd, [2003] S.C.C.A. No. 221.

- [13] Costs awards are owed significant deference on appeal. They should be set aside only if the judge made an error in principle or the award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

Discussion

Was Ms. Gustafson Contributorily Negligent?

- [14] Ms. MacFarlane does not challenge the trial judge's findings of fact. She argues he erred in his consideration of reasonable foreseeability. She says, despite having found that the vehicle Ms. MacFarlane was driving had come to a complete stop, it was nevertheless reasonably foreseeable it would start to move in reverse, such that Ms. Gustafson was contributorily negligent in crouching behind it.
- [15] The judge described the accident as follows:
- [4] On July 14, 2019, Ms. Gustafson, Mr. Blanes, and his son, Ryan Blanes, were engaged in trimming a large holly bush close to the farmhouse. The trimming produced a quantity of leaves and branches on the ground that were to be taken away to a burning pile elsewhere on the property. Once the trimming was complete, Ms. MacFarlane arrived driving a small utility vehicle known as a "Gator", and began to help with the clean-up. She took loads of trimming debris to the burning pile. At the time of the accident, one more pile of debris remained to be taken away.
- [5] Before she was struck, Ms. Gustafson was behind the Gator, preparing to load the remaining debris into a bin at the back. Ms. MacFarlane was at the wheel. Suddenly, she drove the Gator backwards into Ms. Gustafson, pushing her along the ground for a distance, then running her over with both rear and front wheels while travelling down a slope.
- [16] The judge found Ms. MacFarlane had driven the Gator frequently and knew how to operate it: *Reasons* at para. 14. Prior to the accident, Ms. MacFarlane and Ms. Gustafson had put two loads of debris into the Gator. On these occasions, Ms. MacFarlane stopped the Gator and got out of it to help Ms. Gustafson load it with the debris: *Reasons* at para. 17.
- [17] The trial judge made the following findings about how the accident occurred:
- [26] Ms. Gustafson was standing either directly behind or behind and just to the side of the Gator's line of approach as Ms. MacFarlane approached. She and Ms. MacFarlane made eye contact and Ms. Gustafson motioned Ms. MacFarlane to come closer. Ms. MacFarlane approached slowly and cautiously. She could not see the leaf pile on the ground and relied on Ms. Gustafson's gestures.
- [27] Ms. MacFarlane stopped with her foot on the brake. Ms. Gustafson was satisfied that the Gator was now close enough for easy loading. She bent down to pick up the debris and begin loading it into the Gator. Ms. MacFarlane could no longer see her.

- [28] At this point, Ms. MacFarlane's foot unintentionally slipped from the brake to the gas pedal. The Gator was still in reverse gear and it accelerated backwards, striking Ms. Gustafson. Ms. MacFarlane was caught by surprise and did not immediately understand what was happening. She found herself travelling backwards rapidly down the hill, and only took control of her vehicle again at the foot of the hill, braking it so that she would not run into the creek. It was then that she saw Ms. Gustafson on the ground and began to realize what had happened.
- [18] The judge expressly found that the Gator had come to a complete stop before Ms. Gustafson crouched behind it, based on the evidence of those at the scene:
- [33] A finding that Ms. Gustafson bent over, out of sight of Ms. MacFarlane, before she was struck is consistent with all three accounts of the event. I accept Mr. Blanes' evidence that the Gator had come to a complete stop before Ms. Gustafson bent over because this is by far the most likely sequence of events and Ms. MacFarlane is unable to say otherwise. Ms. Gustafson had been in communication with Ms. MacFarlane, making eye contact and gesturing her to come closer to the pile of debris. It would make no sense for Ms. Gustafson to bend over until the reason for the communication and the communication itself had ended. She was bending over to load the bin because the Gator was now in a position and ready to be loaded.
- [19] Ms. MacFarlane argues that the judge ought to have considered whether, even though the Gator was at a complete stop, a reasonably prudent person would have crouched behind it. She says, had he not conflated a "stopped vehicle with a vehicle that could not still move in reverse", the judge would have found Ms. Gustafson contributorily negligent. Ms. MacFarlane suggests the judge made this error because he focused too narrowly on the precise mechanism of injury (Ms. MacFarlane's foot slipping off the brake) instead of on the general mechanism of harm (the vehicle remaining in reverse gear).
- [20] In my view, the trial judge's reasons demonstrate that he did not make this error, if indeed that would be an error. He cited the relevant legal test, stated by the Supreme Court of Canada in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 at para. 76, 1997 CanLII 307. He considered other contributory negligence claims advanced where a plaintiff was struck by a reversing vehicle: *Araujo v. Vincent*, 2012 BCSC 1836; *Dechev v. Judas*, 2004 BCSC 1564. The contributory negligence claims in those cases turned on the foreseeability of the vehicle moving in reverse. Contrary to Ms. MacFarlane's assertion, the judge did consider this to be the general mechanism of harm as opposed to the more specific situation of a foot slipping off the brake pedal while the vehicle is in reverse gear.

- [21] The judge found it was not foreseeable to a reasonable person in Ms. Gustafson's position that the stopped Gator would start moving in reverse while she was bending over to load it. That conclusion was based on all of the relevant circumstances, including that Ms. MacFarlane knew that Ms. Gustafson was behind the Gator and would be bending over to load it.
- [22] In my view, the judge made no reviewable error in his conclusion.

Discount on Personal Care Award

- [23] Ms. Gustafson submits the trial judge made an error in principle when he factored in the contingency that Mr. Blanes would provide unpaid overnight personal care to her. She reiterates the argument she made at trial, which was that a defendant should not benefit from a family member's unpaid labour.
- [24] The judge discussed this Court's decision in *O'Connell v. Yung*, 2012 BCCA 57 and the case of *James v. James*, 2018 BCSC 603. He read these authorities as requiring him to make the following inquiry:
- [99] I conclude that the law requires me to ask whether there is a real and substantial possibility that Ms. Gustafson will not make use of 24 hour paid personal care by reason of the unpaid personal care that is available to her from Mr. Blanes. If there is, I must value that contingency. I must take into account that Mr. Blanes is not required to provide personal care and that, in the future, he may choose not to, or Ms. Gustafson may refuse to receive personal care from him.
- [25] The judge found there was a real and substantial possibility Ms. Gustafson would forego paid overnight care based on the kind of care she requires overnight, her experiences with the quality of care provided by evening care aides, and the evidence of Ms. Gustafson and Mr. Blanes: Reasons at paras. 103, 106-107.
- [26] The trial judge then valued that contingency at 10%:
- [110] Accordingly, the possibility that Ms. Gustafson might only hire personal careworkers for 16 hours as opposed to 24 hours daily is a contingency I must take into account. The difference between 16 and 24 hours would represent one-third or 33% of an award based on 24 hours of daily care. The discount must be less than that because it is not at all certain that Ms. Gustafson would opt for the 16 hour option. It is only a possibility, not a certainty. I must further take into account the risks that, with the passage of time, Ms. Gustafson's condition will deteriorate, so that she requires further care, or that Mr. Blanes' health will deteriorate, so that he cannot take responsibility for overnight care, or that their relationship will deteriorate, so that Mr. Blanes is no longer willing to provide care. I should say that, in view of Mr. Blanes' commitment to caring for Ms. Gustafson over the past three years, this last possibility seems remote, but it cannot be ignored.

- [111] In James, Betton J. discounted the cost of 24 hour care that would otherwise have been required, were it not for the personal care provided by Mr. James, by 20%. Ms. Gustafson's needs, and the strain and responsibility imposed on her caregiver, are more substantial than in that case.
- [112] In my view, taking everything into account, a 10% discount is appropriate in this case. Accordingly, I award Ms. Gustafson 90% of the cost of 24 hour paid personal care, or \$3,770,000 (rounded)
- [27] Ms. Gustafson distinguishes O'Connell, saying that Ms. O'Connell was unwilling to accept paid care. She says:
- ... O'Connell stands for the proposition that resistance of a plaintiff to accepting care is a relevant consideration in determine the amount of an award. It did not direct lower courts to conscript family members to continue to care for their injured loved one or to compensate injured parties less fully simply because their family members have stepped in and provided the care necessary to their survival.
- [28] In my view, the trial judge did not err in interpreting or applying O'Connell. It was open to him to find on the evidence there was a real and substantial possibility Ms. Gustafson would refuse paid overnight care. The fact that this evidence did not come from Ms. Gustafson whereas it did from the plaintiff in O'Connell is irrelevant. It is clear from the judge's quantification of the discount he accounted for the possibility Mr. Blanes might not be willing or able to provide overnight care in the future.
- [29] The purpose of cost of future care awards is to compensate a plaintiff for the costs they may reasonably be expected to require. As the Supreme Court of Canada stated in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22:

Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "'normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can

be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

[Emphasis added.]

That is precisely what the trial judge did in discounting for the possibility that Mr. Blanes would provide overnight care.

[30] Ms. Gustafson also argues the contingency applied by the judge is inconsistent with the "in-trust" award he made to compensate for the services Mr. Blanes had provided to Ms. Gustafson since the accident. I agree with Ms. MacFarlane that there is no inconsistency. An in-trust award is made to compensate for services a family member has provided that are over and above the usual "give and take" within a family: *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 29. It does not inform the analysis of what a plaintiff may reasonably be expected to require in the future.

Double Costs Award

[31] The trial judge exercised his discretion to award double costs against Ms. MacFarlane under R. 9-1(1)(c) of the Supreme Court Civil Rules, based on a formal offer to settle for \$3.4 million that Ms. Gustafson made on August 5, 2022.

[32] Ms. MacFarlane submits the offer was not one that should reasonably have been accepted because of contemporaneous informal discussions between counsel and because it was revoked before its expiry date.

[33] The Costs Reasons set out the relevant legal principles including the factors in R. 9-1(6) and relevant authorities: Costs Reasons at paras. 6-10. Ms. MacFarlane does not take issue with judge's statement of the law.

[34] The trial began on September 12, 2022. The judge noted that informal settlement negotiations began in June 2022, and were complicated because Ms. MacFarlane was under-insured (her policy limit was \$2 million), and because the Health Care Costs Recovery Act, S.B.C. 2008 c. 27 [HCCRA] subrogates the Province to the plaintiff's rights against the defendant to the extent of health care services the Province had provided to the plaintiff: Costs Reasons at paras. 14-15.

[35] The judge set out the chronology of negotiations commencing with the defendant's first formal offer:

[16] On July 20, 2022, the defendant formally offered to settle for the policy limits of \$2 million, plus costs and disbursements. In their letter, defendant's counsel suggested that there were substantial issues of contributory and third party liability and that the likely damages would be less than \$1.6 million.

- [17] On July 28, 2022, counsel informally discussed the July 20 offer. Plaintiff's counsel told defendant's counsel that the plaintiff required a personal contribution of \$500,000 from the defendant. No agreement was concluded.
- [18] On August 4, 2022, the defendant made a formal offer to settle, this time for \$2.25 million, plus costs and disbursements. The offer did not include any contribution towards a HCCRA claim.
- [19] Counsel discussed the August 4 offer that day. Plaintiff's counsel advised that the offer was rejected. He said that he anticipated receiving instructions to counter at \$3.4 million plus costs, but felt that his client would still be willing to accept something along the lines of \$2.5 million.
- [20] On August 5, 2022, the plaintiff made a formal offer to settle for \$3.4 million plus costs. The offer did not address the HCCRA claim. It was open for acceptance until 4:00 pm on September 9, 2022. Plaintiff's counsel informally advised defendant's counsel that "while I don't think we are at an impasse, I do think it makes sense to get ready for trial". Defendant's counsel responded that there was a risk that the defendant might change her mind as to whether she would contribute personally to achieve a settlement.
- [21] On August 31, 2022, the plaintiff revoked the offer of August 5 and substituted for it a formal offer to settle for \$4.7 million plus costs together with a payment to the Ministry of Health for its HCCRA Claim. This offer was open for acceptance until 5:00 p.m. on September 13.
- [22] On September 6, 2022, the defendant made a formal offer to settle for \$2.5 million together with costs and disbursements, not including any amount required to settle the HCCRA claim.
- [23] On September 8, 2022, the plaintiff revoked its offer of August 31.
- [24] On September 9, 2022, the defendant made a final formal offer to settle, this time for \$3 million plus costs and disbursements, not including any payment towards the HCCRA claim.
- [36] The judge rejected Ms. MacFarlane's argument that it was not unreasonable for her to reject the August 5 offer because she had reason to believe she could do better based on plaintiff's counsel's suggestion that his client might be willing to accept something closer to \$2.5 million:
- [29] I reject this argument. The defendant did not have a \$2.5 million offer from the plaintiff in hand. Indeed, concurrently with the \$3.4 million offer, plaintiff's counsel warned that it would make sense to get ready for trial. Neither side was committed to offer concessions beyond the positions they had formally staked out. Regardless of what counsel said his client might do, the defendant could only count on the offer actually presented. Anything else was just pie in the sky. If the defendant was willing to settle for \$2.5 million or even \$3 million, her option was to put the plaintiff to the test by making an offer. Eventually she did just that, but by then the plaintiff was holding out for \$4.7 million.

- [37] The judge also rejected Ms. MacFarlane's argument that he ought not to consider the August 5 offer because it was revoked on August 31. He found Ms. MacFarlane had a reasonable period in which to consider the offer and there was no evidence she would have been willing to accept it but for its premature revocation: Costs Reasons at para. 33.
- [38] I agree with the reasoning of Grauer J. (as he then was) in *ICBC v. Patko*, 2009 BCSC 578, that a court may consider revoked offers. The Supreme Court has done so in numerous cases: see, for example, *C.Y.J. v. R.J.*, 2023 BCSC 140 at para. 20, *Fines v. Johnson*, 2020 BCSC 1045. The judge properly did so under the heading "any other factor the court considers appropriate" in R. 9-1(6)(d).
- [39] The judge discussed the considerations listed in R. 9-(6), which guided his exercise of discretion in awarding double costs to Ms. Gustafson from August 12, 2022 forward. There is no basis for appellate intervention.

Conclusion

- [40] I would not accede to any of the grounds raised on appeal or cross appeal. As success was divided, I am of the view that each party ought to bear its own costs on appeal.

"The Honourable Justice Iyer"

I agree:

"The Honourable Chief Justice Marchand"

I agree:

"The Honourable Mr. Justice Butler"

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