
CANADA / JUDGMENT

Redden v. Maxon

2004 BCSC 510

COURT

Supreme Court of British Columbia

DECIDED

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2004 BCSC 510 Redden v. Maxon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Redden v. Maxon,

2004 BCSC 510

Date: 20040419

Docket: 32618

Registry: Kamloops

Between:

Eileen Redden on behalf of herself and on behalf of all persons

entitled to benefit from the Estate of Jonathan Buddy Redden, Deceased

Plaintiff

And

Luke Maxon

Defendant

Before: The Honourable Madam Justice D. Smith

Reasons for Judgment

Counsel for the Plaintiff:

D.B. McDougall

Counsel for the Defendant:

M.P. Geekie

Date and Place of Trial:

March 9, 2004

Kamloops, B.C.

- [1] The plaintiff, Eileen Redden, tragically lost her youngest son, Jonathan Buddy Redden ("Buddy"), born March 13, 1984, in a motor vehicle accident on his 16th birthday. Pursuant to the Family Compensation Act, R.S.B.C. 1996, c. 126 ("the Act"), she brings a summary trial damages claim for the wrongful death of her son. Specifically, she seeks damages for loss of guidance and companionship, loss of support, and loss of household assistance.
- [2] Based on the material before me, I am satisfied the application can be determined pursuant to Rule 18A of the Rules of Court.

I. Background facts

(i) The accident

- [3] Buddy was a front seat passenger in a 1981 Toyota pick-up truck that was owned and operated by the 19-year-old defendant. The vehicle was a single cab short-box with two bucket seats in the front.
- [4] On March 13, 2000, Buddy and the defendant were returning to Lillooet along West Pavilion Road. It was dusk and the vehicle's headlights were on. The weather was mild and the road was dry.
- [5] West Pavilion Road is a narrow, gravel road that winds along the steep banks of Bridge River ("the River"). The road has no protective side barriers.
- [6] After negotiating a sharp right corner, the defendant momentarily took his eyes off the road to see a deer up the bank and lost control of the vehicle. His truck went over the edge of the road and down a steep embankment, rolling side-over-side and end-over-end, before landing and crossing over the paved road below, and continuing down another steep embankment where it landed upside down in the River with the cab submerged in about two feet of water.
- [7] The defendant's head was under water but he was able to release his seatbelt and exit the vehicle. He was relatively unharmed. Buddy was trapped underneath the vehicle in the water and died.
- [8] There were no witnesses to the accident other than the defendant.

- [9] The coroner's report concluded that Buddy's immediate cause of death was drowning. It also listed a number of other serious injuries. Though toxicology testing indicated traces of marijuana in Buddy's bloodstream, neither drugs nor alcohol were contributing factors to the accident.
- [10] Liability for the accident is admitted. The Statement of Defence pleads contributory negligence based on an alleged failure by Buddy to wear a seatbelt. However, the defendant advised the investigating police officers and testified at his Examination for Discovery, that Buddy was wearing his seat belt at the time. Moreover, there was no expert evidence that use of a functioning seatbelt would have reduced or eliminated Buddy's injuries.

(ii) Mrs. Redden

- [11] Mrs. Redden, age 64, was born on February 25, 1940. As a child, she moved from Vancouver to Lillooet. She graduated from grade 12 and has lived in Lillooet most of her life.
- [12] She was twice married and divorced. She separated from her second husband in 1994 and was recently divorced. She has not been involved in a spousal relationship since 1994.
- [13] Mrs. Redden had two children from her first marriage and two from her second marriage. Buddy was the youngest of her four children. Her three surviving children include:

(a) Elizabeth Eileen Walsh ("Beth")

born November 24, 1963;

(b) Robert Louis Papp ("Bobby")

born December 6, 1965; and,

(c) William Joseph Redden ("Billy")

born March 26, 1981.

- [14] The family is very close. Their grief over Buddy's death was severe. They have strong ties to the community of Lillooet, which has continued to be home for most of the family members.
- [15] Beth, age 40, is married and living with her husband and two children in Sooke, B.C. She is a registered nurse. Both she and her husband are employed.
- [16] Bobby, age 38, resides at the family home in Lillooet, which he purchased from his mother following Buddy's death. He left school in grade 12 but later obtained his G.E.D. and is employed with B.C. Rail clearing and maintaining railroad rights-of-way. Buddy was 19 years younger than him and in that regard Bobby became something of a father-figure to Buddy.
- [17] Billy, age 22, continues to live with his mother in a nearby four-plex that is owned by Mrs. Redden. He graduated from high school in June, 2000, and works for Bridgeside Lumber pulling lumber off the green chain.

- [18] Buddy's father continues to live in Lillooet.
- [19] Mrs. Redden has not worked outside the home since 1981 when she suffered a lower back injury while working as a long-term care aide. She had a spinal fusion in 1984 but continues to suffer from chronic low back pain and is permanently disabled.
- [20] Before the accident Mrs. Redden lived with Billy and Buddy in the four-bedroom family home on about an acre of land. She received monthly income from various sources including a disability pension of \$456.55, spousal support of \$200, and child support of \$200 each for Billy and Buddy. Billy's monthly child support of \$200 ended when he graduated from school in 2000.
- [21] Mrs. Redden also supports herself with the rental income she receives from two real estate investments: the four-plex in which she currently resides with Billy and a non-conforming duplex. The rental properties and family home are all situated close together on the same street.
- [22] Mrs. Redden purchased the duplex in 1978 and the four-plex in 1995. The duplex is owned free-and-clear and each of the two units is rented for \$500 per month. The four-plex was purchased as a duplex and subsequently converted into a four-plex. There remains about \$200,000 owing on the property.
- [23] All four units were rented monthly at the time of Buddy's death - two for \$550; one for \$500; and the fourth unit by the tenant who provided carpentry work for the renovations in exchange for free rent. Currently, Mrs. Redden and Billy live in one of the units.
- [24] Between 1997 and 1999, the two apartment buildings operated at a loss. However, by the 2000 taxation year Mrs. Redden's net rental income was \$3,524.
- [25] In addition to the above income, Mrs. Redden received monthly payments for the benefit of Buddy from various sources totalling \$585.72. Specifically, she received the following:
- (a) Child support \$200.00
 - (b) Federal Child Tax Credit 173.42
 - (c) BC Family bonus 37.60
 - (d) Child's portion of CP disability 174.70

MONTHLY TOTAL 585.72

- [26] The monthly child support payment of \$200 would have continued at least until Buddy's 19th birthday and likely thereafter if he had continued to attend school on a full-time basis. Similarly, Mrs. Redden would have continued to receive Buddy's portion of the CPP disability pension until he was 18 and thereafter, Buddy would have received it directly until age 25 so long as he was in full-time attendance at school. The Child Tax Credit and the B.C. Family bonus payments would have ended when Buddy turned 18.
- [27] Mrs. Redden tracked her monthly expenses in order to calculate her net monthly rental income. The family lived frugally. Based on her documented expenditures, she calculated Buddy's divisible monthly expenses at \$268.74. His medical and dental expenses were covered by her former husband's health care plan with B.C. Rail.
- [28] Mrs. Redden's adult children provided her with some limited financial support. In 1998, Beth gave her about \$900 and in 2003 about \$500. She also paid for her mother's expenses on a 5½ week holiday to Europe. Before the accident, Bobby lived in a trailer at the family home and contributed to the purchase of groceries. Billy contributes about \$800 monthly to the household expenses when he is working.

(iii) Buddy

- [29] Prior to his death Buddy was in excellent health. He was well-liked at school and in the community.
- [30] At the time of the accident, Buddy was a grade 10 student and doing well in school. In grades 8 and 9, he received passing marks and had some trouble with attendance. However, his first quarter marks at December, 1999, placed him on the "Honour Roll, Excellent" list.
- [31] Buddy's school yearbook recorded his expressions of interest in becoming a doctor, mechanic or electrician. However, he had not yet made any concrete plans to achieve those goals. He also said he wanted to help others and to look after his mother.
- [32] Buddy was an active and hard-working youth. He did volunteer work by taking seniors for walks, setting up tables and chairs for the local recreational centre, and serving meals at the soup kitchen. He regularly assisted his grandmother. He also helped out at the B.C. Firefighters Burn Camp outside of Squamish.
- [33] He did not receive an allowance but earned his spending money by doing odd jobs such as cutting lawns, bringing in firewood, sweeping properties, and shovelling snow. In 1999 he worked for minimum wage at a local fast food restaurant. Shortly before the accident, he applied for a position in a local sawmill.
- [34] Following his death, the Burn Camp honoured his memory by dedicating bleachers in his name with a plaque and inscription. The sawmill where he had applied for work also honoured him by presenting a Buddy Redden Memorial Bursary for \$350.

- [35] Buddy assisted his mother with some of her personal care by helping her to put on her stockings when she was unable to move. He also assisted with some of the domestic chores around the house. He mowed the lawn, washed and put away dishes, hung and took down the laundry from the clothesline, vacuumed, assisted with cleaning the bathroom, and changed the water filter in the crawl space under the house two or three times a year.
- [36] After his death, Mrs. Redden was overwhelmed by the work required to maintain all three properties. She sold the family home to Bobby and moved into one of the four-plex units where she currently resides with Billy. She now does all of her own housecleaning and has had to cut back on her gardening, canning and preparation of preserves.
- [37] Buddy also assisted her with the upkeep of the rental properties by mowing lawns, trimming trees, shovelling snow, and putting down salt. He helped clean the apartments and do general repairs after a tenant moved out. Since his death, one of the tenants has assisted Mrs. Redden with the upkeep of the rental properties in exchange for reduced rent. Billy also assists her around the rental properties.
- [38] In support of her claim for loss of household services, Mrs. Redden obtained a report from an occupational therapist that calculated the services Buddy provided at about 3½ hours per day over the period of a week. However, there are assumptions in the report that are problematic. Mrs. Redden submits that on balance, the evidence supports a finding that Buddy would have provided two hours a day of services to her over a period of a year. Relying on the actuarial calculations of an economist, based on an hourly replacement wage of \$12.71, she seeks an award for past value of household services to March 8, 2004 at \$36,469, and future value of household services for the period of their joint life expectancy at \$145,548, for a total of \$182,016.
- [39] Buddy had many positive attributes. Admittedly, however, he was not a perfect child. As of November, 1999, he had experimented with marijuana a few times. He made no promises to his mother to stop using the drug and traces of marijuana were found in his body at the time of his death.

II. The Seatbelt defence

- [40] The defendant seeks to have liability apportioned based on a claim of contributory negligence by reason of Buddy's failure to wear a seatbelt. To successfully advance this claim, the defendant must establish, on a balance of probabilities, that use of a functioning seatbelt would have reduced or eliminated Buddy's injuries.
- [41] The defendant testified that Buddy was wearing his seatbelt at the time of the accident. It remains unclear how Buddy came to rest in the River outside of and pinned underneath the vehicle.

- [42] Counsel for the defendant asks the court to infer that Buddy could not have been wearing a seatbelt as he was ejected from the vehicle or, alternatively, if he was wearing a seatbelt his consumption of marijuana clouded his judgment and caused him to release the seatbelt before being ejected from the vehicle. Counsel points to the fact that the defendant was wearing his seatbelt and escaped relatively unharmed.
- [43] However, in the absence of any concrete evidence regarding how Buddy came to be pinned underneath the vehicle another inference is possible. Buddy's seatbelt could have become detached in the course of the vehicle going end-over-end and rolling sideways over a considerable distance down two steep embankments. Moreover, there was no evidence regarding the proper functioning of the seatbelt.
- [44] Given the paucity of evidence to support either theory of how the accident occurred, and in the absence of expert evidence regarding the functioning of the seatbelt or how it might have prevented or lessened the severity of Buddy's injuries, in my view the court cannot make the inference being sought by counsel for the defendant. There is simply insufficient evidence upon which the defendant can establish this defence on a balance of probabilities and, accordingly, I decline to find any contributory negligence by Buddy.

III. Damages

(i) General

- [45] Damages pursuant to the Act are for pecuniary or economic losses only. The Act makes no provisions for non-pecuniary claims, which have no inherent economic value.
- [46] The nature of a claim for pecuniary losses under the Act was described by Hall J.A. in *Cahoose v. Insurance Corp. of British Columbia* (1999), 63 B.C.L.R. (3d) 265, 1999 BCCA 302 at ¶8:

In a recent Family Compensation Act case in this court, *Sum v. Kan* (1997), 44 B.C.L.R. (3d) 250, Donald J.A. pointed out that the loss suffered in each case must be estimated having regard to the facts of the individual case. He observed that "although pecuniary claims often involve inference and educated guess work, and a strict mathematical approach is undesirable, the subject matter is essentially economic in nature". That case also concerned the death of a young person. The loss of a child is inevitably a terrible tragedy for parents and of course no amount of money can compensate for such a loss. However, a court faced with deciding a case brought under the Family Compensation Act is limited to a consideration of economic loss and is not permitted to award damages for purposes such as alleviating sorrow or addressing emotional loss. The burden lies upon the plaintiff in such a case to prove compensable losses flowing from the death of the deceased. See *Skelding v. Skelding* (1994), 95 B.C.L.R. (2d) 201 (C.A.).

- [47] Thus, it is the economic facts of an individual case that are relevant to the assessment of a pecuniary claim, not "some abstract notion of what it means in monetary terms to lose a child's support." See *Sum Estate v. Kan* (1997), 44 B.C.L.R. (3d) 250 at ¶13 (C.A.).

(ii) Loss of guidance and companionship

[48] At the outset of the hearing, counsel for Mrs. Redden acknowledged that this head of damages was not available to Mrs. Redden as a pecuniary loss. This position is supported by the authorities *Zeleniski Estate v. Fairway* (1998), 60 B.C.L.R. (3d) 76 (C.A.), and, *Bianco Estate v. Fromow* (1998), 56 B.C.L.R. (3d) 12 (C.A.).

[49] In *Bianco*, at ¶10-12, McEachern C.J.B.C. identified the heads of damages that were not available under the Act:

¶10 Damages for the loss of "love" and "affection" under the present legislation, in my judgment, are not recoverable.

¶11 That leaves for consideration the question of companionship which was the principal consideration motivating the trial judge to make this nominal award. In my judgment, companionship is not a recoverable head of damages because such damages must necessarily be for the loss of the life of the deceased. This distinction was well identified by Parrett J. in *Loyie v. Erickson Estate* (1994), 94 B.C.L.R. (2d) 33 (S.C.) where that learned judge reviewed the authorities and decided at 37 that "it is the loss of the 'services' of the deceased rather than the loss of the deceased himself which provides the theoretical framework for this type of award."

¶12 I have no doubt that the father has suffered a loss of companionship. I also have no doubt that in some cases a bereaved father might employ a substitute companion and suffer an actual pecuniary loss in that respect. But returning to the question of characterization, I am persuaded that an actual or potential loss of companionship is not a recoverable head of damages under the Family Compensation Act.

[50] For these reasons, this head of damages is not available to Mrs. Redden.

(ii) Loss of support

[51] Mrs. Redden advances a claim for loss of financial support based on the net difference of the monthly payments she received for the benefit of Buddy at \$585.72 and his actual expenses at \$265, over the 36 months until his 19th birthday:

\$585.72 x 36 months \$21,086.00

\$265.00 x 36 months -9,540.00

TOTAL \$11,546.00

[52] As a 16-year-old, Buddy did not provide any financial support to his mother. The monthly payments Mrs. Redden received were for Buddy's support and were not meant to be a source of income for her. Her decision to use portions of those payments for the support of herself and other family members should not change the characterization of those payments from support for Buddy to income for herself.

- [53] Furthermore, the Child Tax Benefit and B.C. Family Bonus would have ended when Buddy turned 18, and Buddy's share of Mrs. Redden's disability pension would have been paid to him directly after he turned 18 and continued until he turned 25 only if he attended school during that period on a full-time basis.
- [54] The only claim that Mrs. Redden might advance under this head of damages is for the future support that Buddy might have provided her. The evidentiary basis for such a claim is extremely limited given Buddy's young age at the time of his death.
- [55] In *Cahoose*, supra, the court overturned on appeal the trial judge's award of \$50,000 for loss of financial support of an extremely attentive 16-year-old daughter toward her plaintiff mother. Hall J.A. described the claim for loss of support as "highly speculative" where a young person has not yet established any career path or demonstrated an earning pattern.
- [56] Similarly, in this case, while Buddy was admittedly a devoted, active, and hard-working teenager, given his young age at the time of his death he had not yet had the opportunity of demonstrating an earning pattern or establishing a career path. To infer that he would have contributed to the financial support of his mother in the future would be speculative.
- [57] At the same time, Mrs. Redden's adult children have provided her some limited financial support. Given Buddy's close bond to his mother and the strong family ties to the community of Lillooet, there is some evidentiary basis upon which it might be inferred that Buddy would have remained or returned to Lillooet and followed the pattern of contribution to his mother's support that has been provided by his siblings. On that basis, I am satisfied that a nominal award of \$5,000 is appropriate in the circumstances.

(iii) Loss of household assistance

- [58] Mrs. Redden seeks compensation for the loss of household services provided by Buddy including housekeeping, yard work and handyman services. She points to her reliance on Buddy's assistance as a result of her particular circumstances: a single and aging parent with a permanent physical disability, limited financial means and, her financial dependence on the revenue from her rental properties which must be maintained. In support of her claim she relies on an economist's report which calculates the present value of Buddy's past services to the date of the hearing at \$36,468 and future services at \$145,548, for a total of \$182,016, based on two hours of services per day at an hourly replacement wage of \$12.71 per hour.
- [59] In dealing with future losses, the court in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.) at 135, Hutcheon J.A. stated that "substantial possibilities must be considered by estimating the chance of the event occurring and that the balance of probabilities is confined to determining what did in fact happen in the past."

[60] In *Cox v. Fleming* (1995), 15 B.C.L.R. (3d) 201 at ¶3 (C.A.), the appellate court increased the trial judge's assessment of damages for the loss of services of an 18-year-old son who "would have readily assisted his parents as he grew older" and who "would have given them physical assistance through any illness they may have suffered" and "attempted to give them as comfortable a life in their old age as they had provided him as a child." On appeal the award under that head of damages was increased from \$8,000 to \$20,000.

[61] Finch J.A. (now C.J.B.C.) went on to consider the use of actuarial evidence when assessing future losses and made the following comments at ¶5:

The assessment of damages under the Family Compensation Act is always difficult, and particularly so when the deceased is young and has not yet established a career, and when there is no historical record of financial contribution by him to his survivors, or of economic dependency by them upon him. When there is such a record, actuarial evidence may afford some guide as to what reasonable expectation of monetary benefit has been lost and as to its present value. The award, however, is never a matter of mathematical calculation. In *Cox v. Takahashi* (1975), 5 B.C.L.R. 162 (C.A.) this court adopted what was said in *Daniels v. Jones*, [1961] 1 W.L.R. 1103, [1961] 3 All E.R. 24. The passages cited with approval by Mr. Justice McFarlane are at pp. 167 and 168 as follows:

As Holroyd Pearce L.J. said in *Daniels v. Jones*, [1961] 1 W.L.R. 1103, [1961] 3 All E.R. 24 at 28 (C.A.):

Since the question is one of actual material loss, some arithmetical calculations are necessarily involved in an assessment of the injury. But they do not provide a substitute for common sense. Much of the calculation must be in the realm of hypothesis, and in that region arithmetic is a good servant, but a bad master.

[62] In allowing an award of \$20,000, the court considered factors such as cultural traditions of support and dependency, the family circumstances, the age of the deceased and of other children, the age and health of the parents or other survivors, their means, the relationship between the deceased and his survivors, the deceased's education, training, and vocational prospects and, in addition, the predictions as to what all of those factors might lead to in the deceased's future.

[63] Modest awards for loss of "services" have been made at the trial level. See *Bhupal v. Connolly*, [1994] B.C.J. No. 1679 (S.C.) (\$25,000 for the loss of services of an attentive 25-year-old daughter); *Trentin Estate v. Davidson*, [1997] B.C.J. No. 1687 (S.C.) (\$20,000 for the loss of services of a 43-year-old son from a close Italian family); and, *Peacock (Guardian ad litem of) v. Glynes*, [1999] B.C.J. No. 1974 (S.C.) (\$7,000 for the loss of services of a 30-year-old son who helped his mother maintain her home).

[64] Taking into account the factors considered in *Cox*, I am satisfied the evidence supports a finding that a substantial possibility existed that Buddy would have continued to provide services to his mother. The family was close and Buddy had a close bond with his mother.

He was an attentive son and hard-working teenager whose efforts were recognized in the community. I think it a substantial possibility that he would have followed in his brothers' footsteps by remaining in or returning to Lillooet to live and work, in which case he would have continued to provide some services to his mother with the assistance of his brothers.

[65] However, the services provided by Buddy for the maintenance of the rental properties in the past were largely provided by a tenant in exchange for rent. This arrangement appears to have continued following Buddy's death. Furthermore, Mrs. Redden has the assistance of Billy, who continues to live with her when he is not working in camp.

[66] Applying both positive and negative contingencies to this substantial possibility, I conclude that a 20% possibility exists that Buddy would have provided past and future services to his mother as projected. Accepting the actuarial calculations as providing some guidance for this assessment, I have determined that an award of \$36,000 is appropriate for Mrs. Redden's loss of household services.

IV. Summary

[67] In the result, there shall be an award of damages as follows:

Loss of support \$ 5,000

Loss of household services 36,000

TOTAL \$41,000

[68] Costs are granted at Scale 3.

"D.M. Smith, J."

The Honourable Madam Justice D.M. Smith

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