

In the Court of Appeal of Alberta

Citation: H.C. (Dependent Adult) v. Loo, 2006 ABCA 99

Date: 20060419

Docket: 0303-0432-AC

Registry: Edmonton

Between:

**H.C., a Dependent Adult by her
Guardian and Trustee, A.C.**

Respondent/Cross-Appellant
(Plaintiff)

- and -

Anthony Loo and Charlotte Loo

Appellants/Cross-Respondents
(Defendants)

Restriction on Publication: No one may disclose information about the personal history or records of a dependent adult that was obtained by the Public Guardian or Public Trustee under the *Dependent Adults Act*. See the *Dependent Adults Act*, s. 68.

The Court:

**The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Clifton O'Brien**

Memorandum of Judgment

Appeal from the Judgment of
The Honourable Madam Justice D.C. Read
Dated the 21st day of January, 2003
Filed the 5th day of December, 2003
Docket: 9803-04585

Memorandum of Judgment

The Court:

Introduction

[1] The plaintiff, appellant by cross-appeal, and herein referred to as “the appellant” appeals the finding of the trial judge that she was 50 per cent contributorily negligent in regard to injuries sustained by her as a pedestrian struck by a motor vehicle. She also appeals the question of damages awarded to her with respect both to loss of past and future income and for pre-trial care compensation.

Standard of Review

[2] The appellant acknowledged that this Court will intervene only if palpable and overriding error can be shown to have been made by the trial judge with respect to her findings under appeal.

Facts

[3] The facts are fully set forth in the trial judgment, 2003 ABQB 52 and it is not necessary to repeat them for purposes of this judgment. However, a brief summary of the facts is set forth to provide some context for the analysis of the issues raised in the appeal.

[4] On April 22, 1996, the appellant was crossing Franklin Avenue, a busy thoroughfare in Fort McMurray, when she was hit by an automobile driven by Charlotte Loo. The accident occurred at a “T” intersection where Franklin Avenue intersects with an unnamed road that accesses a shopping centre.

[5] Immediately prior to the collision, Charlotte Loo was driving southbound on Franklin Avenue following a slower moving truck in the curb lane. She switched into the median lane to pass the truck, looked into her rearview mirror and when she looked back the appellant was in front of her vehicle. Charlotte Loo applied the brakes of her vehicle and swerved but hit the appellant, who was carrying groceries, somewhere in the median lane.

[6] It was common ground at the trial that the traffic signals at the intersection were not operational at the time of the accident and further that there was no marked crosswalk crossing Franklin Avenue on either side of the intersection. The trial judge found that there was no crosswalk as defined by the *Highway Traffic Act*, R.S.A. 2000, c. H-8, (“the *Act*”), and consequently that the appellant was not struck in a crosswalk. This finding was not challenged on the appeal.

[7] The appellant sustained broken bones, facial lacerations and a closed head injury with haemorrhage. Her recovery was complicated by a massive seizure, termed *status epilepticus*, suffered

on December 13, 1999. There was evidence that the injury to the appellant's brain, even before the seizure, had resulted in some loss of cerebral function. Following the seizure, the appellant's mental condition worsened such that she was rendered a Dependent Adult and disabled from testifying at trial. The Public Trustee is now the trustee and co-guardian of the appellant.

Contributory Negligence

[8] The trial judge found that Charlotte Loo rebutted the statutory presumption arising under s. 180 of the *Act* that she was solely responsible for the accident. The trial judge further found that the appellant had an obligation to look out for traffic, not to cross in the face of oncoming traffic especially as she was not in a crosswalk, and that the appellant was not crossing at a corner and was crossing in an area where there were non-operational traffic signs. Liability was apportioned equally based upon the finding that neither the driver nor the pedestrian was keeping a proper lookout.

[9] The appellant assailed the apportionment of liability on a number of grounds. She argued that she crossed at the corner and at a safe distance from the oncoming traffic when she stepped off the curb.

[10] There were three independent witnesses to the accident, and evidence about the accident was also provided by two investigating police officers and emergency services personnel. An engineering expert gave evidence on behalf of the appellant. He estimated that the vehicle which struck her was 44 metres from the appellant when she stepped off the curb. While it appears that the trial judge misapprehended certain aspects of the expert testimony, on cross-examination the expert acknowledged that the appellant had attempted to cross when it was unsafe for her to do so.

[11] The trial judge carefully reviewed the evidence of each of the independent witnesses and determined, as she was entitled to do so, whose evidence she accepted and explained her reasons for doing so. There was evidence before her which she did not misapprehend and upon which she could and did reach her conclusions. The appellant was unable to demonstrate palpable and overriding error such as would affect her apportionment of liability or otherwise permit appellate intervention in this regard.

Past Income Loss and Future Loss of Earning Capacity

[12] The appellant was 41 years of age at the time of the accident. She had not been employed for more than 10 years prior to it. The trial judge concluded that the appellant would not have become re-employed prior to the trial and that it was unlikely that she would be employed at any time in the future. She awarded damages of \$7,500.00 for the appellant's "loss of chance" of gaining future employment. The trial judge estimated that the appellant had not more than a five per cent chance of future employment if the accident had not occurred.

[13] The award is meagre. However, it is explained by the unfortunate circumstances and lifestyle of the appellant prior to the accident. The facts found by the trial judge in this regard are supported by the evidence. There is no basis for appellate intervention to increase the award.

Pre-Trial Care Compensation

[14] The trial judge awarded damages in the amount of \$65,638.19 for pre-trial care compensation, i.e. compensation for care covering the period from the time of the accident on April 22, 1996 until trial. In making this award, no allowance for care was made for the period between April 24, 1997 to the date of the seizure on December 13, 1999, a period of more than two years.

[15] The trial judge found that the appellant required live-in care for only one year after the accident. She acknowledged that the appellant did have a loss of mental functioning and an increase in her substance abuse behaviour caused by the accident but stated that after April 23, 1997, while the appellant may well have required some assistance with housework and other matters, no evidence was provided about the cost of such assistance. (See paras. 89, 90 and 126 of trial judgment.)

[16] The trial judge appears to have overlooked the report and evidence of Lorian Kennedy, an occupational therapist who gave evidence on behalf of the appellant, relative both to her need for care prior to the seizure and the cost of such care. Ms. Kennedy visited the appellant at her home in Fort McMurray on October 21, 1999, only six weeks before her seizure, for purposes of making a “functional evaluation”.

[17] Ms. Kennedy’s report is dated December 6, 1999, and following a detailed review of the circumstances of the appellant, the report concludes as follows with respect to the appellant:

She lacks insight into her cognitive limitations. Pain in her left arm is a significant barrier to increased activity and her left shoulder function is very limited, decreasing the usefulness of her left hand. She demonstrated that she is partially independent in self care but requires standby supervision and some assistance with personal care tasks such as dressing and bathing. While she is physically able to prepare lighter meals, her poor judgment and memory are a hazard. She is able to walk short distances but tires quickly and then has increased pain and is more likely to fall because of her foot drop. She has had many falls, particularly on the stairs . . .

Ms. C. is not able to do the majority of her housekeeping independently (change beds, wash floors, clean the bathroom, obtain groceries, make meals, do laundry, etc.) . . . she requires supervision and assistance with most housekeeping tasks . . . [i]n my opinion, Ms. C. requires a live-in caregiver to provide assistance, supervision, companionship and housekeeping services.

Her family are presently carrying this responsibility, but cannot be expected to stay with her on an ongoing basis . . .

[18] Ms. Kennedy set out in her report the cost of support services that Ms. C. needed as follows:

Live-in caregiver, plus weekend relief: one hour personal care per day at \$13.00 per hour, 15 hours companionship/supervision at \$8.00 per hour. Vacation pay at 4%, stat holiday pay at 9.96% of daily rate; employer benefits (CPP, EI, WCB) at 7.66% of insurable earnings, totalling \$55,781.00 per year.

[19] At trial, Ms. Kennedy testified that when she had seen the appellant in October, 1999, she determined that the appellant required live-in supervision because of her physical and mental deficiencies, including lack of insight into her limitations. Ms. Kennedy was not challenged in her cross-examination either as to the quantity or the cost of the care that was required in this period prior to the appellant's seizure.

[20] Mavis Andrew, an occupational therapist called at trial on behalf of Charlotte Loo, had reviewed the report of Lorian Kennedy in this regard and did not disagree with its conclusions. Ms. Andrew testified as follows when cross-examined:

Q And at the time you did your assessment, I take it you were not able to discern what care H.C. required from April 22, 1996 until at least the time she suffered her status epilepticus in December of 1999.

A I wasn't involved in looking at that, no.

Q Okay. And - - but you reviewed Lorian Kennedy's report with respect to the same?

A Yes.

Q And you have no reason to disagree with her assessment in that regard?

A No.

[21] Counsel for Charlotte Loo submitted that the evidence of A.C., the appellant's legal guardian and trustee at the time, supported the trial judge's finding that the appellant did not require extensive assistance in this period before the seizure. A review of Ms. C.'s evidence, however, indicates to the contrary:

Q - - and when she finally got out of the Fort McMurray Hospital, who took care of her?

A N and I.

Q Okay. And what kind of care did she need?

A Just everything. We had to do everything, cook, clean, bath her, make the beds, clean the house, everything, everything . . .

Q Could she dress herself?

A No. We had to dress her because this one arm wasn't working and we had to put that through and then put that thing - - pull over through and then pull it down.

. . .

Q Now, eventually did that improve a little bit?

A Yeah, it improved a bit after.

Q Okay. Did she ever get back to 100 percent?

A No.

Q Did she seem to think the way she did before the accident?

A No. H. didn't think that anymore, she just wasn't H.

Q What do you mean it wasn't H.?

A She'd say stupid things that you wouldn't even think, she just like would just lay there and not do nothing, she had no life in her to just even have a conversation. She was repetitive and it was just crazy.

Q What did her speech sound like?

A It was slurred.

Q Was it slurred before the accident?

A No.

Q What was her memory like?

A Before or after the accident?

Q After the accident.

A It was - - she'd forget things. She'd go put a pot on the stove and then she'd be laying down on the couch . . . and then you tell her, Why did you put the water on to boil, H.? And she'd forget what she put the water on to boil so you have to be checking on her all the time.

[22] The trial judge does not refer in her judgment to any of this evidence and, as noted above, appears to have overlooked it. There is no evidence which refutes the above evidence, including the testimony and report of Ms. Kennedy in regard both to the need for care and its cost during this period.

[23] Counsel for Charlotte Loo argued that any award for pre-trial cost of care should be subject to an allowance for negative contingencies. While it is apparent that such contingencies may properly be regarded with respect to future costs and losses, there is no basis, at least in this case, for making any deduction. The appellant required the care during this period and the cost of such services during the period was not challenged.

[24] Accordingly, we allow the appeal in regard to pre-trial care compensation and award the appellant the additional sum of \$73,661.48, being 50 per cent of the annual cost of \$55,781.00 for the 964 days between April 23, 1997 and December 13, 1999. The appellant will also be entitled to pre-judgment interest to the date of judgment and post-judgment interest thereafter with respect to this additional award of damages.

Appeal heard on March 9, 2006

Memorandum filed at Edmonton, Alberta
this 19th day of April, 2006

Berger J.A.

Costigan J.A.

O'Brien J.A.

Appearances:

K.B. Haluschak,
for the Appellants/Cross-Respondents

E.M.A. Robinson and
D.C. MacPherson
for the Respondent/Cross-Appellant