No. C876136
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
DANNY EDWARD BASTIAN, an Infant by his Guardian Ad Litem, SHARON LEA BASTIAN and the said SHARON LEA BASTIAN	REASONS FOR JUDGMENT
PLAINTIFFS	OF THE HONOURABLE
AND:	MR. JUSTICE HOOD
DR. RICHARD Y. MORI	
DEFENDANT	

J.N. Laxton, Q.C. and R.P. Gibbons	for the plaintiffs
H.J. Grey, Q.C. and F.D. Banning	for the defendants
Date and place of hearing:	November 30, 1990 Vancouver, B.C.

On March 15, 1990, reasons for judgment in this matter, on the issue of liability, were delivered. On June 8, 1990, reasons for judgment on the issue of damages were delivered. At that time the question of tax gross-up was outstanding and there may have been some other matters as well. Matters were left on the basis that if the parties could not resolve these matters they would be spoken to.

On November 30, 1990, counsel appeared before me and a number of matters were raised and argued by both sides. I will deal first with the applications brought by the plaintiffs.

REOPENING OF CASE FOR FURTHER EVIDENCE

One of the issues which I had to decide earlier was the life expectancy of the infant plaintiff, Danny. The only evidence before me on that issue was that which is contained in two medical/legal reports filed by the plaintiff. The first report is dated June 8, 1989 and is that of Dr. Leslie G. Andrews, the Assistant Medical Director and Director of the Child and Adolescent Services at the G.F. Strong Rehabilitation Centre, where he has practiced for many years. Dr. Andrews' opinion at the time was that Danny "will live well into his twenties and may even reach 30". The second report is dated July 26, 1989 and is that of Dr. J.U. Crichton who practiced paediatric neurology in Vancouver for many years, and who was professor emeritus and still practicing at the time of trial. In his opinion a life span of 35 to 45 years for Danny was not "unreasonable".

After carefully considering the evidence before me, including that contained in the two reports, and particularly that of Dr. Andrews, I found Danny's life expectancy "to be a maximum of 30 years", that is, that he would live a total of 30 years. In this

regard I state in part as follows at page 73 of my reasons dated June 8, 1990:

> LOSS OF LIFE EXPECTANCY:
> I have reviewed the evidence on life expectancy. Dr. Crichton says 35 to 45 years is not unreasonable. Dr. Andrews says that Danny will live well into his twenties and may even reach 30. He is of the opinion that Danny will likely die of respiratory infection and notes his past problems with respiratory infections. I find Dr. Andrews' report in this regard to be more persuasive, in that it deals more with Danny than with averages, and I find Danny's life expectancy to be a maximum of 30 years.

Counsel now applies to reopen the case in order to lead further opinion evidence through Dr. Andrews on the question of Danny's life expectancy. I am told that Dr. Andrews will now give an opinion that his life expectancy is approximately 37 years; that the new opinion is based "primarily on the fact that Danny has now passed 'a statistically critical milestone'". I am told that counsel is referring to the fact that Danny has reached a certain age (I believe that he is almost 7 years of age now) and that because of that fact a greater life expectancy may be opined.

Counsel for the plaintiffs urged me to hear Dr. Andrews' new evidence at this stage of the proceedings, that is, before hearing argument as to whether or not the case should be reopened and further evidence adduced. I declined to hear the evidence at that point in time. However, both counsel stated in their arguments that Dr. Andrews is now prepared to give evidence, that it is now his opinion, on the basis of Danny's present age, that Danny's life expectancy is approximately 37 years. I take this to mean that he will live a total of 37 years as opposed to 37 years from this date.

The "change" in opinion then, based on the fact that Danny has lived a further 15 months, is from "well into his twenties and may even reach 30", which probably represents a range of 25 to 30 years, TO approximately 37 years, which probably represents a range of 35 to 40 years. Counsel for the plaintiffs put it this way in his written submission:

> Because the plaintiff has survived another year this means that this present life expectancy has increased from 30 years (the number assessed at trial based on his then age) to between 35 to 40 years - say 37.5 years (the present life expectancy based on his present age). The rationale for this increase is simple - the plaintiff has survived a critical period in his development which is reflected now in a longer life expectancy. Therefore, if the present award stands the plaintiff will be under compensated by some seven years and this is surely contrary to the policy underpinning the

> restitutio in integrum principle so clearly enunciated in the Supreme Court decision in Watkins v. Olafson.
>
> (my emphasis)

I do not have a problem with the applicable law to which I will refer in a moment. I do have a problem with regard to the facts and the reason for the application to reopen the case and lead the new opinion evidence referred to. I have reread the two reports referred to. In their reports both doctors lament the fact that there is little literature and statistical information on the life expectancy of children with the severe injuries and disabilities similar to those suffered by Danny. Dr. Andrews did refer to some studies and statistics. However, Dr. Crichton doubted that they were applicable in Danny's case. In the end, Dr. Crichton's opinion seemed to be based on information he received several years ago as regards the experiences at Woodlands School in New Westminster.

It seems to me from a reading of Dr. Andrews' report, at page 4, that he did, in fact, take into consideration to some extent the fact that generally speaking the longer Danny lives, the longer his life expectancy will be. At the time that he gave his opinion, he must have known of this so-called milestone and he must have considered it probable that Danny would live to his present age when assessing the situation and giving his opinion. That being

the case, the fact that the longer Danny lives the better his life expectancy must have been a factor in giving his opinion. Hence, I am concerned that what has happened here is that Dr. Andrews simply has had a change of mind or of opinion for reasons which are not before me. This is the view which I take of the situation on the limited information before me and without having heard Dr. Andrews' explanation to the contrary. The narrow issue then is whether or not the plaintiff should be allowed to reopen the case and lead this new opinion evidence in such circumstances.

The law in this area, as I have already stated, is quite clear. Prior to the entry of an order, a judge who made the order has a discretion to set it aside, to reopen the trial and to hear further evidence and argument. The discretion is unfettered and the trial judge is not bound by rules applicable in governing other situations such as the admission of new evidence before the Court of Appeal, although those rules may give him some guidance. The trial judge may reopen the trial on any grounds that may appeal to his judgment provided he exercises his discretion judicially. The sole principle which governs him in the exercise of the discretion is that a miscarriage of justice should not occur. See Clayton v. British American Securities [1934] 3 W.W.R. 257 (B.C.C.A.), Federal Business Development Bank v. Mission Creek Farm Inc. et al (1988) 25 B.C.L.R. (2d) 188 (B.C.C.A.), Metro Trust Company of Canada v. MacDonald (1988) 24 B.C.L.R. (2d) 315 (B.C.S.C.) and Insurance

Corporation of British Columbia v. Dommasch et al (1978) 8 B.C.L.R. (B.C.S.C.).

I will cite only one passage from the leading case, from the decision of Macdonald J.A. at page 295:

> ...It is, I think, a salutary rule to leave unfettered discretion to the trial Judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur. If, e.g., a document should be discovered after pronouncement of judgment but before entry showing that the judgment was wrong and the trial Judge was convinced of its authenticity no lack of diligence by solicitor in producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial Judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.
>
> (my emphasis)

Counsel for the defendant acknowledges that I have a discretion to make the order sought but says that it should be exercised extremely sparingly in the interest of bringing an end to the litigation; that it would be fundamentally unfair to the defendants to admit evidence of the sort proposed, particularly

opinion evidence. He says that the plaintiff should not be allowed to put his case in twice and cites the decision of McLachlin J., as she then was, in Mandzuk v. Vieira et al (1983) 43 B.C.L.R. 347. The evidence should not be admitted because the plaintiff has not established that it will probably persuade me to vary the judgment. The plaintiff is simply trying to improve on his case. Finally, it is argued that if I open up the case it will lead potentially to the introduction of lengthy and contradictory opinion evidence. In this regard, Mr. Grey tells me that there are some recent California studies which indicate that a 30 year life expectancy for Danny is excessive. He says he will have to have the clinical records produced and cross-examine Dr. Andrews. He will also have to consider what I will call the California evidence and whether or not to bring an expert from that jurisdiction to give evidence on the issue or to provide his written report thereon. The whole trial will effectively be reopened on one of its primary issues.

Mandzuk was concerned with Rule 40(7) which does not seem to be applicable in the case at bar. In any event, counsel for the plaintiff relies on the inherent jurisdiction of the court and the principles set out in Clayton. However, I have considered the "requirements" referred to by counsel for the defendant, including those raised in Mandzuk, since they are all matters to consider, or at least to be guided by, in arriving at the answer to the paramount question, may a miscarriage of justice occur?

Notwithstanding my present view of the reasons for the application, to which I have already referred, I am of the opinion that the trial must be reopened for the hearing of the further evidence on the issue of life expectancy so as to assure that a miscarriage of justice may not occur. The application is therefore granted.

It follows, as well, that the defendant must have full opportunity to defend the issue, including the production of documents, discoveries, time to consult with a specialist and to properly prepare for the trial of the issue. In my opinion the issue is at large, that is to say, that on the evidence to be heard on behalf of both parties, Danny's life expectancy may remain the same or may be raised or lowered.

The award of $51,000.00 per year for attendant care until Danny turns 19 years old;

The award of $75,000.00 per year for group home.

Counsel asks that I reconsider my judgment on these two issues. While I am of the opinion that I am entitled to reconsider them, I decline to do so for a number of reasons, including the time element, the difficulty involved in reviewing the whole of the evidence and the fact that these matters will be considered by the Court of Appeal in due course.

The Deduction of 53% of Personal Expenses from the Future Wage Claim

Counsel submits that my decision on this point is contrary to the law of this province, citing the recent unreported decision of my brother Macdonell in Semenoff et al v. Kokan et al which was tried around the time that Bastian was tried. Justice Macdonell's reasons were issued on December 12, 1989, six months before my reasons in Bastian were issued. I have expressed to counsel my concern that Semenoff was not brought to my attention in light of the fact that the issue before me had apparently been decided by Justice Macdonell. I have accepted, without question, Mr. Banning's explanation as to why Semenoff was not referred to me.

Notwithstanding Justice Macdonell's learned decision in Semenoff, which I have not yet had the opportunity to read, I do not propose to reconsider my judgment on this issue. It is an important matter and will be before the Court of Appeal in due course in both Semenoff and Bastian.

Evidence of Duplication With Respect to Recreation and Health Care Costs

I have heard counsel's further argument on this item. I have concluded, again, that a deduction should be made for this item. I have also concluded that the correct percentage is 4.1%.

The Correct Multiplier To Be Used For Future Care Awards

The issue here is whether the multiplier to be drawn from the evidence of the plaintiffs' actuary, if this can be done, should be used or whether the multiplier of the defendant's actuary should be used. Counsel objects to the fact that the defendant's actuary has included a further factor in his calculations. The fact allows for the possibility that Danny will not live the average life span but will die sooner. Counsel for the defendant points out that the tables used by the defendant's actuary address the fact that the plaintiff may die tomorrow or live to age 50. I see no reason in principle why the defendant's actuary's multiplier should not be used in the circumstances of this case.

The date of the LaRocque Order

As I have already stated, Reasons for Judgment on liability were handed down on March 15, 1990 and on damages on June 8, 1990. The LaRocque order was issued with regard to the future care and

future loss of earning capacity claims. My reasons provide for the addition of the increment (represented by the then current rate of interest applicable to monies in court under the Court Order Interest Act R.S.B.C. 1979 c.76 and the rate of 5%) thirty days after the date of a judgment, June 8, 1990.

Counsel complains of the long delay in the entry of the order which still has not been entered. I am not fully aware of the nature or extent of the problem although as I say some matters were left outstanding at the time of the June 8, 1990 damages' judgment. Counsel says that the plaintiff will suffer a substantial loss of interest between the trial date, September 11, 1989 and July 8, 1990 when the LaRocque order took effect. He argues with regard to the LaRocque decision:

> The apparent assumption behind the judgment was that there would not normally be much of a time gap between the date of the trial and the date of pronouncement where there is a gap that would cause a substitutional loss of interest. The logical extension of the decision would be to make interest payable from the date of trial.

Counsel argues that I should order the payment of interest at the commercial rate from the date of trial to the date of payment of the judgment monies.

Counsel also argues that it would be unjust to deny the plaintiff prejudgment interest on all items entitled to prejudgment interest to the date that the final order is entered. He cites Emil Anderson Construction Co. Ltd. et al v. British Columbia Railway Company (1988) 31 B.C.L.R. (2d) 223 (B.C.S.C.), particularly at pages 225 and 226.

I do not agree with counsel's interpretation of LaRocque or Emil Anderson. In LaRocque, the court was concerned with the fact that the judgment, once it was pronounced, had not been paid, and that this affected the actuarial calculations and resulted in a lesser income stream than that which the judge intended to award. The court was not concerned with interest but rather a further damage award "the increment", although it was calculated like interest. The point is that the court was dealing with a situation where the judgment was not paid shortly after pronouncement. Here the LaRocque order which I made covers the situation which was before the court in LaRocque. The problem addressed here is a different one, the question being whether the plaintiff should be entitled to interest on future damages assessed as of June 8, 1990, prior to the time that they were assessed, i.e., from the trial date to the date of entry of the order.

Counsel for the defendant argues that the LaRocque Order cannot take effect prior to the date of the quantum judgment, June

8, 1990, because prior to that date the defendant could not discharge his liability since it had not been quantified. Again, the plaintiff is not being kept out of his money during the period in question. Counsel also referred me to the line of cases which have held that no party should be prejudiced by the act of the court, including the court's delay in delivering its reasons for judgment.

The court has jurisdiction in "exceptional circumstances" to antedate a judgment by declaring it as having being delivered nunc pro tunc as of the date in which argument was concluded. This was done by Aikins J., as he then was, in Hubert et al v. DeCamillis et al (1963) 44 W.W.R. 1 (B.C.S.C.). In Hubert, at the conclusion of the trial nothing remained for either counsel or the parties to do, and judgment was reserved solely to enable the learned judge to consider the evidence and submissions of counsel. The plaintiff died before reasons were handed down. Obviously the death of the plaintiff in such circumstances constituted "something exceptional in the facts to justify the making of the order". However, it would seem that the courts, at least to date, have not been prepared to antedate a judgment simply in order to allow the plaintiff to collect interest. See Crown Zellerback Canada Limited et al v. R. In The Right of British Columbia (1979) 13 B.C.L.R. 276 (C.A.) and in particular the cases referred to therein.

Counsel for the defendant then argues that the defendant should not be prejudiced by the court's delay in delivering reasons for judgment. Counsel for the plaintiff, of course, advances the same argument. I would have preferred lengthier briefs and arguments on this issue. However, the case is going to the Court of Appeal and it no doubt will be dealt with at that time. On the brief arguments of counsel, and the few cases to which I was referred, I have concluded that the LaRocque order cannot be predated to the trial date, nor can the damages' judgment be predated to the trial date, so as to attract interest on the "future" damages over the period of time referred to.

The defendant is not responsible for the postponement of the quantum judgment and until that judgment came down there was no obligation on the defendant to pay anything and no sum which would attract interest or to which an increment could be added. There could not be any wrongful withholding of those monies until the quantum judgment came down. While it might be said that the postponement of the quantum judgment resulted in a withholding of the plaintiff's monies, it could not be said that such withholding was wrongful or attributable to the defendant. It was a result of the ordinary court process in the delivery of reasons for judgment.

Finally, I turn again to counsel's written argument, which I do not recall being referred to orally, that there should be prejudgment interest on all items entitled to prejudgment interest from the date of the accident to the date that the order is entered. The argument is said to be based on Emil Anderson. It seems to me that prejudgment interest should be payable up to the date that all substantial matters in the action have been determined. In this case the date would be June 8, 1990, unless it can be said that substantial matters remained to be determined thereafter. Again, the statutory rate of interest on a judgment runs from the date of pronouncement of the judgment as that is the date from which the plaintiff becomes entitled to the judgment debt, and not from the date in which judgment is finally entered.

Counsel also requests that I fix the scale under which the costs will be assessed. He suggests scale 5 which relates to matters of unusual difficulty or importance. In my opinion, the scale should be scale 4 which relates to matters of more than ordinary difficulty. I refer to both liability and quantum judgments.

THE DEFENDANT's APPLICATIONS

Counsel requested that I reconsider my decision fixing the prejudgment interest rate at 7%. He has referred me to the Court

of Appeal's decision in Graham v. Grant (1990) 46 B.C.L.R. (2d) 151 (C.A.). He says that the interest rate should have been fixed at 5%.

It seems to me that the interest rate will be argued in the Court of Appeal regardless of whether or not I reconsider and change the rate found. Hence, I do not propose to reconsider my decision in this regard.

Defence Counsel also referred me to pages 446 and 447 of the damages' judgment whereat I seemingly questioned the rate claimed for an individual aide in the classroom. As I recall, I was not able to ascertain whether the rate being charged was the rate for a basic care giver or a skilled person such as a teachers' aide. I recall that different figures were given and that the defence witness, Mrs. Pinili, acknowledged that her figures were tentative in that increases were about to happen. The evidence is still not clear to me and I am not satisfied that the figure I used is not fairly accurate given the fact that even the lower rates were subject to raises some of which have no doubt occurred since June 8, 1990. Hence, I have decided to leave the rate as found or used in the judgment.

Finally, I urge counsel to settle their clients' differences and to bring this matter to as early a conclusion as is possible at this level.

December 20, 1990
Vancouver, B.C.

J.W. Hood J.