No. SC 95/82
Prince Rupert Regist

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THOMAS EDGAR DALZELL

PLAINTIFF

AND:

GORDON LONGFORD VIERECK and
ROBERT GORDON VIERECK

DEFENDANTS

THE HONOURABLE R.T. ERRICO
LOCAL JUDGE

REASONS FOR JUDGMENT

Counsel for Plaintiff — A. Wilson, Esq.
Counsel for Defendants — D. Byle, Esq.

Place of Hearing — Prince Rupert, B.C.
Date of Hearing — October 10, 1985

REASONS FOR JUDGMENT

The parties have concurred in the stating of a special case for the opinion of the Court pursuant to Rule 33 of the Rules of the Court.

The question put to the Court for determination is:

> "Which aspects, if any, of the Plaintiff's claim for general and special damages against the Defendant, arising from the Plaintiff's involvment in a motor vehicle accident alleged to have been caused solely by the negligence of the Defendant, survived the death of the Plaintiff, if the Plaintiff in fact dies from causes unrelated to the said motor vehicle accident?"

The claim for general damages is set out in Paragraph 7 of the special case as follows:

> (a) "Permanent inability to maintain employment from the date of the accident;
> (b) Restriction of recreational pursuits of a physical nature;
> (c) Restriction of social activities of a physical nature;"

The special case further states, as paragraph 9 and 10:

> "9. The Plaintiff dies of cancer on February 19, 1984.
>
> 10. The death of the Plaintiff was not caused by, nor was it in any way related to, the motor vehicle accident as aforesaid."

At the commencement of argument, counsel agreed that the only head of damage that remained in dispute between them and the only issue they wish the Court to rule upon was whether, in these circumstances, the claim for loss of amenities of life survived the death of the Plaintiff.

Submissions of counsel were far reaching, but the narrow point to be decided is whether the claim for loss of amenities of life falls within s.66 (2)(a) or s. 66(2)(b) of the Estate Administration Act. If it falls within s. 66 (2)(b), it would not be barred, **if it falls** within s.66 (2)(a),it would be.

Section 66(2) of the Estate Administration Act reads as follows:

> "The executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, except that recovery in the action shall not extend
>
> a) to damages in respect of physical disfigurement or pain or suffering caused to the deceased;
> b) if death results from the injuries, to damages for the death occurred before February 12, 1942; or
> c) to damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died,
>
> and the damages recovered in the action form part of the personal estate of the deceased; but nothing in this section shall be in derogation of any rights conferred by the Family Compensation Act."

That loss of amenities of life or loss of enjoyment of life as it is sometimes described, falls within s. 66(2) of the Estate Administration Act, has been settled by the British Columbia Court of Appeal in Child v. Stevenson [1973] 4 W.W.R. 322. In that case, the deaths involved were caused instantaneously by the accident. The trial Judge awarded damages for loss of amenities of life stating that although he suspected the failure to exclude a claim for loss of amenities to be a mishap of draughting of the legislation, because of the wording of the legislation he had to allow such a claim.

Branca J.A., for the Court, reviewed the history of the legislation and in particular pointed out that when this legislation was originally passed in 1934 and amended in 1942, to further exclude damages for death, or for the loss of expectation of life, if death results from such injuries, loss of amenities was not recognized as a separate head for awarding damages and was never in the contemplation of anyone. Branca, J.A. at p. 330 then states,

> "It is obvious that when the Legislature realized that s. 71(2), as originally enacted, did not exclude all items of general damages, but specifically left open damages for the shortening of life, it then closed the door effectively by excluding specifically 'shortening of life', which the judicial decisions had dealt with after 1934, and then did away with all right to damages for death, 'if death resulted from such injuries'. This wording, in my judgment, excluded everything, including the specifically mentioned items."

Branca, J.A. goes on to deal further with the loss of amenities at p. 331, where he states,

> "I desire to add a word in conclusion upon the loss of amenities. There is no doubt but that loss of amenities is a term which now denotes the inability of an injured plaintiff, after

> being injured, to pursue those items which went to make up a happy life. It is sometimes closely allied to 'disfigurement' and 'pain and suffering'. It is a difficult thing to assess as a separate item of damage and, of course, an item which depends greatly upon the expectancy of life of the party injured. If there is no expectation of life, it is difficult to visualize how loss of amenities might be measured in damages, and certainly that consideration would make it much more difficul to put a price tag on that item." (my emphasis)

In Crosby v. O'Reilly et al (1974) 51 D.L.R. (3d) 555, a decision of the Supreme Court of Canada, which involved legislation similar to our Estate Administration Act and was again a decision where the deceased died instantly as a result of the accident, Laskin, C.J.C. for the Court deals with the issues of loss of amenities of life and shortened expectation of life and at p. 558 states,

> "Turning to the question of the loss of the amenities of life as a second head of damage in a survival action in tort brought by the deceased's personal representative, I am of the opinion that the Alberta Appellate Division correctly rejected the present appellant's submissions for its recognition as such. I say nothing about it as a separate head of damage in an action by an injured living person, be he or she permanently unconscious or not, nor about its relation in that connection to a claim for shortened expectation of life. Where, however, the claim is asserted in a survival action as here, I can see nothing but duplication of the recognized claim for a shortened expectation of life, even if it be the case that in a living person situation loss of the amenities of life may call for a larger award than would be given for loss of expectation of life along."

It can be seen that in both Crosby v.O'Reilly and Child v. Stevenson, recognition is given to the claim for loss of amenities as separate to and addition to loss of expectation of life where the Plaintiff survives but that where the victim dies instantaneously from the accident, there is no claim for loss of amenities. This must be so, for there must be a period of life in which the loss of amenities can be suffered. Where there is a period of life during which there can be suffered a loss of amenities and in fact there is a loss

of amenities, then in my view, loss of amenities, which is a separate head of damages, can be available even in a survivor action unless otherwise taken away by statute.

Loss of amenities as a separate head of damage is now recognized even though in making the award for non-pecuniary damages, a single figure is usually awarded for all of the items that make up the award of non-pecuniary damages.

In Andrews et al v. Grand & Toy Alberta Ltd. et al (1978) 83 D.L.R. (3d) at p. 452, Dickson, J. as he then was for the Court at p. 478 as states,

> "It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is a sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that these losses have the common trait of irreplaceability, favour a composite award for all non-pecuniary losses." (my emphasis)

In assessing the quantum of a loss of amenities in each particular case, the functional approach to assessing damages is now the proper approach. In Lindal v. Lindal (1981) 34 B.C.L.R. 273 S.C.C., Dickson, J. (as he then was) for the Court referred to the Andrews decision and at p. 279 recapitulated what the Supreme Court of Canada had held in Andrews,

> "The Court adopted the third approach, the 'functional' which, rather than attempting to set a value or lost happiness, attempts to assess the compensation required to

> provide the injured person with reasonable solace for his misfortune. Money is awarded, not because lost faculties have a dollar value, but because money can be used to substitute other enjoyments and pleasures for those that have been lost."

In Knutson v. Farr, unreported, the British Columbia Court of Appeal held that the functional approach applied when considering awards to the unconscious victim and that Lindal v. Lindal overruled the earlier decision of the Supreme Court of Canada in The Queen v. Jennings (1966) S.C.R. 532 and that accordingly where there is no awareness on the part of the victim and the victim cannot receive solace from the award of money damages, there are no damages available to the victim for, inter alia, loss of amenities. Does this principle apply to this deceased victim who cannot receive solace personally from an award of money damages?

Section 66 (2) of the Estate Administration Act reads in part as follows:

> "The executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living,(my emphasis) except that recovery in the action shall not extend...."

In my view, the rights which this section preserves are the rights which were vested in the deceased at the time of his death apart from those rights specifically excluded by the section. If the deceased, "if living" had a claim for damages for loss of amenities applying the functional approach then that claim survives his death unless taken away in the legislation. Such a claim, because it can only apply to the period of his life for which he

suffered the loss, would apply for the period from the date of the accident to the date of his death.

There are three decisions in British Columbia of which I have been made aware of dealing directly with the issue before me.

In Love v. Bennett (1979) 9 B.C.L.R. 397, Paris C.C.J. (as he then was) reviewed the decisions of Child v. Stevenson and Crosby v. O'Reilly. The learned Judge analyzed these decisions and concluded that in a survival action a claim for loss of amenities of life become subsumed under a claim for loss of expectation of life and that as s.71(2)(b), (now s.66 (2)(b)), of the Estate Administration Act, did away with damages for loss of expectation of life and for death only when death resulted from the injuries suffered, where death did not result from those injuries, the claim for loss of amenities survives.

In Timothy et al v. Bowell McLean Motor co. Ltd. et al, Prince Rupert, unreported, 48/82 MacDonell J. in ruling on his proposed charge to the jury, came under a similar conclusion and found that the claim for loss of amenities survives under 2. 66(2)(b) of the Estate Administration Act.

The opposite conclusion was reached by Taylor J. in Cromwell v. Dave Buck Ford Lease Ltd. et al (1984) W.W.R. 322. In a careful analysis of the problem, Taylor, J. concluded that a claim for loss of amenities was concerned with the period of time from the accident to the date of death. This distinguished that case, and the case at bar, from the facts in Child v. Stevenson and Crosby v. O'Reilly.

Taylor J., then examined s. 71(2)(a), (now s. 66 (2)(a)), of the Estate Administration Act which excludes any claim for pain or suffering in all cases and concluded that loss of amenities is included in pain or suffering by virtue of the interpretation of that section in Child v. Stevenson and that pain or suffering, including loss of amenities, has to do with the pain of life remaining and not the period of life lost, that is, not with loss of expectation of life.

Taylor J., at page 326, refers to Child v. Stevenson as finding the intent of the legislative, was "general damages for.....death (of the person injured) should not be revived." On the facts of the case before him, Taylor, J. found that there could not be an assessment of damages for loss of enjoyment of life (amenities) apart from the claim for pain and suffering. He therefore concluded that the claim for loss of amenities, being an extension of pain and suffering, was barred by the statute even in situations where the victim died of circumstances other than as a result of the accident.

Paris, C.C.J. (as he then was) in Love v. Bennett, in commenting on both Child v. Stevenson and Crosby v. O'Reilly, says at p. 400:

> "Thus both the Supreme Court of Canada and the British Columbia Court of Appeal have held that, although normally a separate head of damages, a claim for loss of amenities in a survival action becomes subsumed under a claim for loss of expectation of life. It is significant that they did not consider it to be part of a claim for pain and suffering, although it undoubtedly had its origin historically as an extension of that claim. That analysis, unless and until modified by a court of jurisdiction higher than this one, is binding on me."

The claim for damages for loss of amenities is subsumed under the claim for loss of expectation of life, in the sense that, where death immediately followed the accident, as in Child v. Stevenson and Crosby v. O'Reilly, there is no period of time when the victim could suffer loss of amenities of life. Where there is a period of time when loss of amenities could be suffered, they remain a head of damages to be assessed unless the right to such damages has been removed by statute.

Child v. Stevenson and Cromwell v. Dave buck Ford, both find that loss of amenities are an extension of the claim for pain and suffering. Love v. Bennett comes to a different result because as I understand those reasons, the learned Judge held that both Child v. Stevenson and Crosby v. O'Reilly hold that loss of amenities in a survival action, become subsumed in the claim for loss of expectation of life in the sense that loss of amenities is included in the claim for loss of expectation of life and thus falls within 2. 61 (2)(b) of the Estate Administration Act and where death does not result from the injuries, remains available as a head of damages to be assessed.

With respect, I am of the view that in survival actions where there is instantaneous death, the reason there is not a claim for amenities, is that there is no period of time to suffer such a loss and that Child v.Stevenson and Crosby v. O'Reilly do not decide that loss of amenities are not a part of the claim for pain and suffering.

For these reasons, I find that loss of amenities in this claim before me, where the Plaintiff died and the death of the Plaintiff was not caused by or related to the motor vehicle accident in which he suffered injuries, is included in the head of damage of pain or suffering found in s.62(2)(a) of the Estate Administration Act and accordingly failed to survive the death of the Plaintiff.

January 23 , 1985

R.T. Errico, L.J.S.C.