



Date: 19980625
Docket: 22473
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LOUIS RENE GELINAS, Guardian Ad Litem for DESIREE GELINAS,
and the said LOUIS GELINAS

PLAINTIFFS

AND:

MARIE LUCILLE NADINE GELINAS and LOUIS GELINAS

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BAUMAN

Counsel for the Plaintiffs:

Dick Byl

Counsel for ICBC:

Terrence P. Matte

Marie Lucille Nadine Gelinas and
Louis Gelinas:

Did not appear

Place and Date(s) of Hearing:

Prince George, B.C.
12 February 1998

I. INTRODUCTION

[1] This Rule 18A application is brought by the Guardian *Ad Litem* of the infant plaintiff, Desiree Gelinas.

[2] On 20 July 1991, at about 6:00 p.m., Desiree was involved in a single vehicle accident on Highway 97 north of Quesnel, British Columbia, near the Cottonwood River Bridge.

[3] The car in which Desiree was a passenger was driven by her mother, the defendant, Marie Lucille Nadine Gelinas. Ms. Gelinas failed to negotiate a sharp curve in the road and the vehicle struck a telephone pole. In addition to the infant plaintiff, there were two other adult passengers in the vehicle.

[4] Desiree was three years old at the time of the accident. Her birthdate was 5 May 1988.

[5] Liability is not in issue.

[6] Desiree suffered a significant head injury. While she has now essentially recovered, she has been left with permanent cognitive difficulties which I will describe more fully below.

[7] Before the accident, Desiree was a physically healthy child. She was somewhat precocious in speech and vocabulary.

She was socially adept and she was characterized by her mother as very outgoing.

II. HOSPITALIZATION

[8] An ambulance arrived at the accident scene at about 6:45 p.m. The ambulance crew noted that Desiree was "drowsy" and "lethargic". She registered a ten on the Glasgow Coma Scale.

[9] She was transported to G.R. Baker Memorial Hospital in Quesnel. Doctors noted a severe concussion. X-rays disclosed an occipital fracture and a right post occipital temporal haematoma. At 9:25 p.m. that evening, Desiree registered a three on the Glasgow Coma Scale.

[10] She was transported to the Prince George Regional Hospital later that evening. Her CT Scan on admission disclosed swelling of her brain. Desiree was admitted to intensive care and aggressive treatment for her brain swelling ensued.

[11] She continued to experience high intracranial pressure for the next 48 hours. She shortly developed bilateral aspiration pneumonia. By 26 July, Desiree was awake and was taken off the ventilator.

[12] During the initial days following the accident, Desiree had cortical blindness. It was caused by the severe right occipital contusion.

[13] She remained in the Prince George hospital until 12 August. Her condition gradually improved over the course of her stay.

[14] At Prince George Regional Hospital, Desiree was in the charge of Dr. S.R. Tulsian. He diagnosed a severe head injury with the fracture of the skull and cerebral edema.

[15] Because of the limited facilities for long term rehabilitation for children at the Prince George Regional Hospital, Desiree was transferred to Vancouver's Sunny Hill Hospital on 12 August 1991.

III. SUNNY HILL HOSPITAL AND THEREAFTER

[16] Desiree was at Sunny Hill for about four weeks. She was discharged on 16 September 1991. Her improvement at the hospital was dramatic. During her stay, her vision improved significantly.

[17] Various professionals observed Desiree. It was noted that her gross and fine motor skills were age appropriate; that her conceptualization was at age level in many areas; and that

her articulation, understanding and use of language are at or above expectations for her age.

[18] Further cognitive assessment was, however, thought to be required.

[19] Since her discharge from Sunny Hill on 16 September 1991, Desiree has been assessed on three occasions by Dr. Mel Kaushansky, a neuropsychologist and an educational and rehabilitation consultant. He has prepared reports dated 22 April 1994, 13 October 1995 and 12 November 1996.

[20] In his 1994 report, Dr. Kaushansky assessed Desiree at age 5 years 11 months:

...The neuropsychological profile indicates a youngster with average intellectual abilities and average abilities in most domains tested. Although some weaknesses could be ascribed to brain dysfunction, the profile is more suggestive of normal functioning with some developmental variability, expected in a child of 5 years 11 months who has moved and lived in a number of situations in her few years.

Mother reports no behavioural problems or other untoward difficulties.

This youngster seems to have made very dramatic progress from her injury; however, it is unclear how she will fair in future years as learning demands increase. Certainly, there are few residual problems that have occurred since the accident, yet, one should be most cautious in watching her progress.

[21] In his 1995 report, a note of caution was sounded by Dr. Kaushansky:

This the second time that I have seen this youngster. In most areas of intellectual functioning as noted on the testing and consistent with home and school reports, Desiree is doing well - her performance is consistent with her Grade 1 performance.

However, a weakness in the area of perceptual motor functioning has arisen, and clearly, this will have to be monitored. As mentioned above, this might be due to developmental issues. It is too premature to ascertain if such weaknesses will display themselves in her academic work or whether she may outgrow or compensate for such weaknesses. However, they may well manifest in later years, with handwriting acquisition and, later on, with Math and constructional abilities. The difference between Verbal and Performance scales on the WISC-3, as well as perceptual skills, does suggest some possible brain dysfunction. This is not to suggest that there may be an absence of problems acquiring verbal skills - just that, at this time, such problems have not presented themselves and, in fact, her verbal skills seem quite strong.

[22] By his final report of November 1996, Dr. Kaushansky had become quite concerned:

In summary, this young girl, now 8 years of age, evidenced a sharp decrease in her level of global intellectual functioning since last tested - presently, Desiree is functioning at about the 8th percentile (Full Scale IQ) or at the "borderline/slow learner" range. In my view, such a precipitous drop would not be attributable to factors other than the severe brain injury that was sustained at the time of the injury. Further, as she gains in age, her skills may well continue to decline - this does not bode well for her future. Although she is doing adequate to above average work at school, the skills that she is presently applying are basically rudimentary in nature. As I indicated in my two previous reports, and as corroborated and amplified by these current

findings, I believe her academic, and by extension, her vocational future, are in jeopardy.

It is my strong opinion that any matters of litigation should be postponed well into her teen years. In the meantime, I would recommend tutoring and supportive assistance in school, even though at the present time her academic performance appears not to be problematic. I would prefer to be on the defensive, rather than wait until there is a noted decrease in skills. It is heartening to note that there has been no further decrease in her level of psychosocial functioning. However, the other factors do not portend well for her future.

I do not believe it is important to complete a full neuropsychological assessment in the near future, however, academic testing to delineate the level of strengths and weaknesses on a yearly basis in conjunction with the school based team would be appropriate.

Please do not hesitate to contact me if I can be of further assistance on this matter. Kind regards,

[23] Dr. Kaushansky's opinion raises an issue of the appropriateness of dealing with the assessment of Desiree's damages at this time. I will deal with that concern later in these reasons.

IV. DAMAGES

[24] (a) Non Pecuniary Damages

The plaintiff suggests a range of \$150,000 to \$200,000 under this head. The defendant counters by suggesting that an award of \$70,000 is appropriate.

[25] The plaintiff cites, amongst others:

Sammartino v. Hiebert (1997), 37 B.C.L.R. 308 (S.C.),
Ross v. Watts (4 September 1997) Nanaimo S10640
(S.C.) and *Robulack v. Heidecker* (16 July 1997)
Vancouver B950669 (S.C.)

[26] In *Sammartino*, \$175,000 was awarded to a plaintiff who suffered a serious head injury which left him unconscious for two and one-half weeks. His brain injury left him simple, naive and with a poor memory. He was employable only to a limited extent. Williamson J. noted (at 2):

In a word, there is a general view that Sammy, although chronologically aged 20, is more like a boy of ten or twelve years old.

[27] In *Ross*, the teenaged plaintiff sustained a severe head injury which resulted in permanent brain damage.

[28] In addition, he suffered severe injuries to his legs.

[29] His head injury led to the following deficits as found by the learned trial judge (at 67):

fatigue;
memory difficulties;
concentration difficulties;
attention difficulties;
slowed thinking;
slow and inefficient processing of new information;
incoordination of his right leg and hand;
inappropriate behaviour;
emotional difficulties;

depression;
social isolation;
loneliness, irritability and anger;
vulnerable to alcohol abuse.

[30] Mr. Justice Coultas found that the plaintiff would be unable to live independently without permanent assistance and that he would not be competitively employable.

[31] Non-pecuniary damages of \$175,000 were awarded.

[32] In *Robulack*, \$150,000 was awarded to a plaintiff who was left with permanent adolescent traits, such that she was found incapable of managing her own affairs.

[33] I do not perceive that Desiree's head injury currently presents as serious as the injuries in these cases.

[34] She is socially well adjusted and currently doing average work at school. It is noted by Dr. Kaushansky, however, that her testing indicates that she is functioning in the "borderline/slow learner" range and that she will be challenged as school work becomes more difficult.

[35] He feels that her academic and vocational futures are in jeopardy.

[36] The defendant cites cases which are somewhat dated and in which the injuries were much less severe than the ones presented at bar. These cases support a range of \$50,000 to \$70,000 for non-pecuniary damages.

[37] I conclude that an award of \$130,000 is appropriate in the circumstances of this plaintiff.

[38] (b) Loss of Future Capacity

The plaintiff has filed the expert report of Robert Carson, an economist and actuary. Mr. Carson makes a number of appropriate assumptions and takes into account various appropriate contingencies in estimating lifetime age earnings profiles. The plaintiff submits that the appropriate profile for use in the case of this plaintiff produces a present value range of \$320,000 to \$410,000.

[39] Taking into account a further contingency of 25% to 30%, representing the plaintiff's residual employment potential, counsel suggests a range of \$200,000 to \$250,000 under this head.

[40] The defence, on the contrary, suggests a range of \$150,000 to \$170,000.

[41] I accept, of course, that in assessing the value of Desiree's "lost asset" - her ability to earn income in the future - I am not engaged in a purely mathematical exercise.

[42] Mr. Carson's evidence is of assistance to the court, but in the end, as the plaintiff frankly notes, the court is left "in a sea of contingencies".

[43] In weighing the various contingencies presented here, in the light of Dr. Kaushansky's prognosis for this little girl, I believe that the plaintiff is too pessimistic in estimating Desiree's residual employment potential.

[44] On the whole of the evidence, I award the sum of \$180,000 under this head.

V. THE EFFECT OF AVAILABLE INSURANCE PROCEEDS

[45] It will be noted that Dr. Kaushansky was strongly of the view that this litigation should be postponed until well into Desiree's teen years.

[46] The plaintiff recognizes that in the exercise of the court's *parens patriae* jurisdiction, this concern must be addressed.

[47] With the consent of the defendant, I was informed that insurance proceeds of only \$200,000 are available. There was no underinsured motorist protection and recovery by the infant from her mother is neither feasible nor realistic.

[48] Another individual who was injured in the accident has already settled for \$80,000. With that in mind, the plaintiff has produced calculations of the plaintiff's actual recovery in a scenario where her award ranged from \$325,000 to \$500,000. In fact she would only collect an additional \$12,000 in the highest award scenario.

[49] Practically, counsel submits that the plaintiff will not enjoy a significant additional recovery if we await the years until she is in her mid to late teens.

[50] I agree, and in the circumstances of this case, I believe that justice requires a disposition of the litigation at this time.

VI. DISPOSITION

[51] The plaintiff will have judgment accordingly against the defendant Marie Lucille Nadine Gelinas.

Vancouver, B.C.
25 June 1998


Bauman J.