COURT OF APPEAL FOR ONTARIO

CITATION: Dunk v. Kremer, 2018 ONCA 274
DATE: 20180320
DOCKET: C62361

Sharpe, Juriansz and Miller JJ.A.

BETWEEN

Meaghan Dunk and Shelby Dunk

Plaintiffs
(Respondents)

and

Geoffrey Michael Kremer, Matthew Rushton and Robert Rushton

Defendants
(Appellants)

Alan Rachlin, for the appellant

Paul J. Pape, for the respondent

Heard: March 15, 2018

On appeal from the judgment of Justice Susan E. Healey of the Superior Court of Justice, dated June 3, 2016.

REASONS FOR DECISION

[1] In this personal injury action, the defendant-appellants admitted liability. The sole issue for the jury was damages. The jury awarded the respondent substantial damages for future loss of income and cost of medical care and

$225,000 general damages for pain and suffering. This appeal concerns the general damages award.

[2] As a result of a motor vehicle accident, the respondent suffered a fracture of her tibia and an intra-articular fracture of the right talus bone requiring orthopedic surgery. She testified that she had suffered considerable pain and restriction of movement as a result of the fracture. The medical experts agreed that she would likely require further surgery in the future and that she would suffer on-going pain and restriction of movement on account of arthritis in her ankle.

[3] The appellants raise three grounds of appeal, arguing that the trial judge erred in:

(1) restricting the scope of testimony of the appellants' expert;

(2) failing to declare a mistrial as a consequence of inappropriate closing submissions by the respondent's trial counsel; and

(3) failing to provide sufficient guidance to the jury on the appropriate range for non-pecuniary damages.

1. Restriction on the testimony of the appellants' expert

[4] The appellants retained an expert but did not provide the respondent with a signed Rule 53 report until part-way through the trial. The appellants did not indicate that they would be calling their expert, Dr. Rizek, although they had

given the respondent an unsigned copy of his report after the respondent's orthopedic expert, Dr. Daniels, had testified, the appellants moved for an order permitting them to call their expert. The trial judge ruled that the expert could be called despite the non-compliance with Rule 53, but that he would be restricted to the four corners of his report. In particular, he would not be permitted to comment on developments that had arisen after he had prepared his report. The respondent's experts had served supplementary reports in view of updated medical information and the appellants' expert had not filed a response.

[5] On appeal, the appellants say this order unfairly limited the scope of Dr. Rizek's evidence as he was unable to comment on Dr. Daniels' oral evidence regarding the high probability the respondent would develop arthritis in her upper ankle joint necessitating a fusion of that joint as well leaving her "quite disabled". Dr. Rizek's report had not addressed that matter.

[6] This situation was largely the creation of the appellants and we see no error on the part of the trial judge in ruling as she did. The appellants were slow to deliver a proper Rule 53 report or to indicate that the expert would be called. They had the appellants' experts' supplementary reports well in advance of trial and failed to have Dr. Rizek respond. Dr. Daniels had already testified when the motion regarding the scope of Dr. Rizek's evidence was argued and the appellants made no reference on that motion to the problem they have identified on appeal regarding the upper ankle. Nor have they given any indication, either

to the trial judge or to this court, what Dr. Rizek would have said about the upper ankle. We are left to speculate as to whether any further evidence from Dr. Rizek would have assisted the appellants. As the trial judge observed, if Dr. Rizek were allowed to give evidence on developments not discussed in his report, it might require the respondent to split her case, recall her expert and incur significant additional expense and possible trial delay.

[7] We agree with the respondent that this was a discretionary decision for the trial judge to make. She gave clear and cogent reasons in her ruling and we see no ground for appellate intervention.

2. Respondent's trial counsel's closing address

[8] The appellants submit that the trial judge erred by refusing to declare a mistrial following the respondent's trial counsel's closing address to the jury. As the trial judge found, the closing address of the respondent's trial counsel, Mr. Marc Lemieux, was inappropriate and inflammatory in a number of ways. Of particular concern were counsel's comments regarding the limitations of Dr. Rizek's evidence. Those comments were unwarranted and unfair in light of the trial judge's ruling limiting the scope of his evidence, particularly given counsel's acknowledgment on the record at that time that it would be inappropriate for him to make such comments to the jury.

[9] The mistrial motion was argued for a full day and the trial judge explained in her reasons why she had concluded that the mischief of the closing could

adequately be dealt with by a correcting instruction. She prepared and reviewed with counsel a detailed instruction touching on the most significant areas of complaint.

[10] We certainly do not condone the respondent's trial counsel's conduct. His comments exceeded the limits of forceful advocacy and transgressed the line of what is acceptable. Conduct of this nature risks interfering with the integrity of the trial process and resulting in a mistrial with costs consequences that, in appropriate cases, might well have to be borne by the offending counsel.

[11] On the other hand, we do not accept the contention that this court should interfere with the trial judge's discretion not to order a mistrial but instead to instruct the jury clearly and strongly to disregard the objectionable parts of counsel's closing. It is well-established that the trial judge is in the best position to determine whether a mistrial is required to deal with an inflammatory closing address. A mistrial is the remedy of last resort and the trial judge's decision to deal with the matter by way of instruction rather than mistrial attracts deference in this court.

[12] Here, the trial judge gave a very clear and strong instruction to the jury to disregard the problematic portions of counsel's closing. The trial judge carefully itemized the objectionable aspects of the closing and clearly directed the jury to ignore those passages, explaining how and why counsel had gone astray. At the

end of the day, we are not persuaded that when the record is considered as a whole, there was a miscarriage of justice requiring this court to order a new trial.

3. Quantum of the pain and suffering award.

[13] The appellant submits that the trial judge erred by failing to instruct the jury that the range for general damages suggested by the respondent, $175,000 to 225,000 was too high. The appellant further argues that the jury's award of $225,000 for general damages was so inordinately high as to warrant appellate intervention.

[14] The trial judge discussed with counsel the ranges they intended to offer the jury before they made their closing addresses. Appellants' trial counsel submitted that there was no authority to support the respondent's proposed range. The trial judge observed that there was no case on all fours. In the absence of any authority that the respondent's proposal was outside an accepted or established range, she declined to offer any comment. She did, however, modify her proposed charge by adopting some of the language suggested by counsel for the appellant.

[15] We see no error. Again, this was a matter for the trial judge's discretion. The respondent was only 18 years old at the time of the accident and there was evidence that it was going to cause her significant and serious long-term pain and impairment. She had already suffered several years of pain. The restriction

imposed by the injury had caused her to alter her post-secondary education and career plans, and interfered with her day-to-day activities. It was likely that further surgery would be required and the respondent faced the prospect of increasing and indeterminate pain and impairment from arthritis as she aged. In these circumstances, the trial judge did not err in law in declining to comment on the range for general damages suggested by the respondent's counsel.

[16] Nor do we agree that the jury's award was so inordinately high as to call for appellate intervention. Given the deference accorded to jury damage assessments, the nature of the injury and the likelihood that, in the words of the appellant's expert, that she would likely require further surgery in the future that would leave her "quite disabled", we conclude that there is no basis for this court to interfere.

4. The Cumulative effect of the alleged errors

[17] Finally, we have not been persuaded by appellants' counsel submission that there is a "synergy" to the alleged errors and their cumulative effect warrants a new trial.

Disposition

[18] Accordingly, the appeal is dismissed with costs to the respondent fixed at $30,000 inclusive of disbursements and applicable taxes.

"Robert J. Sharpe J.A."

"R.G. Juriansz J.A."

"B.W. Miller J.A."