COURT OF APPEAL FOR ONTARIO

CITATION: MacLeod v. Marshall, 2019 ONCA 842
DATE: 20191025
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Sharpe, van Rensburg and Thorburn JJ.A.

BETWEEN

Roderick MacLeod

Plaintiff (Respondent)

and

William Hodgson Marshall,
The Basilian Fathers of Toronto,
The Sudbury Catholic District School Board,
The Roman Catholic Episcopal Corporation of
The Diocese of Sault Ste. Marie

Defendant (Appellant)

Chris T. Blom and Susan Metzler for the appellant, The Basilian Fathers of Toronto

Paul Pape, Shantona Chaudhury, and Cristina Senese for the respondent, Roderick MacLeod

Heard: September 6, 2019

On appeal from the judgment of Justice Arthur M. Gans of the Superior Court of Justice, sitting with a jury, dated April 26, 2018 and from his order dated August 29, 2018, with reasons reported at 2018 ONSC 5100.

Thorburn J.A.:

OVERVIEW

[1] This is an appeal by The Basilian Fathers of Toronto ("the Basilians") of a jury verdict and an order for prejudgment interest. The Basilians claim the jury instruction on how to assess damages for past income loss was wrong, the punitive damages award was excessive, and prejudgment interest ought not to have been awarded at the rate of 5%.

[2] The Respondent, Roderick MacLeod, was born in 1949. He was sexually abused more than 50 times by Father Marshall while he was a student at St. Charles College, a school run by the Basilians.

[3] The Basilians were aware that Marshall was abusing boys before they ordained him as a priest. Marshall taught for approximately 36 years and the Basilians repeatedly moved him to different schools when complaints of sexual abuse arose. The jury heard evidence from four other victims of Marshall's abuse. In separate criminal proceedings, he pleaded guilty to sexually abusing 17 minors.

[4] MacLeod testified that he failed Grade 12 because he skipped school to avoid Marshall. He eventually graduated from high school and attended university. He then served in the military with exemplary reviews, achieving the rank of Captain. He said he left the military because his commanding officer reminded him of Marshall and he wanted to get away from him. He pursued other opportunities, first as an entrepreneur, then as a financial advisor, and later a physiotherapist. His two marriages ended in divorce. In 2010, he listened to a radio show about

sexual abuse, which caused him to reflect on his own experience. In 2012, he initiated proceedings.

[5] This case went to trial in 2018. The parties agreed that MacLeod had established on a balance of probabilities that:

1. Marshall had a duty of care to MacLeod;
2. Marshall breached his duty of care to MacLeod; and
3. MacLeod suffered injury as a result of the abuse for which the Basilians are vicariously liable.

[6] The Basilians agreed that the abuse caused or materially contributed to MacLeod's general damages, aggravated damages, and future care costs. They did not admit that the sexual abuse resulted in any loss of income or should attract punitive damages.

[7] The jury awarded MacLeod $350,000 in general damages, $75,000 in aggravated damages, $56,400 in future treatment costs, $1,588,781 lump sum for income loss (to include both past and future), and $500,000 in punitive damages. The jury award exceeded all offers to settle. The trial judge awarded MacLeod prejudgment interest on general and aggravated damages at the annual rate of 5%.

[8] The Basilians raise three grounds of appeal:

1. the trial judge erred by failing to properly instruct the jury on the burden of proof for claims for past loss of income for sexual abuse;
2. the award of punitive damages was excessive; and
3. the trial judge erred in setting the rate of prejudgment interest at 5% for non-pecuniary damages.

[9] For the reasons that follow, I find that the legal instruction given to the jurors to determine entitlement and quantum of damages for loss of income contained no reversible error. The instruction in respect of punitive damages contained no error and the damages awarded were not so excessive as to call for the intervention of this court. However, the trial judge erred with respect to prejudgment interest.

ANALYSIS

Issue One: The Jury Instruction Regarding Loss of Income

The Parties' Positions

[10] The Basilians assert that Macleod must be able to prove that past loss of income was caused by the sexual abuse on a balance of probabilities. The Basilians claim the trial judge erred in telling the jury that MacLeod's claim for past loss of income had to be proven on a lesser standard of real and substantial possibility, which should only apply to future loss of income.

[11] MacLeod claims that in deciding whether the sexual abuse was the cause of economic loss, the jury was correctly told that they must assess how MacLeod's

life would have proceeded had he not been sexually assaulted. Such hypothetical events need not be proven on a balance of probabilities, but simply on the basis of whether there was a real and substantial possibility that these losses were caused by the sexual abuse, and if so, the percentage chance that that possibility would have materialized. MacLeod relies on the principles enunciated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 27.

> Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood. For example, if there is a 30 per cent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 per cent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. [Citations omitted.]

[12] MacLeod claims that a separate consideration of past and future loss of income does not apply in this case because the sexual abuse occurred while MacLeod was a minor with no established career path. MacLeod also claims that all losses would have occurred *after* the abuse; therefore, all income losses are hypothetical. In these circumstances, the plaintiff need only establish that there is a real and substantial possibility that MacLeod's impaired earning capacity was caused by the abuse.

The Standard of Proof to Establish Entitlement to Damages for Pecuniary Loss

[13] Normally, a plaintiff has the burden of proving that s/he suffered damage as a result of the defendant's wrongful conduct, and if so, the quantum of that damage. This is true in respect of each head of damages: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at pp. 235-236.

[14] The objective of awarding damages for past and future loss of income is to put MacLeod in the same financial position he would have been in, had he not been sexually abused. Past loss of income is income loss between the date of the defendant's wrong and trial, while future loss of income is loss of income after the trial: *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 771-774.

[15] Typically, in the case of an adult plaintiff who was working at the time of the accident, there is a clear benchmark from which to determine whether there was a loss of income and to quantify past loss of income: for example, where a plaintiff was working and earning a given income before an accident and is no longer able to work after the accident, past income can be used to determine what the future income would be. As such, it should be determined on a balance of probabilities.

[16] However, in *Mallett v. McMonagle*, [1970] A.C. 166, at p. 176, cited with approval in *Janiak v. Ippolito,* [1985] 1 S.C.R. 146, at p. 170, Lord Diplock held that:

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its

> ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

[17] In the case of a claim for economic loss following childhood sexual abuse, *both* past and future loss of income claims involve a consideration of hypothetical events because the child had not earned income prior to the assault. The jury must therefore determine not what *did* happen in the past but the chance that something *would* have happened, had the sexual abuse not happened in the past.

[18] This requires a determination of loss of earning capacity, not the loss of actual earnings. Since the plaintiff is not required to prove hypothetical events on a balance of probabilities, the burden of proof for entitlement is that of real and substantial possibility: *Athey*, at para. 27; *Janiak*, at p. 170. This is because we must now consider what kind of career the victim would have had, had he not been sexually abused: *Andrews*, at p. 251.

Application to the Facts

[19] For these reasons, in addressing the issue of economic loss in this case, the jury should have been instructed to:

1. Determine responsibility for the tort on a balance of probabilities: This means the jury had to satisfy themselves on a balance of probabilities that Marshall committed the tortious act of sexually abusing MacLeod resulting in harm;
2. Examine the possibility of economic harm: If responsibility for the tort is established, the jury must evaluate whether there is a real and substantial possibility that MacLeod would have earned more income than he did up to the date of trial and beyond, had he not been sexually abused; and
3. Where a real possibility of economic harm is established, quantify the harm: Where the jury is satisfied that there is a real and substantial possibility that MacLeod would have earned more income, the jury must assess the percentage chance that economic loss would be sustained and quantify damages in accordance with that percentage chance.

[20] In this case, the Basilians admitted liability for general damages, aggravated damages, and future care costs resulting from the sexual abuse. MacLeod therefore established his entitlement to general and aggravated damages and future care costs on a balance of probabilities.

[21] There is no dispute that MacLeod earned less than he would have, had he remained in the armed forces. However, there were several possible reasons for his leaving the armed forces and, through no fault of MacLeod's, it is not clear which cause resulted in the financial loss.

[22] Therefore, in order to establish entitlement to past and future economic loss, MacLeod need only prove there is a real and substantial possibility that the sexual abuse caused his *economic* loss.

Quantification of Damages

[23] Where a plaintiff establishes that there is a real and substantial possibility the sexual abuse caused economic loss, damages are assessed by conducting the following analysis:

1. What economic opportunities the plaintiff might have had, had the sexual abuse not taken place;
2. What further income the plaintiff could have earned, if any; and
3. The chance that the plaintiff would have earned that additional amount, after taking into account the various contingencies.

[24] In quantifying the financial loss, the trier of fact must assess the chance that what the plaintiff says would have happened, would indeed have happened. In such cases, the plaintiff is entitled to compensation, but commensurate with the percentage chance that the plaintiff would have earned that income but for the defendant's actions. Damages are commensurate with the value of the chance of earning that income: *Janiak*, at p. 170; *Mallet*, at p. 176.

[25] In assessing damages in this case therefore, the jury should have been instructed to:

1. Determine what MacLeod's life could have looked like and what economic opportunities he might have had, had the sexual abuse not taken place;
2. Decide what the monetary value is of those possible opportunities, had the sexual abuse not taken place;
3. Estimate the chance that MacLeod would have earned the sum(s) claimed, had the abuse not taken place; and
4. Quantify damages commensurate with the chance that that opportunity would have materialized. Compensation is limited to the degree of probability that the defendant was responsible for the loss.

[26] In doing so, it is desirable that the jury be provided with examples to illustrate the point. For example, if MacLeod had submitted that but for the sexual assault, he could have remained in the armed forces and become a Lt. Colonel, the jury should consider:

1. Whether he could have continued to rise through the ranks to become a Lt. Colonel;
2. What additional money he would have earned if he had attained and remained in that rank;
3. The chance he would have achieved this; and
4. Ensure that the damage award is proportionate to the percentage chance that he would indeed have become a Lt. Colonel with all of the past and future financial benefits that would have entailed.

[27] The implications for plaintiffs where there is an assessment of chance "are far-reaching and not necessarily beneficial to plaintiffs because a 60 per cent probability will only lead to 60 per cent damages, not 100 per cent as formerly was the case." S.M. Waddams, The Law of Damages, loose-leaf ed. (Aurora, Ont.: Canada Law Book, 2010), at para. 13.360; *Andrews*, at p. 253.

[28] The trial judge correctly instructed the jury as follows:

1. The Basilians conceded that MacLeod had established on a balance of probabilities that Marshall had breached his duty of care to MacLeod, leading to general damages, aggravated damages, and costs for future care, for which the Basilians were liable.
2. The Basilians did not agree that Marshall's actions caused MacLeod any pecuniary loss.
3. The threshold test to establish entitlement to damages for pecuniary loss in this case is whether there was a real and substantial possibility that the sexual abuse by Marshall caused MacLeod pecuniary loss. This lower standard applies to both past and future loss of income because the jury is considering not what *did* happen but what *would* have happened had the abuse not taken place. The trial judge instructed the jury that:

> [I]n respect of the income loss claim… the plaintiff need not prove the anticipated loss on a balance of probabilities. He need only satisfy you that there is a real and substantial risk or possibility that these losses have been sustained and will be sustained or realized in the future.

4. In quantifying the damages, the jury must consider the various possible financial opportunities MacLeod could have pursued, the chance that he would have pursued them (bearing in mind the contingencies), and quantify the loss by awarding him the damages commensurate with the chance that MacLeod would have earned that additional income. In assessing damages for pecuniary loss, the trial judge instructed the jury as follows:

> Pecuniary Losses…. This head of damages speaks to the loss of past income and loss of future earnings or future income. In this respect you have to ask yourself, what sort of career would Mr. MacLeod have had but for the abuse?
>
> …
>
> [A]t this stage in your deliberations you're called upon to estimate what the chances were that a particular event or events were likely to happen or would have happened to Mr. MacLeod had the abuse not occurred.
>
> …
>
> But assuming you choose one of these income earning scenarios, your computation at that juncture may not be finished. You have to consider whether there were any contingencies, both negative and positive, that should factor into your deliberations.
>
> Contingencies are factors which are intended to reflect the realistic risk that something could impact someone's earning potential outside of Marshall's wrongful conduct.
>
> …
>
> In this respect, you may find that there are no additional contingencies that should be factored into the equation since they are already contained or subsumed in the average level or earnings with which you were provided, both in and out of the Canadian Forces.
>
> …

> Indeed, there may be positive contingencies that were not considered or anticipated that could have impacted the numbers alternatively. You may also conclude that there was no loss at all on the basis of the defence approach that the changes in jobs had nothing to do with the abuse but for perhaps the one year that he was prepared to concede, namely the one year where he was held back in grade 12.

[29] MacLeod offered five possible income earning scenarios:

1. If he remained in the army until 1992 and retired at the rank of Major, he would have earned an additional $1,036,300;
2. If he remained in the army until 1992 and retired as a Lt. Colonel, he would have earned an additional $1,180,800;
3. If he remained in the army until 2008 and retired as a Major, he would have earned an additional $1,253,100;
4. If he remained in the army until 2008 and retired as a Lt. Colonel, he would have earned an additional $1,532,000; and
5. If he earned the average income of males in the civilian workforce who graduated in the year he graduated, from an Ontario university, he would have earned an additional $1,786,500.

[30] The jury awarded damages for past and future economic loss in the amount of $1,588,781 without explanation.

[31] While the charge might have been put more clearly in respect of the fact that damages for income loss must be commensurate with the percentage chance that the opportunity would have materialized, the trial judge made no reversible error

in articulating the legal principles. The Basilians' counsel did not object to the charge and made no submissions to the trial judge or in his closing to the jury on this issue.

[32] For these reasons, I would dismiss this ground of appeal.

Issue Two: Punitive Damages

[33] The question on an appeal of punitive damages is whether the quantum of damages is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have arrived at it. The more reprehensible the conduct, the higher the rational limits to the potential award: *Whiten v. Pilot Insurance Co*., [2002] 1 S.C.R. 595, at paras. 96, 112.

[34] The factors enumerated in *Whiten*, at para. 113, to determine the blameworthiness of the defendant's conduct include:

1. whether the misconduct was planned and deliberate;
2. the intent and motive of the defendant;
3. whether the defendant persisted in the outrageous conduct over a lengthy period;
4. whether the defendant concealed or attempted to cover up the misconduct;
5. the defendant's awareness that what was done was wrong;
6. whether the defendant profited from the misconduct; and

7. whether the interest violated by the misconduct was known to be deeply personal to the plaintiff (e.g., professional reputation) or a thing that was irreplaceable.

[35] The jury granted $500,000 in punitive damages, well over the $225,000 range suggested by the trial judge. The trial judge asked the jury to provide full particulars on the conduct the jury considered as justification for the punitive damages award. The jury articulated the following reasons for the punitive damages award, which correspond closely with several of the *Whiten* factors:

> Concealment: silent shuffle undertaken to divert in conjunction with complaints, avoiding scandal, neglected to document offences. Put children in harm's way – grossly negligent. No reconciliation with the victims, did not follow own policy from 1991. Betrayal of trust with the community.

[36] In rendering its award, the jury was no doubt taking into account the evidence that the Basilians knew Marshall had been abusing boys before he was even ordained, they allowed Marshall to sexually abuse children for more than three decades as a teacher and religious figure, and they decided to move him to different schools when incidents of abuse were reported instead of preventing further harm.

[37] While the award is high, the jury took into account the general objective of punitive damages as punishment, deterrence, and denunciation. The decision also addresses the factors set out in *Whiten* to determine the blameworthiness of the

defendant's conduct. The more reprehensible the conduct, the higher the rational limits for punitive damages.

[38] The jury may well have been concerned by the fact that the Basilians did not follow their own policy set in 1991, regarding the need to reach out to the victims. This failure to follow their own policy undercuts the Basilians' argument that they should not be judged by contemporary standards, as the Basilians failed to meet even their own standards.

[39] For these reasons, the quantum is not so plainly unreasonable and unjust as to warrant judicial interference. I would also dismiss this ground of appeal.

Issue Three: Prejudgment Interest

[40] The last issue raised on this appeal is whether the trial judge exercised his discretion pursuant to s. 130 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (*"CJA*"), and more specifically, whether he considered the changes in market interest rates when exercising his discretion to depart from the default rate.

[41] The endorsement dealing with prejudgment interest indicates that the Basilians asked the trial judge to exercise his discretion under s. 130 of the *CJA* and that s. 258.3(8.1) of the *Insurance Act*, R.S.O. 1990, c.I.8, affects that discretion. The Basilians argued that s. 258.3(8.1) of the *Insurance Act* changed the rate of prejudgment interest to the bank rate, to be calculated pursuant to s. 127 of the *CJA*. Subsection 258.3(8.1) reads as follows:

> Subsection 128(2) of the *Courts of Justice Act* does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss in an action referred to in subsection (8).

The Law in Respect of Prejudgment Interest

[42] Section 130 of the *CJA* provides that:

> **130** (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
>
> (a) disallow interest under either section;
>
> (b) allow interest at a rate higher or lower than that provided in either section;
>
> (c) allow interest for a period other than that provided in either section.
>
> (2) For the purpose of subsection (1), the court shall take into account, [among other things]
>
> (a) changes in market interest rates…

[43] A person who is entitled to an order for the payment of money is entitled to interest at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order: *CJA*, s. 128(1).

[44] However, s. 128(2) of the *CJA* provides that "[d]espite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court". Rule 53.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that the prejudgment interest rate on damages for non-pecuniary loss in an action for personal injury is 5% per year.

[45] The reason for the 5% rate for non-pecuniary loss in an action for personal injury is as follows: it was a legislative response to the 1987 Ontario Law Reform Commission Report for Compensation for Personal Injuries and Death, which criticized the practice of awarding damages for pecuniary and non-pecuniary damages at the same rate because there is a cap on non-pecuniary damages; this cap is adjusted for inflation. The Report concluded that giving the default interest rate (which was much higher than 5% at the time) was effectively double compensation for inflation. The lower rate of 5% was therefore more appropriate: *Awan v. Levant*, 2015 ONSC 2209, aff'd 2016 ONCA 970, 133 O.R. (3d) 401, at para. 23.

[46] However, as Matheson J. noted in *Awan*, "the mischief that gave rise to the subsection [128(2)] is no longer served by a 5% rate given the interest rate climate throughout the period of time relevant to this case", as interest rates had dropped even further. For this reason, s. 258.3(8.1) of the *Insurance Act* was amended through the enactment of the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, S.O. 2014, c. 9, such that the 5% rate did not apply in the context of motor vehicle accident actions.

Application to the Facts

[47] Contrary to the assertion made by the Basilians before the trial judge, s. 258.3(8.1) of the *Insurance Act* does not apply.

[48] However, MacLeod does not dispute that:

> [t]rial judges enjoy a wide discretion under s. 130 of the *CJA* to allow pre- or post- judgment interest at a rate higher or lower than the rate of interest prescribed by the *CJA*, where they consider it just to do so. An appellate court may interfere with the discretionary decision of a trial judge only where it reaches the clear conclusion that there has been a wrongful exercise of discretion by the trial judge in that no weight, or insufficient weight, has been given to relevant considerations: *Stellarbridge Management v. Magna International* (2004), 71 O.R. (3d) 263 (C.A.), at para. 85, leave to appeal refused, [2004] S.C.C.A. No. 371.

[49] As Matheson J. noted in *Awan*, at para. 28:

> It must be remembered that an award of pre-judgment interest is compensatory. Even if s. 128(2) did apply, I would exercise my discretion to impose the ordinary rate of 1.3%. In reaching that conclusion, I have had regard for the interest rates over the relevant period, the circumstances of this case and the different approach to assessing damages in defamation cases from non-pecuniary damages in other areas.

[50] Similarly, this court in *Cobb v. Long Estate*, 2017 ONCA 717, 416 D.L.R. (4th) 222, at para. 86, held that:

> Interest rates fluctuate over time and it only makes sense that the interest rates set by the court should reflect these changes as well. The goal is to fairly compensate an injured party and to restore to him or her, so far as money is able to do, all that he or she has lost as a result of the injury – but neither too much, nor too little.

[51] In this case, the trial judge considered the Basilians' request that he exercise his discretion to impose prejudgment interest at 1.3% for non-pecuniary damages. He declined to do so for the following reasons:

> The current action is a claim for damages arising from an historical sexual assault, and as such, section 258.3(8.1) of the *Insurance Act* has no application. Therefore, I have concluded that the default prejudgment interest rate of 5% is applicable on the general and aggravated damages from the date of the Notice of Claim to the date of judgment. [Emphasis added.]

[52] In other words, the trial judge held that the 5% prejudgment interest rate was applicable *because* s. 258.3(8.1) of the *Insurance Act* did not apply.

[53] While the trial judge was correct that s. 258.3(8.1) does not apply, his conclusion that therefore the default prejudgment interest rate of 5% is applicable is not correct in law.

[54] He should have taken into account the factors listed in s. 130(2) of the *CJA*, including the changes in market interest rates. He did not. In so doing, he placed no weight or insufficient weight on the consideration of market interest rates.

[55] I note that interest rates during this period were low and no issue was taken by the respondent with the 1.3% requested to keep pace with the low rates, save for the argument that s. 258.3(8.1) does not apply.

[56] I accept therefore that the annual prejudgment interest rate should have been 1.3%. I would therefore allow this ground of appeal and vary the judgment accordingly.

SUMMARY OF CONCLUSIONS

[57] For the above reasons, I find that the trial judge made no reversible error in instructing the jury on the burden of proof for claims of past loss of income.

[58] Secondly, the quantum of punitive damages awarded by the jury is not so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as whole and acting judicially could have arrived at it.

[59] Finally, in awarding MacLeod 5% prejudgment interest, the trial judge understood that there was a general right to exercise discretion but did not articulate any of the factors listed in s. 130 of the *CJA,* and more importantly, he concluded that the prejudgment rate should be 5% *because* s. 258.3(8.1) does not apply in this case. In so doing, he failed to consider the fluctuation in market rates from the time the claim was issued to the time judgment was rendered.

[60] For these reasons, I would dismiss the appeal on the first two issues and grant the appeal in respect of prejudgment interest.

[61] The parties are to provide written costs submissions of no more than five pages within ten days.

Released: “RJS” October 25, 2019

“J.A. Thorburn J.A.”
“I agree. Robert J. Sharpe J.A.”
“I agree. K. van Rensburg J.A.”