Date: 19980310
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

No. B940866

BETWEEN:

RANDALL BRENT MONAHAN

PLAINTIFF

AND:

MERVIN JOHN NELSON and
KATHY LORRAINE NELSON

DEFENDANTS

AND:

No. B940867

BETWEEN:

RANDALL BRENT MONAHAN

PLAINTIFF

AND:

DOUGLAS BROOKS OLDHAM, BURNABY METRO LIMO LTD.,
JOHN STEWARD MULDER, POT MU WONG, SHU CHUAN CHANG,
and WALLACE STANLEY HAROLD BRADLEY

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COULTAS

(In Chambers)

Counsel for the Plaintiff: F.G. Potts

Counsel for the Defendants: G.P. Brown/
W.S. Clark

Place and Date of Hearing: Vancouver, B.C.
June 11, 1997
October 20, 21, 22, 1997[1] Randall Brent Monahan, the plaintiff in these actions, was seriously injured in two automobile accidents. In Reasons for Judgment handed down April 11, 1997 and April 29, 1997, I awarded the plaintiff substantial damages. The combined damages awards were:

| | |
|---|---|
| Non-pecuniary damages | 83,000.00 |
| Past wage loss | 16,065.00 |
| Past special damages | 2,246.60 |
| Future cost of care | 46,830.00 |
| Future loss of income | 175,000.00 |
| Total: | $ 323,141.60 |

[2] Evidence and arguments concluded on December 13, 1996 at which time I reserved judgment, saying that I expected to hand down Reasons by the end of February 1997. On February 19, 1997, Ms. Tutiah, co-counsel for the defendants, sent a letter to the District Registrar for my attention advising that Mr. Monahan died on February 15, 1997. The letter was sent without consultation with Mr. Potts, counsel for Mr. Monahan. I sent a memorandum to counsel asking them to advise me of their positions with respect to damages and I received a number of responses from counsel. By March 21, 1997, counsel had reached

agreement that I should deliver Reasons for Judgment without reference to the plaintiff's death and without considering it. I did so. The Judgment has not been entered.

[3] Before me are two applications by the administrator of Mr. Monahan's estate. First, that the applicant have leave to adduce evidence that the plaintiff died on or about February 14, 1997, such evidence to be admitted for the purpose of Ruling on the application for a nunc pro tunc order and for no other purpose. I grant that application on those terms.

[4] Second, that the Judgment be granted nunc pro tunc to December 13, 1996, to take effect on that date. Mr. Potts submits that on December 13, 1996 the parties had done all that they could: evidence had closed, submissions had concluded, and a party should not be prejudiced by a delay caused solely by the court - reserving Judgment.

[5] The defendants apply for an order to have the trial re-opened at large to receive evidence of the plaintiff's death. Should I grant that application, they submit s. 66(2) of the Estate Administration Act, R.S.B.C. 1996, c. 122 applies and I must revise my judgment and make no awards for non-pecuniary damages, future loss of income and future cost of care. That would result in a total damage award of $18,113.60 comprised of past wage loss and some past special damages.

[6] Section 66(2) of the Estate Administration Act reads:

> (2) 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, be entitled to, including an action in the circumstances referred to in subsection (4), 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 death, or for the loss of expectation of life, unless 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 (emphasis added).

[7] The defendants rely, principally, on case precedent decided in circumstances where the death of a party occurred while the litigation, either at trial or on appeal, was in progress and before judgment was reserved.

[8] Section 16 of the Supreme Court Act, R.S.B.C. 1996, c. 443 empowers a Judge, Master or Registrar to reserve decision. That power was first enacted in this province in the Administration of Judgment Act, S.B.C. 1881, c. 1.

[9] The statutory power to give legal effect to an order other than on the date it is pronounced is contained in R. 41(14)(c) of the Rules of Court which reads:

> Unless the court otherwise orders, an order takes effect on the day of its date.

[10] In this province, courts have addressed the circumstances in which that Rule should be applied.

[11] In Jonasson v. Jonasson (1 May 1975), Vancouver D080467 (B.C.S.C.), Errico J. refused to antedate a divorce order saying at paragraph 28:

In so far as I can determine, the provisions of the Rules of Court permitting a judgment to be dated or to be effective other than the date of its pronouncement have only been applied where by reason of the process of the court itself it would be unjust for such an order not to be predated. An example of this is where a party dies after a full trial and argument but before judgment and where the cause of action is lost.

[12] In Crown Zellerbach Canada Limited et al. v. R. in Right of British Columbia (1979), 13 B.C.L.R. 276 (C.A.), the trial Judge antedated his judgment to enable the plaintiffs to collect interest on money paid but found not to be owing. On appeal, the court found there were no exceptional circumstances to justify antedating the judgment. Craig J.A. delivering the judgment of the court, recited the Rule (then R. 41(14)(a), now "(c)") and said at page 284:

Although the rule gives a court the right to ante-date a judgment, the court cases dealing with the application of the rule state that the rule should be applied only in exceptional circumstances or applied with "caution"....

That statement was relied upon in Bastian v. Mori (21 December 1990), Vancouver C876136 (B.C.S.C.) by Hood J. who refused to "predate" an order but acknowledged he had the power to do so.

[13] I find that the death of a party in litigation before Judgment is an exceptional circumstance and R. 41(14)(c) empowers but does not mandate the court to antedate a judgment when it occurs.

[14] I pass now to case precedents where the doctrine of nunc pro tunc has been applied.

[15] In Lankenau v. Dutton (1988), 27 B.C.L.R. (2d) 234 (S.C.), Spencer J., when informed the plaintiff had died after trial and three days before his Reasons for Judgment, on the issue of liability only, came down, invoked the doctrine and antedated the judgment to the date it had been "reserved". At pages 235 and 236 he related the circumstances before him and spoke of the doctrine:

> On 2nd May 1986 I handed down reasons for judgment in this case by which I dismissed the plaintiff's action against Drs. Lyall and Edminson, but found that the plaintiff had proved her cause of action in negligence against the defendant Dr. Dutton, and ordered that the action must proceed to an assessment of damages [37 C.C.L.T. 213]. I expressed my reasons in that particular way because I only heard the trial on the issue of liability. By an earlier order of this court, made at the plaintiff's request, the issues of liability and damages were ordered to be tried separately.
>
> Unknown to me when I filed my reasons for judgment, the plaintiff had died three days earlier. Her counsel now intends to continue the trial for the purpose of assessing damages, but both counsel have agreed to argue the question of what damages are now available to the plaintiff's estate following on her death before the trial is resumed.
>
> The plaintiff relies upon a number of well-established authorities for the proposition that where a trial is concluded but judgment is reserved and where the plaintiff dies before reasons for judgment are published, the claim does not abate but judgment may be entered nunc pro tunc, as of the date when the trial was concluded. The common rationale

> behind those authorities is that the parties should not be prejudiced by any act of the court, including the court's delay in delivering its reasons for judgment. The authorities which settle the point and which were cited to me in the plaintiff's written argument include Hubert v. DeCamillis (1963), 44 W.W.R. 1, 41 D.L.R. (2d) 494 (B.C.), Krujelis v. Esdale, [1972] 2 W.W.R. 495, 25 D.L.R. (3d) 557 (B.C.), Barker v. Westminster Trust Co., 57 B.C.R. 21, [1941] 3 W.W.R. 473, 614, [1941] 4 D.L.R. 514 (C.A.), Gunn v. Harper (1902), 3 O.L.R. 693, Young v. Gravenhurst (1911), 24 O.L.R. 467 (C.A.), and Couture v. Bouchard (1892), 21 S.C.R. 281. Those, and other cases cited to me by the plaintiff, all adopt the same principle that where the court is responsible for a delay the parties should not suffer from it.

Although the point is well settled so far as those cases go, the defendant points out that the case before me is different from any of them. In all of the authorities laid before me by the plaintiff, everything that had to be done by the deceased to complete the whole trial had been done. In the case at bar, however, only the trial on the issue of liability has been completed; the trial of the issue of quantum has never commenced. It is true, however, that even without assessing what damages flowed to the plaintiff from the defendants' actions, I found the cause of action in negligence complete by finding that the plaintiff had suffered a loss of bodily function as a result of the defendant's breach of his duty of care towards her.

He then recited s. 66(2) of the Estate Administration Act, R.S.B.C. 1979, c. 114, and continued at page 237:

> There are two way of approaching this problem. One is to consider that the Estate Administration Act should be construed liberally as legislation designed to ameliorate the formerly harsh common law rule that actions for personal injuries died with the person. The plaintiff's counsel takes that position and, in essence, says that an assessment of damages is not a continuation of an action but merely the quantifying of a vested right to damages. The opposite approach is to remember what the common law rule used to be and to consider more narrowly to what extent it has been ameliorated by the wording of s. 66(2). There are competing policy reasons, one of which would favour an approach which deprived a defendant of a windfall benefit arising from the death of a litigant after a trial on liability, and the other which would deprive the heirs of a windfall benefit arising from the misfortunes of the deceased during her life. I can discern no reason for preferring one policy over the other, but I note that the policy of the law from medieval times to the enactment of this legislation favoured the latter.

[16] Spencer J. held that the judgment on the issue of liability could be entered nunc pro tunc.

[17] An appeal was taken. The judgment of the Court of Appeal was delivered by Southin J.A., reported in (1991), 55 B.C.L.R. (2d) 218 (C.A.). At page 233, she described the issue raised by Mr. Laxton, counsel for the deceased appellant as follows:

Ought the court to have assessed the damages as if Miss Lankenau had survived to the date of assessment and then entered judgment nunc pro tunc as of the date of the conclusion of the trial on the issue of liability?

And said at page 234:

As to Mr. Laxton's first point, it is essentially founded upon policy considerations of a nature which, if they are to be addressed, must be addressed by the Legislature. Delays in litigation sometimes work to the advantage of tortfeasors and sometimes to the advantage of their victims. But this is a litigant-driven system.

Why the trial of this action did not commence until nearly four years after the act of negligence, I do not know. Some of the delay was no doubt systemic - a long wait for a trial date. What the other causes were I cannot say. But if Mr. Laxton's argument were upheld, there would be no rational reason why, if the plaintiff died the day the writ was issued, the case should not proceed as if the plaintiff remained alive and judgment entered nunc pro tunc to the day of the issue of the writ. To take that approach, would completely defeat s. 66 which is the only limitation which the Legislature has chosen to make on the common law rule actio personalis moritur cum persona.

The authorities permitting judgment to be entered nunc pro tunc when the plaintiff dies after the trial but before judgment are founded on the narrow proposition that the court will not allow a claim to be defeated by an act; i.e. failing to deliver judgment forthwith, which is solely within the court's own control. What happened here was not solely within the court's own control. (emphasis added).

[18] The leading case on the application of the nunc pro tunc doctrine is Turner v. London and South-Western Railway Company (1874), L.R. 17 Eq. 561. In Turner the plaintiff died after the hearing but before judgment. At page 565, Hall V.C. said:

The Plaintiff having died since the conclusion of the argument I desire, before proceeding to deliver judgment, to state that it appears to me, upon consideration and an examination into authorities, as far as I have been able to find any, and with the valuable aid that I have received from the Registrars, who have inquired into the matter, and also from the search made by Mr. Cecil Russell, who has been good enough to search the register, that I am able to deliver judgment, and to direct that the judgment shall be entered as of the date when the argument concluded upon the case. As the point is one of some general importance I may observe that the cases which have led me to this conclusion are Collinson v. Lister (1), and Troup v. Troup (2).

And at page 566, he said:

In Chitty's Archbold's Practice, Queen's Bench (4), the rule at law is stated thus: "The Court will in general permit a judgment to be entered nunc pro tunc, where the signing of it has been delayed by the act of the Court. Therefore, if a party die after a special verdict, or after a special case has been stated for the opinion of the Court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument, and pending the time taken for argument, whilst the Court are considering their judgment, the Court will allow judgment to be entered up after the death nunc pro tunc in order that a party may not be prejudiced by a delay arising from the act of the Court". Then it goes on to explain that the Court will not do it where the act arises from the neglect of the party himself in completing the judgment. I need not refer to that. In support of this general statement of the law several cases are referred to, some of them of comparatively modern date. The rule at law is that judgment in certain cases may be entered nunc pro

tunc, whatever that may mean.

[19] That decision has been referred to in many of the cases cited to me, including Lankenau.

[20] Couture v. Bouchard (1892), 21 S.C.R. 281 stands for the principle that a litigant should not be prejudiced by the delay of the court in handing down Reasons. The headnote in Couture reads:

In an action brought by respondent against the appellant for $2,006 which was argued and taken en delibere by the Superior Court sitting in review onthe 30th September, 1891, the day on which the Act 54 & 55 Vic. ch. 25 s.3 giving a right to appeal from the Superior Court in review to the Supreme Court of Canada was sanctioned, the judgment was rendered a month later in favour of the respondents. On appeal to the Supreme Court of Canada:

Held, per Strong, Fournier and Taschereau JJ. that the respondent's right could not be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the 30th September, when the case was taken en delibere, and therefore the case was not appealable. Hurtubise v. Desmarteau, (19 Can.S.C.R. 562),) followed.

Per Gwynne and Patterson JJ -- That the case did not come within the words of s.3 ch. 25, 54 & 55 Vic. inasmuch as the judgment, being for less than œ500 sterling, was not a judgment from which the appellant had a right to appeal to the Privy Council in England. Arts. 1178, 1178a C.C.P.

[21] Taschereau J. (later Chief Justice) speaking for himself and Strong J. said at pages 285 and 286:

This case comes up on a motion to quash for want of jurisdiction. The motion must be allowed. The ruling in Hurtubise v. Desmarteau (1) applies here. It is true that the judgment appealed from here was in fact pronounced in the Court of Review after the coming into force of the act 54 & 55 Vic., ch. 25, which allows for the first time appeals from that court; but, as regards this appeal, the case having been put en delibere on the 30th September, 1891, on the very day that the act was sanctioned, the judgment is to be treated as if it had been given on that day, on the principle actus curiae neminem gravabit. Nothing that happens after the case is en etat can alter in any way the rights or position of the parties. It cannot be that a judge can render a case appealable or not at his will by simply delaying or hastening the judgment thereon.

I refer to the following authorities: Lawrence v. Hodgson (2) in which Garrow B. says:

> Where a case stands over for judgment the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively, if necessary, to meet the justice of the case.

Freeman v. Tranah (3) where Cresswell J. says:

> The maxim actus curiae neminem gravabit is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law.

And Maule J. says:

> It is an established principle of law that the act of the court shall injure no one, such as the court taking time to deliberate its

judgment.

And the writer's remarks on Pinhorn v. Sonster (1) in Maxwell on the Interpretation of Statutes (2):

> The judgment was, in strictness, due before the act, and the delay of the court ought not to affect it.

See also Evans v. Rees (3); Green v. Cobden (4); and Miles v. Williams (5).

I rest my judgment on that ground without expressing any opinion one way or the other on the ground relied upon by my brothers Gwynne and Patterson.

[22] In a number of subsequent judgments the Courts have failed to refer to Couture. Mr. Potts attributes the failure to counsel's inadequate preparation for the case is, he says, a binding decision in Canada.

[23] The same principle was applied by the British Columbia Full Court in Bryce v. Canadian Pacific Railway Company (1908), 23 B.C.R. 446 (Full Ct.). The action in negligence arose from a steamship collision. An appeal was taken from Martin J. to the Full Court and allowed. At page 459 of the case report, this note appears:

> Upon application to settle the minutes of judgment, it being brought to the attention of the Court that the plaintiff Bryce had died after argument, but before judgment, the Court ordered the judgment to be ante-dated to the 18th of April, which was the last day of the argument.

The case was appealed to the Privy Council which allowed the appeal. The nunc pro tunc order was not, however, raised there.

[24] In Barker v. Westminster Trust Company, [1941] 4 D.L.R. 514 (B.C.C.A.), Sloan J.A. (later Chief Justice) applied the doctrine in an appeal from a judgment dismissing a husband's action against his wife's estate for maintenance pursuant to the Testator's Family Maintenance Act, R.S.B.C. 1936, c. 285. The husband died following argument in the Court of Appeal but before judgment. At page 515, Sloan J.A. said:

> The motion to add the executors of the deceased appellant is granted and the appeal is allowed, my brother McDonald dissenting.
>
> A word of explanation is necessary as to what is the effective order we make. My brother O'Halloran is of opinion the appellant's right of action survives, and he would in effect vest the entire estate of the deceased wife in the deceased husband's executors.
>
> My brother McDonald is of the opinion that the action does not survive, and therefore dismissed the appeal.
>
> I find it unnecessary to decide that question. A few days after the appeal had been heard, when we reserved judgment, the appellant died, and because of the principle that no one shall be prejudiced by an act of the Court, I would follow the course adopted in a similar situation by Vice-Chancellor Hall in Turner v. London & South Western R. Co. (1874), 43 L.J. Ch. 430, and by the Court of Appeal of Ontario in Gunn v. Harper (1902), 3 O.L.R. 693 and deliver the same judgment now as I would have delivered had we given judgment at the conclusion of the appeal, that is, I would allow the appeal and direct judgment be entered nunc pro tunc as of the date when arguments were concluded.

Because O'Halloran J.A. decided the action did not die with the appellant and McDonald J.A. dissented on the merits, only Sloan

J.A. considered the issue of antedating the judgment. However, his reasoning on the issue has been followed in several decisions of this court, which follow.

[25] In Hubert v. DeCamillis (1963), 41 D.L.R. (2d) 495 (B.C.S.C.), Aikins J. (as he then was) considered the effect of the plaintiff's death in a libel action claiming damages to reputation and for loss of business. It must be noted that the Administration Act, R.S.B.C. 1960, c-3, s. 71, then in force, excluded actions of libel and slander from protection from abatement. The plaintiff died after the evidence and submissions had concluded and while judgment was on reserve. At p.515, Aikins J. said:

> The trial of this action, including all argument was entirely concluded on July 4, 1962. Nothing remained for the parties or for counsel to do, and judgment was reserved solely so that I might consider the evidence and the submissions on the law and the fact made to me by counsel during argument. When I heard counsel on June 28th, last, Mr. Dowding (counsel for the plaintiff) submitted that because the trial had been wholly completed, and nothing remained for either counsel or the parties to do and judgment having been reserved as a matter of convenience to the Court that I should give exactly the same judgment that I would have given had the plaintiff not died, but direct that it be effective nunc pro tunc as at the date of the conclusion of argument, and that the formal judgment itself be entered as of that day.

He then reviewed existing caselaw starting with Turner, the Ontario cases of Gunn v. Harper (1902), 3 O.L.R. 693 (C.A.) and Young v. Town of Gravenhurst (1911), 24 O.L.R. 467 (C.A.), and the decision of Sloan J.A. in Barker. At page 519, he concluded:

> ...I propose, with respect, to follow the reasoning adopted by Sloan, J.A., and I hold that the governing principle to be applied is that expressed in Turner v. London & South-Western R. Co. and the other cases to which I have referred, namely that no one shall be prejudiced by an act of the Court. Mr. Collings' argument for the defendant was based primarily on the proposition, not seriously in dispute, that plaintiff's cause of action ceased to exist at the time of plaintiff's death. The principle that no one shall be prejudiced by an act of the Court is one which, in my opinion, is of general application, and to hold that it is not to be applied in those cases in which a cause of action ceases at death would wholly deny the principle as prejudice would result entirely because of an act of the Court.

[26] The decision of Sloan J.A. in Barker was applied by Gould J. in Krujelis v. Esdale (1971), 25 D.L.R. (3d) 557 (B.C.S.C.). The Krujelis action was in negligence. The infant Krujelis suffered respiratory and cardiac arrest following surgery leaving him permanently unconscious. The child died following the completion of the trial while judgment was on reserve. The plaintiff's counsel submitted the judgment should be entered nunc pro tunc to the last day of argument; the defendant submitting that evidence of death should be admitted and the Administration Act, R.S.B.C. 1960, c. 3 should apply. Gould J. entered the judgment nunc pro tunc. At page 565 he said:

> I do not think it necessary to appoint now a personal representative of the deceased boy: see s. 11, Administration Act, R.S.B.C. 1960, c. 3. That can be done at a later date, as exigencies may require.
>
> With reference to the death of the infant plaintiff while judgment was reserved, diverging views had been urged upon this Court. Plaintiff's counsel invokes the principle that "no one shall be prejudiced by an act of the Court": per Sloan J.A. (later C.J.B.C.), Barker v. Westminster Trust Co., [1941] 4 D.L.R. 514

at p. 515, 3 W.W.R. 473, 614, 57 B.C.R. 21; defendant hospital's counsel submits that to ignore the fact of the intervening death, and deliver judgement nunc pro tunc the conclusion of the trial, would be to give judgment on a patently artificial group of facts and inferences. Were I to accept the defendant's submission, s. 71 [am. 1966, c.1, s.9; 1968, c.3, s.3] of the Administration Act would govern, and reduce the factors properly applicable in arriving at the quantum. The difference between the two views would be, in this case, of minor significance. Under the first proposition (nunc pro tunc judgment) the following factors would have to be evaluation and arrive at the general damages:

(1) Pain and suffering;
(2) loss of expectation of life;
(3) loss of probable future earnings;
(4) loss of amenities.

For reasons which appear at the end of this judgment, cost of future care was not a factor. Under the alternative proposition, namely, that s. 71 of the Administration Act applies, all component factors contained in the first proposition are statute barred except that for loss of amenities...

He continued at page 567:
As to quantum of general damages, the difference between the two approaches is insignificant: but the matter must nevertheless be decided. My view is that the law governing the effect of the death of the infant plaintiff while judgment was under reserve is that the Court must disregard the fact of the death and deliver judgment nunc pro tunc the last day of trial, December 8, 1970. The principles involved in arriving at this conclusion, and the respective supporting law, are succinctly and fully enunciated in the judgment of Aikins, J., of this Court, in Hubert et al. v. DeCamillis et al. (1963), 41 D.L.R. (2d) 495 at pp. 514-9, 44 W.W.R. 1. I also follow that judgment (p. 519) procedurally, and direct that these reasons for judgment be considered as having been delivered nunc pro tunc as of the day on which the main argument was concluded, namely, December 8, 1970, and I order that entry of judgment shall be as of that date. Special leave is granted to antedate the judgment to December 8, 1970. I do not expand upon this aspect of the case, because all that I would want to say appears in the judgment of Aikins, J., at pp. 514-9, all of which I adopt as applicable to this case.

[27] The requirement that "special leave be granted" to antedate a judgment has been removed from R. 41(14).

Ontario Case Precedent

[28] A line of case law similar to that in British Columbia, has developed in Ontario.

[29] In Gunn v. Harper, supra, referred to by Aikens J. in Hubert, the plaintiff died following argument in the Court of Appeal but before judgment was delivered. Moss J.A. delivering the judgment of the court said at page 695:

It is well settled that the death of a party to an action after hearing or trial does not prevent judgment being delivered, and that it is not necessary to obtain an order to proceed before drawing up or entering the judgment...

And at page 696:

It may be taken as now settled that where, at the

time of giving judgment, the Court is aware that an abatement has occurred since the argument, it may direct the judgment to be dated as of the day when the argument terminated...

In the present case, if the Court had been aware of the death of the plaintiff when giving judgment, it doubtless would have pronounced it, and directed it to be entered, as of the day of the argument.

which the Court proceeded to do.

[30] In Young v. Town of Gravenhurst, supra, also referred to in Hubert, the Ontario Court of Appeal again addressed the death of a party after argument in the Court of Appeal but before judgment. The action was in negligence. At the conclusion of the reported judgment of Moss, by then Chief Justice of Ontario, is the following note:

> We have now been informed that since the argument of the appeal the infant plaintiff has died from causes not attributable to the injuries, and it has been suggested that this necessitates the taking of some proceedings in the nature of revivor or order to proceed, before the appeal can be disposed of.
>
> The death after judgment does not affect the cause of action, nor does it prevent the delivery of judgment upon the appeal.
>
> All that is necessary is, that the Court should direct that the certificate of the judgment should be entered as of the date when the argument was concluded.
>
> We give a direction to that effect. The practice is discussed in Gunn v. Harper (1902), O.L.R. 693.
>
> Should any question arise as to the frame of the certificate, the matter may be mentioned in Chambers.

[31] In Thrush v. Read, [1949] 4 D.L.R. 564 (Ont.H.C.) Wilson, J. considered Turner, Couture, Gunn and Young. He found that he had the power to antedate his judgment to the last day of argument but at counsel's request declined to do so.

Further Case Precedents

[32] In Knickle v. Rayner (1989), 64 D.L.R. (4th) 158 (P.E.I.S.C. A.D.) the Court considered the effect of the death of the infant plaintiff after trial and after the trial judgment was entered but before the appeal taken from that judgment was heard. At page 164 the Court quoted from the decision of Denning M.R. in McCann v. Sheppard, [1973] 2 All.E.R. 881 (C.A.) who said, at pages 885-6:

The general rule in accident cases is that the sum of damages falls to be assessed once and for all at the time of the hearing; and this court will be slow to admit evidence of subsequent events to vary it. It will not normally do so after the time for appeal has expired without an appeal being entered - because the proceedings are then at an end. They have reached finality. But if notice of appeal has been entered in time - and pending the appeal, a supervening event occurs such as to falsify the previous assessment - then the court will be more ready to admit fresh evidence - because, until the appeal is heard and determined, the proceedings are still pending. Finality has not been reached. It is in every case a matter for the discretion of the court. In Mulholland v. Mitchell Lord Wilberforce gave helpful guidance as to the way in which the discretion should be exercised. This case seems to me to come within his words that 'it would affront the common sense' if we shut our eyes to the fact of death. The damages which the judge awarded were intended as compensation

for the injured man himself - during the long years of life which the judge thought he would suffer pain and lose earnings. They were not intended to provide for the widow or child in case of his death. I would, therefore, admit the evidence that David McCann died on 22nd October 1972, and assess his damages accordingly.

[33] In Knickle, the Court granted leave to introduce additional evidence and to amend the Notice of Appeal, saying the effect of that evidence would be decided when damages were argued on the appeal.

[34] In McCann, finality had not been reached - the appeals had been filed but not yet argued. The litigation was ongoing; that is a material distinction from this case and others decided in this Province.

[35] The same distinction must be made in respect of the decision of our Court of Appeal in Cory v. Marsh (29 January 1993), Vancouver CA011032 (B.C.C.A.). At trial, Mrs. Cory was awarded $94,000 non-pecuniary damages, $22,575 for future loss of earnings and $41,500 for cost of future care. The defendant appealed. Before the appeal was heard Mrs. Cory died. At the commencement of argument in the Court of Appeal, counsel for the defendant applied for leave to introduce evidence of her death. The Court ruled in favour of receiving the evidence and reduced the awards for future loss of earnings and cost of future care and, for separate reasons, Mrs. Cory's award for non-pecuniary damages. It seems that counsel for the defendant on appeal did not take the position that the non-pecuniary damages award abated by reason of death. The Court of Appeal did not mention s. 66(2) of the Estate Administration Act. Nevertheless, it reduced the $64,075 award for future loss and expense to $10,000.

[36] In Cory, there was, of course, no delay attributable to the Court. The death occurred while the litigation was ongoing; finality had not been reached at the time the evidence of death was allowed.

[37] On "all fours" with the facts in the case at Bar, is the Nova Scotia case of Eagles et al. v. St. Peter (1960), 26 D.L.R. (2d) 670 (N.S. Co. Ct.), a decision of Macdonald Co. Ct. J. In Eagles, the defendant, plaintiff by way of counterclaim, seeking damages for personal injuries suffered in an automobile accident, died before judgment in his favour had been delivered. When the judgment was handed down, his counsel sought to have it antedated to the day the trial concluded pursuant to Rule 2, 0. XXXIX of the Judicature Act, 1950, which provided that a judgment may be antedated by special leave of the Court. That section is similar to R. 41(14) of our Rules of Court. The Nova Scotia Survival of Actions Act, R.S.N.S. 1954, c. 282, s.3 has a provision similar to s. 66(2) of the Estate Administration Act in this province.

[38] At one point in his judgment, Macdonald Co. Ct. J. said, at page 670:

Counsel for the parties agree and it has been brought to my attention that since the conclusion of the final argument herein the defendant St. Peter died.

However, at another point later in the judgment at page 672, he said:

The latter part of r. 1 of 0.XVII of the Judicature Act, 1950, is cited. It reads: "And, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death."

It is claimed that the phrase "between the verdict or finding of the issues of fact and the judgment" means "between the end of the trial and judgment". "Verdict or finding of the issues of fact" refers,

strictly speaking, to the verdict or finding of a jury and therefore to the completion of the trial and cannot reasonably and sensibly mean the filing of a decision by a Judge who has waited for a transcript of evidence and the briefs of counsel.(emphasis added)

[39] It is not clear to me if Macdonald Co. Ct. J. is speaking hypothetically in that passage which I have emphasized or if, in fact, he was waiting for a transcript of evidence and briefs of counsel. For my purposes, I assume he had received them and nothing was left to be done save for delivering Reasons. Macdonald Co. Ct. J. cited the Turner case, Ecroyd v. Coulthard, [1897] 2 Ch. 554 in which Turner was applied, Bonsor v. Musicians' Union, [1954] 1 All E.R. 822 and others. He said at pages 675 and 676:

In my opinion the present case is not one in which special leave to antedate the judgment should be granted. A principle seems to be that where a judgment is antedated it must be the same judgment that would have been delivered at the conclusion of the case. See decision of Sloan, J.A., in Barker v. Westminster Trust Co.,[1941] 4 D.L.R. 514 at p. 515. Another principle is that there must be no benefit or loss to accrue to anybody by the course being taken of antedating the judgment (Turner v. London & South Western R. Co., L.R. 17 Eq. at p. 569). Had I given judgment in his case immediately on the conclusion of the argument I would have granted damages to the defendant for future pain and suffering, for restriction of the use of his hand and leg for the rest of his life and for future loss of a pension caused by his injuries. If the judgment were antedated there would consequently be a gain to the defendant and a loss to the plaintiffs. I therefore refuse the application for special leave to antedate the judgment.

[40] I have read the remarks of Sloan J.A. in Barker with care and, in my opinion, he did not make the statement attributed to him by Macdonald Co. Ct. J. He did say he would deliver the same judgment that he would have delivered at the conclusion of the appeal, not that he "must" do so. I shall reserve any further comments on Eagles until later. Understandably, the defendants take comfort from the case.

The Defendants' Position

[41] The defendants oppose the plaintiff's application on three principal grounds. First, the nunc pro tunc doctrine was intended to counteract the harsh effects of the maxim actio personalis moritur cum persona. Second, judgment should only be entered nunc pro tunc where it would not affect the quantum of damages awarded, in other words, it would not result in a benefit or loss to any party. Third, to ignore the death of one of the parties, in this case the plaintiff, would be an affront to common sense. I shall address those arguments in turn.

[42] Section 66(2) of the Estate Administration Act prevents an action from abating upon death. While the Estate Administration Act permits an action to survive in part, in this action that part would have minimal value. It would reduce an award of $323,145 to approximately $18,000. In my opinion, the doctrine is not restricted to circumstances where an action would abate due to death, if not invoked. In Krujelis, Gould J.'s decision did not rest on the fact that a nunc pro tunc order would make little difference to the amount of the award. He gave a principled judgment relying on the narrow proposition that when a death of a party ensues, no prejudice should flow from an act of the Court. Aikens J. in Hubert said that proposition is one of "general application". The proposition was adopted by Spencer J. in Lankenau and, in the Court of Appeal, Southin J.A. spoke of its being used to prevent a claim being defeated as a result of a Court failing to deliver judgment forthwith when it was in the Court's power

to do so.

[43] The defendants submit that the doctrine should not be invoked if a benefit or loss would accrue to a party, and for that proposition rely on the secondary consideration of Hall V.C. in Turner. At page 569 of the Turner decision, Hall V.C. said:

> I may add that upon consideration I cannot think that any injustice can accrue to anybody else in doing that (entering the judgment nunc pro tunc) either as between different judgment creditors or persons having the benefit of judgments in the present state of the law...Therefore there is apparently no benefit or loss to accrue to any body by the course being taken of antedating the judgment.

[44] That statement was adopted by Macdonald Co. Ct. J. in Eagles. But for Eagles, in no Canadian case presented to me where the judgment was entered nunc pro tunc does the Court suggest it was making the order because none of the parties would be prejudiced thereby - that a benefit or loss would not accrue. In Couture, the Court antedated the order knowing that it would bar the appellant's right of appeal. In Bryce, the order was made knowing it would result in the defendants having to pay damages that it otherwise would not have had to pay. Similarly, in Hubert and Krujelis. No case other than Eagles interprets Turner as saying a condition for applying the doctrine is that no party be prejudiced.

[45] I am not persuaded to follow Eagles. In my respectful opinion, Macdonald Co. Ct. J. may not have been well served by counsel. A number of relevant cases are not mentioned in his judgment: Couture; Bryce v. C.P.R.; Young v. Town of Gravenhurst; Gunn v. Harper. Macdonald Co. Ct. J. said no case had been cited to him of an action brought for damages for tort in which judgment had been antedated. Bryce and Young were actions in tort. However, the most significant factor that weighs against following Eagles, is that Macdonald Co. Ct. J.'s reasoning was not adopted in Couture in the Supreme Court of Canada and has not been in caselaw decided in British Columbia.

[46] In my opinion, the Court should not refuse to invoke the doctrine because a loss or benefit would accrue to one of the parties. Historically its application would, in most cases, benefit the estate of the plaintiff and prejudice the defendants, for if found liable, they would pay damages. The caselaw in this Province and in Ontario stands for the narrow proposition that no one should be prejudiced by an act of the Court.

[47] Relying on Knickle v. Rayner and Cory v. Marsh the defendants submit that a refusal to allow new evidence of the plaintiff's death for the purposes of assessing damages, would affront common sense. With respect, those decisions rested on different facts. In both, death occurred after an appeal had been filed but before it had been heard. Those cases address what should be done when a party dies during a proceeding, not what should be done when all evidence and submissions have ended and judgment has been reserved. Knickle and Cory are concerned with ensuring that the proceedings before the Court are founded on accurate factual information.

[48] The defendants' application is refused. I order that the judgment in this case be dated nunc pro tunc to December 13, 1996 with the result that the Estate Administration Act does not apply. The damages awarded in my Reasons of April 11th and 29th, 1997 stand.

[49] The issue of Costs may be spoken to by arrangement with the Trial Division.

"Coultas, J."

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The Honourable Mr. Justice Coultas