
CANADA / JUDGMENT

Bennett v. Bell

2020 BCSC 2113

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2113 Bennett v. Bell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bennett v. Bell,

2020 BCSC 2113

Date: 20200402

Docket: S48702

Registry: Vernon

Between:

Christopher John Bennett

Plaintiff

And

Thomas Austin Bell

Defendant

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Betton

Oral Reasons for Judgment re Costs

In Chambers

Counsel for the Plaintiff:

R.P. Barton

For the Defendant:

No appearance

Counsel for the Third Party:

M. Prah

Place and Date of Trial/Hearing:

Vernon, B.C.

March 3, 2020

Kelowna, B.C.

April 2, 2020

Place and Date of Judgment:

Kelowna, B.C.

April 2, 2020

- [1] THE COURT: I will say at the outset that in these oral reasons I am going to abbreviate some references to authorities and my reasons for judgment following the trial. If my reasons are to be transcribed, I may augment them by inserting some of those references, none of which would change the decision or the reasoning.

Introduction

- [2] The plaintiff was injured in a motor vehicle collision. During a lengthy trial to assess damages, counsel requested that the matter of deductions, pursuant to s. 83 of the Insurance (Vehicle) Act, be dealt with following the delivery of my reasons for judgment. Those reasons for judgment are indexed at 2019 BCSC 1925 and were delivered on November 12, 2019.
- [3] In those reasons for judgment, counsel were also invited to make submissions as to costs, in the event that either party took the position that costs should not follow the event. The third party seeks an apportionment of costs on the basis that the result of the trial represented divided success.
- [4] This decision and these reasons deal only with the divided success issue. Arguments with respect to the deductions under s. 83 have yet to be concluded and that decision will follow the conclusion of the submissions.

- [51] My reasons for judgment set out the background and conclusions on the substantive issues and should be referenced for a full appreciation on the context of the issues raised here. I will, however, include some relevant excerpts from those reasons which give rise to the issues raised on costs. They are as follows:.
- [32] There are numerous issues regarding how the plaintiff's health has been affected by the MVC. I will deal with those issues in later segments of this decision in detail. At this stage, I will summarize the documented physical injuries received as a direct consequence of the MVC. Some of these were not immediately identified but discovered in the days and weeks post-MVC.
- [39] Other conditions and complaints have emerged or been identified since the MVC where the causal link to the MVC is in issue. Some are discrete physical conditions including bilateral carpal tunnel syndrome, right bicep tendon tear, dizziness, hyperacusis and the tinnitus. Others are psychiatric, psychological and/or emotional conditions including chronic pain, sleep disturbance, chronic fatigue, cognitive impairment and depression. For convenience and simplicity I will refer to the latter constellation of issues as the "mental injuries" unless there is a need to reference a particular component of that constellation. It is these issues of causation and the impact of or contribution of each symptom or condition on his overall functioning that are really at the heart of this case.
- [46] This MVC occurred over eight years ago. That passage of time and the complicated history contributed to a long trial. The trial consumed 32 days between June 4, 2018 and April 26, 2019. A total of 47 expert reports were filed. The plaintiff's written submissions were 158 pages in length (1076 paragraphs). There were also supplemental written submissions. The third party's written submissions were 72 pages (353 paragraphs). The plaintiff's reply was 19 pages (91 paragraphs).

Issues and Positions of the Parties

- [47] The parties agree that the defendant is liable for the MVC.
- [48] In addition, there is no real dispute as to what medical, psychological or emotional challenges have emerged for the plaintiff since the MVC; that is to say, the parties do agree as to the fact and general nature of the plaintiff's injuries, conditions and symptoms since the MVC. In respect of damages however, the parties urge me to draw very different conclusions from the evidence.
- [49] The plaintiff argues that all injuries and conditions are caused by the MVC. He says the results have been devastating to all aspects of his life including his employability. The third party challenges the plaintiff's positions as to both the cause and effect of the injuries.

- [51] As to effect, the third party argues that the portion of the physical injuries and symptoms not caused by the MVC directly impacts the plaintiff's capacity to work while also contributing to the mental injuries which in turn impact the plaintiff's capacity to work. I will adopt the third party's reference to these as the unrelated injuries.
- [52] It is these unrelated injuries and their contribution to the mental injuries that the third party says require the 40% negative contingency deductions. The third party says that the deduction should be applied to non-pecuniary damages, past loss of income from teaching, and work with granite countertops and loss of earning capacity as a teacher and granite countertops and some future care items.

Issues and Positions of the Parties

- [6] The third party says that the plaintiff failed to prove several of the injuries or conditions claimed were in fact caused by the motor vehicle collision. The third party argues that the plaintiff's claim for loss of rental income also failed. It argues that these are discrete issues where it succeeded and it should be awarded costs for 10 days of trial as a reasonable estimate of the time consumed in addressing these issues. In addition, it says that the plaintiff should not be permitted to recover various disbursements connected with his effort to prove those claimed injuries. The third party also says that the case was over-litigated. In para. 16 of its written arguments on this issue, it said as follows:

The Third Party further submits that the significant Court [time] spent in this trial on the Issues (which the Third Party [says] was over-litigated by the Plaintiff), the Third Party's success with respect to the issues, and considerable disbursements expended on the Issues warrants the Court's consideration with respect [to] exercising its discretion under Rule 14-1(15) and would provide a just result given the Third Party's success.

- [7] The plaintiff argues that he never alleged that two of the injuries referenced by the third party as not having been proved arose from the motor vehicle collision and that he was successful with respect to one other. Further, the plaintiff says that while not all of the claimed injuries were proved, the plaintiff did successfully recover damages under "all of the major heads of damage". As to the disbursements referred to, the plaintiff points out that not all of the witnesses giving rise to the impugned disbursements testified as experts. He argues that the evidence of those that were expert witnesses was not confined to the specific issues where the plaintiff was not successful.
- [8] In its written argument on the divided success issue, the plaintiff said this at para. 42:

The Plaintiff submits that, while it is certainly open to this Honourable Court to make directions under Rule 14-1(7) that certain items of costs be allowed or disallowed, and it is open to the court to fix disbursements under Rule 14-1(15), the better place for a full assessment of costs and disbursements would be the hearing scheduled before the registrar on April 28, 2020.

- [9] The hearing referred to, I should note, as I understand it, has been adjourned as a result of the directions of the Chief Judge in response to the Covid-19 pandemic.
- [10] Is that an accurate statement, first of all, counsel, that matter has been adjourned?
- [11] MR. BARTON: Yes, My Lord.
- [12] THE COURT: Counsel?
- [13] MR. BARTON: Yes.
- [14] MR. PRAH: Yes, My Lord, it has been adjourned.
- [15] THE COURT: I am sorry?
- [16] MR. PRAH: It has been adjourned, yes.
- [17] THE COURT: All right, sorry, thank you.

Relevant Law

- [18] I do not intend to read these provisions at this point in time, but simply would insert those if my reasons are to be transcribed, Rule 14-1(9) and (15) are particularly relevant:
- (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
- (15) The court may award costs
- (a) of a proceeding,
 - (b) that relate to some particular application, step or matter in or related to the proceeding, or
 - (c) except so far as they relate to some particular application, step or matter in or related to the proceeding
- and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.
- [19] Subrule (15) gives the court a broad discretion. In *Lee v. Jarvie*, 2013 BCCA 515, the Court of Appeal commented on the use of the word "matter" as it is used in that subrule. After referring to several decisions and various academic writings, the Court of Appeal said this at para. 39:
- [39] In my view, the canons of construction referred to by the plaintiff do not cast doubt on the conclusion that Rule 14-1(15) allows a judge to award costs in respect of a discrete issue in litigation.
- [20] In *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, the test for apportionment of costs was set out at para. 31;

- [31] The test for the apportionment of costs under Rule 57(15) can be set out as follows:
- (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
 - (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
 - (3) it must be shown that apportionment would effect a just result.
- [21] In a more general context, it made these observations at para. 7:
- [7] Applications to apportion costs are not a regular part of litigation. They should be confined to relatively rare cases:
- [22] The Court of Appeal also dealt with costs orders being used to address cases in which trials had been unnecessarily prolonged and, in that regard, said this at para. 35, in part:
- [35] A party might prolong a case unnecessarily in various ways. . . . A third way to prolong a case unnecessarily would be to "over litigate" an issue properly raised by either party. In such cases it could be unfair to the party that is ultimately unsuccessful to have to pay costs for issues raised or prolonged unnecessarily by the other party. In order to remedy such unfairness, the judge may exercise his or her discretion to award costs to the party who succeeded on a particular issue, but lost overall.
- [23] In *Kovac v. Moscone*, 2014 BCSC 259, Mr. Justice Harvey declined to apportion costs and said:
- [50] Having considered the authorities, I do not find this case to be one of the exceptional or rare instances where costs apportionment should take place. Although the claims for future economic loss were discrete issues which occupied identifiable portions of the trial, I am not of the view that apportionment would affect a just result in the circumstances.
- [51] Unlike in *Lee*, where the court found that the plaintiff pursued inflated and unrealistic claims, all parties agreed that the plaintiff had profound and disabling injuries. I did not find that her injuries were exaggerated; they were real and catastrophic. As noted earlier, the assessment of the plaintiff's damages were complicated by the subsequent accident at her workplace.
- [52] I agree with Gaul J. that the divergence over apportionment of costs in motor vehicle cases hinges on the "determination of the degree of success" achieved at trial and whether the trial was "unnecessarily prolonged by the pursuit of inflated or unrealistic claims" (at para. 38). He did, however, limit the number of days of trial the plaintiff was entitled to claim costs for, reducing the total number of days from 21 to 11.
- [24] Dealing specifically with disbursements, Rule 14-1(5) and sub (7) say:

- (5) When assessing costs under subrule (2) or (3) of this rule, a registrar must
 - (a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
 - (b) allow a reasonable amount for those disbursements.
- (7) If the court has made an order for costs,
 - (a) any party may, at any time before a registrar issues a certificate under subrule (27), apply for directions to the judge or master who made the order for costs,
 - (b) the judge or master may direct that any item of costs, including any item of disbursements, be allowed or disallowed, and
 - (c) the registrar is bound by any direction given by the judge or master.

Analysis

- [25] Some of my conclusions at the trial which are most relevant in the context of this decision include paras. 104 through 106 inclusive, 108, 111, and 112:
- [104] In summary, I agree with the third party that the bilateral carpal tunnel, right bicep, and right thumb injuries are unrelated to the accident. In addition, the tinnitus and resulting stapedectomy surgery and hyperacusis were not caused by the MVC.
- [105] This leads then to the second facet of causation issues referenced above, the secondary effects [of] the MVC-related injuries and the unrelated injuries or, what I have referenced as the mental injuries.
- [106] There is no doubt that the symptoms, treatments/surgery and associated recovery from the unrelated injuries would have made the post-MVC pre-trial period more difficult for the plaintiff. Logically, all of that would have some impact on his mental health. The challenge is to address that overlap in a manner that awards the plaintiff only for those losses that are properly connected to the negligence of the defendant. This requires trying to understand the plaintiff's physical and mental health prior to those periods and the long-term contribution of the unrelated injuries to the plaintiff's mental injuries and overall functioning.
- [108] It is my conclusion that chronic pain is a primary contributor to the ongoing limitations experienced by the plaintiff and the primary source of the mental injuries. Understanding the source of that chronic pain is therefore necessary.
- [111] It is my conclusion that the sources then of the chronic pain that have driven the mental injuries are the MVC-related injuries.

- [112] The third party argument says "The most significant problem in terms of his ability to work was his pre-existing degenerative conductive hearing loss in his left ear that caused tinnitus and ultimately required stapes surgery that created further complications." I do not agree. It is striking that in a review of the medical opinions for both the third party and the plaintiff there is limited reference to hyperacusis as a significant contributor to his current functioning. Examples include Dr. Laidlow for the third party and Dr. Boucher and Lydia Philips for the plaintiff.
- [26] While it is true that the plaintiff's efforts to connect all of what were grouped as the "unrelated injuries" to the motor vehicle collision were unsuccessful, they remained relevant to the causation of what I termed the "mental injuries."
- [27] In the vast majority of personal injury cases, success for purposes of costs is simply obtaining an award. Where offers pursuant to the Rules have been made by a defendant or third party, success is measured against those offers. As noted above by the Court of Appeal in Sutherland, exceptions to that are relatively rare.
- [28] Here, the plaintiff's case was complicated. I do agree with the third party that the presentation of the case was not a showcase for efficiency. The number of reports and the time spent reviewing in great detail matters of relatively limited import, certainly added days to the length of the trial. There were contributors to that that were beyond the plaintiff's control. There were also arguments advanced that were unsuccessful, but that exists in many cases. I do not wish to be seen to endorse the use of so many expert reports. Counsel must marshal all evidence in the interests of efficiency and focus.
- [29] I am unable, however, to identify discrete matters or issues that would justify a departure from the normal rule regarding costs. All of the possible contributors to the plaintiff's mental injuries needed to be understood. The fact that the plaintiff sought to argue that they were causally linked to the motor vehicle collision as well required time, but given the overall result I would not order an apportionment of costs.
- [30] The plaintiff did succeed in obtaining a substantial overall award in all general categories of damages. To dive into individual issues and parse out who succeeded over each is to invite diminishing the importance of the overall outcome. Obviously, there are circumstances where that is appropriate, but I do not find this to be one of them. There is good reason that such cases are the exception. If courts were easily drawn into such processes the determination of costs would become an overly complex and time-consuming issue. That is not the intention behind the Rules or the cases interpreting them.
- [31] I turn, then, to the third party's argument about the time spent and that the plaintiff over-litigated issues he was unsuccessful on. This is a reference to the comments of the Court of Appeal in Sutherland referenced above, at para. 35. This trial was very long. There were certainly stages of the trial where the plaintiff's case seemed burdened by an approach that it was safer to cover everything and "leave no stone unturned", if you will, than to be precise and laser focused. Unlike Kovac, however, this is not a case where clearly identifiable time

was spent on issues where the plaintiff did not succeed. I am not prepared to reduce the number of days of trial for which the plaintiff is entitled to claim tariff cost items.

- [32] The final issue with respect to costs relates to disbursements claimed in relation to the issues on which the plaintiff did not succeed. The third party proposes a deduction of \$25,019.68 based on all or portions of various disbursements that related to four doctors. For the reasons outlined earlier, I will not make this order. I want to be clear that I am not saying that disbursements should be allowed as presented. They are subject to the taxation in the ordinary course and for the registrar to determine the reasonableness of them.
- [33] Counsel, those are my reasons on the divided success matters. Is there any aspect of that that requires clarification? Given your personal attendance, I invite that in case I have not been clear on any particular point or it is not clear to counsel.
- [34] MR. BARTON: With respect to disbursements and a subsequent assessment hearing, as I understand it, you are not denying any particular item of disbursements, but it is up to the third party to be able to challenge the quantum of [indiscernible] --
- [35] THE COURT: That is correct. So, for example, and I will simply use Dr. Longridge because my recollection is that it is by far and away the largest, his total costs, I think, were something in the order of \$25,000. I do not single that out to say that I think it is reasonable or unreasonable, but it is certainly open to the third party to argue and the registrar to find that the amount charged on any disbursement including those that were the subject of argument here, that they are excessive or unreasonable in the ordinary course, really, echoing the observation made by you, Mr. Barton, in your submissions that I referenced earlier, I think, at para. 42.
- [36] MR. BARTON: Yes.
- [37] THE COURT: Mr. Prah, anything from your perspective?
- [38] MR. PRAH: No, no, My Lord, understood.
- [39] THE COURT: All right.

"Betton J."

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