

CANADA / JUDGMENT

Dhillon v. Jaffer

2013 BCSC 1860

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Supreme Court of British Columbia

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2013 BCSC 1860 Dhillon v. Jaffer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhillon v. Jaffer,

2013 BCSC 1860

Date: 20131010

Docket: S042375

Registry: Vancouver

Between:

Gurmej Singh Dhillon

Plaintiff

And

Jalal A. Jaffer and Nasib Kaur Dhillon

Defendants

Before: The Honourable Mr. Justice Melnick

Supplementary Reasons to: Dhillon v. Jaffer, 2013 BCSC 1595, August 30, 2013

Reasons for Judgment

Counsel for the Plaintiff:

P. Jaffe

Counsel for the Defendant Jaffer:

A.A. Macdonald

Place and Date of Hearing:

Vancouver, B.C.

September 26, 2013

Place and Date of Judgment:

Vancouver, B.C.

October 10, 2013

- [1] In my reasons for judgment (2013 BCSC 1595), I awarded Mr. Dhillon damages for loss of opportunity of \$5,000 and general damages of \$40,000. I did not award court order interest on either amount. Mr. Jaffe, counsel for Mr. Dhillon, submits that I should have ordered interest on both, as they are both pecuniary judgments. Mr. Macdonald, counsel for Mr. Jaffer, takes the opposite view, submitting that I should not include court order interest on those two portions of my judgment.
- [2] In light of counsels' helpful submissions, I have reconsidered my not having awarded court order interest on those two heads of damages. As I mentioned to counsel during submissions to me on September 26, 2013, it was my initial impression that these were both essentially awards of "non-pecuniary" damages. I have now, in part, come to a different conclusion in light of counsels' submissions and further research.

I. DISCUSSION

- [3] The Court Order Interest Act, R.S.B.C. 1996, c. 79 [Act] provides in part:

1 (1) Subject to section 2, a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.

2 The court must not award interest under section 1

- (a) on that part of an order that represents pecuniary loss arising after the date of the order,
- (b) if there is an agreement about interest between the parties,
- (c) on interest or on costs,
- (d) if the creditor waives in writing the right to an award of interest, or
- (e) on that part of an order that represents nonpecuniary damages arising from personal injury or death.

- [4] The terms "pecuniary" judgment is not defined in the Act. A useful starting point is *Wepruk (Guardian ad litem of) v. McMillan Estate* (1993), 33 B.C.A.C. 114 (C.A.) [Wepruk]. The issue on appeal in *Wepruk* was whether the appellant was entitled to court order interest pursuant to s. 1 of the Act for an award for future support and other benefits pursuant to the Estate Administration Act, R.S.B.C. 1996, c. 122. As part of her analysis, Madam Justice Prowse looked at the 1987 Report on the Court Order Interest Act by the Law Reform Commission of BC ("LRC"). In that report, the LRC noted that the term "pecuniary judgment" had not been used by it in its original report that led to the Act. Rather the Commission had used the words "sounding in money" to distinguish monetary awards from non-monetary awards such as decrees of divorce or injunctions, and the Legislature adopted "pecuniary judgment" to signify that concept. In *Wepruk*, Madam Justice Prowse used the LRC's originally suggested terms as an interpretive tool in concluding that the money awarded to the appellant in the case before her "unquestionably sounds in money" and that the award thus constituted a pecuniary judgment to like effect (see *Cabaniss v. Cabaniss*, 2010 BCSC 513).
- [5] In *K.L.B. v. British Columbia* (1998), 163 D.L.R. (4th) 550 (B.C.S.C.) [K.L.B.], a case that dealt with the interpretation of s. 2(e) of the Act, Madam Justice Dillon stated at para. 3:
- 3 Section 1(1) of the Court Order Interest Act, R.S.B.C. 1996, c. 79 establishes the general rule that pre-judgment interest is to be added to a "pecuniary judgment". This refers to any monetary award and is not used in the sense of describing one of the heads of damages (*V.(J.L.) v. H.(P.)* (1997), 40 B.C.L.R. (3d) 73 at 75). Statutory interest is awarded on any monetary judgment that is not excluded under section 2 of the Court Order Interest Act.
- [6] As well see *Mullins v. Levy*, 2006 BCSC 1723 [Mullins], where Mr. Justice Holmes stated at paras. 3 and 4:
- [3] At trial the plaintiff was found to have been assaulted, apprehended and falsely detained, and as a result awarded general damages of \$15,000, and special damages of \$148.74.
- [4] The judgment for general damages is clearly a "pecuniary judgment" under s. 1(1) of the Court Order Interest Act, and subject to s. 2 it is mandatory that "a court must add to a pecuniary judgment an amount of interest the court considers appropriate in the circumstances".
- [7] Although both *K.L.B.* and *Mullins* were successfully appealed on other grounds, the Court of Appeal in *K.L.B.*, 2001 BCCA 221, upheld Madam Justice Dillon's conclusion that the awards in question in that case were pecuniary judgments that were excluded from attracting interest pursuant to s. 2(e) of the Act.
- [8] Finally, in *Woo v. ONNI Ioco Road Five Development Limited Partnership*, 2012 BCSC 1445 [Woo], a declaration that resulted in a monetary order was found to be a pecuniary judgment for the purposes of s.1 of the Act (para. 10). This case involved the plaintiffs successfully applying for a declaration of rescission of a real estate contract for purchase and sale. This entitled them to the return of monies paid under the contract. The plaintiffs then applied for

court order interest. The difficulty with the request was that a 'declaration' was one of the original remedies distinguished from pecuniary judgments by the LRC. Though the LRC recommended, at page 66 of the Report, that a declaration that money is owing should attract prejudgment interest, the case law was conflicting. Thus, the question for the court was whether this specific declaration was a pecuniary judgment or not. The court considered the underlying principle for the award of prejudgment interest, which is that the plaintiff has been kept out of their money, and should be compensated for the harmful effects of delay. In conclusion the court held at para. 36 that the declaration was a pecuniary judgment as the plaintiff was kept out of their money, while the defendants had use of it.

- [9] In light of the above authorities, I conclude that both my awards for damages for loss of opportunity and for general damages are pecuniary judgments for the purpose of s. 1(1) of the Act. Both remedies are, in essence, monetary awards or "sound in money". They do not fall into any other recognized categories such as a divorce decree or injunction. They are awarded as a lump sum. Woo notwithstanding, there does not appear to be any case law that restricts the notion of "pecuniary judgment" based on the principle that a plaintiff has not been kept out of their money. In fact, Woo reaffirms that the main consideration is whether the award is monetary. The courts have also recognized that the application of s. 1(1) is mandatory unless expressly excluded by the Act (*J.L.M. v. P.H.* (1997), 40 B.C.L.R. (3d) 73 (SC) [*J.L.M.*], at para. 8).
- [10] That brings me to the consideration of whether either award is excluded from the application of s. 1 of the Act by s. 2.
- [11] A "pecuniary judgment" is not to be confused with a head of damages (see *K.L.B.* at para. 3; *J.L.M.* at para. 5). That is, "pecuniary judgment" does not refer, solely, to pecuniary damages. Therefore, unless explicitly excluded under s. 2, non-pecuniary damages are also included in the calculation of interest under s. 1.

A. General Damages

- [12] For convenience, I repeat here portions of my original decision relating to the award of general damages:
61. As a result of not having his home or all or part of the proceeds of sale from it, Mr. Dhillon was unable to bring his four children from India for a considerable period of time. That made him lonely. At one point he wanted to die.
62. Of course it was the fraud of Ms. Dhillon and Manohar Dhillon in selling the 57th Avenue property in the first place and not only the negligence of Mr. Jaffer that put Mr. Dhillon into this unhappy state. But Mr. Jaffer's negligence undoubtedly contributed substantially to the agony Mr. Dhillon endured for many years.

71. It is my view that a claim for damages for mental distress consequent upon the negligence of a solicitor is not foreclosed in British Columbia. But must that be negligence in the context of where there also exists a fiduciary duty, such as when a solicitor is negligent in his duty to his own client? I think not, as long as the negligence resulted in injury that is reasonably foreseeable.
72. In this case, I conclude that the greater portion of Mr. Dhillon's distress was brought on by the actions of the fraudster rather than by Mr. Jaffer. However Mr. Jaffer's negligence did contribute to it in a measurable and significant way. By "measurable", I mean to the extent of one-third of overall general damages that I assess at \$120,000, or \$40,000.

(bold added)

- [13] With respect to this award, the only relevant subsection of s. 2 is subsection (e): whether or not the award should be excluded because it represents non-pecuniary damages "arising from personal injury or death". General damages awarded for intangible losses, such as for pain and suffering and mental distress, are considered non-pecuniary damages, and are available in tort and contract cases (Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2d ed. (Toronto: Irwin Law Inc., 2008) at 212). The real issue to be decided is whether the general damages I awarded, essentially for mental distress, are to be considered as "arising from personal injury", as those words are intended to be understood in the Act. This is a question of statutory interpretation.
- [14] Any case of statutory interpretation today must follow the modern approach, as laid out by Elmer Driedger in the *Construction of Statutes*, 2ed. (Toronto: Butterworth's, 1983) at 87, endorsed by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21:
21. Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
- [15] Sections 2(e) and 1(4) of the Act, the two sections which include the term "personal injury", were brought in as part of Bill 27 the Miscellaneous Statutes Amendment Act, 1993, which was passed on June 29th, 1993. There was no debate regarding the amendments except two questions about whether they would affect proceedings already in court for which there was not a judgment yet. There is thus no direct evidence, however weak, about the intention of the Legislature with regards to the implementation of the amendments.
- [16] The words "personal injury" as they appear in s. 2(e) of the Act, have been interpreted in a couple of BC Supreme Court cases, namely *K.L.B.* and *Mullins* mentioned above. *K.L.B.* dealt with negligence on the part of the government with regards to foster children. In the Supreme Court decision dealing with interest, Madam Justice Dillon dealt with whether s. 2(e) applied to damages for breach of fiduciary duty as well as non-pecuniary damages in tort. She found that it did apply, but went on to hold that the court had discretion to apply

equitable interest in that case. At the Court of Appeal, 2001 BCCA 221, the decision of Madam Justice Dillon with regards to most of the awards for damages, the breach of fiduciary duty and equitable interest were overturned. The court upheld an award for general damages with regard to mental injury arising from the complaint of sexual assault, and held that s. 2(e) of the Act applied and thus there was no interest:

54 Court order interest could not be added to the award of general damages because s. 2(e) of the Court Order Interest Act, R.S.B.C. 1996, c. 253 prohibits an award of interest "on that part of an Order that represents non-pecuniary damages arising from personal injury or death."

- [17] In his original decision in *Mullins*, Mr. Justice Holmes found the plaintiff had been assaulted, apprehended and falsely detained. The plaintiff was therefore awarded general damages of \$15,000, in the form of aggravated damages, due to the humiliation and undignified circumstances suffered by the plaintiff. This award was overturned on appeal, making the related decision with regards to s. 2(e) moot. However, the discussion with regards to s. 2(e), although not binding on me, is insightful, on point, and was not addressed by the Court of Appeal.
- [18] In his supplementary decision respecting court order interest in *Mullins* (referred to in para. 6 above), Mr. Justice Holmes dealt directly with the issue of whether general damages for mental pain and suffering fell within the meaning of the words "personal injury" under s. 2(e) of the Act. He noted that the words are undefined within the Act, and that these same words are used in many different legal contexts (para. 7).
- [19] Mr. Justice Holmes referred to several sources including the Black's Law Dictionary entry of "personal injury", *Schrieber v. Canada (AG)*, 2002 SCC 62 [Schrieber], which dealt with the meaning of 'personal injury' in the State Immunity Act, R.S.C. 1985, c. S-18, as well as the ordinary meaning of the word in the Oxford Dictionary. Mr. Justice Holmes also considered the decision in *K.L.B.*, discussed above. At paras. 13 and 14 Mr. Justice Holmes stated:

13 Madam Justice Dillon in *K.L.B. v. British Columbia* (1998), 163 D.L.R. (4th) 550, [1998] B.C.J. No. 1909 (S.C.) held an award for general damages for physical and mental abuse were damages for personal injury" and interest could not be awarded under the Act. I agree with my sister Dillon's view that the object and purpose of the exclusion of interest for personal injury is difficult to understand given the absence of legislative debate or discussion prior to the enactment of s. 2(e) and was contrary to the recommendation of the Law Reform Commission of British Columbia.

14 Madam Justice Dillon noted that it was difficult to justify the exclusion on a principled basis and in my view it would be even more difficult to justify a distinction between physical and mental injury. I agree with the submission of counsel for the defendants that if physical damage only is excluded by s. 2(e), general damage assessments need be further broken down into damages for physical injury and damages for emotional or mental injury. I do not accept that was a purpose of s. 2(e), nor is it a consequence.

- [20] In my view, the reasoning by Mr. Justice Holmes makes sense, and coincides with the application of s. 2(e) by the Court of Appeal in *K.L.B.* to general damages for mental suffering awarded for sexual assault due to negligence.
- [21] It is important to distinguish the case at bar from *Schreiber*, mentioned above. In *Schreiber*, the SCC found that the words "personal injury" in the State Immunity Act were meant to only deal with physical injury and not mental injury. However, the court stated that the English words themselves included the notion of mental injury within their meaning, but that these were limited by the French text of the statute, which only included physical harm. Therefore this case is authority for the "shared meaning rule" in statutory interpretation which governs the interpretation of bilingual legislation: if there is a discrepancy between the two language versions of an enactment, the meaning that is common to both must be adopted unless there is contrary evidence of legislative intent (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis Canada, 2008) at 100). In this case there is no bilingual statute and thus the analysis in *Schreiber* does not apply.
- [22] At the time of the LRC's 1987 report on the Act, s. 2(e) did not exist. The LRC, however, dealt with this proposed change of excluding non-pecuniary damages, and rejected the addition of a section with the effect of s. 2(e). On page 51 the recommendation of the Commission is:
8. The New Act should carry forward the principle that the whole of an award of damages for non-pecuniary loss should attract interest throughout the period preceding judgment.
- [23] Despite this recommendation, in 1993 the Legislature did bring in s. 2(e). The restriction they placed on the exclusion of non-pecuniary judgments from interest was simply to apply it only to damages "arising from personal injury or death". Section 1(4) also uses the term "personal injury". That section deals with the compensation for loss of income through collateral benefits, such as disability insurance. However, there is no language in either section restricting the meaning of "personal injury" to physical injury.
- [24] I therefore conclude that the term "personal injury" in s. 2(e) of the Act includes both physical and mental injuries.
- [25] The next question to be addressed is whether the award for general damages can be seen as "arising from personal injury", as that phrase is found in the Act.
- [26] General damages can be awarded for intangible losses such as pain and suffering and mental distress, which are, literally, injuries to one's person. This would include damages in breach of contract cases, without an independent tort, such as in the "holiday" cases, where the contract is for a non-economic benefit. In those cases general damages may be awarded, under expectation damages, for "disappointment, the distress, the upset and frustration caused by the breach." (Cassels, 226). General damages may also be awarded for loss of amenity and loss of enjoyment of property.

[27] In defamation cases, where general damages have been awarded for injury to reputation, the courts have ordered interest on those general damages: e.g. *Manno v. Henry*, 2008 BCSC 738; *Wilson v Switlo*, 2011 BCSC 1287. In *Manno*, Mr. Justice Grauer of this Court held at para. 213:

213 Although these damages are non-pecuniary in nature, their award nevertheless constitutes a pecuniary judgment within the meaning of s. 1(1) of the Court Order Interest Act, R.S.B.C. 1996, c. 79, and they do not arise from personal injury or death within the meaning of s. 2(e) of that Act. Accordingly, the plaintiffs are entitled to interest from the date on which their cause of action arose to the date of this judgment.

[28] This result would appear to me to reflect the view of the courts that injury to reputation is not to be equated with injury to one's person in the sense that physical injury or emotional or mental injury are injury to one's person.

[29] In this case, the injury that I have found Mr. Dhillon suffered was injury to his person in the form of mental distress. The mental distress was, in my view, undoubtedly "personal injury" and that was what gave rise to the award of damages. To the extent that Mr. Jaffer by his negligence contributed to that personal injury I found him responsible for a portion of the damages.

[30] On behalf of Mr. Dhillon, Mr. Jaffe argued that a general damage award cannot be characterized as a personal injury award in that personal injury was never pleaded. However there is, strictly speaking, no such thing as a "personal injury case", just court cases where the damage demonstrated is to the person. Mr. Dhillon's action against Mr. Jaffer was framed, in part, in tort. It was the tort of solicitor's negligence, his breach of the duty of care he owed to Mr. Dhillon as a non-client, that the Court of Appeal found gave rise to the damages I assessed. One of the consequences of Mr. Jaffer's negligence, I found, was the mental anguish suffered by Mr. Dhillon. It was by that path that causation was established, and for that reason the general damages were awarded.

[31] In the result, I am satisfied that the general damages that I awarded to Mr. Dhillon can properly be said to have arisen from personal injury. As a consequence, interest on that portion of my award to him is excluded pursuant to s. 2(e) of the Act.

B. Loss of Opportunity

[32] Again, to assist, I repeat a portion of my original judgment that dealt with this award:

52. In the result, I consider that Mr. Dhillon did indeed lose an opportunity to invest in the Vancouver real estate market before 2005 as a consequence of not having been made aware sooner of the availability to him of the proceeds of sale in September 1993. But I discount the availability to him of a fund to invest by 50%, given the contingencies noted above. That is, it is my judgment that the funds he would have had to invest would likely have been smaller than \$187,200 given the very significant potential of Ms. Dhillon being successful in an FRA claim, a claim that likely would have taken some time to resolve while, in the

meantime, the prices of real estate would have risen. Mr. Dhillon presented himself as a man who was not wealthy. This is borne out by the manner in which he lived, including the type of housing in which he and his children resided during the fraud action and up to 2008 when he got possession of the 52nd Avenue property. But he did subsequently manage to re-mortgage that property to another bank so he qualified for that.

[33] As noted earlier, this award is a pecuniary judgment. In the case of this award, however, I find that it does not fall under any of the exclusionary headings in s. 2 of the Act. This is an example where the plaintiff has been kept out of his money. At para. 53 of my reasons, I did say that the claim for loss of opportunity did not arise until 1995, the date that a possible Family Relations Act proceeding would have been completed. Thus it is not unreasonable to say that the cause of action relating to this part of Mr. Dhillon's claim arose in 1995 rather than in 1993. As in my original reasons I did not state a specific date in 1995, I would now say that court order interest on this portion of the damages I awarded should be calculated from January 1, 1995.

II. CONCLUSION

[34] I conclude that:

1. Mr. Dhillon is entitled to court order interest at Registrar's rates on the sum of \$5,000 awarded for loss of opportunity from January 1, 1995.
2. Mr. Dhillon is not entitled to court order interest of the sum of \$40,000 I awarded for general damages.

[35] Counsel may speak to the issue of costs arising from this application when they address costs of the action generally at a later date.

"Melnick J."

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