

CANADA / JUDGMENT

Estey v. Bateson

2012 BCSC 1515

COURT

Supreme Court of British Columbia

DECIDED

15 October 2012

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2012 BCSC 1515 Estey v. Bateson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Estey v. Bateson, 2012 BCSC 1515 Date: 20121015 Docket: M125976 Registry: New Westminster Between: Mark Alexander Estey Plaintiff And Nicholas Perry Bateson and Batesons Martial Arts Ltd. also known as Batesons Martial Arts Ltd. Defendants Before: Master Caldwell Reasons for Judgment Counsel for the Plaintiff: A. Sovani Counsel for the Defendants: A. Urquhart Place and Date of Hearing: New Westminster, B.C. June 27, 2012 Place and Date of Judgment: New Westminster, B.C. October 15, 2012

- [1] The plaintiff applies for an advance of \$35,000 on his claim for damages relating to a motor vehicle accident which occurred on August 16, 2008 and for costs thrown away as a result of the adjournment.
- [2] Liability has been admitted and the trial, which was set to commence on February 13, 2012 for 10 days, was adjourned on that date by Fitzpatrick J.; at the time of the adjournment leave was granted to the plaintiff to apply for an advance and for costs thrown away.
- [3] While the matter was directed to be re-set for 15 rather than 10 days, the main reason for the adjournment was a late change of counsel on the part of the defendants. That change became necessary when original defence counsel was required to withdraw from practice for medical/health related issues.
- [4] Certain matters are clear on the sworn material:
1. liability was contested until the eve of trial;
 2. plaintiff's counsel was required to prepare to establish liability;
 3. plaintiff's counsel had several witnesses, including experts, prepared and on notice to attend the trial;
 4. no fault can be attributed to the defence for the late change of counsel;
 5. the plaintiff had incurred considerable expense relating to special damages and witness preparation and attendance fees;

6. the trial will now be heard sometime in mid-2014, a delay of some two years from the time of the adjournment.
- [5] Master Keighley considered the issue of the jurisdiction to order an advance other than as a term of an adjournment in the case of *Cikojevic v. Timm*, 2007 BCSC 1689 and found that such jurisdiction does exist. In addition, I rely upon the order of Fitzpatrick J. which expressly granted the plaintiff liberty to make such application in this particular case.
- [6] The court has a discretionary authority to order that an advance be paid but such order should only be made in special circumstances and only if the judge or master is satisfied that there is no possibility that the ultimate award of damages will be less than the amount of the advance: see *Serban v. Casselman*, [1995] B.C.J. No. 254 (B.C.C.A.) and *Cikojevic v. Timm*, 2008 BCSC 74. Two of the considerations which the court must address are the length of time which will pass until trial and whether the delay will cause the plaintiff financial hardship: see *O'Ruairc v. Pelletier*, 2002 BCSC 1107 and *Cikojevic*.
- [7] Prior to the accident the plaintiff supported himself by buying, restoring and selling cars and pool tables. The evidence regarding his financial situation reveals that he earned a modest income which met his basic day to day needs and expenses.
- [8] Since the accident the plaintiff says that he has been limited in his ability to return to such pursuits, that his income is significantly reduced and that he has had to rely on the generosity of friends and family in order to survive.
- [9] The plaintiff's experts tend to support the position of the plaintiff regarding his injuries and his ability to work and earn income. Reference to the various reports and to the submissions of plaintiff's counsel, the material suggests that:
- the plaintiff did not complete high school;
 - his injuries include soft tissue complaints, right rotator cuff tendinitis, left knee pain, mild traumatic brain injury/concussion, psychological and emotional injury including depression and elements of PTSD;
 - his work and recreational pursuits will be affected by his injuries;
 - he may require vocational rehabilitation.
- [10] I am prepared to accept, for purposes of this application, that the plaintiff was injured and had his ability to work compromised for a time; I do not know for how long.
- [11] I am also left with a complete lack of evidence as to how much money, particularly income, the plaintiff claims to have lost as a result of the accident. He says, at paragraph 19 of his affidavit #2 that "I was making a sufficient amount of money prior to the Accident, which allowed me to support my daily costs of living" and then goes on to say at paragraph 21 of that affidavit that "since the Accident, I have requested and received monetary assistance from my family and friends, in order to support my daily cost of living." At no point does he

put a figure to either of these assertions other than to suggest that he is requesting a \$35,000 advance "to help me support my daily cost of living, including my medical expenses".

- [12] I am prepared to find that the plaintiff was subsisting on his income prior to the accident and that he has been forced to live in a deficit position since the accident. Absent evidence of actual loss or shortfall, and on an interim "advance" basis, I am prepared to estimate that a minimum shortfall of \$2,500 per year for each of the six years from accident to trial is appropriate. There will be an order for an advance payment to the plaintiff in the amount of \$15,000 forthwith.
- [13] In addition to the above advance, I am satisfied that the plaintiff is entitled to his costs thrown away including preparation for the trial of this matter which was adjourned on the first day of trial, February 13, 2012 in any event of the cause. I have not been asked to quantify those costs at this time and my review of the material indicates that it is unclear as to which of the professionals have actually been paid for their trial preparation and attendance or late cancellation; accordingly that issue will have to be dealt with in the normal fashion as part of the assessment of costs.
- [14] Finally, I have reviewed the special damages as claimed. The plaintiff has clearly spent considerable money on medications and physiotherapy as well as other treatments such as those provided by Japan Shiatsu Inc. I am unable at this point to determine the propriety of all of these treatments or expenses however I am prepared to order an additional advance on special damages in the amount of \$1,500, again payable forthwith.
- [15] The plaintiff is entitled to his costs of this application in any event of the cause. "Master Caldwell"

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