
CANADA / JUDGMENT

Howell v. Witt

2016 BCSC 913

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 913 Howell v. Witt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Howell v. Witt,

2016 BCSC 913

Date: 20160524

Docket: M111891

Registry: Vancouver

Between:

Kurtis Howell

Plaintiff

And

John Witt, Mercedes-Benz Financial Services

Canada Corporation, DCFS Canada Corp., Mercedes-Benz

Financial Services, previously known as DCFS Canada Corp.

and Safetek Emergency Vehicles Ltd.

Defendants

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Plaintiff:

James A. Hanson

Counsel for the Defendants:

Jasroop S. Grewal

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 28, 2016

Place and Date of Judgment:

Vancouver, B.C.

May 24, 2016

- [1] Following a 14-day trial by judge and jury, Kurtis Howell, the plaintiff, was awarded damages of \$370,200 for personal injuries suffered in a motor vehicle accident. The plaintiff, as the successful party, was entitled to costs, but I permitted the parties to make submissions at a later date if they could not agree as to the terms of the order for costs. They were unable to agree as to the scale of costs. The plaintiff says he should be awarded costs at Scale C while the defendants say that costs should be awarded at Scale B.
- [2] Pursuant to the Supreme Court Civil Rules, Appendix B, s. 2(2), Scale B is for "matters of ordinary difficulty" and Scale C is for "matters of more than ordinary difficulty". Subsection 2(3) sets out three factors which a court can take into account when fixing the scale of costs. The only one of those factors which is relevant to the present case is (a) whether the case involved "a difficult issue of law, fact or construction". The plaintiff says that the case involved difficult issues of fact. In addition, the plaintiff says that examination of the factors set out in *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494 at para. 6, supports an order for costs at Scale C. Both parties agree that the factors set out in that case are useful for assessing the appropriate scale of costs here. Those factors are:
- (a) Length of trial;
 - (b) Complexity of issues;
 - (c) Number and complexity of pre-trial applications;
 - (d) Whether or not the action was hard-fought with little or nothing conceded along the way;
 - (e) The number and length of examinations for discovery;
 - (f) The number and complexity of expert reports;
 - (g) The extent of the effort required in the collection of and proof of the facts.

- [3] As noted in Slocan at para. 23, the fact that some of the factors are neutral "does not allow them to be notionally set-off against or deducted from the factors militating in favour of an order for increased costs, if Scale C is justified on the basis of one or more of the other factors." Accordingly, the question is whether the circumstances of this case justify Scale C costs on the basis of one or more of the relevant factors. For the reasons that follow, I conclude that the plaintiff is entitled to costs at Scale B. In arriving at this conclusion, I have considered all of the factors in Slocan as well as the arguments of the parties.

Position of the Plaintiff

- [4] The plaintiff says that an examination of the factors collectively should result in the conclusion that the case was one of more than ordinary difficulty. He argues that usually a trial of three weeks or longer will be found to be of more than ordinary complexity. Further, he says that a jury trial of that length is, on its face, of more than ordinary difficulty. The plaintiff also says that the case involved complex issues regarding the extent and nature of his injuries, his degree of vocational disability following the accident, and the impact on his future. The plaintiff notes that there were a number of pre-trial applications, three conferences and four half-days of discovery. He also emphasizes the large number of expert reports: 18 in total.
- [5] The plaintiff emphasizes that the case was "hard fought at trial". The defendants delivered a lengthy letter objecting to almost all of the expert reports and took positions at trial which challenged the plaintiff's credibility, not only about the nature of his injuries, but also about his Facebook posts and the severity of the collision. The plaintiff says that these aggressive tactics were designed to bring home to him that the litigation process was a rough ride indeed.

Position of the Defendants

- [6] The defendants take issue with the plaintiff's characterization of the relevant factors. They say the case was a relatively straightforward personal injury action where the plaintiff was advancing a substantial claim arising from a soft tissue injury. This is the kind of case frequently heard in this Court. Such cases always involve questions of credibility and causation of injury. The defence says those issues, as considered in this case, did not result in a matter which could be described as being of more than ordinary difficulty.
- [7] While the trial lasted for close to three weeks, the defence says that fact alone, whether with or without a jury, does not turn a case of ordinary difficulty into one to which Scale C should apply. The defendants note that the applications were, for the most part, uncontentious and the additional trial management conference was occasioned by an adjournment of the trial and the Court's concern about the sufficiency of the time set aside for trial. The defence contests the characterization of the expert reports as complex; they were the kind of reports received and considered regularly in personal injury cases. Finally, the defence says that while counsel challenged the plaintiff's evidence at trial, there was nothing untoward or

unduly aggressive about the defence. Indeed, the defence says that counsel worked well together throughout the trial and each accommodated the reasonable requests of the other side.

Analysis

- [8] When I consider each of the factors as set out in *Slocan*, I find that none of them suggest that this was a case of more than ordinary difficulty. Further, when I look at those factors collectively, the case is still properly characterized as one of ordinary difficulty.

Length of trial

- [9] The plaintiff cites *Slocan* at para. 9 for the proposition that "generally a trial of three or four court weeks will be found to be a trial of more than ordinary complexity". The trial in the present case lasted 14 days, nearly bringing it within the low end of that range. However, as the defendants note, evidence was heard on only 10 of the 14 days. Simply because the length of a trial falls within the three to four-week range does not automatically bring it under Scale C; it is the nature of the case and complexity of the issues that are more important when fixing the scale of costs. In other cases, the court has awarded Scale B costs for trials of more than three weeks: see, for example, *Hussack v. School District No. 33 (Chilliwack)*, 2010 BCSC 304 (20 days of evidence and 3 days of argument); *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1842 (43-day trial); and *Best v. Thomas*, 2014 BCSC 2487 (15-day personal injury trial).
- [10] The plaintiff's suggestion that jury trials of three weeks should be considered to be of more than ordinary difficulty finds no support in the jurisprudence. None of the cases cited by the parties considered the mode of trial to be a factor in fixing the scale of costs. I note that this issue was considered in *Topple v. Topple*, [1991] B.C.J. No. 2990 (S.C.). The plaintiff sought costs at Scale 5 (under the former Rules) following a 16-day trial on the grounds that a jury trial was, by its very nature, more complex than a trial by judge alone. Madam Justice Rowles rejected that argument and stated:

The fact that a trial proceeds with a jury does not, in itself, alter the difficulty of the matters to be decided. In my view costs on a scale higher than 3 cannot be justified solely on the basis that there has been a jury trial. (at p. 3)

- [11] The length of the trial in the present case is certainly not determinative. Even if I accept that it does fall within the general range where Scale C costs may be awarded (in other words, ignoring the fact that some of the days were half days or shorter), other factors must necessarily be taken into account in determining the scale of costs. In other words, the length of trial here is, at best, neutral in considering which scale of costs is appropriate.

Complexity of issues

- [12] The plaintiff's argument focused on the complexity of the issues. While acknowledging that personal injury cases are often of ordinary difficulty, he says that some of the nature of the issues in this case made the case quite difficult: the extent and nature of his injuries; the degree of his vocational disability; and the impact of his injuries on his future. He argued that consideration of these issues required the jury to look at "medical, vocational and economic considerations".
- [13] While the issues in question were extremely important to the plaintiff, they were not significantly different from those that must be considered in the ordinary motor vehicle accident case. Every personal injury case requires the examination of medical, vocational and economic considerations. While those considerations can, in some cases, become sufficiently complex to be of more than ordinary difficulty, they did not attain that level here. The plaintiff contended that he could no longer work as a longshoreman, even though he had done so for many years after the accident. That claim required the jury to consider his credibility, as well as the vocational and economic considerations associated with his loss of future income claim. The jury was required to consider evidence regarding his occupation as well as expert evidence about his ability to perform other jobs. The evidence may have been unfamiliar to most jury members, but it is the kind of evidence heard on a daily basis in our courts. The unionized pay scale and highly structured promotion scheme likely made it easier for the jury as the triers of fact, to determine an appropriate damage award.
- [14] As noted in *Aikenhead v. Higgs* (1992), 65 B.C.L.R. (2d) 340 (S.C.) at paras. 9-10, personal injury litigation dominates the civil lists in this Court and is often of average or ordinary difficulty. While the present case has a number of elements that bring it close to crossing the line into more than ordinary difficulty, it does not quite get there. Liability was admitted from the outset. The nature of the injuries the plaintiff sought to prove in this case was rather common and did not involve complicated evidence from any of the medical specialists. Indeed, in spite of the number of expert reports, the trial was able to complete with only two weeks of testimony.

Number and complexity of pre-trial applications

- [15] The number and complexity of pre-trial applications does not support a conclusion that this was a matter of more than ordinary difficulty. There was a case planning conference and two trial management conferences. The second conference was held only because the Court was concerned that the trial could not be completed in the time allotted. While there were pre-trial applications for documents, they were either unopposed or by consent.

Was the action hard fought with little or nothing conceded along the way

- [16] This was the other main focus of the plaintiff's submissions. He argued that the case was "hard fought at trial" and relies on *Kinloch v. Edmonds*, 2008 BCSC 1684 for the proposition that when that happens, it is a factor which weighs markedly in favour of fixing a higher scale of costs.
- [17] The plaintiff says the defendants used an approach similar to that taken in *Kinloch* as described at para. 48:
- [48] Without delving into further detail, this was a case where the police defendants were defended in a way that gave absolutely no quarter. It was apparent that part of the strategy was to ensure that the plaintiff would recognize that the litigation process upon which she had chosen to embark was a rough ride indeed. One could be forgiven for thinking that the defence was eager to put the plaintiff's character on trial, and to put it in a most unfavourable light. Although they were not able to do that, it was not for a want of effort.
- [18] In *Kinloch*, the court was very critical of the way in which the defence handled the case throughout the litigation. The court very nearly awarded special costs to the plaintiff as a result of the problematic conduct and behaviour of the police defendants who took positions that were "not-unreasonably described as uncooperative and difficult". Justice Williams found the defendants "ardently pursued a strategy of seeking to put in issue the plaintiff's character and to lead evidence unflattering to her" (at para. 39).
- [19] The plaintiff in the present action gave the following examples of the case being hard fought:
- the defence sent a lengthy letter giving notice of their objection to the admissibility of all of the plaintiff's expert reports;
 - the defence contended that the accident occurred at a lower velocity and with less force than the plaintiff alleged and called the defendant driver to give evidence;
 - the defence alleged that the plaintiff left the scene shortly after the accident occurred, which he denied; and
 - defence counsel conducted an aggressive cross-examination of the plaintiff regarding his credibility which included a reference to an inaptly named Facebook group to which he belonged, but which was irrelevant to any issue in the case.
- [20] I do not agree that the steps taken by the defendants in this case amount to the kind of behaviour which meets the "hard fought" standard as described in *Kinloch*. As noted in *Slocan* at para. 14, being tenacious in defence of a claim should not by itself be a basis for an award of increased costs:
- [14] The consideration of whether the matter was "hard fought" must be approached with caution. In *Ter Neuzen v. Korn* 1991 CanLII 1662, Hutchinson, J. observed:

To award Scale 5 costs because the defendant was tenacious in defending an action hardly seems a fair test for increased costs to the plaintiff, tenacity being defence counsel's duty to his client.

- [21] Here, the defendants did not take unreasonable positions or attempt to embarrass the plaintiff unduly. Counsel challenged his evidence in ways which were never inappropriate. While the issue of the Facebook group could have been handled differently (it should have been raised with the plaintiff or counsel prior to the commencement of cross-examination), I accept defence counsel's explanation: they were not made aware of it before cross-examination started and, if there was truth to the implication, it could have been relevant to the plaintiff's credibility.
- [22] I should also note that counsel for both parties co-operated in virtually all matters throughout the course of the trial. Indeed, I commend both sides for the professional and courteous way in which they handled the trial. While the letter of objection to the expert reports was overstated and arguably unreasonable, at the start of trial, the defendants resiled from the position taken in that letter. The admission of the reports and testimony of the experts proceeded smoothly and without any unusual difficulty.
- [23] In short, this was not a case like *Kinloch* where the defence took unreasonable positions which were ardently maintained. Credibility was very important and the defence strategy to challenge the plaintiff's version of the accident and the extent and nature of his injuries was not unreasonable. In the adversarial process, the parties will often take contrary positions which will require issues to be seriously challenged and vigorously argued. When that occurs, it should not elevate the scale of costs except when one side is acting in an unreasonable manner. Vigorously defending a client or a client's interests is of fundamental importance to the integrity of the justice system and should not be curbed for fear of an increase in the scale of the costs award.

The number and length of examinations for discovery

- [24] Four half-days of discovery is not out of the ordinary, particularly in light of the magnitude of the plaintiff's claim for income loss.

The number and complexity of expert reports

- [25] There were 18 experts' reports served by both sides, although some were not tendered in evidence. While this is a large number, the reports were not complex or difficult to understand. There were no complex causation or engineering reports. The issues which did require expert evidence - the extent of the plaintiff's injuries; his prognosis; the type of work he could do in the future - were relatively straightforward, even though the parties had differing views. In *Maras*, where evidence of a similar nature was presented in a personal injury case, the trial judge found that the "evidence was not of more than ordinary difficulty" (at para. 16). I would arrive at the same conclusion.

The extent of the effort required in the collection of and proof of the facts

[26] The plaintiff presented evidence from a number of longshoremen to describe and explain the nature of the work performed by longshoremen. He also called evidence to prove the claim for income loss and to explain what is required in order to become a foreman. While the proof of these matters required more witnesses than many personal injury cases, I cannot conclude that it made the collection and proof of facts to be of more than ordinary difficulty.

Summary

[27] I cannot conclude that any of the factors to be considered renders this case one of more than ordinary difficulty. It was a case which involved interesting issues of fact and the jury as trier of fact had to consider ten days of testimony and not an inconsiderable number of expert reports. However, even when I consider all of the factors together, I must find that this was a case of ordinary difficulty.

"Butler J."

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