

CANADA / JUDGMENT

Lee v. Jarvie

2013 BCCA 17

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 17 Lee v. Jarvie COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Lee v. Jarvie, 2013 BCCA 17 Date: 20130116 Docket: CA040327 Between: Stanley You Won Lee aka Stanley Lee Appellant (Plaintiff) And Ruth Eleanor Jarvie and Rosana Ng Respondents (Defendants) Before: The Honourable Madam Justice Newbury (In Chambers) On appeal from: Supreme Court of British Columbia, October 16, 2012 (Lee v. Jarvie, 2012 BCSC 1521, New Westminster Docket No. M94690) Counsel for the Appellant: T. Spraggs K. Gardner Counsel for the Respondent: C. Godwin Place and Date of Hearing: Vancouver, British Columbia January 4, 2013 Place and Date of Judgment: Vancouver, British Columbia January 16, 2013 Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] The plaintiff Mr. Lee seeks leave to appeal a costs judgment released after the trial of a personal injury action. The plaintiff had sought the following damages at trial: Non-Pecuniary Damages \$90,000 – \$130,000 Loss of Past Income \$92,000 – \$107,000 Loss of Future Earning Capacity \$400,000 – \$650,000 Loss of Housekeeping Capacity \$10,000 – \$12,000 Cost of Future Care \$46,000 – \$104,150 Special Damages \$1,722 The trial judge's award of \$50,200 (see 2010 BCSC 1852) comprised the following: Non-Pecuniary Damages \$40,000 Loss of Past Income \$1,650 Loss of Future Earning Capacity \$0 Loss of Housekeeping Capacity \$0 Cost of Future Care \$7,500 Special Damages \$1,050
- [2] Submissions regarding costs were heard on June 30, 2011 and the Court's reasons were released on October 16, 2012. Those reasons, indexed as 2012 BCSC 1521, are lengthy and contain a review of the leading cases of this court and the trial court dealing with the apportionment of costs in cases where success has been mixed. The trial judge disagreed with the plaintiff's argument that he had been "substantially successful" at trial. In his analysis: In my view, the plaintiff was not substantially successful at trial. The defendants admitted liability. They also agreed with the plaintiff's claim for his actual past wage losses. The main dispute between the parties and the principal focus of the 13 days of evidence was on the plaintiff's claims for loss of past opportunity to earn wages, loss of future earning capacity, and cost of future care. I found the plaintiff's claim on the first two of these issues failed completely and there was divided success on the third. In my opinion, the trial of the plaintiff's action resulted in divided success. I agree with the defendants' submission that given the divided success and the clearly distinguishable issues upon which they were

successful, and the fact that the trial was prolonged by the claimant's pursuit of claims that were unsupported by the evidence, the plaintiff's case is one where an apportionment of costs is worthy of consideration. [At paras. 39-40.]

- [3] The trial judge reviewed what had transpired at trial with respect to each of the heads of claimed damages, noting that the evidence presented on past wage loss was "so weak there was no option for the court but to dismiss it" and that the claim was "grossly inflated and contributed to an unnecessary protraction of the trial"; that the claim for loss of future earning capacity was exaggerated and "unsupported by the evidence"; that the claim for costs of future care was "an unrealistically inflated one that unnecessarily prolonged and complicated this proceeding"; and that overall, the protracted nature of the litigation was mainly attributable to the plaintiff. Having concluded that an apportionment of the costs would be in the interests of justice, he noted the two methods of apportioning costs discussed by Legg J. (as he then was) in *Waterhouse v. Fedor* [1984] 13 B.C.L.R. (2d) 186: I also agree that two methods may be used in determining "the degree of success". One method involves the judge assessing a percentage figure to the relative success of the parties. The other method involves determining the number of days spent in trial on "unsuccessful" issues in proportion to the time spent on "successful" issues. Either way, the relative success of the parties is determined and each party is entitled to that portion of his own costs, which are then set-off against the other, and the difference, if any, is paid to the party in whose favour the difference lies. [At 190]
- [4] The judge calculated that both approaches would yield the same result. He explained: In the present case, either approach to the apportionment of costs articulated in *Waterhouse* will yield the same result. In my opinion, approximately seven out of the 13 days of trial can be attributed to the evidence and arguments addressing the plaintiff's claims for loss of past opportunity to earn wages, loss of future earning capacity and cost of future care. As I am of the view that success at trial was divided, the fair and just result would be to apportion costs on a 50/50 basis. That is, the plaintiff will be entitled to 50% of his costs and the defendants will be entitled to 50% of their costs, both to be set-off one against the other. Moreover, I am denying the plaintiff his disbursements associated with the evidence of Mr. Worthington-White, Ms. Quastel and Mr. Benning. Although I had significant difficulties with the evidence of Dr. Lee, Dr. Kokan, and Dr. Hershler, particularly with respect to the plaintiff's claims for loss of future earning capacity, their evidence was marginally helpful regarding the plaintiff's claim for general damages and therefore I will grant him 15% of his disbursements regarding their evidence. [At paras. 77-78.]
- [5] The plaintiff seeks leave to appeal what he refers to in his written argument as "points in issue" - whether the Court erred in granting the plaintiff only 50% of his costs and granting the defendants 50% of their costs, to be set off; whether it erred in denying the plaintiff all of his disbursements relating to two of the experts; whether it erred in granting the plaintiff only 15% of his disbursements relating to two other experts; and whether it erred in granting the defendants their costs of the costs hearing. The plaintiff contends that the

"point on appeal" is significant to the practice and to the parties, but with one exception, he does not suggest that any particular reasoning of the trial judge was erroneous. It appears his primary submission is that as a matter of law, the result was such that the trial judge's discretion was not exercised judicially and that the plaintiff's "victory" may be only a pyrrhic one once the amounts of costs have been determined.

- [6] The one issue of law advanced by the plaintiff is that there is an inconsistency in the jurisprudence of the British Columbia Supreme Court as to whether "heads of damages" can be considered as discrete "issues" on which success or failure may be judged and on which costs may be apportioned. On this point, Mr. Spraggs cited *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 31, where this Court noted the "test" for the apportionment of costs under former Rule 57(15). With respect, I do not read *Sutherland* as disclosing any particular conflict in the jurisprudence. The question of what constitutes a "particular issue or part of the proceeding" within the meaning of the former Rule 57(15) was debated some years ago in *British Columbia v. Worthington (Canada) Inc.* (1988) 32 C.P.C. (2d) 166 (B.C.C.A.), but in my view, the jurisprudence has for some time considered "heads of damages" to be "issues" or "parts" of the proceeding within the meaning of former Supreme Court Rule 57(15), on the basis of which costs could be apportioned in appropriate cases.
- [7] The new rule, however, uses very different terminology. Rule 14-1(15) of the Supreme Court Civil Rules now states: 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. [Emphasis added.]
- The trial judge stated at the beginning of his reasons (paras. 8-10) that he saw no meaningful difference between former Rule 57 and the new Rule 14-1. It was because of this that he referred to this court's decision in *Sutherland* and was guided by the test articulated at para. 31 of that case by Chief Justice Finch: 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. [Emphasis added.]
- [8] It does not appear that either party before the Court in the costs hearing in the case at bar argued that Rule 14-1(15) differed in any material respect from its predecessor, and as has been seen, none of the "grounds" of appeal proposed to be argued on appeal refers to the wording or effect of the new Rule as something distinct from the former one. I note that

Madame Justice Dillon and Mr. Gordon Turriff, the authors of the British Columbia Annual Practice (2013), say this at the beginning of their annotation of Rule 14-1(15): Quaere whether "matter" is intended to include "issue", one of the keywords used in Rule 57(15), the predecessor to this subrule. The authors make that assumption. They also assume that "step" is used as a synonym for "part", a second keyword in the predecessor subrule. If the authors' assumptions are incorrect, many of the annotations included under this subrule may no longer be useful.

- [9] It seems to me that the wording of the new Rule is sufficiently different from the old as to warrant consideration by this court, even though this point was not raised by the applicant for leave in this case. Arguably, the word "matter" is to be interpreted ejusdem generis with "application " and "step"-- in which case the jurisprudence under the former Rules may no longer be correct. This point is of importance to the practice and to the law generally. Accordingly, I grant leave to Mr. Lee to appeal on the general question (which may well be approached as encompassing several sub-questions) of whether, given the wording of Rule 14-1(15), the trial judge erred in apportioning and making the order as to costs that he did. "The Honourable Madam Justice Newbury"

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