

CANADA / JUDGMENT

LeFler v. Anderson

2008 BCSC 1563

COURT

Supreme Court of British Columbia

DECIDED

17 November 2008

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2008 BCSC 1563 LeFler v. Anderson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: LeFler v. Anderson, 2008 BCSC 1563 Date: 20081117 Docket: M89807 Registry: New Westminster Between: Donna LeFler Plaintiff And Leigh Anderson, Evelyn Jean Rickerby, Michael Wall, and Greater Vancouver Transportation Authority Defendants Before: The Honourable Madam Justice Koenigsberg Reasons for Judgment Counsel for the Plaintiff: G.A. Smith Counsel for the Defendants: A.M. Gunn, Jr. R.W. Parsons Date and Place of Hearing: May 29, 2008 New Westminster, B.C.

INTRODUCTION

- [1] The parties seek judgment in this proceeding consequent upon the verdict of the civil jury in this matter. In that context two post-verdict issues have arisen for the Court's consideration, as set out by the defendants:
- (a) Is any prejudgment interest payable pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 231 [the "COIA"]?
- (b) Does the Rule 37 offer to settle issued in this proceeding with respect to the second accident on 13 August 2003 (the "Second Accident Rule 37 Offer") attract the costs consequences prescribed by Rule 37(24)(a) of the Rules of Court, B.C. Reg. 221/90 (the "Rules of Court")?
- PREJUDGMENT INTEREST
- [2] The defendants say no prejudgment interest is payable for income loss. Their submission, in summary, is set out here: The plaintiff received payments before trial to replace, provide indemnification for, compensate for, or protect against some or all of her pre-trial loss of income earning capacity. The value of those payments exceeds the jury's assessment of damages for past loss of income earning capacity - and thus reduces to zero the amount of the income loss on which interest may be calculated under the Court Order Interest Act, R.S.B.C. 1996, c. 29 ["COIA"]. Accordingly, pursuant to subsection 1(4) of the COIA, no award of prejudgment interest should be made.
- [3] The defendants set out the issue succinctly on prejudgment interest and I reproduce it for clarity: A. Jury Verdict

2. Part c(ii) of the questions for the jury asked for an assessment of the "past income loss from August 13, 2003, until today" caused or contributed to by the two motor vehicle accidents of August 13, 2003. The jury responded with the answer "\$37,000.00". B. Pre-Trial Payments Made in Respect of Past Loss of Income Earning Capacity
3. Subsection 1(4) of the COIA provides that: If part of an order represents income loss arising from personal injury or death and one or more payments have been made before the date of the order to replace, provide indemnification for, compensate for or protect against some or all of the income loss or for any other purpose related to the income loss, the amount of the income loss on which interest may be calculated under this section must be reduced by the amount of each such payment as of the date of the receipt of the payment.
4. The evidence adduced at trial establishes that the plaintiff did receive "payments to replace, provide indemnification for, compensate for, or protect against some or all" of her lost income earning capacity arising from personal injury:
 - (a) Estimated gross disability insurance benefits for period from 31 August 2003 to 07 February 2004 (75 per cent of \$832.00 per week for 23 weeks) \$14,352.00
 - (b) Gross disability benefits for period from 18 May 2004 to 15 November 2004 . \$14,300.04
 - (c) Unemployment Insurance benefits in taxation year 2004 \$ 5,460.00
 - (d) Gross disability benefits for period from 16 November 2004 to 29 January 2005 \$ 9,042.80TOTAL \$43,334.84
5. Pursuant to subsection 1(4) of the COIA, the amount of the income loss on which prejudgment interest may be calculated must be reduced by the amount of the benefits summarized in paragraph 4, supra. As the amount of gross pre-trial benefits that the plaintiff received well exceeds the amount of the gross loss of past income earning capacity found by the jury, the plaintiff has not been "kept out of funds" under this head in a manner that would call for an award of prejudgment interest. Accordingly, no award of prejudgment interest is warranted in this proceeding. [Defendants' emphasis]
- [4] The only issue raised in relation to the defence position by the plaintiff on this matter is that in relation to the first several payments received there was a considerable time period between loss and compensation paid. Thus, the plaintiff should have interest calculated for the period from time of loss to receipt of compensation. I accept that this is a reasonable position.
- [5] The defence points out that the amount actually received in compensation paid exceeds by about \$6,000 the amount awarded by the jury. In this circumstance the defendant says there is no net loss and thus no prejudgment interest is warranted.
- [6] In these circumstances I accept the defence position and make no award for prejudgment interest. RULE 37

- [7] Counsel for Ms. LeFler relies significantly on a recent decision of this Court: *Carvalho v. Angotti and Carvalho v. Huang and Lui* re costs, 2008 BCSC 386, which bears a close resemblance to this case in relation to costs. Defendants respectfully submit that *Carvalho* was wrongly decided. I reserved this decision to await the outcome of the appeal of *Carvalho* on costs. I was advised in July that the appeal was abandoned in light of recent amendments to Rule 37, specifically Rule 37B.
- [8] Thus, I am invited simply to refuse to follow *Carvalho*, because among other matters three Court of Appeal decisions said to provide binding principles were not referred to.
- [9] *Carvalho* involved two motor vehicle actions tried together. The plaintiff claimed injuries for the two accidents which occurred approximately one and one-half years apart. The defendants, similarly to the two defendants in these actions, delivered two separate offers to settle the actions. The Huang action offer was received 12 days prior to trial. Mr. Justice Smith acknowledged that Rule 37 is a complete code that leaves no room for judicial discretion. He then analyzed the facts of his case in relation to the principles sought to be codified in Rule 37 and decided that Rule 37 did not apply to the case before him.
- [10] At paras. 21 and 22 of that decision Smith, J. set out succinctly why he could not apply Rule 37 and award double costs to the defence in that case:
- [21] If the plaintiff had proceeded to trial only on the *Angotti* action, the court could not have properly assessed damages without determining the extent to which the plaintiff's injuries were aggravated by the Huang accident and making an appropriate deduction. That would likely have required all of the same evidence that was heard at the trial of both actions. One of the major benefits of a settlement would have been lost in that there would have been no saving of time and expense. There would also have been a real risk of the plaintiff being over-compensated or under-compensated if the court's assessment of the impact of the Huang accident differed from what the parties had assumed in their settlement.
- [22] The plaintiff was faced with offers to settle in two actions when there was a substantial overlap in her damage claims. The overlap was presumably the major reason the two actions had to be tried together. In the circumstances, I find that the plaintiff had to consider the two offers together. She could accept both or reject both, but neither offer was capable of acceptance in isolation. The situation is therefore one to which rule 37(24) does not apply and the Huang defendants are not entitled to costs under it.
- [11] Rule changes have overtaken this case. Rule 37B retroactively reinstates judicial discretion in the matter of settlement offers and cost awards.
- [12] As set out in *Bailey v. Jang*, 2008 BCSC 1372, Rule 37B came into force on July 1, 2008. The Rule states that it applies to offers to settle made both before and after July 1, 2008, where no order as to costs has been made. As conceded by the defendants on this application, Rule 37B returns judicial discretion as a major factor in determining an appropriate award of costs. Thus, the new rule makes far less applicable most of the Court of Appeal decisions

relied upon by the defence. That is, those which stated Rule 37 is a complete code in relation to which no judicial discretion is applicable.

[13] Rule 37B provides as follows:

- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.
- (5) In a proceeding in which an offer to settle has been made, the court may do one or both of the following:
 - (a) deprive a party, in whole or in part, of costs to which the party would otherwise be entitled in respect of the steps taken in the proceeding after the date of delivery of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.
- (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.

[14] The analysis requires applying the facts to Rule 37B(6)(a): Whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date

[15] Here, while I do not find, as urged to do by the plaintiff, that the offer is ambiguous or at least significantly ambiguous, it is clear that to accept the second offer in this case would not have simplified the trial at all. It is reasonable to assume that, particularly with a jury to have settled the second action would tend to leave the jury with more complicated instructions. The relationship between the terms of settlement offered and the final judgment of the Court

[16] The two offers combined were significantly less than half the award of the jury. Thus, this factor favours not awarding costs to the defendants. The relative financial circumstances of the parties

[17] This was a matter of a bus company versus the modest financial circumstances of the plaintiff. If anything, it favours the plaintiff however, I give little weight to this.

- [18] In all these circumstances - the over-riding principle here is whether, if the offer had been accepted would there have been a significant or any saving in litigation cost to either party or the Court. Here, it would be difficult to see any saving. It was obvious during this trial that the defence intended to call the bus driver and perhaps other witnesses to the second accident to challenge the plaintiff's credibility generally. There was little or no evidence by the plaintiff that painted the second accident as other than minimal physically. The psychological impact was far greater because the second accident occurred just hours following a much more traumatic accident.
- [19] Thus, there would have been no savings in time at the trial. In these circumstances the defendants are not entitled to any costs of these two actions and the plaintiff will have her costs throughout.
- [20] There is divided success on this application. However, the plaintiff was successful on the costs issue which took up almost the whole of the submissions. In these circumstances she should have her costs at the lowest scale on this application. "KOENIGSBERG, J."
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