

CANADA / JUDGMENT

Loughlin v. Nichol

2003 BCCA 599

COURT

British Columbia Court of Appeal

DECIDED

7 November 2003

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2003BCCA0599.htm COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Loughlin v. Nichol et al., 2003 BCCA 599 Date: 20031107 Docket: CA031279 Between: Teresa Loughlin Appellant (Plaintiff) And Trudy Lee Nichol, GMAC Leasco Limited, GMAC Location Limitee doing business as GMAC Leaseco Ltd. (Lessor) and Wendy Lee Nichol (Lessee) Respondents (Defendants) Between: Teresa Loughlin Appellant (Plaintiff) And Sean Tyler List and Simon Kam Fat Lai Respondents (Defendants) Before: The Honourable Mr. Justice Smith (In Chambers) M. Theroux Counsel for the Appellant M.P. Ragona, Q.C. T. Jespersen Counsel for the Respondents Place and Date of Hearing: Vancouver, British Columbia 27 October 2003 Place and Date of Judgment: Vancouver, British Columbia 7 November 2003 Reasons for Judgment of the Honourable Mr. Justice Smith:

- [1] This is an application by the plaintiff below brought pursuant to s. 10, ss. 1 of the Court of Appeal Act to extend the time for filing notice of appeal from a judgment of the Supreme Court pronounced by Mr. Justice Joyce on November 1, 2002.
- [2] The plaintiff was involved in two motor vehicle accidents in 1994 and 1996 respectively and brought actions for damages for personal injuries. The actions were tried together by Mr. Justice Joyce and a jury and, on April 26, 2002, the jury rendered a verdict for damages in favour of the plaintiff as follows: Non-pecuniary damages \$ 33,000.00 Past wage loss 0.00 Future income loss/loss of property 0.00 Cost of future care 0.00 Special damages 7,000.00 Reduction on account of failure to mitigate (30,000.00) Total award of damages \$ 10,000.00
- [3] The plaintiff asked Mr. Justice Joyce to reject the verdict of the jury and to substitute his own assessment of damages or alternatively, to order a new trial. The application was dealt with by written submissions and, on November 1, 2002, Mr. Justice Joyce dismissed the application and pronounced judgment in accordance with the verdict of the jury. As I understand it, the judgment has not yet been drawn up and entered.
- [4] The factors to be considered on this application have been mentioned in many cases. One frequently cited is *Davies v. Canadian Imperial Bank of Commerce* (1987), B.C.L.R. (2d) 256 (C.A.) where they are set out as follows: ...In *Re Flair Construction Ltd.*; *Venables v. Bank of Montreal* (1981), 38 C.B.R. (N.S.) 292, five questions are set out that I think are the proper questions to consider in this case. First, was there a bona fide intention to appeal? Second,

when were the respondents informed of the intention? Third, would the respondents be unduly prejudiced by an extension? Fourth, is there merit in the appeal? And fifth, is it in the interest of justice that an extension be granted? ... The fifth question I think to be the most important as it encompasses the other four questions and states the decisive question.

- [5] It is not disputed that the plaintiff has always had a bona fide intention to appeal and that her intention was communicated to counsel for the respondents. On May 1, 2002, shortly after the jury's verdict, plaintiff's counsel, Mr. Mudry, wrote to respondents' counsel, Mr. Sprague, and advised of his intention to ask Mr. Justice Joyce to reject the verdict and to substitute his decision and "as necessary to appeal this decision". On December 2, 2002 following Mr. Justice Joyce's dismissal of her application, the plaintiff wrote to Mr. Mudry instructing him to appeal and forwarding funds to pay for transcripts.
- [6] Thereafter, Mr. Mudry, who normally practices in the Province of Alberta, proceeded in the mistaken belief that the time for appeal ran from the date of entry of judgment, rather than from its pronouncement. In letters sent on December 17, 2002, January 29, 2003 and February 5, 2003, and April 2, 2003, he pressed Mr. Sprague to provide him with a draft of the judgment and with a bill of costs. He received no response. In April 2003 he discovered that he had erred in respect of calculating the time for bringing an appeal and that the time limit had expired. He immediately advised the Law Society of Alberta and his client, suggesting that she consult other counsel.
- [7] The plaintiff followed his advice and sought the assistance of an Alberta law firm, who wrote to Mr. Sprague on July 3, 2003, advising that Mr. Theroux would be acting in respect of the proposed appeal. Mr. Sprague responded by letter of July 29, 2003, expressing surprise at receipt of the letter and advising that the time for bringing the proposed appeal had expired.
- [8] In the meantime, Mr. Sprague and Mr. Mudry had been engaged in settling the form of judgment and the costs of trial. These communications resulted in an agreement. By letter of August 11, 2003, Mr. Mudry wrote to Mr. Sprague as follows: Thank you for your letter. We look forward to receipt of a filed copy of the Order. I note your comments regarding the advances, and have reviewed your Bill of Costs. If my understanding of the situation is correct, it appears that the net effect of the Judgment plus our costs; less your costs and the advances, would leave Ms. Loughlin in a minus position. Is your client willing to settle the costs and advances issue on the basis of no funds being paid by either party in order to conclude this matter? Ms. Loughlin already has the liability of paying substantial disbursements and outstanding treatment costs in connection with this matter.
- [9] To that Mr. Sprague responded by letter of August 21, 2003, as follows: We acknowledge receipt of your letter dated the 11th day of August, 2003. I have now had an opportunity to discuss your proposal with my client. Please be advised that I am now instructed to accept your proposal as set out in your correspondence dated the 11th day of August, 2003. In effect, therefore, our clients are waiving any and all claims they may have for any monies that may be owing from your client to my client as a result of these actions. May this letter

serve therefore as confirmation that this lengthy and protracted matter is concluded. I take this opportunity to thank you for your professional co-operation throughout. [Emphasis added]

- [10] Mr. Mudry responded to that letter as follows: Thank you for your letter of August 21, 2003. I don't know that this matter can be concluded. Have you heard from Bennett Jones here in Calgary?
- [11] Mr. Mudry deposed in his affidavit that he did not receive any response to that letter from Mr. Sprague. In respect of their correspondence in August, 2003, Mr. Mudry deposed: ...I understood that Bennett Jones LLP had been retained by the Appellant to proceed with prosecuting her Appeal in this matter. As such, I did not discuss issues relating to an appeal from the trial judgement with Mr. Sprague, nor did Mr. Sprague raise the issue of the letter he had received from Bennett Jones LLP in late July 2003 advising him the Bennett Jones LLP had been retained to prosecute the Appellant's Appeal. Our negotiations in August 2003, were limited to settling the issue of costs arising from the trial.
- [12] It appears that the next relevant communication was a letter from Mr. Theroux to Mr. Sprague of October 9, 2003 in which Mr. Theroux said the following: I left you a message recently to discuss the above noted matter but did not hear from you. I had hoped to speak with you about scheduling of the application to extend the time for appeal in this matter. Having not heard from you, I have now prepared the materials and made the application returnable on Monday, October 27, 2003. We are in the process of filing our materials and will provide them to you very shortly. Please let me know at your earliest convenience if October 27, 2003 is not a convenient date for you. If that is the case, we can discuss arranging an alternate mutually convenient date.
- [13] On October 9, 2003 the notice of appeal and notice of motion to extend the time for leave to appeal were filed.
- [14] The proposed ground of appeal is that the jury's award of non-pecuniary damages was a wholly erroneous estimate of the plaintiff's loss and, accordingly, that the judgment for non-pecuniary damages is inordinately low and must be corrected.
- [15] In his reasons for judgment Mr. Justice Joyce remarked that the jury had evidence before it to support a conclusion that the plaintiff "suffered only modest injuries" and that she suffered no causally related loss of income, past or future. He observed that "the credibility of the plaintiff was critical in this case," since her expert opinion evidence was based on her subjective complaints. He mentioned evidence that would have supported the defence submission that the plaintiff's evidence was unreliable. He referred, as well, to evidence that would have supported the jury's conclusion that she had failed to act reasonably in mitigating her loss. He noted, finally, that counsel had made submissions on the questions to be put to the jury, and that plaintiff's counsel made no objection to the questions and no submission that there was no evidence to go to the jury on the question of mitigation.

- [16] Counsel for the respondent quite properly emphasizes Mr. Justice Joyce's remarks and the difficulty inherent in an appeal on a question of fact which is supported by the evidence and is based on findings of credibility.
- [17] I agree that the chances of success on the proposed ground of appeal are remote. However, that the jury was asked to consider mitigation separately from the assessment of non-pecuniary loss and to make a discrete deduction for that failure is a curious approach that I have never seen before. Moreover, the deduction might seem disproportionately high in light of the high standard to be met by a defendant on that issue. These questions might well interest a panel of this Court despite trial counsel's acquiescence in the questions to be put to the jury and, accordingly, I cannot say that the appeal is bound to fail.
- [18] However, prejudice is the critical factor here. The respondents say that they will be prejudiced if the time to appeal should be extended because of the settlement by which they gave up their claim to monies otherwise owing to them by the plaintiff after satisfaction of her judgment. In their submission, a full and final settlement was reached between the parties.
- [19] The plaintiff takes the position that the settlement agreement is binding and would remain binding even if she should succeed on appeal. Accordingly, she would not consent to an order, as a term of extending the time to appeal, that the settlement be reopened. In my view, she seeks to "have her cake and eat it too." In these circumstances, prejudice to the respondents has been demonstrated.
- [20] Given that the respondents would be prejudiced if the appeal should be successful and that the prospects of success on the appeal are remote, it is my view that the interests of justice require that an extension time to appeal be denied. Accordingly, the application is dismissed. "The Honourable Mr. Justice Smith"

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