

CANADA / JUDGMENT

Mothe v. Silva

2015 BCSC 1053

COURT

Supreme Court of British Columbia

DECIDED

19 June 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCSC 1053 Mothe v. Silva IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Mothe v. Silva, 2015 BCSC 1053 Date: 20150619 Docket: M134851 Registry: Vancouver Between: Lindsey Erick Mothe Plaintiff And Jean-Paul Silva, GFS British Columbia Inc. and Penske Truck Leasing Canada Inc./Location de Camions Penske Canada Inc. Defendants Before: The Honourable Madam Justice Ross Reasons for Judgment Counsel for the Plaintiff: Joel D. Zanatta Counsel for the Defendants: Robert C. Brun, Q.C. Eric J. Lundberg Place and Date of Trial/Hearing: Vancouver, B.C. May 19, 2015 Place and Date of Judgment: Vancouver, B.C. June 19, 2015

- [1] The plaintiff Lindsey Mothe was injured in a motor vehicle accident that occurred on November 24, 2011. Liability was admitted. The trial of the action was heard over five days from October 27 to 31, 2014. Reasons for judgment indexed at 2015 BCSC 140, were released on January 30, 2015.
- [2] Prior to trial, the defendants issued three formal offers to settle the action in the amounts of \$20,000 by letter dated February 11, 2014, \$23,000 by letter dated March 17, 2014, and \$35,000 by letter dated September 24, 2014.
- [3] The positions of the parties at trial with respect to the various heads of damages were as follows:
- (a) Non-pecuniary loss The plaintiff sought an award in the range of \$80,000 to \$105,000. The defendants submitted that the award should be \$25,000.
 - (b) Past Wage loss The plaintiff sought an award of \$3,000. The defendants submitted that there should be no award under this head.
 - (c) Loss of Future Earning Capacity The plaintiff sought an award in the range of \$250,000 to \$300,000. The defendants submitted that there should be no award under this head.
 - (d) Special Damages The plaintiff sought \$750 which was not contested by the defendants.
 - (e) Cost of Future Care The plaintiff sought \$2,500. The defendants took the position that there should be no award under this head.

- [4] Mr. Mothe was awarded damages under each head of damages for which he sought an award, apportioned as follows: (a) Non-pecuniary damages \$40,000 (b) Past wage loss \$2,100 (c) Loss of future earning capacity \$20,000 (d) Special damages \$750 (e) Cost of future care \$2,500 Total Damages \$65,350
- [5] Mr. Mothe was also awarded his costs of the action, subject to liberty to make further submissions on the issue of costs. The defendants have applied for the following relief with respect to the issue of costs:
- (a) a determination that because the total damages awarded were less than \$100,000, there is an \$11,000 cap on costs pursuant to Rules 14-1(1)(f) and 15-1(15)(c);
 - (b) an order that Mr. Mothe receive costs for three days of trial and preparation pursuant to Rule 15-1(15)(c) and the defendants be awarded costs for two days of trial; and
 - (c) an order disallowing the claim relating to the disbursements claimed for the preparation of the reports of Dr. Sahjpaul, Dr. Kleinman and Dominic Shew and their attendance at trial. Rules 14-1(1)(f) and 15-1(15)(c)
- [6] Rule 14-1(1)(f) applies in situations in which the total award is less than \$100,000. The Rule provides:
- (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
 - (f) subject to subrule (10) of this rule,
 - (i) the only relief granted in the action is one or more of money, real property, a builder's lien and personal property and the plaintiff recovers a judgment in which the total value of the relief granted is \$100,000 or less, exclusive of interest and costs, or (ii) the trial of the action was completed within 3 days or less, in which event, Rule 15-1 (15) to (17) applies to the action unless the court orders otherwise.
- [7] Rules 15-1(15) to (17) provide:
- (15) Unless the court otherwise orders or the parties consent, and subject to Rule 14-1 (10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:
 - (a) if the time spent on the hearing of the trial is one day or less, \$8000;
 - (b) if the time spent on the hearing of the trial is 2 days or less but more than one day, \$9500;
 - (c) if the time spent on the hearing of the trial is more than 2 days, \$11000.
 - (16) In exercising its discretion under subrule (15), the court may consider an offer to settle as defined in Rule 9-1.

- (17) If tax is payable by a party to a fast track action in respect of legal services, an additional amount to compensate for that tax must be added to the costs to which the party is entitled under subrule (15), which additional amount must be determined by multiplying the amount of costs to which the party is entitled under subrule (15) by the percentage rate of the tax.
- [8] The principles established in the case law relating to the application of these Rules include:
- (a) There is discretion to award costs beyond the limits prescribed in the Rule in special circumstances;
 - (b) Special circumstances include complex factual issues and a trial lasting more than two days;
 - (c) Where such an award is justified, costs should be calculated using the limits prescribed in the Rule as reference points, rather than under the usual tariff;
 - (d) Where special circumstances exist, an additional \$1,500 for each day of trial exceeding three days has been accepted as the appropriate award: see *Saopaseuth v. Phavongkham*, 2015 BCSC 45.
- [9] Although this case was not conducted as subject to the Fast Track rules pursuant to Rule 15-1, I find that costs must be awarded pursuant to that Rule because of the provisions of Rule 14-1(1)(f): see *Codling v. Sosnowsky*, 2013 BCSC 1220. I find that there are special circumstances in the present case which warrant an award of additional costs, in particular the factual complexity of the issues which necessitated a five-day trial to address. Accordingly the appropriate award is \$11,000 plus \$3,000, representing two additional days at \$1,500 per day for a total of \$14,000. Rule 14-1(15)
- [10] Rule 14-1(15) permits the court to make different costs awards for different parts of the proceeding. The Rule provides:
- (15) 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.
- [11] The test for apportionment of costs under Rule 14-1(15) remains the same as it was under the former Rule 57(15) as set out in *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 31, and *Lee v. Jarvie*, 2013 BCCA 515 at para. 40:
- (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.
- [12] In *Lee v. Jarvie*, 2012 BCSC 1521, Mr. Justice Gaul described guiding principles in the exercise of the court's discretion to apportion costs as follows at para. 12:
- [12] From these cases, I have drawn the following guiding principles relating to the apportionment of costs:
- 1) Applications to apportion costs should be the exception and not the norm in civil litigation, and they should be limited to "relatively rare cases".
 - 2) The power to apportion costs is a discretionary one that "must be exercised judicially, not arbitrarily or capriciously".
 - 3) The exercise of discretion must be connected to circumstances of the particular case "which render it manifestly fair and just to apportion costs".
- [13] In the present case, the defendants submit that the question of the cause of the plaintiff's C6-7 disc herniation constituted a discrete issue, which was decided in favour of the defendants. The plaintiff submits that this was not a discrete issue of the kind that makes apportionment of costs appropriate and that in any event, apportionment would not be a just result in the circumstances.
- [14] I have concluded that this is not an appropriate case to apportion costs. First, from the perspective of the heads of damage, this is not a case of divided success, but one in which the plaintiff recovered under every head of damage claimed. While the awards for non-pecuniary loss and loss of future earning capacity were considerably lower than the plaintiff's claim, the defendants cannot be said to have succeeded with respect to these claims.
- [15] In addition, there is no conduct on the part of the plaintiff or with respect to the conduct of the plaintiff's case which is worthy of criticism. I found Mr. Mothe to be an honest and straightforward witness. I did not conclude that he was exaggerating his evidence. I agree with the submission of Mr. Mothe's counsel that a clear distinction is to be made between a plaintiff who lacks credibility, who exaggerates his or her claims, and the plaintiff who is unable to provide an accurate account of the history of his or her condition despite best efforts to do so. I found the experts called by the plaintiff to be helpful. They did not take on an advocacy role.

- [16] The trial was efficiently conducted and finished within the time that had been set. In any event, it was necessary to address the role that the disc herniation played in relation to the plaintiff's condition and level of function no matter what the decision on causation of that condition. Thus it cannot be said that the case was prolonged unnecessarily as a result of the time spent considering the causation issue. There were no witnesses called exclusively to testify about the C6 disc herniation.
- [17] In the result, I am not prepared to exercise my discretion to grant apportionment of costs. Disbursements
- [18] The defendants submitted that they should not have to pay for the medical legal reports of Dr. Sahjpaul and Dr. Kleinman, or the report of the occupational therapist Dominic Shew, because they were based on incomplete, and to some extent, incorrect information. Counsel submits that the court was not assisted by these reports or the testimony of those experts.
- [19] I do not agree. In my view, Drs. Sahjpaul and Kleinman and Mr. Shew provided thoughtful testimony, fully consistent with the responsibilities of an expert that was of considerable assistance to the court in determining the matters at issue in the litigation. While I concluded that Mr. Mothe had provided inaccurate histories, as noted above, I made no finding that this arose from dishonesty or exaggeration. As I noted at paras. 91 and 92:
- [91] My impression of Mr. Mothe was that he was an honest and straightforward witness who was doing his best to provide an accurate and honest account. However, I also formed the opinion that Mr. Mothe was a very poor historian. In particular, that he had difficulty providing an accurate account looking back in time. This is consistent with a pattern of difficulties with the history he provided to experts in the litigation.
- [92] I note first that none of the experts who testified found evidence of abnormal pain behaviour, pain amplification or inappropriate illness behaviour. As noted, Mr. Shew noted that Mr. Mothe provided high levels of effort and passed placebo and distraction tests. These observations are all consistent with my impression of an honest and straightforward witness.
- [20] In my view it was reasonable to secure the evidence of these three experts in the context of the matters at issue in the litigation. As noted, I found their evidence to be helpful and consistent with their responsibilities as experts providing opinion evidence to the court. The plaintiff should be allowed to recover the disbursements associated with this evidence and these reports. Summary
- [21] In the result, Mr. Mothe is awarded \$14,000 for his costs of the trial. Mr. Mothe is also entitled to recover the disbursements noted above. I decline to exercise my discretion to grant apportionment of costs. "Ross J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/15/10/2015BCSC1053.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mothe-v-silva-2015>

Prepared on 27 October 2026 · Esheria