

CANADA / JUDGMENT

## Stevens v. Creusot

2020 BCSC 1263

### COURT

Supreme Court of British Columbia

### DECIDED

27 August 2020

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2020 BCSC 1263 Stevens v. Creusot

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stevens v. Creusot,

2020 BCSC 1263

Date: 20200827

Docket: M178037

Registry: New Westminster

Between:

Jonathan Harold Stevens

Plaintiff

**And**

Martha Charlie [deceased], by her Litigation Representative, Fidele James Henry, Sidney Robert Alex, Marcel Creusot and Jorgelina T. Ulcnik Creusot also known as Jorgelina T. Ulcnik-Creusot

Defendants

**And**

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

(Ruling Clarification / Costs)

Counsel for the Plaintiff:

S.T. Cope

Counsel for the Defendants:

L.J. Grenier

Place and Date of Hearing:

New Westminster, B.C.

August 6, 2020

Place and Date of Judgment:

New Westminster, B.C.

August 27, 2020

## INTRODUCTION

- [1] This application was brought by the parties to resolve two final issues arising from the trial judgment rendered in this motor vehicle accident proceeding. Liability had been admitted for the two accidents (the "Accidents") such that the only matter for determination was the assessment of the plaintiff Jonathan Stevens' damages.
- [2] On October 17, 2019, I issued my reasons for judgment: *Stevens v. Creusot*, 2019 BCSC 1781 (the "Reasons"). The damages awarded by the Court are summarized at para. 231 of the Reasons and totalled \$495,286.32 with respect to non-pecuniary loss, past wage loss, loss of future earning capacity, cost of future care and special damages.
- [3] Mr. Stevens now seeks clarification as to what deductions, if any, should be made with respect to the past wage loss award. In addition, the matter of costs remains to be determined, in light of previous offers to settle made by the parties prior to the start of trial.

## PAST INCOME LOSS AWARD

- [4] The Court's assessment of damages for past income loss is found at paras. 134-163 of the Reasons. At para. 163, I concluded that an appropriate award was \$250,000, subject to income tax. This assessment was based on an earnings approach with respect to my finding that, but for the Accidents, Mr. Stevens would have remained employed as a carpenter at Bird Construction to the time of the trial.
- [5] The past income loss award was adjusted by a 10% deduction by reason of the finding that Mr. Stevens had failed to mitigate his loss in that respect (Reasons, para. 230).

[6] Mr. Stevens now questions whether the past income loss award should be subject to adjustment for income tax payable.

[7] Sections 95 and 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 (the "Act") govern deductions from awards of past wage loss for income tax. The relevant portions provide:

95 In this Part:

"accident" means an unintentional mishap occurring in British Columbia as a result of which a person suffers bodily injury, death or loss of or damage to property that arises out of the use or operation of a vehicle;

...

"net income loss", in relation to a person who suffered loss of income as a result of an accident is, for any period,

- (a) if the person is a person referred to in section 2 (1) of the Income Tax Act, the gross income that the person lost in that period less the amount that would have been payable on that gross income for the following:
  - (i) income tax under the Income Tax Act, as that Act read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, calculated in accordance with the regulations and with reference to prescribed deductions and tax credits;
  - (ii) income tax under the Income Tax Act (Canada) as that Act read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, calculated in accordance with the regulations under, and with reference to deductions and tax credits prescribed under, this Act;
  - (iii) premiums under the Employment Insurance Act (Canada), as that Act read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined,

...

98 Despite any other enactment or rule of law but subject to this Part, a person who suffers a loss of income as a result of an accident or, if deceased, his or her personal representative, is entitled to recover from designated defendants, as damages for the income loss suffered after the accident and before the first day of trial of any action brought in relation to it, not more than the net income loss that the person suffered in that period as a result of the accident.

[8] Section 180 of Insurance (Vehicle) Regulation, B.C. Reg. 447/83 (the "Regulation") sets out the prescribed deductions and tax credits for the purpose of calculating "net income loss" pursuant to s. 95 of the Act.

- [9] Accordingly, the Act and the Regulation require that any gross award of past income loss be adjusted to deduct income tax and employment insurance premiums.
- [10] The leading authority on the interpretation of the above provisions is found in *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 and, in particular, Justice Tysoe's disposition of the cross appeal.
- [11] Mr. Stevens suggests that *Lines* confirms that the Court retains some discretion as to the application of the Act and the Regulation, to ensure that it is consistent with the principles of damage assessment.
- [12] I agree that *Lines* stands for that proposition, but the discretion confirmed by Tysoe J.A. in his reasons does not arise in the circumstances of this case. The issue in *Lines* was whether deductions from past income loss awards should be calculated as if the award was made on the first day of trial, or whether the Act allowed the Court some discretion to allocate the award to the respective calendar years between the date of loss and date of trial. At paras. 184-187, the Court confirmed that such discretion was available to the trial judge.
- [13] Mr. Stevens' argument arises from his evidence at trial concerning withdrawals of his RRSPs. His evidence at trial was that, to supplement his income after the Accidents, Mr. Stevens made various withdrawals from his RRSPs for each of the years after the Accidents from 2015-2019, totalling \$240,793.88.
- [14] Mr. Stevens argues that he has already paid income tax on his RRSP withdrawals. As such, he seeks a "credit" for the taxes he has already paid in that respect in the face of the consequences arising under the Act and the Regulation. In essence, he says that he should not be penalized by paying income tax twice - first, on the RRSP withdrawals and second, on the past income loss award.
- [15] There are a number of difficulties that arise with respect to Mr. Stevens' submissions.
- [16] Firstly, it must be remembered that the past income award was an assessment, not a calculation, of Mr. Stevens' loss. That was based on, as stated above, what I concluded was the income that Mr. Stevens would have earned prior to the trial through his employment, but for the Accidents, subject of course to contingencies.
- [17] The issue, from Mr. Stevens' point of view, arises from comments found in the Reasons, as follows:
- [196] There are other more technical issues arising from the requirements of converting RRSPs to RIFs at age 71, rather than age 75. Finally, it is apparent that my award of lost income will be available to Mr. Stevens to replenish his RRSP, assuming that there is sufficient room to do so under the current income tax rules.

[Emphasis added.]

- [18] Mr. Stevens extrapolates that the intention of the Court was to, in essence, compensate him under the lost income award in order to allow him to reinstate his RRSPs as held prior to the Accidents. He then argues that, since he can only do so with gross income, allowing him only net income under the Act will not result in full compensation to him for his loss.
- [19] With respect, such an interpretation of the Reasons is misplaced.
- [20] As I have stated, the assessment of past income is made on a gross basis. The comment at para. 196 of the Reasons concerning Mr. Stevens' RRSP was only made in the context of an entirely different (and unrelated) issue raised by him, addressed under the heading "Investment Loss" at paras. 191-197. Mr. Stevens argued at trial that there should be an award for the loss arising from what he contended would have been the projected increase in the value of his RRSPs, but for the Accidents. That claim was rejected.
- [21] It is not the case that the past income loss assessment was intended to inevitably lead Mr. Stevens to replenish his RRSPs so as to equate the two matters. As noted by the defendants, the Court is generally not concerned with how a plaintiff chooses to spend an award of damages. Mr. Stevens may decide to use the monies to contribute to his RRSP, if he is able under tax laws, or he may decide to use the monies in an entirely different manner. This is his business only and the tax consequences arising from his choices are not a concern of the Court.
- [22] Further, a plaintiff may choose to supplement his or her income following an accident through any number of means, each with varying tax consequences. For example, a sale of a capital asset may lead to capital gains tax. It is not the purview of the Court to undertake a forensic analysis of the tax consequences of those choices toward altering the tax consequences of a past income loss award, save as dictated by the Act.
- [23] Even assuming Mr. Stevens' argument had merit (which I do not find), there is simply no means by which to conclude that the tax he paid on his RRSP withdrawals is equal to the income tax deduction from the past income loss award. In that respect, Mr. Stevens has not proven on this application what tax he actually paid on his RRSP contributions, either by providing copies of his income tax returns or otherwise. He has provided income tax slips for the RRSP withdrawals that disclose the amount of tax deducted, but that does not necessarily equate to the taxes paid on that amount.
- [24] The defendants point to the result and reasoning in *Riley v. Ritsco*, 2018 BCCA 366 as confirmation of the interpretation of the Act and Regulation in similar circumstances (paras. 104-119). The Court was addressing whether the income tax deduction under the Act should apply in respect of disability benefits that the plaintiff received and which he was required to repay. Similar to Mr. Stevens, the plaintiff argued that since he had to repay the gross amount of the disability benefits received from the insurer (on which he paid tax), he should also receive the gross amount of the award without deduction of income tax.

- [25] The court in Riley allowed the cross-appeal, holding that the mandatory provisions in the Act were clear and did not allow any such adjustment. Justice Groberman stated:
- [115] I would reject the approach taken in those cases. The language of the Insurance (Vehicle) Act is clear in allowing a plaintiff to recover only the "net income loss" as defined in s. 95 of the statute. A plaintiff cannot, by agreement to pay a third party insurer more than the amount recoverable from the tortfeasor, thereby increase the amount that the tortfeasor is required to pay. The limitation in the Insurance (Vehicle) Act governs the damages award.
- [116] This result may appear to be unfair to Mr. Riley. The unfairness, however, is not the result of the Insurance (Vehicle) Act, which does no more than set out straightforward and defensible limits on damages recovery. If Mr. Riley's disability insurance plan creates an enforceable obligation on him to repay the insurer amounts going beyond its rights of subrogation, it seems to me that the unfairness would derive from the terms of the insurance plan. Equally, if income tax laws do not adjust Mr. Riley's liability to pay taxes to take into account the fact that he must repay the benefits that he received, those laws would seem inequitable.
- [117] We must recognize, however, the limitations in the record before the court and in the legal argument that has been brought to bear on this issue. The only issue we can address is that of whether the judge had discretion to depart from the limitations on a damages awards set out in the Insurance (Vehicle) Act. In my view, he did not.
- [26] Similarly, any unfairness in Mr. Stevens' circumstances here arises simply from the choices he has made as to how he supplemented his income after the Accidents.
- [27] An example of these types of difficulties arose in Lines. There, the plaintiff argued that he should be entitled to notionally deduct the RRSP contributions that he would have made if he had, in fact, received the income he lost. At paras. 190-193, Tysoe J.A. rejected this argument holding that no such deduction could be made unless the RRSP contribution had actually been made.
- [28] More relevant to Mr. Stevens' argument, at para. 194, Tysoe J.A. in Lines also pointed out that the plaintiff would be overcompensated in that event since the RRSP contribution would only have allowed a deferral of income tax. Similarly, by cashing in his RRSPs after the Accidents, Mr. Stevens only accelerated his payment of income tax on those amounts, having received a deferral of that tax to that time. To allow Mr. Stevens a credit for some tax that he would have inevitably paid would result in him being overcompensated since he would never pay tax on the past income loss award.
- [29] In summary, Mr. Stevens has misconstrued the import of the Reasons and conflated the assessment of the past income loss award and the Investment Loss/RRSP issue, as raised by him at the trial. Further, the Act and the Regulation mandate that the past income loss award be subject to deduction for income tax. The issue that arose in Lines, confirming the Court's discretion in some aspect of the Act's application, does not arise here. Any

unfairness in the result arises from the choices made by Mr. Stevens and the income tax consequences that arose.

- [30] On this application, counsel indicated that they had not yet resolved the matter of the appropriate deduction to the past income loss award under ss. 95 and 98 of the Act, if the deduction was applicable, as I conclude it is. I have some confidence that counsel will now be in a position to resolve the matter between them. If not, that issue is referred to the Registrar for disposition.

## COSTS

- [31] Rule 14-1(9) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 states that the successful party is entitled to costs unless the Court orders otherwise.
- [32] Pursuant to Rule 9-1(4), the Court may consider an "offer to settle" in exercising its discretion as to costs. Rule 9-1(5) sets out various options available to the Court where an offer to settle has been made. Rule 9-1(6) sets out certain considerations for the Court in making an order under Rule 9-1(5). Rules 9-1(5) and (6) provide:
- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
    - (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service 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 or service of the offer to settle;
    - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
    - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service 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 served 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.

[33] The trial began on Monday, June 24, 2019.

[34] The exchange of settlement proposals and "offers to settle", as defined in Rule 9-1(1), are as follows:

- a) On May 16, 2019, Mr. Stevens offered to settle for \$1.1 million, open for acceptance to May 31, 2019. This was not a formal "offer to settle". Mr. Stevens made particular reference to the anticipated evidence of Tony Maida, a construction manager at Bird Construction. Mr. Maida's evidence is discussed at paras. 148-155 of the Reasons;
- b) On June 12, 2019, Mr. Stevens offered to settle for \$700,000, open for acceptance to 4:00 p.m. on June 19, 2019. This was a formal "offer to settle";
- c) On June 13, 2019, the defendants offered to settle for \$393,550 (\$400,000 less the advances already paid), open for acceptance to the Friday before trial, June 21, 2019, at 4:00 p.m. This was a formal "offer to settle"; and
- d) On Thursday, June 20, 2019, the defendants offered to settle for \$500,000 (\$506,450 less the advances already paid), open for acceptance to the start of the trial at 10:00 a.m. on Monday, June 24, 2019. This was a formal "offer to settle".

[35] The total amount of the award in favour of Mr. Stevens, before any deductions, was \$495,286.32.

[36] The defendants seek an order that Mr. Stevens be awarded his costs to June 21, 2019 and thereafter, that Mr. Stevens pay the costs of the defendants. In the alternative, the defendants seek an order that Mr. Stevens is awarded his costs to June 21, 2019 and that the parties bear their own costs thereafter.

[37] Mr. Stevens concedes that he should suffer some consequences arising from the result in the face of the defendants' offers to settle, but argues that the consequences should be limited. He seeks an order that he recover his costs and disbursements, save for those incurred over the course of the trial from June 24-July 5, 2019.

[38] There is no dispute between the parties as to the relevant case law.

[39] The Court retains a broad discretion in fashioning an award of costs where formal offers to settle have been made: *Warren v. Morgan*, 2015 BCSC 1168 at paras. 25.

[40] The dominant and overarching object of Rule 9-1 is to promote reasonable settlements and attach some consequence to the failure of a party to accept a reasonable settlement: *Gonzalez v. Voskakis*, 2013 BCSC 675 at para. 13 and *Brewster v. Li*, 2014 BCSC 463 at paras. 15-16. As the Court stated in *Clubine v. Paniagua*, 2018 BCSC 1076 at para. 13, a plaintiff who rejects a reasonable offer should usually face some sanction in costs. As noted, Mr. Stevens accepts this is the case.

- [41] As set out above, when considering a costs award under Rule 9-1(5), the Court may consider the factors set out in Rule 9-1(6).

Should the Offer have been Accepted?

- [42] Whether an offer to settle should reasonably have been accepted is assessed, not by reference to the award that was ultimately made, but under the circumstances existing when an offer was open for acceptance: *Bailey v. Jang*, 2008 BCSC 1372 at para. 24.
- [43] This factor is considered from the perspective of the person receiving the offer. It has both a subjective and objective component. The court is entitled to take into account the reasons why a party declined to accept an offer to settle. The court must consider whether those reasons are objectively reasonable. Relevant factors under this issue can include the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated and whether some rationale for the offer was provided: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.
- [44] Mr. Stevens argues that the defendants' second and last formal offer to settle was received on the eve of trial (Thursday afternoon before the start of trial on Monday morning). He argues that there was no time for analysis of it as trial preparations were then underway.
- [45] On the timing issue, case authorities cited by the defendants indicate that context is important. Examples in the case law indicate that offers delivered even in such circumstances (on the eve of trial) can still potentially provide a reasonable time for assessment: *Brewster* at paras. 26-32 and the cases cited, including *Uppal v. Rawlins*, 2010 BCSC 11 and *Wright v. Hohenacker*, 2009 BCSC 996.
- [46] The defendants also cite *Bevacqua v. Yaworski*, 2013 BCSC 29, which also involved an offer on the eve of trial (less than 52 hours between the offer and the start of trial). At para. 8, Justice Curtis makes a point that I would similarly make here. Prior to trial, and knowing the issues, the evidence and the risks and expense of proceeding to trial, it is to be expected that responsible counsel will always have a keen eye to consider any reasonable settlement offer, however, close to the start of trial that offer may be received. It is hardly a reasonable response to say that a litigant has no time to consider an offer since trial preparations are underway, when the whole point of the offer is to hopefully avoid that trial occurring.
- [47] In addition, this was not the first offer sent by the defendants. An earlier offer was sent on June 13, 2019. This earlier offer would have revealed the views of the defendants and allowed Mr. Stevens to consider it.
- [48] Mr. Stevens also argues that consideration of the defence offers was difficult in that they did not include "commentary and biting analysis". I agree that is the case. I also agree that, if possible and necessary, some explanation in respect of the amount of the offer will usually be of assistance in order to allow a proper evaluation of the offer, as intended by Rule 9-1: *Currie v. McKinnon*, 2012 BCSC 1165 at para. 29.

- [49] However, Mr. Stevens could have directed his counsel to engage with defence counsel toward obtaining a better understanding of the June 20, 2019 offer, if he wished clarification. Even so, each counsel would have necessarily put some thought into the potential awards under the various heads of damages and come to an assessment based on the law and potential evidence at trial prior to making any offer. Similarly, Mr. Stevens' substantial reduction in his second offer of June 12, 2019, closer to the trial, was without commentary or analysis.
- [50] Mr. Stevens raises issues concerning the conflict in the expert evidence as to his recovery and prognosis after trial, asserting that he viewed his own expert as adequately responding to the defence expert.
- [51] That may be the case, but more to the point, Mr. Stevens was well aware prior to trial that both his expert (Dr. Hirsch) and the defence expert (Dr. Boyle) had noted his lack of an active rehabilitation program as likely affecting the course of his recovery. As noted in the Reasons (para. 218), it was only in the face of these reports that Mr. Stevens undertook such a program prior to trial. However, Mr. Stevens was well aware then that he faced a significant mitigation argument from the defence at trial. Mr. Stevens was also well aware of, or should have been aware of, the frailty of Dr. Newton's qualifications, objectivity and opinions (Reasons, paras. 75-88).
- [52] Mr. Stevens' major claims related to past wage loss (loss of earning capacity) and future loss of earning capacity.
- [53] Mr. Stevens says that he was disappointed with Mr. Maida's evidence in terms of supporting his claim that he would have been promoted with an increased salary but for the Accidents. However, accepting that Mr. Maida did not provide what counsel anticipated as his oral evidence at trial, such a result is not entirely unexpected because witnesses do not always provide the wished for evidence. Litigation is not a risk free affair and witnesses can disappoint. To compound Mr. Stevens' asserted problem in that respect, as the defendants point out, there was no corroborative documentary evidence from Bird Construction to support much of the evidence on this issue.
- [54] Further, Mr. Stevens himself failed to provide any evidence to support that he would have accepted this promotion in any event (Reasons, paras. 151-154). Finally, Mr. Stevens failed to provide any convincing evidence that he would have worked to age 75 (Reasons, paras. 167-168) in support of his claim for loss of future earning capacity, another major head of damages.
- [55] Finally, evidentiary issues arose from the lay witnesses called by Mr. Stevens to corroborate his claims of disability. I found the evidence from all those witnesses to be limited (Reasons, paras. 49-62). In addition, Mr. Stevens chose not to call any of his family members to support those assertions (Reasons, para. 63). Mr. Stevens did not feel that their evidence was required for the trial, for reasons only known to him. However, the result in the quality of the actual evidence and lack of other corroborating evidence made Mr. Stevens' own

evidence more critical in proving his claim. In that respect, my finding was that his evidence was to be approached with caution, which was a risk that he assumed in proving his case that affected the quality of his own evidence at the trial.

- [56] Overall, I consider that this factor favours the defence. I conclude that the offer of June 20, 2019 should reasonably have been accepted in the circumstances.

### **Relationship between Offer and Judgment**

- [57] This factor is the mirror image of the first factor. It provides the court with an objective measurement of the reasonableness of the offer that has been made and the decision to reject it: C.P. v. RBC Life Insurance Company, 2015 BCCA 30 at para. 99.
- [58] By any measure, the judgment did not exceed the offer of June 20, 2019.
- [59] I accept that this factor is not determinative: Clubine at para. 24. However, as in that case, this factor weighs in favour of the defendants.

### **Relative Financial Circumstances**

- [60] The parties agree that this is not a relevant factor in this case.

### **Other Factors**

- [61] The only other factor in this respect is raised by Mr. Stevens. He asserts that he did not purchase any "After-the-Event" (ATE) insurance prior to trial that would have saved him from any adverse costs consequences.
- [62] In Clubine at paras. 27-29, the Court considered that the existence of ATE insurance was a factor that strongly supported the costs award sought by the defendant.
- [63] In my view, the failure of Mr. Stevens to purchase ATE insurance is not a factor that he can rely on to avoid the objectives of Rule 9-1 and the salutary effects that are intended to be achieved by it.

### **Conclusion re Costs**

- [64] The Court has wide discretion under Rule 9-1 to make such order as may be just in the circumstances of the case before the Court.
- [65] Here, the defendants made a reasonable offer to settle the matter on the eve of trial. There does not appear to have been much effort toward considering that offer and accessing Mr. Stevens' case in terms of many of the evidentiary and other issues that were known, or should have been known, at that time.

[66] I agree that a just result is that as suggested by the defendants. Mr. Stevens is awarded his costs of the proceedings to June 21, 2019; thereafter, Mr. Stevens will pay the costs of the defendants. Those costs will include disbursements: Gonzalez at para. 68 and Brewster at paras. 41-42.

"Fitzpatrick J."

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