

CANADA / JUDGMENT

Tong v. Lanser

2013 BCCA 239

COURT

British Columbia Court of Appeal

DECIDED

22 May 2013

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2013 BCCA 239 Tong v. Lanser COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Tong v. Lanser, 2013 BCCA 239 Date: 20130522 Nos: CA039678, CA039697 Docket: CA039678 Between: Kin Ning Tong Respondent (Plaintiff) And Sharon Ann Lanser, GMAC Leasco Corporation/ Lacompagnie GMAC Location, and Infocus Commerce Solutions Ltd. Appellants (Defendants)

- and - Docket: CA039697 Between: Kin Ning Tong Respondent (Plaintiff) And: Richard Oppong and Animah Afua Agatha Adu Appellants (Defendants) Before: The Honourable Chief Justice Finch The Honourable Mr. Justice Frankel The Honourable Madam Justice MacKenzie On appeal from: Supreme Court of British Columbia, January 19, 2012 (Tong v. Lanser, New Westminster Docket M95149; and Tong v. Oppong, New Westminster Docket M109154) Counsel for the Appellants: J. Lindsay Q.C., M.H. Wright, J. S. Grewal Counsel for the Respondent: P.T. Gordon, S.J. Turner Place and Date of Hearing: Vancouver, British Columbia April 24, 2013 Place and Date of Judgment: Vancouver, British Columbia May 22, 2013 Written Reasons by: The Honourable Chief Justice Finch Concurred in by: The Honourable Mr. Justice Frankel The Honourable Madam Justice MacKenzie Reasons for Judgment of the Honourable Chief Justice Finch:

- [1] The defendants in these two actions appeal from the order of the Supreme Court of British Columbia on 19 January 2012, following a jury trial at New Westminster, awarding the plaintiff damages for injuries and consequent losses suffered as the result of two motor vehicle accidents which occurred on 3 November 2003 and 7 November 2005. The jury's award was as follows: · Non-pecuniary damages - \$100,000; · Pre-trial loss of working capacity - \$127,000 before deductions under s. 98 of the Regulations of the Insurance (Vehicle) Act; · Future loss of working capacity - \$223,000; · Costs of future care - \$38,000; and · Special damages - \$12,000.
- [2] The defendants appeal three heads of damage, namely the awards for loss of working capacity both pre- and post-trial, as well as the award for cost for future care.
- [3] The defendants contend that those awards are perverse, unsupported by any evidence and, they ask this Court to substitute "significantly" reduced awards.

- [4] In addition, the defendants say the court erred in ruling as inadmissible two letters from the plaintiff's general physician, Dr. Klaponski. The doctor was too ill to attend trial, and the judge held it would be unfair to admit the letters in the absence of any opportunity for the plaintiff to cross examine their author. If this ground of appeal succeeds, the defendants seek a new trial.
- [5] Counsel addressed this latter ground of appeal first, and I will do likewise. The order excluding the two letters was made on 10 January 2012 by Mr. Justice McKinnon, who was not the trial judge. The issue was referred to him because of an apparent conflict in the trial judge, Mr. Justice Armstrong, on this matter. Nothing turns on the fact that the order was made by a judge other than the trial judge.
- [6] Dr. Klaponski's two letters were dated 9 March 2005 and 26 May 2006. The first was written some two years after the first accident, the second was written about six months after the second accident.
- [7] It appears that at some point counsel for the plaintiff intended to either tender the two letters in evidence, or to call Dr. Klaponski to testify, or both. Two prior trial dates were set - 5 January 2009 and 15 March 2010. Both of those trial dates were adjourned. It appears that the defence received both of Dr. Klaponski's reports prior to the second trial date.
- [8] Shortly before the trial date of January 2012, counsel became aware that Dr. Klaponski was too ill to attend the trial. Counsel was told that he had not been practising since about 2007. It appears that counsel for the plaintiff decided not to tender Dr. Klaponski's letters in evidence, and advised defence counsel accordingly. Defence counsel then took the position that the defendant would tender the two letters as defence evidence. Plaintiff's counsel objected on the basis that Dr. Klaponski would not be available for cross examination, and this resulted in the application that was referred to Mr. Justice McKinnon.
- [9] Counsel for the defence submitted that the reports were admissible under Supreme Court Rule 11-7. She did not take the position that the reports were admissible under the principled exception to the hearsay rule (see *R. v. Khan*, [1990] 2 S.C.R. 531).
- [10] Counsel for the plaintiff relied on the Evidence Act, R.S.B.C. 1996, c. 124, s. 10(5), and on Rule 11-7(3), asserting the right to cross examine the doctor on his opinion if his letters were to be admitted.
- [11] At the conclusion of counsels' submissions, Mr. Justice McKinnon gave oral reasons ruling Dr. Klaponski's letters inadmissible. He held that it would simply be unfair to the plaintiff to admit the letters when there would be no opportunity for plaintiff's counsel to cross examine the doctor.

- [12] On this appeal, counsel for the defence contends the chambers judge erred in so ruling, because Dr. Klaponski's letters covered a period of the plaintiff's medical history not addressed in any other evidence, and that the absence of cross-examination was relevant to the issue of the weight to be given to the letters, rather than to their admissibility.
- [13] Counsel for the plaintiff pointed out that the content of Dr. Klaponski's letters relate mainly to the doctor's factual observations, and that such evidence could have been adduced by the defence if it had subpoenaed the doctor's clinical records, which was not done. As to the opinion part of the letters, counsel for the plaintiff says the opinions were stale-dated and had been superseded or overtaken by events in the almost seven intervening years since they were written. Counsel says the order to exclude the letters was within the discretion of the chambers judge, and that no error of law has been shown.
- [14] I respectfully agree with the position taken on the plaintiff's behalf. The order to admit or exclude was, on the submissions addressed by counsel to the chambers judge, to be made under the provisions of the Rules, which afford the judge a discretion. The judge reasoned that if the parties' positions had been reversed, with the plaintiff seeking to tender the letters and the defence objecting to them, it would have been seen as unfair to the defence, when there was no opportunity for cross examination.
- [15] I would not give effect to this ground of appeal.
- [16] On the three contested heads of damage, counsel for the appellants contend that the evidence does not support damages of the magnitude the jury awarded. The plaintiff had been a successfully self-employed businessman since coming to Canada with limited assets. He and his wife had operated a flower shop, and had also acquired a number of properties that were providing rental income. Prior to his accidents, the plaintiff worked in both the flower business, and did the maintenance work on the properties. The evidence was that he worked about 70 hours per week.
- [17] By the time of trial, the flower business had been sold, and the plaintiff was no longer able to do the building maintenance. Although it appears that some of his physical complaints had substantially resolved, he was, according to one doctor, left with a serious mood disorder, personality changes, and chronic pain and headaches. The plaintiff was said to suffer a "marked functional impairment", and to be "vulnerable to future psychiatric health issues" as a result of the two accidents.
- [18] This doctor's opinion continued: Mr. Tong now has certain limitations as a result of the serious psychiatric disorders. He now has limitations in regards to his general daily living activities, both in his employment and in his home. He is severely limited in his daily functioning, social functioning, concentration, perseverance, and adaptation to stressful circumstances. ... The prognosis for Mr. Tong is now severely guarded. The chronicity of his psychiatric disorders, the extent, the duration, the lack of intensity of treatment allows his condition to have the potential to deteriorate to the point where he could require urgent medical intervention with emergency treatment, hospitalization, or where he could be a

danger to his own life or the life of others. Such guarded prognosis is now the result of the first MVA of November 2003 and made worse and aggravated by the second MVA of November 2005.

- [19] Another doctor said that the plaintiff had a "major depressive disorder".
- [20] The plaintiff was 51 years of age at the time of trial. His ability to work had been reduced from the previous 70 hours per week to something on the order of 40 hours per week. There was evidence of his medical expenses to the date of trial totalling some \$12,000, an award which is not contested, and further evidence that the plaintiff would continue to require a variety of treatments in the future.
- [21] This is not a case where there is no evidence to support the damage awards under the three contested heads. There was evidence from which the jury could reasonably conclude that the plaintiff had suffered a significant loss of earning capacity in the pre-trial period, and that that loss of capacity was likely to continue for an indefinite period of time into the future.
- [22] The jury was entitled to draw all reasonable inferences from the evidence, and they were not required to engage in an attempt to quantify the plaintiff's losses on a mathematical basis.
- [23] Whether one regards the three contested awards as modest, or as generous, there is, in my respectful view, no basis on which this Court could properly vary them.
- [24] I would dismiss the appeal. "The Honourable Chief Justice Finch" I agree: "The Honourable Mr. Justice Frankel" I agree: "The Honourable Madam Justice MacKenzie"

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