

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: X. v. Y.,
2012 BCSC 37

Date: 20120113
Docket: M99443
Registry: New Westminster

Between:

X.

Plaintiff

And

Y. and Z. Ltd.

Defendants

Corrected Judgment: The front page of the judgment was amended on
January 26, 2012

Before: The Honourable Madam Justice Dardi

Reasons for Judgment - Costs

NOTICE: COURT FILE SEALED

Counsel for the Plaintiff: T.L. Spraggs

Counsel for the Defendants: J. Lindsay Q.C. and
P. Tung

Written Submissions

Place and Date of Judgment: New Westminster, B.C.
January 13, 2012

Introduction

[1] These reasons address the issue of costs following a personal injury trial.

[2] This action arose in relation to a motorcycle accident in which the plaintiff, an RCMP officer, sustained injuries in a collision while responding to an emergency call on the Lougheed Highway in Coquitlam. The collision occurred on July 19, 2005. The plaintiff's motorcycle collided with a truck driven by one of the defendants, Mr. Y. The truck was owned by Z Ltd., the other defendant. The plaintiff suffered serious injuries in the accident. The defendants acknowledged some degree of responsibility for the accident but argued that the plaintiff was contributorily negligent. They also contended that the plaintiff's claim for compensation was excessive.

[3] The trial proceeded for 25 days between February 22, 2010 and November 16, 2010. In Reasons indexed at 2011 BCSC 944, I found the defendants wholly liable for the accident and awarded the plaintiff \$451,591.30 in damages. In a companion judgment indexed at 2011 BCSC 943, I ordered that in the published Reasons for judgment, the parties and all witnesses be referred to by their initials and that the court file be sealed.

[4] I directed that if the parties were unable to agree on costs, they file written submissions which I have now received.

Positions of the Parties

[5] The plaintiff seeks an order for costs at Scale C or increased costs for the liability portion of the trial, increased or special costs for the application for the anonymity and sealing order and, in the alternative, an order for costs at Scale B for the entirety of the proceeding. The plaintiff submits that costs should be determined under the new *Supreme Court Civil Rules*, which were brought into force on July 1, 2010 (the "New Rules").

[6] The defendants concede that the costs should follow the event but maintain that the plaintiff should recover his costs at Scale B for the entirety of the

proceeding. The defendants also submit that costs should be determined under the former Rules of Court, as much of the trial was heard while those Rules were in force.

[7] It is common ground that neither party made an offer to settle that would be a pertinent consideration on this application.

Issues

[8] The following questions arise in determining the plaintiff's entitlement to costs:

- 1) Do the New Rules govern the determination of the costs award in this proceeding?
- 2) Is the plaintiff entitled to costs on Scale C or increased costs for the liability portion of the trial?
- 3) Is the plaintiff entitled to increased or special costs for those aspects of the trial dealing with the application for the anonymity and sealing order?

[9] I will deal with each question in turn.

(i) Do the New Rules apply to this proceeding?

[10] Under the New Rules a transitional proceeding means a proceeding that was started before July 1, 2010.

[11] *Supreme Court Civil Rule 24-1(2)* states as follows:

A transitional proceeding is deemed to be a proceeding started under these Supreme Court Civil Rules.

[12] *Supreme Court Civil Rule 24-1(14)* states that:

If a step in a proceeding is taken before July 1, 2010, the former Supreme Court Rules apply to any right or obligation arising out of or relating to that step if and to the extent that that right or obligation is to have effect before September 1, 2010.

[13] Section 10 of Appendix B to the New Rules provides:

Without limiting section 9, Appendix B of the Supreme Court Rules, B.C. Reg. 221/90, as it read on June 30, 2010, applies to

- (a) orders for costs made after December 31, 2006 and before July 1, 2010,
- (b) settlements reached after December 31, 2006 and before July 1, 2010 under which payment of assessed costs is agreed to,
- (c) costs payable on acceptance of an offer to settle made under Rule 37 or 37B, if that offer to settle was made after December 31, 2006 and before July 1, 2010, and
- (d) all assessments related to those orders, settlements and costs.

[14] This proceeding is a transitional proceeding pursuant to Rule 24-1(2) and as such, the determination of costs is governed by Rule 14-1. Although the trial was commenced under the former Rules, the judgment in this matter was rendered on July 18, 2011. The defendants' obligation to pay damages arose on that date. As there were no rights or obligations arising out of or relating to the trial that were to have effect before September 1, 2010, I cannot conclude that Rule 24-1(14) has any application to the determination of costs in this case.

[15] Furthermore, on a plain reading of Section 10 of Appendix B, Appendix B of the former Rules has no application to this case as there were no relevant offers or orders made prior to July 1, 2010.

[16] In the result I conclude that the New Rules govern the determination of costs in this proceeding.

(ii) Is the plaintiff entitled to Scale C or increased costs for the liability portion of trial?

[17] Having concluded that the New Rules govern the assessment of costs in this matter, I turn to consider whether the plaintiff is entitled to Scale C or increased costs for the liability portion of trial. While it is not the general rule, the court retains a broad discretion to fix costs at different scales for different aspects of a case, see *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494, at paras. 20 – 21.

Costs on Scale C

[18] Section 2(2) and 2(3) of Appendix B to the New Rules state:

(2) In fixing the scale of costs, the court must have regard to the following principles:

- (a) Scale A is for matters of little or less than ordinary difficulty;
- (b) Scale B is for matters of ordinary difficulty;
- (c) Scale C is for matters of more than ordinary difficulty.

(3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:

- (a) whether a difficult issue of law, fact or construction is involved;
- (b) whether an issue is of importance to a class or body of persons, or is of general interest;
- (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

[19] The factors that inform the analysis of the difficulty of a proceeding were summarized by Mr. Justice Goepel in *Bronson v. Hewitt*, 2011 BCSC 102, at para. 105 as follows:

Scale C applies to matters of more than ordinary difficulty. In *Mort v. Br. of Sch. Trustees of Sch. Bd. No. 63 (Saanich)*, 2001 BCSC 1473 at para. 6, the court identified the following criteria for assessing the difficulty of a proceeding:

- (a) the length of the trial;
- (b) the complexity of the issues involved;
- (c) the number and complexity of pre-trial applications;
- (d) whether or not the action was hard fought with little or nothing being conceded along the way;
- (e) the number and length of Examinations for Discovery;
- (f) the number and complexity of Experts' Reports; and
- (g) the extent of the effort required in the collection and proof of facts.

[20] In *Ter Neuzen v. Korn*, [1992] 64 B.C.L.R. (2d) 125, at para. 20 the court, in considering the term "unusual difficulty" in the context of the scale of costs in the former Rules of Court, observed that:

The cases do not give any empirical formula for determining what is and what is not "of more than unusual difficulty" or what is or what is not "of unusual

difficulty." They do give some guidance but the trial judge should, or is at least expected to, recognize such a case when he hears and sees it.

[21] Those observations are also apposite to the formulation of what constitutes a matter of "more than ordinary difficulty" under the New Rules.

[22] The defendants admitted liability during the trial but maintained that the plaintiff's negligence contributed to the accident. I found that the defendant Mr. Y's negligence was the sole cause of the collision.

[23] For the reasons that follow it cannot be said that the matter of the determination of liability was more than that of ordinary difficulty.

[24] There were 8 witnesses who testified for the plaintiff on liability – the plaintiff, 3 independent witnesses, an expert engineer, a traffic collision analyst with the RCMP, and 2 RCMP officers who testified regarding motorcycle training within the RCMP. The defendant called evidence on liability from the defendant, his father, and an expert engineer.

[25] Although this trial was of a significant length, the number of trial days devoted to liability does not in itself demonstrate complexity. In the context of the liability cases this court typically hears, the expert evidence regarding the issue of contributory negligence was not particularly lengthy or unusually complex. The legal issues were not complex. The pertinent documents primarily comprised the police file and photographs. The record does not show that there were any pre-trial applications in relation to this issue. Nor am I able to conclude, as the court did in *Lee v. Lee*, 2001 BCSC 562, with respect to conceding liability in a defamation action, that it should have been plainly obvious to the defence that a claim for contributory negligence would fail.

[26] In support of his submission on this point, the plaintiff relies on the judgment in *Camaso v. Egan*, 2011 BCSC 954, in which the court awarded costs on Scale C to the successful plaintiff. However, that case involved a 33-day trial with numerous pre-trial and trial applications, six examinations for discovery totaling seven days,

complex questions of law, and no concession on liability. Those facts render the analysis in that case distinguishable.

[27] In the result, I conclude an award of costs on Scale C is not warranted with respect to the liability aspect of this proceeding.

Increased Costs

[28] The plaintiff also maintains that if the Court fixes costs under Scale B for the liability portion of the trial, then the Court should order increased costs on the basis that there were “unusual circumstances” that would render such a cost award “grossly inadequate or unjust” pursuant to s. 2(5) and (6) of Appendix B to the Rules. The relevant part of section 2 of Appendix B provides as follows:

- (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3(1).
- 6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

[29] This determination is at its core a fact-based inquiry driven by the nature of the litigation and the conduct of the parties, see *Bajwa v. British Columbia Veterinary Medical Assoc.*, 2008 BCSC 905, at para. 73.

[30] In 380876 British Columbia Ltd. v. Ron Perrick Law Corp., 2009 BCSC 1209, at para. 37, the court identified those factors that would constitute unusual circumstances that would justify an award of increased costs as including:

- Misconduct by the unsuccessful party in the litigation;
- The serious nature of the allegations;
- The complexity or difficulty of the issues in the litigation; and
- The importance of the litigation to the parties or to the development of the law.

[31] The plaintiff argues that the defendants should have conceded liability earlier in the proceedings and that the defendants had an obligation not to proceed with their unsupportable position on liability. The plaintiff's essential contention is that the defendants' tactics substantially increased the plaintiff's costs and delayed the completion of the trial, and that it would be most unjust if he was not adequately indemnified for the costs associated with litigating the claim of contributory negligence.

[32] Applying the principles articulated in the authorities, I cannot find that as a result of unusual circumstances there would be an unjust result if the plaintiff was limited to an award of costs at Scale B. The defendants did admit liability during the trial. Their position on contributory negligence was not "unsupportable"; it was unsuccessful. In my view this does not constitute "misconduct"; rather this was the defendants putting their best case forward in an adversarial system, see *Slocan Forest Products Ltd.* at para.15.

[33] In summary on this issue I am not persuaded that an order for increased costs under s. 2(5) and (6) of Appendix B is warranted.

(iii) Is the plaintiff entitled to increased or special costs for the application for the anonymity and sealing order?

Increased Costs

[34] During the trial, the plaintiff applied for certain orders to protect his identity. The defendants opposed the application. The plaintiff asserts that approximately one to two days of trial time were devoted to addressing matters associated with this issue.

[35] In the Reasons for judgment I summarized the key aspects of the application as follows at para. 4:

It clearly emerges from the jurisprudence that the orders sought are exceptional: *V.F. v. E.B.*, 2010 BCSC 1870 at para. 18. At the heart of this application lies the balancing of two different public interests: maintaining the openness of these judicial proceedings and protecting the safety and personal security of the plaintiff, who works as a police officer investigating

criminal gang activity. The plaintiff's essential contention is that the inclusion in the reasons for judgment of information from which his identity could be discerned would place him and his family at risk of serious harm. Further, without a sealing order, the court file could be searched and the plaintiff's personal circumstances could become a matter of public knowledge and accessible to members of criminal gang organizations.

[36] I concluded that the plaintiff met the burden of showing that the orders sought were necessary to prevent a serious risk to the administration of justice.

[37] The plaintiff submits that in the circumstances, an order for increased costs would be appropriate because of the complexity of the issue, the serious nature of the issue, the importance of the issue to the plaintiff and to a class of people, and the fact that the application was hard fought.

[38] I found that in the unique circumstances of this case, the release of the plaintiff's personal information would create a security and personal protection risk for him and his family. While the order sought was exceptional, the legal issue cannot be characterized as one of unusual complexity. Moreover, while I recognise that the issue was important to the plaintiff I am not persuaded that the result of the application is significant with respect to the development of the law.

[39] In the end, having considered all of the relevant factors, I am not persuaded that the unsuccessful opposition to the orders sought to protect the plaintiff's identity should attract an award for increased costs. I do not find that there are unusual circumstances that would render an award of costs at Scale B grossly inadequate or unjust.

Special Costs

[40] In the alternative, the plaintiff argues that special costs should be awarded for the application to protect his identity. He seeks to characterize the defendants' opposition to this application as reprehensible and deserving of reproof or rebuke.

[41] The authorities mandate that the court exercise its discretion to award special costs judicially, and only where a litigant has engaged in reprehensible conduct from which the court should dissociate itself.

[42] Mr. Justice Walker summarized the governing principles in awarding special costs in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, at para. 8:

Special costs are awarded where a litigant engaged in reprehensible conduct. The purpose of an award of special costs is to chastise a litigant. Special costs are punitive in nature and encompass an element of deterrence. A wide meaning is given to the word “reprehensible”. The term represents a general and all encompassing expression of the applicable standard for an award of special costs. “Reprehensible” conduct includes conduct that is scandalous, outrageous, or constitutes misbehaviour, as well as milder forms of misconduct that in a court’s view deserves reproof or rebuke. In determining whether the conduct of a party is reprehensible, courts may consider whether the conduct complained of is a type from which it should seek to dissociate itself [Internal cites omitted].

[43] The plaintiff did not identify any specific misconduct on the part of the defendants which is deserving of reproof or is conduct from which the court should seek to disassociate itself. I do not accept that the unsuccessful opposition to the application constitutes conduct which is properly characterized as reprehensible and for which the defendant should be chastised. The record does not reasonably support any inference that the defendants had an improper motive in opposing the application. Nor am I persuaded, as is alleged by the plaintiff, that the defendants displayed a complete disregard for the safety and security of the plaintiff and his family at trial. Notably, at trial the defendants consented to the sealing of the video surveillance tape of the plaintiff.

[44] In short I cannot conclude on any principled basis that an order for special costs is warranted.

Conclusion

[45] The plaintiff is entitled to costs of the proceeding at Scale B.

“The Honourable Madam Justice Dardi”