Citation: Monahan v. Oldham et al.
2001 BCSC 654

Date: 20010501
Docket: B940867
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RANDALL BRENT MONAHAN

PLAINTIFF

AND:

**DOUGLAS BROOKS OLDHAM, BURNABY METRO LIMO LTD.
JOHN STEWARD MULDER, POT MU WONG, SHU CHUAN CHANG
AND WALLACE STANLEY HAROLD BRADLEY**

DEFENDANTS

AND:

Docket: B940866

BETWEEN:

RANDALL BRENT MONAHAN

PLAINTIFF

AND:

**MERVIN JOHN NELSON
AND KATHY LORRAINE NELSON**

DEFENDANTS

**SUPPLEMENTARY REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE COULTAS**

Counsel for the Plaintiff: Timothy J. Delaney

Counsel for the Defendants: Guy P. Brown

Date and Place of Hearing: January 4, 2001
Vancouver, BC

Written Submissions Received: January 5, 2001
February 19, 22, 2001

[1] The issue is "costs".

[2] Randall Monahan, the plaintiff in the within two actions which were tried together, was injured in two motor vehicle accidents. The trials concluded on December 16, 1996. Judgment was reserved. Before Judgment came down, Randall Monahan died from reasons which were not causally related to his injuries.

[3] I awarded global damages of $323,141.60 which included large sums for future income loss and future care costs.

[4] Before Judgment, counsel for the defendants sought to adduce evidence of Mr. Monahan's death and to have the trial "opened up at large". Counsel for Mr. Monahan's legal representatives, the plaintiffs, who were Mr. Monahan's counsel at trial, opposed the defendants' application and sought a *nunc pro tunc* order that the judgment should be made effective on the day the trials concluded. The defendants opposed that application. In the result, I made the *nunc pro tunc* order sought by the plaintiffs, declined to receive evidence of death and declined to open up the trial.

[5] The defendants appealed. They sought to limit the judgment to $18,311.60, being the sum I had awarded for past wage loss and past special damages, sought to have the *nunc pro tunc* order set aside, submitting I was wrong to have excluded evidence of Randall Monahan's death.

[6] The Court of Appeal found that the *nunc pro tunc* order was properly made, but that the evidence of death should have been admitted. The court set aside my damages awards and awarded damages of $81,311.60. The court awarded the appellants two-thirds of their costs on appeal and the respondents (plaintiffs), one-third of their costs on appeal. The Court of Appeal remitted the issue of trial costs to this court if counsel could not agree. Counsel have not been able to agree and the issue is now before me.

[7] The principal difficulty is the issue of costs in respect to the proceedings in this court after judgment - the applications for a *nunc pro tunc* order, to introduce evidence of death and to open up the trial. I shall consider the costs of the trial, including awards of damages, as the "First Issue" and the costs of post-trial applications as the "Second Issue".

THE FIRST ISSUE

[8] On May 18, 1998, I awarded the plaintiffs costs for both actions at Scale 3 and double costs from April 25, 1996 to the date of the award. I declined to order increased costs sought by the plaintiffs for the following reasons:

> 1. First, on the issue of costs, the plaintiffs sought increased costs for the trials submitting that the time costs of their lawyer far exceeded the taxable costs and the disparity was very great. I found that the *nunc pro tunc* order resulted in a large windfall to the deceased's estate because damages related to future loss of income and future care costs which Mr. Monahan would never lose and never pay because of his death, and, therefore, there would be ample funds to pay the lawyers' fees from windfall money.
>
> 2. Second, the cases were not of unusual difficulty or importance. They did not raise difficult issues of law or fact. Liability had been admitted. Assessing and presenting past and future economic loss was not difficult or unusual. The case was difficult because Mr. Monahan gave incorrect information about the onset and severity of his pain symptoms to his medical doctors and to those assessing him and their opinions were based on that incorrect information. But for his omission to give accurate information, the case would have been relatively easy to present and to resolve; but for his omission, there may not have been a trial, at all. That was the difficulty Mr. Potts, counsel for the plaintiff Monahan, was faced with. He overcame the difficulty and obtained a judgment satisfactory to his client. I suspect that much time, skill and prodigious effort was expended to overcome his client's failure to give accurate information and I suspect that is the principal reason that the time cost for the trials was so high. That effort and time should not be visited on the defendants for it was caused by Mr. Monahan himself.
>
> 3. Before me now, and not argued at the earlier proceeding in respect of costs, the defendants advance a further reason to deny increased costs for the trials. The plaintiff and his lawyers entered into a contingency fee agreement by which he was obligated to pay one-third of the sums received in a Judgment. That agreement taken together with s. 67(2) of the ***Legal Professions Act*** will prevent a large disparity between legal fees to be paid and costs recovered. I deal with that issue later in these Reasons at page 10.

[9] Because the Court of Appeal reduced the damages, there is no longer a windfall to the plaintiffs. But the windfall was not the only, nor indeed the principal reason I denied increased costs for the trials [see para. 2, *supra*].

[10] I conclude that the order for costs at Scale 3 for the trials, should stand.

DOUBLE COSTS

[11] Before the Court of Appeal judgment came down, the defendants took the position that an award of double costs from April 1996 was appropriate for the defendants had offered $80,000, plus costs. In the result, the Court of Appeal awarded damages exceeding that sum, although not by much.

[12] I award the plaintiffs double costs from April 1996 to the end of trial.

THE SECOND ISSUE - THE COSTS FOR POST-TRIAL MATTERS

[13] On this issue the plaintiffs submit:

> 1. They are entitled to costs of the entire Supreme Court proceedings, including the cost of post-trial matters;
>
> 2. The costs awarded should be assessed as increased costs at 50% of special costs of the entire Supreme Court proceedings;
>
> 3. Alternatively, they are entitled to:

> (a) costs at Scale 3 to April 25, 1996 and double costs to the end of trial (December 1996). (I have made that order)
>
> and,
>
> (b) increased costs or Scale 5 costs from December 1996 to May 1998 for post-trial matters in this court.

[14] In support of the first submission that the plaintiffs should be awarded all the costs of the Supreme Court proceedings including the cost of post-trial matters, the plaintiffs say that the defendants did not accept the plaintiff's offer to settle and themselves offered to settle for less than the Court of Appeal awarded. The plaintiffs rely on ***Skye v. Matthews***, [1996] O.J. No. 44 (Ont. C.A.).

[15] ***Skye*** was a jury trial. The jury awarded the plaintiff $60,000 in non-pecuniary damages and nothing for future income loss. The trial judge made a distributive costs order that the defendant pay the plaintiff's costs except for that part of the trial that dealt with her claim for loss of past and future income. For that part of the trial, he ordered the plaintiff to pay the defendant's costs. A distributive costs order in Ontario is akin to the provisions in our Rule 57(15). The Ontario Court of Appeal set aside the trial judge's order for distributive costs, for the plaintiff had obtained a judgment for an amount greater than the defendant's offer. The court said:

> We do not think that the distributive cost order was appropriate in this case. Having secured a judgment greater than the defence offered to settle, the appellant is entitled to party and party costs of the trial.

[16] The only common fact in ***Skye*** and the case at bar is an offer to settle and recovery in excess of it. I have awarded costs of trial to the plaintiffs. Our Court of Appeal could have awarded the plaintiffs the costs of the Court of Appeal proceedings, despite the outcome in that court, for the awards of damages it ordered exceeded the defendants' offer to settle. The court did not. It awarded costs based on the discrete issues before it. I am persuaded that is the fair and proper approach for this court to take when considering the award of costs on post-trial issues, invoking Rule 57(15) of our Rules of Court, which provides:

> The court may award costs that relate to some particular issue or part of the proceedings or may award costs except so far as they relate to some particular issue or part of the proceedings.

Rule 57(15) was formerly Rule 57(8) but the two sub-sections - 15 and 8 - are the same in all respects.

[17] The Rule was considered by the Court of Appeal in ***B.C. (Govt.) v. Worthington (Can.) Inc.*** (1988), 24 B.C.L.R. (2d) 145. Hutcheon, J.A. who gave the majority judgment, said at p. 162:

> I think that under R. 57(8) the court has full power to determine by whom the costs related to a particular issue are to be paid. ... The discretion must be exercised judicially, not arbitrarily or capriciously...

Esson, J.A. agreed in the result but gave his own Reasons, saying at p. 167:

> The purpose (of the Rule) is to give trial judges a discretionary power to effect a just result. ...

[18] The Court of Appeal found the post-judgment issues to be discrete issues and apportioned costs on the basis of success and failure in respect to them.

[19] I consider it would not be just to award all the costs of the Supreme Court trial to the plaintiff despite that in the end he achieved an award that exceeded the defendants' offer to settle. Were I to make such an order, it would ignore the intent of Rule 57(15), to effect a fair result between the parties for the trials were prolonged by discrete issues which were not contemplated when the original offers of settlement were exchanged.

[20] It would not be appropriate, either, to award double costs for the post-trial proceedings.

SHOULD INCREASED COSTS BE AWARDED FOR POST-TRIAL ISSUES?

[21] The plaintiffs seek an award of increased costs. First, they say the issues were complex, they raised an important issue of law in an area of the law that was unsettled. Second, they say Mr. Monahan's solicitor's time and effort was prodigious and an award of ordinary costs would create a great disparity between the solicitor's actual cost and taxed costs.

[22] Dealing with the second submission first, I have said that Randall Monahan and his solicitors entered into a contingency fee agreement which provided that he would pay one-third of the recovery exclusive of costs and disbursements. Section 62(2) of the ***Legal Professions Act*** precludes a lawyer from recovering any part of an award for costs under a contingency fee agreement. The fee agreement in this case prevents the plaintiffs from having to pay very large

fees to Mr. Monahan's lawyers. There will not be a significant disparity between fees paid and costs recovered.

[23] Counsel for the plaintiffs submit that the court should not assume that their clients will only be paying a percentage of recovery because the solicitors may take the position that the contingency contract likely has been frustrated and should be set aside, and fees will have to be determined based on *quantum meruit*. No action has been taken to have the contingency fee agreement set aside. The most that can be said is that at some future time the lawyers may take proceedings to challenge the validity of the fee agreement. If that is done, I cannot predict the outcome. The outcome is pure speculation. I am not prepared to make an order for costs based on the possibility that the fee agreement will be set aside and costs awarded on the basis of *quantum meruit*.

[24] The defendants agree that the post-trial issues were of above-average complexity and submit that an award of costs at Scale 4 would be appropriate.

[25] I find that an award of increased costs would not be appropriate.

[26] I award costs for post-trial matters at Scale 4. Those costs will be divided in the same manner that they were divided in the Court of Appeal - two-thirds to the defendants and one-third to the plaintiffs.

"G.R.B. Coultas, J."
The Honourable Mr. Justice G.R.B. Coultas