IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chavez-Salinas v. Tower,*
2023 BCSC 1043

Date: 20230621
Docket: M119256
Registry: New Westminster

Between:

Delia L. Chavez-Salinas

Plaintiff

And

Kenneth Tower

Defendant

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment re: Costs

Counsel for the Plaintiff:	P.C. Formby
Counsel for the Defendant:	S. Amendolagine
Place and Date of Hearing:	New Westminster, B.C. June 22, 2022 August 23, 2022
Place and Date of Judgment:	New Westminster, B.C. June 21, 2023

Introduction

[1] The plaintiff was injured in December 2008 in a motor vehicle collision and commenced this action seeking the full range of damages. Liability for the collision was denied by the defendant. In reasons for judgment indexed at 2017 BCSC 2068, the Court found the defendant 80% liable and the plaintiff 20% liable for the collision. The plaintiff was awarded costs of her action.

[2] On appeal, the Court's finding of contributory negligence on the plaintiff's part was set aside and her cost of care award was reduced. Reasons for judgment in that decision are indexed at 2022 BCCA 43. Ultimately, the plaintiff was successful in obtaining an award of $390,750 in damages whereas at trial she claimed approximately $1,400,000.

[3] The plaintiff seeks a costs order on scale C pursuant to s. 2(2)(c) of Appendix B of the *Supreme Court Civil Rules* contending her case involved "matters of more than ordinary difficulty".

Background

[4] This judge alone trial was set for 10 days, but was ultimately heard over 28 days from November 2013 to January 2017. The plaintiff was awarded damages for past income loss\loss of earning capacity, future income\impaired earning capacity, future care costs, special damages, non-pecuniary damages and an in trust award for her daughters.

[5] There were some complications in the trial stemming from the plaintiff's mental incompetence that became apparent during the first few days of the trial.

[6] Before the trial began, plaintiff's counsel became aware that Ms. Chavez-Salinas was incompetent but had difficulty finding anyone to accept the role of litigation guardian.

[7] Defence counsel had urged plaintiff's counsel to arrange the appointment of a litigation guardian for Ms. Chavez-Salinas. This had not happened by the end of the

first week of the trial when it became obvious the plaintiff's competence was an issue.

[8] At one juncture early in the trial, plaintiff's counsel informed the Court that one of the plaintiff's children was her litigation guardian. Plaintiff's counsel said that the two daughters jointly agreed to act as litigation guardians but were afraid of making their mother permanently hostile toward them.

[9] Plaintiff's counsel had obtained consents from the plaintiff's daughter to act as litigation guardian but did not make the application to appoint a litigation guardian under Rule 20-2(10) before the trial commenced.

[10] The trial was adjourned during the first week because the plaintiff was struggling in giving her evidence in chief. It became apparent during the first week of trial through the plaintiff's testimony that she was not competent, the trial was adjourned for plaintiff's counsel to seek the appointment of a litigation guardian and obtain information concerning the plaintiff's mental competence to testify.

[11] The plaintiff eventually obtained an opinion from the plaintiff's psychiatrist indicating she was competent. However, on January 21, 2016 the plaintiff's daughter, Sahara Kurtyka was appointed litigation guardian of the plaintiff.

[12] This trial was originally estimated to take 10 days but, due to issues concerning the plaintiff's mental competence, there were substantial delays in concluding the trial and many adjournments related to her mental status.

[13] Although the trial proceeded for 28 days over which the was trial was before the Court, there were multiple days when the trial continued for half days only. I am satisfied that the trial more likely occupied 23 or 24 days of actual court time.

Legal Framework

Costs at Scale C

[14] According to Rule 14-1(1), unless any of the enumerated circumstances exist:

> (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…

[15] Section 2 of Appendix B provides:

> 2 (1) If a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (2), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.
>
> (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.

[16] Looking to the *Rules* and the term “increased costs” is usually used to refer to s. 2(5) of Appendix B, which reads:

> 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).

[17] The plaintiff did not seek to rely on this provision.

[18] In *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.,* 2010 BCSC 1494 [*Slocan Forest*], at para. 6, Justice McEwan set out seven factors that continue to be relevant to the analysis of a claim for Scale C costs:

> …
>
> (a) Length of trial;

(b) Complexity of issues;

(c) Number and complexity of pre-trial applications;

(d) Whether or not the action was hard-fought with little or nothing conceded along the way;

(e) The number and length of examinations for discovery;

(f) The number and complexity of expert reports;

(g) The extent of the effort required in the collection of and proof of the facts.

Positions of the Parties

Plaintiff

[19] The plaintiff seeks costs at Scale C on the basis that the issues in the trial were complex and made more difficult because of the plaintiff's mental health issues.

[20] The plaintiff contends that as a result of the accident, her pre-existing mental health issues were reactivated and she developed symptoms of a major depressive disorder with psychosis which had been in remission.

[21] She contends the trial was much longer than an ordinary trial; it involved complex issues requiring extraordinary measures to obtain proof of the necessary facts. She tendered expert opinion evidence from four physicians and two physicians testified for the defendant. She argues the action was hard-fought with nothing conceded along the way.

[22] She contends that the flaws in her credibility and reliability and poor testimony as a historian with an inability to recall details of her interactions with her doctors for all functions of the injuries she sustained are a result of the accident.

[23] Overall, she contends that this case was more difficult than an ordinary case and she should be awarded her costs at Scale C.

Defendant

[24] Although conceding that the trial of this action was lengthy, adjourned on several occasions and was hard-fought, the defendant contends that costs at Scale B is appropriate because the issues were no more complex than ordinary and the length of the trial was influenced or wholly caused by the plaintiff's credibility and behavioural problems.

[25] The defendants submit that there was no evidence to support a conclusion that the plaintiff's accident-related injuries contributed to her credibility deficits.

[26] The defendant challenged the reliability of the plaintiff's submissions on this application concerning a number of alleged factual inaccuracies. In the end, the defendant contends this was not a case of sufficient complexity to warrant costs at Scale C.

Analysis

The Factors

[27] In this case, I have concluded that it is appropriate that the costs payable by the defendant to the plaintiff should be fixed at Scale B. I begin my analysis of the appropriate scale of costs in this matter by considering the factors laid out by the Court in *Slocan Forest*.

Length of Trial

[28] The plaintiff argues this case involved more than ordinary difficulty due in part to the length of the trial. The trial spanned three years and two months. With lengthy adjournments, counsels' work preparing each time for the resumption of the trial made it more complex. The plaintiff says the delays made it difficult for the plaintiff and other witnesses to remember details which led to more time spent on testimony.

[29] The defendant concedes that this was a lengthy trial but asserts that this was a result of the plaintiff's own credibility and behavioural issues.

[30] In *Slocan Forest,* the Court commented at para. 9 that a "trial of 21 days is, in itself, suggestive of some form of complexity", while acknowledging that "it is possible to imagine a trial where the proof of damages, for example, is a lengthy and repetitive exercise without being inherently complex". In my view, this is such a case.

[31] As such, and because many of the adjournments were a result of the plaintiff's competency issues and counsel's inadequate time estimations, I find that the length of trial does not suggest that this matter was of "more than ordinary difficulty".

Complexity of Issues

[32] In view of the defendant's concession that this trial was lengthy and hard-fought, the dominant factor to be considered is "the complexity of the issues involved": *Elsen v. Elsen*, 2011 BCSC 1011 at para. 60.

[33] In *Elsen*, Justice Morrison underscored the importance of resolving issues of credibility as a component of any ordinary trial, recognizing that the business of the Court is to deal with conflicts in evidence (at para. 61). Scale B costs are intended to apply to the ordinary business of the Court: *Elsen* at para. 61.

[34] In *Burnett v. Moir*, 2012 BCSC 1286, Cullen A.C.J. (as he then was) decided an application flowing from a 28-day motor vehicle accident trial on liability and damages. The case involved 17 lay witnesses and four expert witnesses called by the plaintiff and 14 lay witnesses and four expert witnesses called by the defence. After reviewing the rule and principles set out in *Mort v. Br. Of Sch. Trustees of Sch. Bd. No. 63 (Saanich)*, 2001 BCSC 1473, he said:

> [55] There is no doubt, in my view, that this case had some difficulty, complexity and importance woven into it. However, it was not a case of novel scientific or expert evidence. It is not a case of first impression in terms of the legal theory of liability or damages. It is not a case of multiple parties or complicated transactions (although I accept that the conduct of the Cheers Defendants had some potential implications on the issue of apportionment of liability, if found). It is also not a case involving complex legislation.
>
> [56] While the plaintiff did maintain some of his allegations against the defendants in the face of clear contrary evidence, it was not a case as in *Mort v. Br. Of Sch. Trustees of Sch. Bd. No. 63 (Saanich)*, where the plaintiff went

> beyond his pleadings to allege misconduct in the nature of fraud against the defendants.
>
> [57] Thus, while this case was not without difficulty, I am not satisfied on balance that the difficulties it embraced were of a sufficient order of magnitude to take it out of the category of ordinary difficulty and into the realm of more than ordinary difficulty. I would thus set the tariff at Scale B.

[35] The plaintiff contends that the trial was made complex by her significant mental problems induced by the subject collision. I held at trial that some of the stressors stemming from the collision reactivated her pre-existing major depressive disorder with psychosis. However, as the defendant points out, one of the plaintiff's medical advisors said her psychiatric condition was in remission by August 2013.

[36] The plaintiff contends that her collision-induced injuries made it gradually more difficult for her to relate to others and help in the litigation process, which led to major difficulties in trying to prove her claims.

[37] The plaintiff argued that in 2013 defence counsel was insisting that the plaintiff should have a litigation guardian, which was a difficult procedure to implement. Counsel said the plaintiff's daughters initially agreed to act as litigation guardians, but were afraid that their mother would become hostile if they went against her will. From this submission, and the exchanges at trial, I am satisfied the plaintiff's lawyer and children were alive to the fact she was not capable of giving instructions prior to trial. Nonetheless, the trial commenced and the difficulties with the plaintiff's psychiatric health emerged during the first five days, forcing an adjournment of the trial.

[38] Overall, the legal and factual issues in this case were not complex. The plaintiff had estimated the trial would take 10 days and the issues, from the outset, focused on the plaintiff's credibility and reliability. This aspect of the claim was not unusually complex.

[39] The defence relies on *Elsen* to contend that cases turning on issues of credibility do not necessarily imply that a case is complex.

[40] Liability for the collision was not admitted and the parties testified to their observations at the time of the incident. Neither party tendered evidence from an accident reconstructionist to explain how the collision had occurred from the perspective of forensic analysis.

[41] The plaintiff relied on *Graham v. Marek*, 2002 BCSC 214 for factors that could influence the Court's determination of complexity. In *Graham*, the plaintiff was alleging a brain injury and the claim was strenuously opposed, with the suggestion that the plaintiff was fabricating symptoms. In that case, the plaintiff's credibility was unfairly impugned simply because they were an actor by occupation. The plaintiff was also subject to unfair and biased evidence tendered by the defence. The circumstances in this case are not comparable.

[42] The plaintiff contends that liability, causation, credibility and reliability were in issue and the plaintiff was unfairly challenged about small details while suffering from memory and recall problems.

[43] The defendant challenges the plaintiff's assertion that her mental problems were significant and induced by the accident. The defence also points out that the accident was not causative of most of her problems; the accident re-activated a previously quiescent psychiatric health problem. The defendant contends that "the plaintiff has been a very difficult person" and it is not that "her accident injuries made litigation difficult".

[44] Having heard all of the evidence in this trial, I do not conclude that the plaintiff's credibility and reliability issues moved this case out of the range of ordinary complexity.

Pre-trial applications

[45] Neither party made any submissions about pre-trial applications that were made in this case.

Hard-fought with Little or Nothing Conceded

[46] The plaintiff says the action was hard-fought with little conceded, as the defence put "virtually every injury and every issue possible to the strict proof: liability, credibility, reliability, character, causation of every injury, extent of disability, and quantum". She says the defence ought to accept the consequences that in doing so made the proceeding very difficult.

[47] The defendant concedes that the action was hard-fought.

[48] The plaintiff claims that a hard-fought trial, the manner in which it is fought, and taking a particularly hard-nosed approach to litigation can affect an award of costs at a higher scale: see *Kinloch v. Edmonds*, 2008 BCSC 1684 at para. 47. However, consideration of this factor "must be approached with caution" as tenacity is a duty defence counsel has to their client: *Slocan Forest* at para. 14.

[49] This caution was echoed in *Howell v. Witt,* 2016 BCSC 913 at para. 20, where Justice Butler (as he then was) discussed the "hard-fought" standard as described in *Kinloch*, adopting the principle that defence counsel has an obligation to tenaciously defend their client's claim. As in this case, the Court found in *Howell* that there had been no unreasonable attempts to embarrass the plaintiff unduly; rather, counsel challenged the plaintiff's evidence appropriately (at para. 21).

[50] Further, in *Howell,* the Court commented at para. 23 that:

> In the adversarial process, the parties will often take contrary positions which will require issues to be seriously challenged and vigorously argued. When that occurs, it should not elevate the scale of costs except when one side is acting in an unreasonable manner.

[51] The defendant in this case opposed the plaintiff's claim for damages in the order of approximately $1.4 million; ultimately the plaintiff was successful in obtaining an award of $390,750. While the defendant conceded that the trial was hard-fought, I can discern no hard-nosed approach taken by the defendant in this case. Credibility was very important and the defence strategy to challenge the plaintiff on the extent and nature of her injuries was not unreasonable.

Examinations for Discovery

[52] There was no direct evidence on this application concerning the number of examinations for discovery; in a draft bill of costs submitted by the plaintiff it appears that there may have been three days of examination for discovery.

[53] Nothing in the examination for discovery process suggests that this case involved more than ordinary difficulty.

Nature and Complexity of Expert Reports

[54] The plaintiff tendered expert evidence from four physicians: Dr. Hershler, a physiatrist; Dr. Fuller, an orthopedic surgeon; Dr. Fenster, a urologist; and Dr. Mok, a psychiatrist. In answer, the defence presented the opinions of Dr. Leith, an orthopedic surgeon, and Dr. Smith, a psychiatrist. Three of the psychiatric opinions were concerned with the issue of whether the plaintiff was competent to testify at trial. The number of medical experts does not suggest this trial involved more than ordinary difficulty.

[55] Each of the experts called by the plaintiff were cross-examined and in several instances they undermined the plaintiff's credibility or reliability.

[56] The plaintiff complained of soft tissue injuries in her neck, back, shoulders, groin, knee, and hand. She also complained about, incontinence, and disturbances to her mental health triggered by the accident.

[57] There were no medical issues suggesting she had any unusual conditions or injuries; although differing medical opinions were presented, challenges in proving the plaintiff's claims for damages arising from the injuries did not involve more than ordinary difficulty. The assessment of the plaintiff's claims involved the assessment of different medical and psychiatric opinions. For the most part, the testimony of the plaintiff's orthopedic surgeon and physiatrist were given little weight due in part to the plaintiff's failure to disclose important information to them and limitations on their competencies.

[58] To some extent, these experts' opinions were complicated by the lack of reliability and credibility in the plaintiff's testimony, but there was little in the medical evidence that suggested this claim was more difficult than ordinary personal injury cases.

Effort Required to Collect Evidence and Prove Facts

[59] The Court in *Slocan Forest* established that the "effort required to collect facts may, in part, be inferred from the extent of the investigations conducted, and in part, from the extent of the exchange of documents" (at para. 18).

[60] The notice of application contends that the plaintiff refused to take part in an occupational therapist's examination and assessment which plaintiff's counsel believed was necessary and that the plaintiff's oppositional approach to cooperating in the assessment of her required care impeded counsel's trial preparation. However, there is no affidavit evidence on the application concerning this point.

[61] In her notice of application at para. 33, the plaintiff contends that a great deal of the work that became necessary to prove parts of her claim "must be laid at the door of the [d]efendant for reactivating the psychosis, hallucinations, paranoia, about ICBC, her memory problems, lack of lucidity with her medications, making it more difficult to deal with her, and to prepare her for trial, let alone all of the difficulties in her testifying at trial". I did not make the findings suggested by plaintiff's counsel. I accepted that some reactivation of her depressive disorder with psychosis occurred but I found that she had not been completely or fully asymptomatic in regard to some of her physical and mental concerns. I also concluded that her behaviours raised questions about the reliability of her evidence concerning the onset and development of her symptoms.

[62] I concluded that she reactivated a pre-existing condition that was psychological in origin and manifesting in chronic pain syndrome including reactivation of pre-existing depressive disorder and psychosis.

Discussion

[63] There is clearly a balancing aspect to this analysis. The factors considered above are “just *considerations* that help to ensure that a comprehensive view is taken of the question” of whether this was a matter of more than ordinary difficulty: *Slocan Forest* at para. 22. Where several factors are neutral, they are not to be notionally set-of against or deducted from factors weighing in favour of costs on Scale C: *Slocan Forest* at para. 23.

[64] Because some factors may favour a finding of more than ordinary difficulty, it is necessary to take into account all of the factors argued by the parties. One aspect of this case, namely the length of the trial, may weigh in favour of finding that the plaintiff’s claim was a matter of more than ordinary difficulty. The defendant conceded that the trial was lengthy, however I do not find the length of this trial to be a true indication of complexity, unusual difficulty or importance.

[65] None of the factors set out in s. 2(3) of Appendix B of the *Rules* are applicable in this case. There were no difficult issues of law, fact or construction; the claim did not involve an issue of importance to a class or body of persons, or of general interest; and the result of the proceeding did not effectively determine the rights and obligations between the parties beyond the relief that was actually granted or denied.

[66] There is no single determinative factor guiding this analysis; taking into account all of the factors discussed in *Slocan Forest* and subsequent decisions, I am unable to conclude this case involved more than ordinary difficulty as discussed in many of the cases presented. Difficulties with the case resulting in a lengthy trial were largely caused by the plaintiff’s credibility and reliability shortcomings. Although the medical evidence suggested the plaintiff’s pre-accident psychotic symptoms were re-activated by the collision, Drs. Hershler and Fuller resiled from some of their opinions. For example, Dr. Hershler abandoned his opinion concerning the plaintiff’s incontinence because the conclusion was beyond his competence.

[67] Overall, I found that the opinion of Dr. Mok was undermined because he did not have a complete picture of the plaintiff's history; his opinion may have been different had he known the facts. I can not conclude that the plaintiff's injuries elevated her claim to beyond ordinary complexity.

[68] Several of plaintiff's counsel's submissions were not supported by the evidence. These comments were highlighted by defendant's counsel in para. 17 of the application response. As examples, plaintiff's counsel suggested that the plaintiff's mental limitations were known to the defendant's insurer and they knew this would present difficulties in proving her claim. Plaintiff's counsel also referred to a formal offer to settle that was not accepted by the plaintiff; the defendants contend this was a breach of litigation privilege to reference that offer in the notice of application. Plaintiff's counsel also alleged in submissions that the plaintiff's behaviour early in the trial had been induced by her accident injuries; however, following the first week of trial, her fitness to testify was confirmed by her psychiatrist.

Conclusion

[69] Taking into account all of the factors informing the analysis of a claim for a Scale C costs award under s. 2(2) of the Appendix B of the *Rules*, I conclude this case has one feature that suggests more than ordinary difficulty but taking into account all factors my overall conclusion is this was a case of ordinary difficulty. As in *Elsen,* it was lengthy and hard-fought, but not particularly difficult.

[70] Based on that conclusion, this case warrants an order for costs at Scale B. The plaintiff's application for costs at Scale C is denied.

"Armstrong J."