Date: 19970530
Docket: B910142
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LANCE RONALD GIBSON

PLAINTIFF

AND:

KARL RAYMOND RICKETT and
VAN HERRICK'S ENVIRONMENTAL PLANTING LTD.

DEFENDANTS

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

THIRD PARTY

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RONALD ALBERT GIBSON and LANCE RONALD GIBSON

PLAINTIFF

AND:

GEOFF HALL

DEFENDANT

SUPPLEMENTARY REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COULTAS

Counsel for the Plaintiff:	Laura M. McGee
Counsel for the Defendant, Van Herrick's Environmental Planting Ltd. and Insurance Corporation of British Columbia:	Lina Guistra
Counsel for the Defendant, Hall:	Paul Kent-Snowsell
Place and Date of Hearing:	Vancouver, B.C. April 1, 1997

[1] These Reasons address the issue of costs following a long and difficult trial of two actions heard together.

[2] The plaintiff was injured in three car accidents. The first occurred on April 5, 1990, the second on April 19, 1990, and the third in California, on August 29, 1992. Before the accident he was in superb physical condition) an accomplished athlete embarked on a career as stuntman in films and as a personal fitness trainer.

[3] At trial, liability and damages arising from the first accident were in issue. Liability for the second accident was admitted at commencement of trial, quantum of damages remained in issue. The parties settled damages for injuries caused in the third accident.

[4] The plaintiff suffered moderately severe soft tissue injuries in the first accident from which he has not made a full recovery; those injuries were exacerbated in the second

and third accidents. He suffered pain and limitations and in the fall of 1990 disfiguration of his left shoulder and upper back commenced. In March 1991, doctors diagnosed a long thoracic nerve injury resulting in serratus anterior muscle palsy. He attributed the nerve injury to either the first or second accidents. Exhaustive medical evidence was called on the issue of causation of the nerve injury ("causation"). I found that the nerve injury did not result from any of the accidents.

[5] The nerve injury has had a profound effect on the plaintiff's life and his career. It has resulted in chronic pain, physical limitations, body disfigurement and future economic loss. I found the defendants were not liable for that loss. I awarded damages for soft tissue injuries accompanied by emotional overlay (depression), past wage loss and special damages. The amount, including interest, exceeded $90,000. From first to last the defendants denied the nerve injury was caused in the accidents. They conceded the plaintiff had suffered soft tissue injuries and a past wage loss and offered $60,000 compensation. In the result, the plaintiff was awarded approximately one-third more than the defendants were prepared to pay.

[6] The trial lasted 20 days; three of those days were taken up with submissions. The original time estimate for trial was nine days. Nine days of evidence were heard in April, followed by three days in May and then the trial was adjourned

generally. At the time of adjournment the plaintiff's case had concluded, the defence had commenced. The trial was scheduled to continue in November and conclude in five days. During the adjourned period the defendant served two further Reports, complying with the 60-day rule. I allowed the Reports to be entered and their authors called, but on terms. One term was that any plaintiff's witnesses recalled to rebut the evidence of Drs. Elson and Allan would be at the defendant's expense, in any event, and I also ordered that any bill rendered by expert witnesses for their further attendance would be borne by the defendants. Those orders stand.

[7] The plaintiff seeks full costs of the entire trial and post-trial proceedings at scale 4, pursuant to Rule 57(9) of the ***Rules of Court***, which reads:

> **Costs to follow event**
>
> (9) Subject to subrule (12), costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

[8] The defendants invoke Rule 57(15), which reads:

> **Costs of part of proceeding**
>
> (15) The court may award costs that relate to some particular issue or part of the proceeding or may award costs except so far as they relate to some particular issue or part of the proceeding,

and the defendants submit Scale 3 is appropriate.

[9] The plaintiff submits he was successful in the event. He achieved an award more than a third greater than the defendants offered. He submits that even if a claim for the nerve injury had not been advanced, because there is a close similarity of symptoms arising from soft tissue injury and the nerve injury, the court would have been compelled to hear medical evidence on the effects of the nerve injury to arrive at a proper award for soft tissue injury and emotional overlay. There is support for that submission in the Reasons for Judgment at pages 9 and 10:

> It is not disputed that he suffered significant soft tissue injuries in the first accident. One of the difficulties the case presents is that in the initial stages after April 5, 1990, and before the nerve injury was diagnosed, the symptoms of pain and disability were those associated with both flexion/extension soft tissue injuries and a serratus anterior muscle palsy. The second and third accidents aggravated his soft tissue injuries, if they did nothing else. It was impossible for him and difficult for the court to distinguish between the pain resulting from the muscle palsy and that from soft tissue injuries. There is clear evidence that the pain he has experienced in his low back since 1990 is a soft tissue injury.

[10] The plaintiff also submits that an unforeseen prejudice was created by the late delivery of the Elson and Allan Reports; had they been delivered 60 days before commencement of trial, he could have weighed his option whether to proceed to trial on causation at all. By the time the Reports were delivered, nine days of trial had passed and the plaintiff had closed his case. I find that to abandon the issue of causation at that stage based on written reports alone after so much

effort, time, and money had been expended on the issue, would have been foolhardy. The late Report and evidence of Dr. Elson greatly benefitted the defendants. To rebut it, the plaintiff had to recall Drs. Taunton and Bozek, and in their recall they gave evidence, not given previously, that significantly assisted the defendant on the issue of causation.

[11] I find it would be unjust to award costs in favour of the plaintiff based on Rule 57(9). Much time was taken up and expense incurred with the causation and future economic loss issues, on which the plaintiff did not succeed. The defendants say they always conceded the plaintiff had suffered soft tissue injuries and wage loss. That is so, and it prompted their offer but it proved insufficiently generous. There is a complicating factor. The defendants called evidence to show the plaintiff was less than an honest witness and was exaggerating his claim for damages. That evidence related, in part, to his nerve injury but also, in part, to his other claims for damages) soft tissue injuries and wage loss. The defendants were unsuccessful in their attempts to prove the plaintiff was not credible. I found him generally credible. He testified over many days. His evidence took up 360 pages of transcript and he was at pains to deny the attacks on his credibility.

[12] The crucial issue arising is what percentage of costs should be attributed to the causation issue in respect of which

the plaintiff failed, and to the issues where he met with success.

[13] The defendants say the court has three options. First, to award the plaintiff 50% of his costs and disbursements and award the defendants 50% of theirs. An award of that character would result in the plaintiff receiving no costs at all despite receiving substantial awards of damages, well beyond the defendant's offer. I am not persuaded to adopt that course.

[14] The second option is to compare the amount claimed to the damages awarded. I am not persuaded to that course, either, and these are my reasons. The plaintiff's claim for damages was approximately $700,000 - $800,000, accounted for by future economic loss, including loss of a capital asset and cost of retraining. The large sum claimed rested on the allegation of nerve damage. That claim was not frivolous; it was a serious and proper triable issue. A long thoracic nerve injury is uncommon; an isolated injury of that character is rare indeed. Many highly experienced medical experts testified at trial: Drs. Hershler, Taunton, Bozek and Toews attributed the nerve injury to the motor vehicle accidents; Dr. Elson, the only anatomist to testify, and Drs. Allan and Reebye did not. At the end of the day, while finding the nerve injury was not caused in the accidents, I could not find its cause.

[15] Given that the plaintiff was successful to the extent that he was awarded damages significantly greater than those offered

by the defendant, it would not be appropriate to allow an unfavourable result regarding a single, properly triable issue to result in a drastic reduction in the plaintiff's costs award. That would be the result if I followed the second option.

[16] The defendants advance a third option) award costs to the plaintiff on the issues on which he was successful and award no costs to the defendants. That is the "degree of success" test spoken of in ***Waterhouse v. Fedor*** (1987), 13 B.C.L.R. (2d) 186, where at page 190 Legg J. (as he then was) said:

> I also agree that two methods may be used in determining "the degree of success". One method involves the judge assessing a percentage figure to the relative success of the parties. The other method involves determining the number of days spent in trial on "unsuccessful" issues in proportion to the time spent on "successful" issues.

[17] I conclude the third option is the appropriate one in the circumstances, and I have determined the relative amounts of time spent in trial on "successful" and "unsuccessful" issues. I have revisited all the evidence and the issues. I have been assisted by full transcripts of the evidence and submissions.

[18] Ms. McGee, counsel for the plaintiff, submits:

> If the plaintiff acknowledged he had a long thoracic nerve injury unrelated to these motor vehicle accidents, I'm submitting that the parties still would have been asking this Court to apportion what

> part was from -- what part of his chronic pain, if we want to call it that, and soft tissue injuries, was from the car accidents, and what part was just related to a long thoracic nerve injury.

[19] Ms. Guistra, counsel for Van Herrick's and the Third Party submits:

> There was never a contest as to whether or not the plaintiff sustained soft tissue injuries. That was not in issue. The only issue was the nerve injury. Given that the defendants conceded the soft tissue injuries, in my submission it's extremely unlikely that the medical testimony would have been as extensive as it was, had it not been for the nerve injury.
>
> It's unlikely all the doctors would have been called to give evidence. It's unlikely that having given that evidence that they would have taken as long to give the evidence when they were on the stand, because if you look at most of the testimony, most of the medical testimony given, most of it focused on the long thoracic nerve injury, because the other injuries were not in issue. So with respect to the medical evidence, I believe, My Lord that it's fairly clear that it was the nerve injury that really took up all of the court time for the medical evidence and there was only a small amount of time spent with respect to the soft tissue injuries which were conceded.
>
> With respect to the lay testimony, a good deal of that also had to do with the long thoracic nerve injury. All of the evidence that was called about the plaintiff's activities after the accidents, his weightlifting, his fights, his arrest and so on, all of that was called mainly to establish a possible cause for the nerve injury. So if that had not been an issue in the proceeding, a lot of lay evidence would have been eliminated all together or at the very least substantially shortened.

[20] In part, I agree with both submissions. Had the plaintiff not claimed damages for the nerve injury, that injury would still have been a live issue at the trial. The court would

have been called upon to determine the extent of pain and the physical limitations arising from it, as opposed to that arising from the soft tissue injuries, to arrive at a fair award of damages for the latter injuries. The court would have been called upon, also, to determine the cause of the continuing depression the plaintiff experienced after the accidents. So, while the cause of the nerve injury would not have been in issue, the character of the injury and the effect of it on the plaintiff's physical and emotional condition would have been.

[21] Not all the lay testimony was devoted to the nerve injury; some was adduced to discredit the plaintiff generally.

[22] The evidence at trial took up approximately 1,381 pages of transcript and the submissions a further 248 pages. The evidence of some medical witnesses overlapped) covering the character of the long thoracic nerve, the possible cause of the nerve injury, the effect of it on the other body parts, the pain and limitations associated with it, the plaintiff's soft tissue injuries and their effect upon him, and his efforts to rehabilitate. Some of the lay witnesses were called to rebut the damaging evidence given by Danielle Soklofsky, not related to the nerve injury. Others testified about the fight with Jeff Bell and the arrest procedure. Constable Hartle testified in respect of the first accident; it must not be forgotten that liability for that accident was not admitted.

[23] For the plaintiff's case, on the issues in which he was successful the following witnesses were necessary regarding the accidents, the plaintiff's background and personality, and the soft tissue injuries: Donna Rogers, Ronald Gibson, Drs. Greenwood, Toews and Hershler, Roberta Gibson, Constable Hartle, Colleen Schmitt, the defendant Hall and of course, the plaintiff himself.

[24] On issues of credibility (not related to causation), the following witnesses were necessary for the plaintiff's case: Dionne Brown, Eric Malebranche.

[25] I conclude the following witnesses were called either totally or principally to testify about the nerve injury or the plaintiff's claim for future economic loss: Kathryn Petersen, Drs. Bozek, Taunton, Allan, Reebye and Elson, Jonathan Makaro, Thomas Crowe, Ronald Robinson, Mark Ackerstream, Kosta Kromidis, Christine Dibiasio, Victor Wardlow, A.J. Lamport, D. Fausto, Jeff Bell, Christopher Franco, Guile Frazer, Eric Malebranche (as to weight training), Mark Bailey, and Kathleen McClugan.

[26] With respect to the recall of Drs. Taunton and Bozek, the defendants Van Herrick's and the Third Party are liable to pay the costs of their attendance and the preparation for it.

[27] With respect to Danielle Soklofsky, who proved to be an unreliable witness, the plaintiff is entitled to the costs for that part of the trial in which she testified.

[28] I have reread the transcripts of the evidence, that of the plaintiff and that of the other parties. I have divided that evidence into two parts: that which relates to the issues upon which the plaintiff failed and that which relates to the issues upon which he succeeded. The issues upon which he failed are the long thoracic nerve injury, weight training, the fight and arrest procedure, and future economic loss. He succeeded on the other issues. Taking into account all of the evidence, I find that approximately 51% relates to issues upon which he was not successful, and approximately 49% of it relates to issues upon which the plaintiff was successful.

[29] I have also reread the transcripts of the submissions, which took up three days in trial. Attributing success, or absence of it in submissions, is a much more difficult task than it is with respect to evidence. I calculate that roughly two-thirds of the submissions relate to issues where the plaintiff was unsuccessful, and one-third to those where he was successful.

[30] Finally, I have taken into account that evidence concerning the long thoracic nerve injury, specifically the evidence concerned with the effects of that injury, would have been necessary even if the plaintiff had not pressed his claim

in respect of that injury. This means that that evidence, which in the above paragraphs and percentages has been accounted for as relating to issues upon which the plaintiff failed, should actually be factored into his success instead.

[31] After taking a weighted average of the percentages of the evidence and the submissions, and after accounting for the evidence that would have been necessary in any case, I find that the plaintiff is entitled to 60% of his costs generally and all his costs related to the recall of Drs. Taunton and Bozek. The defendant Hall is liable for 10% of the plaintiff's costs but not liable for the costs of recall of witnesses.

[32] I find the trial would not have completed in November 1995, but for the further evidence called by the defendants in November.

[33] I do not agree with the defendants that the trial would have taken up only five days had the nerve injury claim not been advanced.

DISBURSEMENTS

[34] By naming the witnesses necessary to prove the plaintiff's successful claims versus those that were called on matters in which he was unsuccessful, I have tried to assist the parties to resolve the disbursements for which they are entitled to reimbursement.

[35] In ***Waterhouse v. Fedor***, *supra*, Legg J. spoke of the right to disbursements in an action where success is divided. At page 187, he said:

> 1. The defendant is not required to pay for the disbursements claimed by the plaintiff insofar as those disbursements relate to an issue upon which the plaintiff was unsuccessful. I refer to s. 63(2) of the Supreme Court Act, R.S.B.C. 1979, c. 397, which reads:
>
> > (2) Subject to subsection (1) the court may, in its discretion, award or refuse to award costs to a party in civil proceedings in the court,
>
> and to R. 57(5) and R. 57(8) of the Rules of the Court, which provide:
>
> Costs to follow event
>
> > (5) Subject to these rules, the costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.
>
> Costs of part of proceeding
>
> > (8) The court may award costs which relate to some particular issue or part of the proceeding or may award costs except so far as they relate to some particular issue or part of the proceeding.

(Rule 57(5) and (8) are presently Rules 57(9) and (15)).

He continued, at page 188:

> 2. The defendant may recover his disbursements relating to an issue upon which he was successful notwithstanding the fact that he lost the "event" and judgment was entered against him.

[36] I allow the plaintiff his disbursements with respect to the issues on which he succeeded, and allow the defendants their disbursements on issues on which they succeeded) causation of the nerve injury and future economic loss. Van Herrick's and the Third Party are obligated to pay disbursements incurred for the recall of witnesses.

[37] I allow no disbursements in respect of the third Report of Dr. Allan, or for the attendance of Danielle Soklofsky.

[38] Dr. Reebye examined the plaintiff at the defendant's request before the long thoracic nerve was diagnosed and the defendants are responsible for the cost of that examination and Report. The cost of his attendance at trial is another thing.

[39] I have resisted attempting to extract, from the evidence of witnesses who testified to both causation and the other injuries, the portions attributable to each; similarly with respect to medical reports that dealt with both issues. It would be difficult to do and lead to an unsatisfactory result. The parties are both disadvantaged and advantaged by my not doing so and, in my opinion, they cancel out. For example, Drs. Reebye and Taunton testified with respect to both nerve and soft tissue injuries and Taunton with respect to steroids. I have placed them in the defendants' "camp". Dr. Toews, the family physician, and Dr. Hershler were treating physicians and I have placed them in the plaintiff's camp. Jeff Bell was called by the defendants to describe the fight and arrest

procedure which they said may have caused the nerve injury and to describe the plaintiff's weight lifting activities which goes both to the cause of the injury and to the plaintiff's credibility. I have placed him in the defendants' camp. Those are some examples.

[40] The cost of all transcripts will be shared by the three parties.

SCALE OF COSTS

[41] I find scale 4 is appropriate. The plaintiff suffered the nerve injury shortly after the accidents. The symptoms of pain and disability arising from that injury and soft tissue injuries are much alike. Had the nerve injury claim not been advanced at trial, as I have said, the court would still have been compelled to determine how much pain and disability suffered by the plaintiff was attributable to each injury when addressing damages for chronic soft tissue injury and expert medical evidence would have been necessary to help resolve the matter. I had medical evidence before me on that issue and despite it, I found it a very difficult matter to resolve. The issue was one of more than ordinary difficulty. Resolving the "cause" of the nerve injury was one issue; the "effect" of it quite another.

"Coultas, J."