# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fong v. British Columbia (Minister of Justice),* 2019 BCSC 969

Date: 20190614
Docket: S111826
Registry: New Westminster

Between:

**Michael Kwok Shuen Fong**

Plaintiff

And

**Her Majesty the Queen in Right of British Columbia as represented by The Minister of Justice for British Columbia**

Defendant

Before: The Honourable Mr. Justice Blok

## Reasons for Judgment on Costs

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| Counsel for the Plaintiff: | P.G. Kent-Snowsell |
| Counsel for the Defendant: | O. Kowarsky<br>A. Mallek |
| Place and Dates of Trial: | New Westminster, B.C.<br>May 31, 2019 |
| Place and Date of Judgment: | New Westminster, B.C.<br>June 14, 2019 |

## I. Introduction

[1] These reasons address issues of costs following a judgment rendered on March 1, 2019.

[2] This is a personal injury case in which the plaintiff sought damages for injuries he suffered as a result of a "hard takedown" arrest by RCMP officers on March 11, 2006.

[3] The trial lasted 18 days. Both liability and damages were in issue. The plaintiff sought damages totalling about $1.3 million. In reasons for judgment indexed at 2019 BCSC 263, I found in favour of the plaintiff on liability and awarded damages which, as a result of certain adjustments, the parties agree total $71,129.34.

[4] At para. 445 of that judgment I said the following:

> [445] The plaintiff will have his costs on the ordinary scale unless there are matters which the parties wish to draw to my attention.

[5] The plaintiff subsequently presented a bill of costs totalling approximately $169,500, comprised of about $69,000 in tariff items and $100,000 in disbursements.

[6] The defendant seeks an order limiting or denying some of the costs sought by the plaintiff. The defendant's primary argument is that the plaintiff rendered the opinion evidence of his various experts valueless because he misled them through "serial misrepresentations".

## II. Positions of the Parties

### A. Defendant

[7] The defendant reviewed the trial judgment in some detail, noting that the evidence of each of the plaintiff's medical witnesses was not accepted by the Court because the plaintiff had not informed them of important matters relevant to his physical and mental health. This had a consequential negative impact on the

usefulness of the five expert reports produced by the plaintiff's economist, who relied on assumptions that were rejected by the Court. The defendant noted that the economist's reports were not even mentioned in the reasons for judgment.

[8] The defendant acknowledges its formal offer to settle of $25,000 did not exceed the judgment, but said its offer was much closer to the mark than the $1.3 million claimed by the plaintiff.

[9] Although the defendant concedes that the fact that the plaintiff obtained a judgment in an amount significantly less than the amount sought is not, in itself, a reason to deprive him of costs, the defendant says the case authorities grant to the Court the discretion to deprive a plaintiff of costs where he is guilty of misconduct in the litigation or where he has been unsuccessful on discrete issues. The Court also may disallow all or part of disbursements that relate to claims or issues on which the plaintiff was unsuccessful. The defendant says all of these factors are present in this case.

[10] The defendant put its main point this way:

> If the Plaintiff, through his ongoing misrepresentations and obfuscations, rendered his own testimony suspect, and his experts' reports or no value or of negligible value, then … it is proper for the Court to exercise its discretion to have that fact … reflected in the costs award.

[11] The defendant also said it is open to the Court to find that if the damages awarded in a proceeding are so nominal as to be lower than assessable costs, a holistic reduction, either by percentage or lump sum figure, may be ordered.

[12] The defendant also made submissions on some other aspects of the trial and the associated costs. These were:

a) two days of court time was spent on applications or objections on which the plaintiff was unsuccessful;

b) the plaintiff failed to establish that the police used a police baton on him in effecting the arrest and he failed in his claim that a police officer repeatedly used a racist and homophobic slur against him;

c) the plaintiff failed in his claims for (1) aggravated and punitive damages; (2) loss of pensionable earnings; and (3) damages for the cost of future care; and

d) a family physician and a chiropractor testified as lay witnesses, yet the plaintiff is seeking costs for those witnesses as though they were experts.



[13] As a result of items (a) and (c) above, the defendant argues that the plaintiff should be deprived of costs and disbursements for three days of trial time.

[14] The defendant submits that the appropriate order would be to: (1) disallow 2.5 days of tariff items, this being the trial time that was taken up with the plaintiff's experts; (2) disallow 6 units of tariff item 17 (process for retaining and consulting experts); and (3) disallow all disbursements relating to the plaintiff's experts.

[15] Additionally, the defendant submits that after those specific disallowances, the remaining costs and disbursements should be disallowed by 50 percent.

**B. Plaintiff**

[16] The plaintiff emphasized that he was successful in the action because he established liability and obtained a remedy in the form of damages. Accordingly, the usual rule should apply and he should be awarded costs. He submits the defendant has not met its onus of showing this case has exceptional circumstances which warrant a departure from that usual rule. This case was an ordinary personal injury case, and in such cases it is common that a plaintiff might fall short, even well short, of the amount claimed, but still be entitled to costs.

[17] The plaintiff submits he acted reasonably in the matter of his experts, as evidenced by the fact that WorkSafeBC had accepted his psychological issues as a

workplace injury. The case spanned a very long time frame and so there were a number of physicians involved with the plaintiff's care over the years, and the plaintiff might have been faced with arguments about adverse inferences if he had not submitted evidence from his treating physicians. In all cases, the defendant required the attendance of the expert at trial, which added to the cost.

[18] The plaintiff notes that the effect of the orders sought by the defendant would be that $36,000 in disbursements incurred for experts would be "wiped out". The overall effect would be to reduce the plaintiff's claimed costs by 58 percent.

[19] The plaintiff argues that this case does not fall within any exception to the usual rule. There were no discrete issues in this case and no misconduct on the plaintiff's part. The objections and applications heard during the trial were part of the ordinary ebb and flow of a trial. As to the alleged misconduct on the part of the plaintiff, while he undoubtedly has some personality issues which affected his view of events, he did not proffer his evidence in order to hoodwink the Court. His version of events might not have been accepted, but he should not be punished for seeing things as he does.

## III. Principles

### A. Applicable Rules

[20] Costs are dealt with in Rule 14-1 of the *Supreme Court Civil Rules*. The applicable subrules are (7), (9) and (15). Subrule (9) provides that costs must be awarded to the successful party unless the court otherwise orders. Subrule (7) grants to a judge or master the power to direct that any item of costs, including any item of disbursements, be allowed or disallowed. Subrule (15) allows the court to award or deny costs for a particular application, step or matter relating to the proceeding.

### B. Applicable Authorities

[21] There was little disagreement between the parties on the applicable authorities. Both parties cited essentially the same cases and buttressed their arguments by relying on different aspects of those cases.

[22] The two principal authorities referred to were *Loft v. Nat*, 2014 BCCA 108 [*Loft*], and *Briante v. Vancouver Island Health Authority*, 2017 BCCA 148 [*Briante*].

[23] In *Loft*, a plaintiff in a personal injury case claimed damages totalling nearly $3 million, but recovered damages at trial of just $63,000. A psychiatrist testified at trial that the plaintiff had developed a somatoform pain disorder. He agreed in cross-examination that a diagnosis of antisocial disorder would also apply to the plaintiff, and he said it was very challenging to determine how much of the plaintiff's pain was really perceived as such by him or was just exaggerated for litigation purposes.

[24] The trial judge concluded that the plaintiff's injuries would have prevented him from working at his usual occupation for just six to seven months post-accident. He dismissed the plaintiff's claims for future loss of income and costs of future care. As the Court of Appeal noted, the trial judge's findings were largely grounded in the plaintiff's lack of credibility. He found that the plaintiff had not only grossly exaggerated his pain and suffering but he had tailored his evidence to suit the claimed he was advancing.

[25] The trial judge awarded costs to the defendants because they were largely successful in all areas of the claim.

[26] The Court of Appeal dismissed the plaintiff's damages appeal but allowed his appeal on costs. On costs, the court said:

> [46] Pursuant to Rule 14-1(9), costs in a proceeding must be awarded to the successful party unless the court otherwise orders. At its most basic level the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case: *Service Corporation International (Canada) Ltd. (Graham*

> *Funeral Ltd.) v. Nunes-Pottinger Funeral Services & Crematorium Ltd.*, 2012 BCSC 1588, 42 C.P.C. (7th) 416.
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> [47] In this proceeding Mr. Loft was awarded damages for injuries he had suffered in the motor vehicle accident. The respondents had denied liability until shortly before trial. Although the damage award was far less than sought, Mr. Loft was the successful party. The fact that he obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving him of costs*: 3464920 Canada Inc. v. Strother*, 2010 BCCA 328, 320 D.L.R. (4th) 637.
>
> [48] The trial judge's stated reason for awarding costs to the respondents was that the respondents had been largely successful in all areas of the claim. With respect, that decision is wrong in principle and cannot stand. I note that on the hearing of the appeal the respondents did not suggest otherwise.
>
> [49] The fact that a party has been successful at trial does not however necessarily mean that the trial judge must award costs in its favour. The rule empowers the court to otherwise order. The court may make a contrary order for many reasons. One example is misconduct in the course of the litigation: *Brown v. Lowe*, 2002 BCCA 7, 97 B.C.L.R. (3d) 246. Another is a failure to accept an offer to settle under Rule 9-1. A third arises when the court rules against the successful party on one or more issues that took a discrete amount of time at trial. In such a case the judge may award costs in respect to those issues to the other party under Rule 14-1(15): *Lee v. Jarvie*, 2013 BCCA 515. Such an order is not a regular part of litigation and should be confined to relatively rare cases: *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, 77 B.C.L.R. (4th) 142; *Lewis v. Lehigh Northwest Cement Limited*, 2009 BCCA 424, 97 B.C.L.R. (4th) 256. Whether a judge will order otherwise in any particular case will be dependent upon the circumstances of that individual action.

[27] The Court of Appeal reiterated and expanded on these principles in *Briante*. In that case, the plaintiffs in two medical negligence cases established negligence but failed on the issue of causation. In light of the result, the plaintiffs argued that each side ought to bear their own costs. The trial judge ordered that the plaintiffs pay the defendants' costs in relation to all issues other than standard of care.

[28] The Court of Appeal set aside the trial judge's order. The court said:

> [198] The usual rule is that, absent special considerations, costs follow the event; they must be awarded to the successful party unless the court orders otherwise. As Goepel J.A. observed in *Loft v. Nat*, 2014 BCCA 108 at para. 46, "[a]t its most basic level the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case". The onus is on the party seeking to have the court exercise its discretion to depart from the usual rule: *Gill v. Canada (Minister of Transport)*, 2014 BCSC 2235. The onus is a

> substantial one. As noted in *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27 at para. 26, "a successful litigant has a reasonable expectation of obtaining an order for the payment of his [or her] costs"…

[29] The court went on to discuss the discretion to depart from the usual rule, which is conferred on the court by Rule 14-1(15). The court said:

> [200] The discretion embodied [in] Rule 14-1(15) must be exercised judicially in accordance with established principles: *British Columbia v. Worthington (Canada) Inc. et al.* (1988), 29 B.C.L.R. (2d) 145 (C.A.) per Esson J.A. at 165, Hutcheon J.A. at 162, Lambert J.A. (dissenting in the result) at 154; *Gichuru v. Smith*, 2014 BCCA 414 at para. 100. Such an order is not a regular part of litigation and should be confined to relatively rare cases: *Sutherland* at para. 43. One example is misconduct in the litigation as, for example, when a party deliberately misleads or "displays a light regard for the truth": *Brown v. Lowe*, 2002 BCCA 7 at para. 163. A second is when the court rules against the successful party on one or more of the issues that took a discrete amount of time at trial: *Loft* at para. 49, citing *Lee v. Jarvie*, 2013 BCCA 515 – a case in which liability was admitted and the various heads of damage under a negligence claim were held to constitute the divisible issues for the purposes of determining the relative success of the parties.

[30] The principles from *Loft* and *Briante* may be summarized as follows:

a) the usual rule is that, absent special considerations, costs follow the event; they must be awarded to the successful party unless the court orders otherwise;

b) at its most basic level the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or is the defendant who obtains a dismissal of the plaintiff's case;

c) the onus is on the party seeking to have the court exercise its discretion to depart from the usual rule. That onus is a substantial one;

d) an order contrary to the usual may be made for a number of reasons, including misconduct in the course of the litigation (including when a party deliberately misleads or "displays a light regard for the truth"), the failure to accept an offer to settle, or when the court rules against the successful party on one or more issues that took a discrete amount of time at trial;

e) the discretion embodied in Rule 14-1(15) to award or deny costs of part of a proceeding must be exercised judicially in accordance with established principles. Such an order is not a regular part of litigation and should be confined to relatively rare cases.



## IV. Discussion

### A. "Misconduct in the Litigation"

[31] It is true that I commented negatively on Mr. Fong's credibility in this case. In the witness box, Mr. Fong frequently wandered off-track and often had difficulty coming to the point. His evidence about the actual assault was elaborately detailed, "improbably so", as I found. He was selective in the information he provided to his family doctors. He had experienced a lot of negative events in his life, including his approximately year-long use of crack cocaine, being fired from his job as hotel manager and the loss of $800,000 in family money in a failed investment, but he either failed to tell his physicians and experts about those other stressors or he minimized them.

[32] However, I am not satisfied he did these things deliberately, in the fullest sense of that word.

[33] The three psychological or psychiatric witnesses who gave evidence in this case all remarked on Mr. Fong's psychological issues, and two of them commented on Mr. Fong's pre-existing problematic personality traits.

[34] Dr. Hendre Viljoen, a psychologist called by the plaintiff, noted Mr. Fong showed indications of a number of problematic personality traits, including being emotionally labile and reactive, with angry acting-out behaviour, feelings of mistrust and hypervigilance as to the motives of people around him. He also noted Mr. Fong showed a negative self-perception, dwelling on previous failures and prone to harsh self-criticism and a pessimistic outlook. Among other things, these manifested themselves through Mr. Fong's significant preoccupation with pain and likely over-reporting or exaggeration of symptoms.

[35] Dr. Stephen Fitzpatrick, a defence psychiatrist, concluded Mr. Fong has, at minimum, “personality traits of the Cluster B type with narcissistic and antisocial traits”. These personality traits cause marked functional impairment and/or subjective distress in relationships, employment and day-to-day social functioning.

[36] Although I found that Mr. Fong was not a credible witness, I do not conclude he was lying to the Court. I also do not conclude that Mr. Fong’s failure to tell physicians and experts about other negative events in his life was a deliberate scheme on his part to enhance his personal injury claim or that he displayed “a light regard for the truth”. Instead, I conclude that Mr. Fong likely believed (and may still believe) that all of his troubles were and are fully attributable to the police arrest and assault of March 11, 2006. His focus on that arrest and his minimization of other negative life stressors must be viewed in that light, particularly given the expert evidence about his problematic personality issues.

[37] Had I concluded that Mr. Fong had no genuine subjective belief in the things he said, or that he deliberately withheld or minimized information with full knowledge that it was relevant to the damages claimed, then I might well have acceded to the defendant’s submission that the plaintiff had deliberately misled the Court and his experts. As it is, this case is no different than any other personal injury case where some of the injuries or damages claimed have not been proven. Accordingly, the defendant has failed to meet its substantial onus of showing there was misconduct in the course of the litigation or that the plaintiff displayed a “light regard for the truth”.

### B. Costs for Discrete Aspects or Issues

[38] While that conclusion effectively disposes of the defendant’s central argument, out of an abundance of caution I will also address the “discrete issue” submission.

[39] I observe, first of all, that the case authorities emphasize apportionment of costs on this basis is reserved to rare or special cases: *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27, at para. 43 [*Sutherland*].

[40] The Court of Appeal in *Sutherland* set out the following test for apportionment of costs:

> [31] The test for the apportionment of costs under Rule 57(15) can be set out as follows:
>
> (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
>
> (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
>
> (3) it must be shown that apportionment would effect a just result.



[41] *Sutherland* involved a claim in nuisance arising out of the construction and operation of the north runway at Vancouver International Airport. The plaintiffs were nearby landowners. The trial judge found the defendants liable in nuisance and he rejected the defence of statutory authority. The finding of nuisance was upheld on appeal, but the Court of Appeal also found that the defendants had established the defence of statutory authority and so the appeal was allowed. Trial costs were remitted to the trial judge.

[42] In his ensuing costs ruling, the trial judge concluded, among other things, that the plaintiffs were entitled to 25/39ths of all their properly assessable costs and the defendants were each entitled to 14/39ths of all their respective properly assessable costs. He arrived at this conclusion on the basis that the trial lasted 39 days, 25 of which were occupied with the issue of nuisance, on which the plaintiffs ultimately succeeded, and 14 of which were occupied with the defence of statutory authority, the issue on which the defendants succeeded in having the action dismissed.

[43] The Court of Appeal in *Sutherland* found that the first and second branches of the test for apportionment were satisfied, but not the third. The court said:

> [33] However, in my respectful opinion, the trial judge erred in determining that the plaintiffs satisfied the third branch of the test for apportionment. In the circumstances of this case, it would not be manifestly just or fair to apportion costs as did the trial judge. There was no basis for denying the defendants their costs on the issue of nuisance and, even more clearly, no basis for awarding costs on that issue to the plaintiffs.

[44] In the present case, there are difficulties with all three branches of the *Sutherland* test. Mr. Fong's physical injuries were inextricably bound together with the psychological components of his case. Each affected the other. They were not separate and discrete issues.

[45] Mr. Fong failed on some aspects of his claim, but he succeeded insofar as he was awarded: (a) non-pecuniary damages; (b) damages for past loss of income and past loss of capacity; (c) loss of future income-earning capacity; and (d) special damages. He was also awarded *Charter* damages, but that award was modified post-trial by consent for reasons that will be the subject of separate reasons for judgment, yet to be issued. Mr. Fong failed in his claims for aggravated and punitive damages, loss of pensionable earnings and cost of future care, but these issues were entirely, or at least largely, subsumed within issues on which he was successful. In my view, despite the fact that the total damages award was far less than the damages claimed, all of the damages issues were part of an essentially indivisible whole.

[46] For the same reasons, I conclude it is not reasonably possible to identify the trial time attributable to those unsuccessful aspects of the plaintiff's case. All three of Mr. Fong's family physicians (he had several over the years) testified about both the physical and psychological components of Mr. Fong's case, and his treating psychiatrist (Dr. Mallavarapu) testified about how Mr. Fong's symptoms of depression related to his pain symptoms. Accordingly, there is no obvious line of demarcation between the issues on which Mr. Fong was successful and unsuccessful.

[47] Finally, even if the first two branches of the *Sutherland* test had been met, for the reasons already reviewed I do not consider it "manifestly just or fair" (see *Sutherland* at para. 33) that costs be apportioned. As well, I note the defendant availed itself of the option of making a formal offer to settle, the usual or typical process for managing the risk of costs in a personal injury case, and the fact that its

formal offer fell short does not mean that the plaintiff's recovery of costs is an unfair result.

[48] I accept that in *Lee v. Jarvie*, 2013 BCCA 515, the Court of Appeal upheld a trial judge's apportionment of costs in a personal injury case. There, the trial judge, in reasons indexed at 2012 BCSC 1521, concluded that: (a) the trial was prolonged by the claimant's pursuit of claims that were unsupported by the evidence; and (b) the issues on which the plaintiff was successful and unsuccessful were "clearly distinguishable". He also said (at para. 73):

> What should have been a reasonably straight forward claim for personal injury damages was made complex and time consuming by the nature, quantity and poor quality of the evidence the plaintiff attempted to adduce at trial.

[49] These features were not present in the case at bar.

[50] For these reasons, I am not satisfied the defendant has met its burden of showing this is the kind of rare case warranting a denial of costs for some discrete aspect or aspects of the trial.

[51] Finally, I do not consider the damages recovered by the plaintiff to be "nominal", and so the cases awarding or denying costs on that basis are not applicable here. The plaintiff succeeded in obtaining an award totalling about $71,000, and although that sum is less than the amount claimed in his bill of costs, I do not consider that this makes the award "nominal" in the sense used in the authorities.

### C. Specific Costs Issues

[52] There were several specific costs issues. I deal with these as follows:

a) Applications and objections: the defendant listed three events of this nature, amounting to one and a half days of court time. Two were evidentiary objections by the defendant on which the plaintiff was unsuccessful. I agree with the plaintiff that these sorts of events are part

and parcel of many trials. They are not discrete events warranting apportionment.

The third event stands on different ground. This was an application by the Attorney General of British Columbia, made on the first day of trial, to have a subpoena to a Crown counsel set aside. The application was successful and the subpoena was set aside with costs awarded to the Attorney General against the plaintiff. The plaintiff cannot claim costs for this event as costs were dealt with and, indeed, were ordered *against* the plaintiff. I would disallow any costs associated with this application and, for clarity, I note that submissions and judgment on this issue took about a half-day in total.

b) Costs grounded in status as an expert: The defendant notes that two witnesses, Dr. Yang (a family doctor) and Mr. Yan (a chiropractor) testified as lay witnesses, yet the plaintiff is claiming costs as if they were experts. I agree that any costs claimed for these witnesses on the basis that they were experts ought to be disallowed.

[53] The directions I have made on these specific items are made pursuant to Rule 14-1(7).

## V. Conclusion

[54] The defendant's application for an order limiting or apportioning the plaintiff's costs generally is dismissed. Certain specific items of costs are disallowed as outlined in para. 52.

[55] Costs of this application to the plaintiff.

"Blok J."