ONTARIO

Superior Court of Justice

Justices' Office
Central West Region

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Re: Bosnali v. Michaud- Judgment (June 26, 2017)

Please find attached a copy of Justice Tzimas' Judgment in the above-noted matter dated today.

Thank you.

CITATION: Bosnali v. Michaud, 2017 ONSC 3943
COURT FILE NO.: CV-13-2159-00
DATE: 2017 06 26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CANER BOSNALI	)	
	)	
Plaintiff	)	
	)	F. Burns, Counsel for the Plaintiff
ROBERT MICHAUD and CENTRAL GRAPHICS AND CONTAINER GROUP LTD.	)	
	)	
Defendants	)	
	)	N. Kostyniuk, Counsel for the Defendants
	)	
	)	**HEARD: April 18 and 19, 2017**

JUDGMENT

Tzimas J.

[1] A jury trial in this matter was held from January 3 to February 17, 2017. The plaintiff was injured in a car accident that occurred on November 28, 2007. He submitted to the court that he suffered a neurocognitive and post-concussional disorder, and that he also suffered from post-traumatic stress disorder, chronic pain, and symptoms of depression, social withdrawal, headaches, cognitive deficits, lack of motivation and sleep disruption. He also submitted that as a result he suffered very significant economic losses principally with respect to his ability to work and his loss of a competitive advantage. The jury awarded the Plaintiff

$100,000.00 in general damages, $42,500.00 for housekeeping and $10,000.00 for medical and rehabilitation costs.

[2] On April 18 and 19 the court heard submissions on the following issues:

a) Monetary Threshold & Deductible
b) The treatment of the pre-judgment interest
c) The treatment of Collateral Benefits in relation to AB Credits and
d) Costs

[3] I have considered the submissions of counsel on each of these points. My ruling on each of these issues follows.

a) Monetary Threshold & Deductible

[4] I agree with the defendant that the jury's award of $100,000.00 for non-pecuniary losses is subject to a deductible and that the applicable deductible ought to be in accordance with the legislative amendments to section 267.5 (8.3) of the *Insurance Act,* R.S.O. 1990 c. C.8 that took effect on August 1, 2015. The jury's award for general damages must therefore be reduced by $37,385.17 to result in a net award of $62,614.83.

[5] I disagree with the plaintiff's contention that the deductible should not be applied to an award of $100,000.00 or that the court ought to resort to the principle of *De Minimis Non Curat Lex,* and section 98 of the *Courts of Justice Act,* to relieve the plaintiff from the application of the deductible. As much as it is unfortunate that the plaintiff "missed" the ability to avoid the deductible by one cent, the concept of a deductible is not punitive as counsel suggested. The applicable legislation is clear on its face. It does not speak of an award that is equal to or exceeds $100,000.00; it only speaks of the award that exceeds $100,000.00. With respect, the plaintiff's submission amounts to a request that

the court re-write the legislation. It is too bad that the jury's award did not exceed $100,000.00 even by one cent but that is not the issue. The whole legislative scheme is clear. No matter what that figure might be, unless the Legislature were to say that all awards are subject to deductibles or conversely that no awards are subject to a deductible, there will inevitably be a cut-off and one or the other party would face the prospect of missing the mark even if only by one cent.

[6] I also disagree with the submission that if there is to be a deductible, the amendments of August 1, 2015 ought not to apply retrospectively. Although I understand that this issue may be before the Ontario Court of Appeal shortly, at this time there is no pronouncement from that court. In my review of the competing lines of cases that have considered this issue, I am persuaded by the analysis contained in *Vickers et al.* v. *Palacious* 2015 ONSC 7647 and the cases that have followed it to date. I note that better drafting on the part of the legislative drafters may have avoided the difficulty over retrospective applicability of the amendments. For example, when the amended section concerning deductible amounts says "1. Until December 31, 2015, the prescribed amount is $36,540.00", the language could have clarified if that would apply to all accidents, irrespective of when they occurred. Such an approach would have been similar to the way the language was articulated in the October 2003 regulation, see O.Reg. 312/03 when the regulation included the phrase "in respect of incidents that occur on or after October 1, 2003".

[7] But as drafted, O.Reg. 221/15 did away with any reference to the date of the accidents. From statutory interpretation point of view, the implication is that all awards until December 31, 2015, as opposed to all accidents, are subject to the prescribed deductible. The fact that the purpose of this amendment was to reflect the effects of inflation since 2003 and to index the deductible amounts would

reinforce the conclusion that the amendment to the regulation was not about when an accident occurred but how the deductible would be indexed.

[8] Insofar as the plaintiff suggested that his risk analysis and the offers that were exchanged were based on the legislation that pre-existed the August 2015 legislation, that position is not borne out by the facts before the court. Such an argument would have been available to the plaintiff had the claim been tried in advance of August 1, 2015. One could then genuinely say that whatever considerations were made concerning settlement offers and risks were based on the preceding legislation. But in this instance, the plaintiff's counsel, who is most seasoned in personal injury claims and who supposedly brought several years of experience to this case, would have known well before the trial commenced of the divide in the case law on this issue. The offers that were put to the plaintiff for his consideration after August 1, 2015 would have, (or should have) been considered in light of the competing interpretations concerning the applicable deductible.

b) Prejudgment Interest

[9] The appropriate pre-judgment interest rate that is payable by the defendants to the plaintiffs is 5%. ON this point I agree with the plaintiff's position.

[10] The defendants submitted that the court should consider the implications of section 52(4) of the *Legislation Act,* 2006, S.O. 2006, c. 21 Sched. F as well as the delays in the litigation of this matter to award a rate of 5% from the notice of this action to the date of the amendments to the *Insurance Act* concerning the applicability of the *Courts of Justice Act* in the determination of damages for non-pecuniary losses in an action. Thereafter, the rate should be reduced to 1.3 %. The plaintiff opposed this approach and submitted that the rate of interest to be applied to the non-pecuniary award should be 5%.

[11] While I find counsel's submission concerning the applicability of *Legislation Act* intriguing, section 52(4) of that act refers to the introduction or amendment of procedures. Hypothetically speaking, if the procedural requirements leading up to the trial of a claim were to change to eliminate examinations of discovery, section 52(4) would likely apply to the procedural progression of all claims whether they were commenced before or after the proclamation of such a change. The amendment to the *Insurance Act,* as that related to the determination of appropriate pre-judgment interest rate, was not such a procedural change. As for the nature of the particular amendment, I rely on the analysis outlined in *Dimopoulos* v. *Mustafa,* 2016 ONSC 4119 at paras. 17 through 19 for the conclusion that for actions predating January 2015, the prejudgment interest to be awarded is to be determined on the basis of Rule 53.01 of the *Rules of Civil Procedures.*

[12] As for the delays that occurred in the trial of this matter, I decline to exercise my discretion pursuant to section 130 of the *CJA* to reduce the pre-judgment interest. Although there were delays in the prosecution of this case, I do not find that the burden should be borne entirely by the plaintiff. On the view that the plaintiff commenced the claim in the wrong jurisdiction, there was no protest by the defendants on this point. It was not until 2013 that Justice Archibald ordered the action to be transferred to Brampton from Toronto. With respect to the delay caused by the late disclosure of the Kern-Lieber employment file can be addressed in the awarding of costs. Similarly, the delivery of an improper opening can be addressed with the awarding of additional costs and in any event, in and of itself the resulting delay was marginal.

[13] In the result, it is appropriate that the prejudgment interest to the non-pecuniary award be determined on the basis of 5% for a period of nine years.

That means that a prejudgment interest of 45% should be applied to $62,614.83, resulting in a payment of $28,176.38.

c) Collateral Benefits and AB Credits

[14] I accept the defendants' submissions that it be credited for past and future medical and rehabilitation benefits and past and future housekeeping and home maintenance expenses awarded by the jury to Mr. Bosnali.

[15] I have considered the submissions by both parties very closely as well as the *viva voce* evidence from the representative of the Accident Benefits insurer. I note the submissions made on behalf of Mr. Bosnali to the effect that the settlement of $35,000.00 for accident benefits under the *Statutory Accident Benefits Schedule* (SABS) was a lump sum payment and that it was on account of all claims, including extra-contractual damages and that it was not broken down sufficiently to be able to determine the precise allocation of that settlement to medical and rehabilitation benefits and to future housekeeping. I also note the submission that the "Settlement Disclosure Notice" is only a notional document and that the breakdown is in conflict with the full and final release which also spoke of a global release for all claims.

[16] However, against those submissions, I am persuaded by the defendants' submission that the Settlement Disclosure Notice, combined with the evidence before the court makes it possible to glean the allocations made on account of medical and rehabilitation costs, as well as the housekeeping costs. That document reveals that even if described as a notional allocation, the accident benefits insurer allocated $17,500.00 on account of past and future medical and rehabilitation and $2,500.00 on account of the housekeeping costs. The plaintiff's submission concerning the conflict between the Full and Final Release and the Settlement Disclosure Notice is of little value because the latter document is

expressly incorporated in the former. The plaintiff would have been a very different position if there were no Settlement Disclosure Notice at all and if all that was known was the lump sum settlement figure.

[17] In the result, the jury's award of $10,000.00 for past and future medical and rehabilitation costs must be credited entirely to the defendants, in accordance with section 267.8 of the *Insurance Act.* For housekeeping, the accident benefits allocation was limited to $2,500. Accordingly, that sum is to be deducted from the jury's award of $42,500.00 such that it is reduced to $40,000.00.

d) Costs

I. Costs Generally

[18] In my review of the parties' submissions on this subject, I am very mindful that even though the jury made certain awards, a cost award stands to reduce that outcome very substantially. While it is with much regret that I make this observation, there are some realities in the unfolding of this case that I cannot ignore.

[19] First and foremost, the defendants advanced a number of offers over the course of this litigation. Their offer of April 14, 2016 in the sum of $310,000.00 for all damages claimed, inclusive of pre-judgment interest to that date is a significant benchmark as that offer exceeded the trial outcome. The offer of December 13, 2016 in the sum of $550,000.00 for all damages claimed, was an even more pronounced offer, also far in excess of the jury's award. Both of these offers were *bona fides* and significant to the analysis of costs. It is therefore appropriate that the operation of Rule 49 of the *Rules of Civil Procedure,* guide the respective awarding of costs to the parties.

[20] Second, the exercise of the court's discretion in accordance with section 131 of the *Courts of Justice Act,* cannot be exercised in a vacuum or simply on the basis of an outcome that is unfortunate for the plaintiff. While it is true that Rule 57.01(1) contains a non-exhaustive checklist of factors that may guide the court in its exercise of its discretion over the awarding of costs, in my review of those considerations, they do not support the plaintiff's conclusions, and in particular, the submission that the defendants should not receive any costs.

[21] Third, the defendants' Bill of Costs and their claim for fees on a partial indemnity basis in the sum of $207,997.66, disbursements in the sum of $81,449.66 and HST against the sum of $207,997.66 of $27,039.70, is reasonable. As I will explain below, I cannot say the same about the variations in the claims advanced by the plaintiff.

[22] Turning to the specifics of my analysis, the plaintiff's submissions present the court with a number of difficulties.

[23] First, the submission that the defendants should not receive any costs because they are insured and have the backing of their insurer to absorb their respective costs defies any logic. This is not a situation where the defendants failed to advance any offers or took the position that they would not make any offer and would force the plaintiff to trial. To the contrary, there were a total of four offers, the last two being very substantial and significantly more than what the plaintiff was awarded by the jury. To deny the defendants the benefits of Rule 49 would be eliminate all incentives for insurers to advance any offers.

[24] The further suggestion that the defendants should have made the April 2016 offer, if not the December 2016 offer, much earlier in the process and that their advancement on the eve of trial inflamed matters for the plaintiff, whose psychological and psychiatric problems caused him to believe that his claim had a

value of $6 million, is also highly problematic. I am not sure what to make of this submission. The evidence before the court that related to the plaintiff's psychological and psychiatric difficulties would not support a finding of an inability to evaluate the strengths and weaknesses of his case. More significantly, if counsel is suggesting that the plaintiff lacked the competence to exercise his judgment, the more severe implication is that he may have also lacked the capacity to instruct his counsel. I do not propose to go beyond this observation or make any finding, but I am concerned about counsel's portrayal of his client. Finally, and more practically, the suggested explanation that the plaintiff was somehow fixated on an award of $6 million, cannot be reconciled with the plaintiff's own offer to settle in the sum of $1.75 million. Clearly, he was prepared to accept something significantly less than the suggested $6 million.

[25] I also find it difficult to agree with counsel's submission that the jury's failure to make any award for loss of earning capacity and competitive advantage was unreasonable, that the jury did not act judiciously, or that alternatively did not comprehend the evidence that was presented. This submission ignores the totality of the evidence that was before the court.

[26] While I do not propose to review the evidence in any detail, I am obliged to remind the plaintiff that at no time did the evidence before the court support a $6 million award. More significantly, the jury heard that until Mr. Bosnali's falling out with Kern-Lieber in the spring of 2015, he was receiving a very substantial compensation package that included an apartment, a luxury vehicle. The jury also heard that Mr. Bosnali spent several hours commuting back and forth to the U.S. from Guelph, Ontario and that he also travelled for work fairly regularly. The jury was then presented with evidence concerning the compensation for very senior executives at such corporations as RIM and Bombardier but there was very little evidence about the compensation prospects for executives at smaller-scale

companies. The jury also heard that Mr. Bosnali interrupted his employment search in anticipation of the trial and the need to be focused on that matter. As for Mr. Bosnali's employability, while it is true that the defendants' expert confirmed that as of the time of the trial Mr. Bosnali was not employable, the jury also heard that with some effort and conditioning that limitation could be overcome.

[27] It is impossible to know how the jury evaluated the evidence that they heard or what findings that they made to reach their conclusion, and indeed it would be improper to do so. My own fear is that the extraordinary request for the loss of earning capacity and competitive advantage may have compromised the plaintiff's overall credibility before the triers of fact. It is trite that triers of fact may accept all, some or none of the evidence before them to come to a conclusion. Given the extensive evidence before the triers of this jury, I am not prepared to find that the jury failed to act judiciously or that they misunderstood the evidence.

[28] Insofar as the complexity of the case was concerned, that contention cannot be disputed. But what is important to the consideration of costs is that the defendants' offers of April and December 2016 underscored that complexity. The contention that the defendants "took a hardball approach on the hope that this Plaintiff would not have counsel to represent him at trial", is entirely without merit, is unsupported by anything before the court. As for the contention that the insurance industry takes an unfair view of chronic pain, whatever those views might be, that could not be said about these defendants who advanced two substantial offers.

[29] I could not agree more with contention that costs involve a question of access to justice and that a trial judge ought to stand back and view the result in a broad fashion with respect to the impact on all parties. But such a broad examination must consider the conduct of everyone involved. Access to justice does not extend a carte blanche to any claim that a plaintiff would like to advance.

At some point there has to be a reality check and an evaluation of the strengths and weaknesses of one's case. In this case, the court must reconcile a challenging claim by the plaintiff against two substantial offers from the defendants. To ignore the defendants' offers would be to feed into the narrative that insurers and triers of fact take a dim view of chronic pain. But that is not what happened in this instance.

[30] Perhaps the more dramatic problem in this case was not one of not having access to justice but rather, to limitations with the evidence that concerned Mr. Bosnali's earning capacity and loss of competitive advantage. At the end of the day the system has to work fairly and efficiently for all involved. The jury heard the evidence on this matter from both sides and came to their conclusion. I cannot imagine that the plaintiff and his counsel did not have a fulsome discussion on the risks associated with the advancement of a very substantial award, especially given the plaintiff's willingness to reduce his claim to $1.75 million from his aspirational claim of $6 million. The plaintiff was not denied any access to justice. He chose to take a risk that unfortunately did not result in a favourable outcome.

[31] Turning to the fees claimed by the plaintiff, I have difficulty reconciling the indication that counsel spent a total of 870.1 hours in the period between 2009 to May 2016, with counsel's own communication in December 2016 in response to the defendants' offer, to the effect that the time on the file did not exceed a value of $120,000.00. In my review of the accompanying dockets, I am more concerned with a number of excessive charges as well as duplication in the efforts of counsel. That said, it strikes me that counsel's estimate of his costs in December 2016, having regard for the trial preparations that occurred in 2013 and then in the spring of 2016 and prior to the April 14, 2016 offer were already in the range of $120,000.00. I therefore fix the plaintiff's fees on a partial indemnity basis at $120,000.00. HST against that sum would come to $15,600.00

[32] On the actual allocation of costs, In the result, having regard for the April 2016 offer, the activities that occurred between May 2016 and December 2016, which to some degree contributed to the increase in the offer of December 2016 from $330,000.00 to $550,000.00, I fix the plaintiff's legal costs at $120,000.00 and a corresponding HST charge of $15,600.00.

[33] On the subject of disbursements I allowed the plaintiff's counsel to make supplementary submissions to the original ones before the court. The evidence in support of the claim was insufficient. Having regard for the fact that counsel obtained a number of reports and assessments in advance of April 14, 2016, I fix disbursements at $50,000.00.

II. Costs on account of the mistrial

[34] At the very beginning of trial the plaintiff's original opening statement had to be struck in its entirety and a mistrial had to be declared. My reasons for that were outlined in an extensive ruling. The defendants seek their costs for the time wasted on account of the mistrial.

[35] Given counsel's experience of over 40 years, the errors were inexcusable. It resulted in a delay of approximately three days. That said, having regard for the numerous other motions and rulings that I had to make in the course of the trial where the success was divided, and also having regard for the overall outcome and the overall costs, I limit a cost award on account of this particular mishap to a token award of $2,000.00 in favour of the defendants.

CONCLUDING REMARKS

[36] In the result, judgment is to issue in accordance with the following conclusions:

Monetary Threshold & Deductible:	$62,614.83
Pre-judgment interest:	$28,176.38
Collateral Benefits:	$40,000.00
Costs to the Plaintiff:	$120,000 (fees) $15,600 (HST) & $50;000, (disbursements)
Costs to the Defendants:	$207,997.66 (fees), $27,039.70 (HST) & $81,449.66 (disbursements)
Costs to the Defendants for mis-trial:	$2,000.00

E. Tzimas J.

Tzimas J.

Released: June 26, 2017

CITATION: Bosnali v. Michaud, 2017 ONSC 3943
COURT FILE NO.: CV-13-2159-00
DATE: 2017 06 26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CANER BOSNALI

Plaintiff

ROBERT MICHAUD and CENTRAL GRAPHICS AND CONTAINER GROUP LTD.

Defendants

JUDGMENT

Tzimas J.

Released: June 26, 2017