IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Blenkarn v. Mills ,
2017 BCSC 1904

Date: 20171024
Docket: M121001
Registry: Vancouver

Between:

Annette Blenkarn

Plaintiff

And

Elwood Mills, Darlene Bork, Jill Adrian, Jennifer Hicks and Laura Lopez

Defendants

- and -

Docket: M153383
Registry: Vancouver

Between:

Annette Blenkarn

Plaintiff

And

Ling Jie Huang and Wen An Tang

Defendants

- and -

Docket: M153336
Registry: Vancouver

Between:

Annette Blenkarn

Plaintiff

And

Aruna Marjorie Simpson

Defendant

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment on Costs

Counsel for the Plaintiff:	M. Chandler B. Scheidegger, Articling Student
Counsel for the Defendants:	H. Mathison
Place and Date of Hearing:	Vancouver, B.C. September 14, 2017
Place and Date of Judgment:	Vancouver, B.C. October 24, 2017

[1] These three actions were tried at the same time. They arose out of five motor vehicle accidents in which the plaintiff suffered indivisible injuries.

[2] Elwood Mills, a defendant in action number M121001 which related to the first accident, was found not to be at fault for the plaintiff's injuries from that accident and the action against Mr. Mills was dismissed. Liability for the plaintiff's injuries from the four later accidents was admitted.

[3] The global damage award from all five accidents was assessed at $206,000 in reasons indexed at 2016 BCSC 1976 and supplementary reasons indexed at 2017 BCSC 31.

[4] The defendants had made a pretrial offer to settle on March 31, 2016 of $177,743.58 "new money" which expression means the offer was to pay that sum to the plaintiff in addition to the "no fault" payments made to her pursuant to the regulations made under the *Insurance (Vehicle) Act*, R.S.B.C. 1996 c. 271. Section 83(2) of that statute provides that a person "who has a claim for damages" and who receives, what I have characterized as "no-fault" benefits, is "deemed to have released the claim to the extent of the benefits".

[5] Ms. Blenkarn received $47,256.42 in benefits. The defendants submit that once that sum is deducted from the award of $206,000 she is entitled to be paid $158,743.58 which is less than the offer of March 31, 2016. The defendants thus submit they are entitled to their costs from the date of the offer onward. They accept the plaintiff is entitled to be paid her costs up to it and including March 31, 2016 but only as to two thirds. That fraction is said to arise from the operation of s. 3(1) of the *Negligence Act*, R.S.B.C. 1996 c. 333 which provides that liability for costs of the parties to every action to which s. 1 applies "is in the same proportion as their respective liability to make good the damage or loss". Section 1(1) one of the *Negligence Act* reads"

> 1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

[6] The defendants submit that the subtraction of one-third of the damage award which led to an award of $206,000, to account for the dismissal of the claim for damages against Mr. Mills in the first accident (see reasons indexed at 2017 BCSC 31), is required by s. 3(1) of the *Negligence Act*.

[7] I have heard extensive and able arguments by the parties on many aspects of the law of costs as it may apply to this trial. If, however, the plaintiff is correct that she beat the defendants' offer to settle she is entitled to an award of costs throughout this proceeding and I need not address the other interesting arguments advanced by the defendants and resisted by the plaintiff.

[8] The plaintiff does not dispute she received $47,256.42 in no-fault benefits but she submits that $31,200 of that sum was paid in relation to the first accident which, as it turned out, gave her no claim for damages as required by s. 83(2) of the *Insurance (Vehicle) Act* to create the release contemplated by that subsection. The plaintiff did not receive no-fault payments for the second and third accidents, and just over $16,000 for the fifth accident for which she did have a claim for damages.

[9] The plaintiff points out that the policy of the Legislature in enacting s. 83(2) of the *Insurance (Vehicle) Act* was to prevent double recovery by plaintiffs in motor vehicle negligence actions (see *Kirk v. Kloosterman*, 2011 BCSC 228). The plaintiff submits that policy is not thwarted if the $31,200 paid in no-fault benefits in relation to the first accident is not deducted from her damage award because she was not entitled to such an award and therefore s. 83(2) has no application.

[10] I agree with the plaintiff's submissions. I find the plaintiff by operation of s. 83(2) of the *Insurance (Vehicle) Act* has released only the sum of about $16,000 and therefore has beaten the defendants' offer.

[11] I do not agree with the defendants' submission that the plaintiff ought to be deprived of one-third of her costs up to the date of the offer of March 31, 2016. The provisions of the *Negligence Act* on which the defendants rely address divided liability (see s. 2 of the *Act*) the deduction of one-third from the plaintiff's damage

assessment occurred not because liability was divided but because the action against Mr. Mills in the first action was dismissed. In my view the provisions of s. 3(1) of the *Negligence Act* cannot be employed as the defendants suggest to reduce the plaintiff's award of costs.

[12] I conclude the plaintiff is entitled to an order for her costs to be paid throughout these proceedings.

"The Honourable Mr. Justice Affleck"