Garisto v. Wang et al.

[Indexed as: Garisto v. Wang]

91 O.R. (3d) 298

Court of Appeal for Ontario,
Sharpe, Gillese and Blair JJ.A.
May 16, 2008

Civil procedure -- Simplified procedure -- Costs -- Trial judge in personal injury action instructing jury that range of up to $75,000 for general damages was available to them and that upper end of range was open to them if they accepted plaintiff's view of his case -- Trial judge dismissing defendant's threshold motion and finding that evidence of plaintiff's experts was impressive and that plaintiff was sufficiently credible on issue of impact of injuries on his daily living -- Jury awarding general damages in amount of $20,000 -- Trial judge erring in depriving plaintiff of his costs pursuant to rule 76.13(3) of Rules of Civil Procedure on ground that it was not reasonable for him to commence or continue action outside of simplified procedure regime -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 76. [page299]

By the time the plaintiff's personal injury action went to the jury, the only claim was for general damages. The trial judge instructed the jury that a range of up to $75,000 was available to them, with the upper end of the range being open to them if they accepted the plaintiff's view of his case. While the jury was deliberating, the trial judge dismissed the defendants' threshold motion, noting that he was very impressed by the evidence of the plaintiff's experts and that the plaintiff was sufficiently credible on the issue of the impact of his injuries on his daily living. The jury returned a

verdict in favour of the plaintiff in the amount of $20,000 for general damages. The trial judge deprived the plaintiff of his costs pursuant to rule 76.13(3) of the Rules of Civil Procedure on the basis that it was not reasonable for him to commence or continue the action outside of the Rule 76 simplified procedure regime. The plaintiff appealed.

Held, the appeal should be allowed.

Allowing the plaintiff to recover costs would not undermine the integrity of the simplified procedure regime. The trial judge's conclusion that it was not reasonable for the plaintiff to have commenced and continued the action under the ordinary procedure could not be reconciled with his pre-verdict assessment of the case, both in his charge to the jury and in his ruling on the threshold motion. The reasonableness of the decision to proceed under the ordinary procedure had to be assessed on the basis of the facts as they existed before the jury's verdict. To proceed under the simplified procedure, the plaintiff would have had to abandon any claim for more than $50,000 and forego the opportunity to approach the case with the level of procedural rigour appropriate for a potentially significant claim. Jury verdicts in this area are notoriously difficult to predict, and as the trial judge himself recognized, had the jury accepted the plaintiff's evidence, there was a realistic possibility of an award in excess of $50,000.

Cases referred to

Branco v. Allianz Insurance Co. of Canada, [2004] O.J. No. 4690, [2004] O.T.C. 1011, 135 A.C.W.S. (3d) 40 (S.C.J.); Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, 235 D.L.R. (4th) 193, 316 N.R. 265, J.E. 2004-470, 184 O.A.C. 209, 40 B.L.R. (3d) 1, [2004] CLLC 210-025, 128 A.C.W.S. (3d) 1111; Kincses v. 32262 B.C. Ltd. (c.o.b. Macey Neon), [1998] O.J. No. 6582, 39 C.P.C. (4th) 384, 67 W.C.B. (2d) 323 (Gen. Div.); Snider v. Salerno, [2002] O.J. No. 1004, [2002] O.T.C. 284, 113 A.C.W.S. (3d) 780 (S.C.J.); Wicken (Litigation Guardian of)

v. Harssar, [2002] O.J. No. 2843, [2002] O.T.C. 1067, 24 C.P.C. (5th) 164, 115 A.C.W.S. (3d) 210 (S.C.J.)

Statutes referred to

Insurance Act, R.S.O. 1990, c. I.8, ss. 267.5(7) [as am.], (9) [as am.], (15) [as am.]

Solicitors Act, R.S.O. 1990, c. S.15, ss. 20.1(1) [as am.], (2) [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 76, 76.13(2), (3) [as am.]

Authorities referred to

Watson, Garry D. and Michael McGowan, Ontario Civil Practice, 1999 (Toronto: Carswell, 1998) [page300]

APPEAL from an order depriving a successful plaintiff of his costs.

David M. Schell, for appellant.

Mark Elkin, for respondents.

The judgment of the court was delivered by

[1] SHARPE J.A.: -- This is an appeal, with leave of this court, from the trial judge's order pursuant to rule 76.13(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, depriving the appellant of his costs in a personal injury action on the ground that it was not reasonable for the appellant to commence or continue the action outside of the Rule 76 simplified procedure regime.

Facts

(1) The appellant's claim

[2] The appellant's action was for damages for personal injury arising out of a motor vehicle accident. The respondents disputed both liability and damages. The appellant alleged that he had sustained a mild traumatic brain injury and that he had ongoing and constant lower back pain arising from soft tissue

injuries. The trial proceeded before a judge and jury for eight days. In addition to his own evidence and that of other lay witnesses, the appellant called his family doctor and three expert witnesses in the areas of neurology, psychology and orthopaedics. Those experts supported the appellant's claims of mild brain injury and back pain.

[3] The respondents called expert evidence to dispute the appellant's claim and alleged that the appellant's complaints arose largely, if not entirely, from pre-existing injuries.

[4] The plaintiff also asserted a claim for lost income, but by the time the case went to the jury, the basis for that claim had evaporated and the jury was only asked to consider the claim for general damages.

[5] The appellant's trial counsel asked the jury to return an award of $100,000 to $120,000 for general damages. Defence counsel submitted to the jury that no general damages had been established.

(2) The trial judge's instruction to the jury

[6] The trial judge instructed the jury as follows:

> You are not bound to accept the plaintiff's suggestion, nor to accept what I suggest to you, or what the defendant's counsel has suggested. You, and you alone, will determine the amount you conclude is fair to both parties. [page301] In my view, a range of somewhere between 25,000 to 65,000 to 75,000 is open to you. The upper range is open to you if you accept the plaintiff's view of his case.

[7] Defence counsel objected on the basis that the trial judge might have given the jury the impression that it could not go below $25,000. The trial judge brought the jury back and gave the following further instruction:

> . . . I told you that in my view a range of 25,000 to 65,000 to 70,000 is open to you. The upper area of that range is open to you if you accept the plaintiff's view of the case, including the various items that I mentioned, the cognitive

issues resulting from the concussion, back pain continuing, some limitation in future options of employment, and changes in his lifestyle and personality.

If you do not accept some or all of these conditions as being caused or materially contributed to by the March 20, 2001 accident, as I said the assessment should be accordingly reduced, and I did not suggest, by using the figure 25,000 to give you any impression there is a floor here. It is just simply my opinion. And it is a range based on whatever findings you may make. All I am suggesting is that it would have to be reduced if you did not accept some or all of the plaintiff's view of things as I have stated. And if you do not accept some or all of those conditions, then, of course, some reduction would have to be made from the upper range, and it could go down below 25,000 depending on what you find. But I do want to indicate that this man -- everybody agrees -- suffered a concussion. And whatever else is a problem or not is for you to decide based on the evidence.

(3) The trial judge's threshold ruling

[8] After the jury retired to deliberate, but before it returned with its verdict, the trial judge heard and ruled on the respondents' threshold motion, pursuant to the Insurance Act, R.S.O. 1990, c. I.8, s. 267.5(15), that the appellant had not suffered a permanent serious impairment of an important physical, mental or psychological function. The trial judge rejected the motion, ruling as follows:

[R]elying heavily on the evidence of Dr. Kaminska and Dr. Ogilvie-Harris, by whom I was very impressed, and the plaintiff being sufficiently credible on the impact on his daily living, my ruling is this case meets the threshold.

(4) The jury's verdict

[9] The jury returned a verdict in favour of the plaintiff in the sum of $20,000 for general damages, leaving the plaintiff with a net recovery of only $5,000 after applying the statutory deductible: Insurance Act, s. 267.5(7). However, it was common

ground that pursuant to s. 267.5(9), costs fell to be determined on the basis of the award of $20,000. [page302]

(5) The trial judge's costs ruling

[10] The trial judge ruled that although the appellant's counsel had been retained on a contingency fee basis, the appellant was entitled under the Solicitors Act, R.S.O. 1990, c. S.15, s. 20.1(1), (2), to claim costs, as the contingency fee agreement provided for a percentage of the recovery "plus whatever party-and-party costs are recovered".

[11] The trial judge ruled, however, that the appellant should be deprived of costs by the application of rule 76.13:

> (2) Subrules (3) to (10) apply to a plaintiff who obtains a judgment that satisfies the following conditions:
>
> 1. The judgment awards exclusively one or more of the following:
>
> i. Money.
>
> ii. Real property.
>
> iii. Personal property.
>
> 2. The total of the following amounts is $50,000 or less, exclusive of interest and costs:
>
> i. The amount of money awarded, if any.
>
> ii. The fair market value of any real property and of any personal property awarded, as at the date the action is commenced.
>
> (3) The plaintiff shall not recover any costs unless,
>
> (a) the action was proceeding under this Rule at the commencement of the trial; or
>
> (b) the court is satisfied that it was reasonable for the plaintiff,
>
> (i) to have commenced and continued the action under the ordinary procedure or under Rule 77, as the case may be, or
>
> (ii) to have allowed the action to be continued under the ordinary procedure or under Rule 77, as the case may be, by not abandoning claims or parts of claims that do not comply with subrule 76.02(1), (2) or (2.1).

(Emphasis added)

[12] The trial judge stated that either before or immediately after the action was commenced, "it was clear that the plaintiff had significant pre-accident conditions similar to or the same as his complaints in this case". The plaintiff's own evidence had undercut that of his experts as to his loss of future job opportunities, and his economic loss claim was never substantiated. The trial judge concluded:

> The only viable claim well prior to trial was for non-pecuniary damage of less than $50,000 realistically. It is true that the plaintiff survived the [page303] defendants' threshold motion, but the decision was very much a borderline case. My estimate to the jury indicated a range of $25,000 to $65,000. The latter assumed that the plaintiff could be believed in his claims of severe, ongoing problems which was a question of fact for the jury, though the evidence for exceeding $50,000 was weakened by the plaintiff's pre-accident complaints, no future income loss, and flat demeanour. In addition to the plaintiff's problems, at least one of the lay witnesses called on his behalf hurt his case regarding his actually playing golf considerably more than the plaintiff had said, a fact which could have been determined well before trial.

[13] The trial judge then went on to assess the appellant's costs, in case his ruling with respect to entitlement was reversed on appeal. The trial judge assessed the costs at $26,639.50 for fees and $20,519.44 for disbursements.

Issue

[14] This appeal raises the following issue: Did the trial judge err by depriving the appellant of costs pursuant to rule 76.13?

Analysis

[15] The appellant must overcome two hurdles to succeed on this appeal. The first is that costs are a matter within the discretion of the trial judge and an appellate court must accord the trial judge considerable deference. Costs decisions

turn on an assessment of the nature of the case and the conduct of the parties throughout the litigation, and trial judges are obviously in the best position to make that assessment.

[16] That said, appellate courts are entitled to intervene to ensure that costs decisions accord with the applicable legal principles that define and limit the range of discretion available to trial judges. If the appellant can demonstrate an error in principle or that the decision was plainly wrong, he is entitled to succeed: Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, at para. 27.

[17] The second hurdle is that the costs consequences of Rule 76 are "the device that drives the whole system": Kincses v. 32262 B.C. Ltd. (c.o.b. Macey Neon), [1998] O.J. No. 6582, 39 C.P.C. (4th) 384 (Gen. Div.), at para. 13, quoting Garry D. Watson and Michael McGowan, Ontario Civil Practice, 1999 (Toronto: Carswell, 1998), at P. 1074. The purpose of the simplified procedure regime is to reduce legal costs and to enhance access to justice by making available a cheaper and more expeditious procedural regime appropriately geared to the litigation of modest claims. That important purpose will be undermined if the costs sanctions built into the simplified procedure regime are not enforced. On the other hand, rule 76.13 has a built-in safety [page304] valve and provides that costs may be awarded even when a plaintiff recovers less than $50,000, if it was "reasonable" for the plaintiff to have commenced or continued the action under the ordinary procedure.

[18] For the following reasons, I conclude that allowing the appellant to recover costs would not undermine the integrity of the Rule 76 simplified procedure regime, and that the appellant has demonstrated an error in principle that justifies appellate intervention. In my view, in the circumstances of this case, the trial judge's conclusion that it was not reasonable for the plaintiff to have commenced and continued the action under the ordinary procedure cannot be reconciled with his pre-verdict assessment of the case, both in his charge to the jury and in his ruling on the defendants' threshold motion.

[19] The trial judge instructed the jury that if it accepted

"the plaintiff's view of the case", the appropriate range of damages was between $25,000 and $70,000. In light of that instruction, it could only have been unreasonable for the appellant to have commenced or continued the action outside the simplified procedure regime if the appellant, or his counsel, should have realized that there was no reasonable prospect that the jury would accept the appellant's version.

[20] The trial judge himself had assessed the plaintiff's case, albeit for the limited purpose of the threshold motion. The trial judge was "very impressed" by the appellant's expert witnesses and he found that the appellant's evidence was "sufficiently credible" to support a ruling that the appellant had suffered a permanent and serious impairment of an important physical, mental or psychological function as a result of the accident. Moreover, although the jury plainly did not entirely accept the appellant's version of the case, neither did it accept the respondents' view that the appellant had suffered no significant injury and that his claim was worth nothing.

[21] Accepting at face value the trial judge's jury instruction and threshold ruling, I fail to see how it could not have been reasonable for the appellant to have commenced or continued the action under the ordinary procedure. The reasonableness of the appellant's decision to proceed under the ordinary procedure must be assessed on the basis of the facts as they existed before the jury's verdict. To proceed under the simplified procedure, the appellant would have to abandon any claim for more than $50,000 and forgo the opportunity to approach the case with the level of procedural rigour appropriate for a potentially significant claim. The trial judge found that the appellant had impressive expert medical evidence, and although the appellant's credibility [page305] was plainly under dispute, the trial judge accepted his evidence as sufficiently credible to defeat the respondents' threshold motion. Jury verdicts in this area are notoriously difficult to predict and, as the trial judge himself recognized, had the jury accepted the appellant's evidence, there was a realistic possibility of an award in excess of $50,000. Moreover, in the end, the jury did accept at least

part of the appellant's evidence, as it returned a verdict in his favour.

[22] Finally, fully recognizing that each case is to be decided on its own facts, I note that when ruling on the application of rule 76.13 to personal injury claims where the plaintiff has credible medical evidence to support a claim for an amount that exceeds the simplified procedure limit, other trial judges have taken a more generous approach: see e.g., Branco v. Allianz Insurance Co. of Canada, [2004] O.J. No. 4690, [2004] O.T.C. 1011 (S.C.J.), at paras. 7-8; Wicken (Litigation Guardian of) v. Harssar, [2002] O.J. No. 2843, 24 C.P.C. (5th) 164 (S.C.J.), at paras. 13-15; Snider v. Salerno, [2002] O.J. No. 1004, [2002] O.T.C. 284 (S.C.J.), at paras. 8-13.

[23] I note that no appeal is taken from the trial judge's assessment of the appellant's costs should this court find that the trial judge erred in making his rule 76.13 order.

Conclusion

[24] For these reasons, I would allow the appeal and allow the appellant his costs of the action in the amount assessed by the trial judge. The appellant is also entitled to his costs of both the application for leave to appeal and the appeal itself, which I would fix at $7,500 in total, inclusive of disbursements and GST.

Appeal allowed.