

CA014230

Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

WALTER PALLOS

PLAINTIFF

(APPELLANT)

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANT

(RESPONDENT)

Before: The Honourable Chief Justice McEachern

The Honourable Mr. Justice Goldie

The Honourable Mr. Justice Finch

Art E. Vertlieb Counsel for the Appellant

John P. Lauener Counsel for the Respondent

Place and Date of Judgment Vancouver, British Columbia

26 June 1995

Supplementary Written Reasons by: (Pages 1-13, Paras. 1-27)

The Honourable Mr. Justice Finch

Concurred in by:

The Honourable Mr. Justice Goldie

Further Written Reasons by: (Page 14, Paras. 28-29)

The Honourable Chief Justice McEachern

Court of Appeal for British Columbia

Walter Pallos

- v. -

Insurance Corporation of British Columbia

Supplementary Reasons for Judgment of the Honourable Mr. Justice Finch

1 The plaintiff's appeal was allowed, the Chief Justice dissenting, in written reasons filed 3 January 1995. The Court set aside the trial judge's finding of contributory negligence against the plaintiff, and held the defendant solely responsible for the plaintiff's losses. The effect of this conclusion was to increase the trial judgment of 12 June 1991 by the following amounts:

- | | | |
|----|-----------------------------|-------------|
| 1) | non-pecuniary damages | \$15,000.00 |
| 2) | past wage loss | 4,596.50 |
| 3) | future care and income loss | 3,000.00 |

In addition, this Court awarded \$40,000.00 for the plaintiff's claim for loss of income earning capacity.

2 The plaintiff's factum on appeal did not include any request for an award of interest, and the matter was not addressed when the appeal was heard, nor in the reasons for judgment. The parties were unable to agree on the form of order to be entered. At the appointment to settle the order, the Registrar's jurisdiction to order interest, where the Court had said nothing on that issue, was disputed. The matter was referred back to the Court, and the parties filed written submissions.

3 During the period between the trial decision on 12 June 1991 and the hearing of this appeal on 2 December 1994, two changes to the British Columbia **Court Order Interest Act**, R.S.B.C. 1979, c. 76 were enacted and proclaimed in force. First, on 1 April 1992, the provisions of this Act relating to post-judgment interest, ss. 7 to 9, were brought into effect, coincident with the repeal of the post-judgment interest provisions of the Canada **Interest Act**, R.S.C. 1985, c. 1-15, ss. 11-14.

4 Second, on 30 June 1993, the **Court Order Interest Act** was again amended (by S.B.C. 1993, c. 28, s. 3) to add s-s. 2(e) which precludes awards of prejudgment interest "on that part of any order that represents non-pecuniary damages arising from personal injury or death". At the same time a transitional provision was enacted, as follows:

Transitional

18. A reference to an order in section 1 (4) or 2 (e) of the **Court Order Interest Act** as enacted by sections 2 and 3 of this Act includes an order made in an action commenced but not concluded before the coming into force of the amendment made to that section by this Act.

5 The respondent submits that s-s. 2(e) prohibits prejudgment interest on the awards granted by this Court of \$15,000.00 for non-pecuniary damages, and of \$40,000.00 for loss of future earning capacity.

6 The respondent's first position is that because interest was not argued on the appeal, and not addressed in the reasons for judgment, the Registrar could not direct the inclusion of a provision for interest on an application to settle the order. It is, I think, correct to say that the Registrar could not, except by consent, add to an order terms not pronounced by the Court. But, until the judgment is entered, the Court can, in proper circumstances, add to or vary a judgment previously pronounced, where that is necessary. A similar conclusion was reached in *aper curiam* judgment of this Court in **Moyer v. Bosshart**, [Q.L. 1995 B.C.J. No. 851] (B.C.C.A.), where it was said:

3. The first issue is whether the plaintiff should be entitled to make submissions after judgment has been pronounced in the appeal, but before judgment is entered, in circumstances where the issues raised by the supplementary submissions could reasonably have been anticipated by counsel for the appellant. We think that counsel should generally speaking try to anticipate issues about interest and about costs on the basis of the judgment that is requested and in relation to any judgment which might well be given. But we do not think the parties should be denied an opportunity to make submissions about interest and about costs when nothing is said about those matters in the pronouncement of the judgment of the court or in the reasons for judgment and no submissions were made to the Court about those matters before the Court pronounced judgment.

7 I respectfully agree with those comments, and consider them apt in the present circumstances. It is, in my opinion, open to the Court to pronounce orders concerning interest, even though the issue was not raised in the factums or oral arguments on the appeal, nor addressed in the reasons for judgment.

8 Before a determination as to entitlement to interest can be made, it is necessary to identify the date or dates upon which entitlement to interest is to be decided. It is settled law that a plaintiff who succeeds on appeal ought, so far as the calculation of interest is concerned, to be placed in the same position he would have had, if the trial court had made the order obtained by the plaintiff on appeal: see **Lewis Realty Ltd. v. Skalbania** (1980), 25 B.C.L.R. 17,

18 C.P.C. 174 (C.A.). It is also settled that interest on the amount by which a judgment is increased for future loss of capacity to earn income is to be calculated as from the date of judgment at trial: see **Freitag v. Davis** (1984), 54 B.C.L.R. 112 (C.A.).

9 At the date of the trial judgment on 12 June 1991, the amendments to the **Court Order Interest Act** had not been enacted. The plaintiff was then entitled to court order interest on the amounts for non-pecuniary damages and past wage loss, totalling \$19,596.50 by which those awards had been increased on appeal: (see **Zrnoh v. Richdale** (1995), 2 B.C.L.R. (3d) 347 (C.A.), and **Moyer v. Bosshart** (*supra*)). The formal order should include a provision that the plaintiff recover court order interest at the rates fixed from time to time by the District Registrar of the Supreme Court on the full amount of the awards for non-pecuniary damages and past wage loss from the date of the injury to the date of the trial judgment, 12 June 1991.

10 With respect to post-judgment interest on the awards for non-pecuniary damages, past wage loss, and future care and income loss, all totalling \$22,596.50, the plaintiff claims only simple interest from 12 June 1991 to 3 January 1995 at five percent. The defendant did not make any submission on the issue of post-judgment interest on these awards.

11 The plaintiff's limited claim for post-judgment interest on these items does not take into account the legislative change effected as of 1 April 1992. As will be seen subsequently, in these reasons, it is my view that, after that date, post-judgment interest is to be calculated and awarded in accordance with Part 2 of the **Court Order Interest Act**.

12 As to interest on the award for future loss of capacity to earn income, two points are to be kept in mind. First, for the purposes of interest, the award of \$40,000.00 by this Court is to be viewed as though it had been made in the trial judgment on 12 June 1991. Second, because it is an award for future loss, it would not attract interest for the period prior to trial. The remaining question is the rate at which interest is payable on the award of \$40,000.00 for future loss of income earning capacity, from the date of the trial judgment to the date of its payment to the plaintiff. The plaintiff says interest on the \$40,000.00 award for the period 12 June 1991 to 3 January 1995 should be paid at market rates. It relies upon a judgment of this Court: **Clarke v. Clarke** (1991), 55 B.C.L.R. (2d) 273, 80 D.L.R. (4th) 301 (C.A.).

13 The respondent says that no interest is payable on the award for future loss of income earning capacity before the date on which the judgment of this Court was pronounced, namely 3 January 1995. The respondent relies on s-s. 7(2) of the **Court Order Interest Act** which provides:

Interest rate

7. (2) A pecuniary judgment shall bear simple interest from the later of the date the judgment is pronounced or the date money is payable under the judgment.

14 The respondent also says that an award of interest is barred by s-s. 2(a) of the **Court Order Interest Act** which says:

Interest not awarded in certain cases

2. The court shall not award interest under section 1

(a) on that part of an order that represents pecuniary loss arising after the date of the order;

15 And the respondent says that **Clarke** (*supra*) is distinguishable on its facts, and was decided before s.7(2) to the **Court Order Interest Act** was proclaimed effective.

16 I do not think s-s. 7(2) supports the respondent's position. The award for future loss of income earning capacity is to be viewed as though made by the trial judge on 12 June 1991. That is the date of "pronouncement", and the date on which the award would have been payable, if the trial judge had made the award. Nor do I think that s-s. 2(a) assists the respondent. Section 2 only qualifies s.1 which refers to interest for the period before trial, which is not being sought with respect to this head of damages.

17 The award of \$40,000.00 is for pecuniary loss arising after the date of the trial judgment, 12 June 1991. However, the plaintiff has not had the benefit or use of that award from the date on which it ought to have been made, and paid. If the trial judge had made the order which this Court did, and if the judgment had been paid in a timely way, the plaintiff would have had the use of \$40,000.00 from 12 June 1991 or shortly thereafter. If he is to be placed in the position he would have had, he would be entitled to interest to compensate him for that loss of use of the award, and that interest would be calculated at market rates.

18 That result, however, may be anomalous. If the \$40,000.00 award for future loss of income earning capacity had been made by the trial judge on 12 June 1991, but not paid immediately by the defendant, that award would have attracted only post-judgment interest in accordance with the statutory rate fixed either by the Canada **Interest Act** up to 1 April 1992, or by s. 7 of the British Columbia **Court Order Interest Act**, after that date.

19 It would seem illogical, therefore, that a plaintiff who failed in a claim for future loss of income earning capacity at trial,

but who succeeded on appeal, should have interest calculated on the award from the date of the trial judgment at market rates; whereas a plaintiff who succeeded in his claim at trial, but was not immediately paid, should have interest on the award calculated at only the rate fixed by statute.

20 The next consideration is the application of this Court's judgment in **Clarke** (*supra*). The parties in that case made a settlement in 1982 of the wife's claim under the **Family Relations Act** for maintenance and a share of family assets. Under the settlement agreement, the wife received a lump sum payment of \$100,000.00. In 1985, the wife commenced a divorce proceeding, which included a claim for maintenance and a re-apportionment of family assets. Those ancillary claims were rejected by the trial judge, on the basis that the wife had previously settled these claims and released her husband. On appeal, this Court held the wife entitled to a re-apportionment of the value of the matrimonial home, and gave her judgment for a further lump sum of \$40,000.00. That is the award on which the order for interest was to be made. The Court held the wife entitled to interest from the date of judgment in the divorce action, when her claim for re-apportionment was dismissed, to the date of judgment in the Court of Appeal, at the rate fixed from time to time by the Registrar. In support of that conclusion, the Court referred to the many cases where interest at market rates, or at the Registrar's rates, had been ordered payable as a condition for stays of execution pending appeal to this Court. Such orders became possible after amendments in 1982 to the **Court of Appeal Act** concerning stays of execution. The Court concluded its judgment in **Clarke** with this passage, at p. 286 B.C.L.R.:

49 As will be seen from the above cases, the effect of the change in the Court of Appeal Act has been to give a successful plaintiff interest at the market rate from the date of the trial judgment to the date of the appeal judgment. It follows that a plaintiff, who fails at trial but succeeds on appeal, is also entitled to interest at the market rate from the date of the trial judgment to the date of the appeal judgment. It follows that **Wells v. Chrysler Canada** and **Lewis Realty v. Skalbania** are no longer applicable.

21 It is that passage, in particular, upon which the plaintiff relies in its submission. In my view, **Clarke** is distinguishable from this case. In **Clarke**, the money judgment was awarded to correct unfairness in the settlement agreement of 1982, a "past loss" as at the trial date in the divorce action in 1988; whereas, in this case, the award of \$40,000.00 for future loss of income earning capacity is to compensate the plaintiff for losses not yet suffered at the time of trial in 1991. Interest at the market rate after the date of the trial judgment was allowed in **Clarke** to compensate the wife for a prejudgment loss. The award recognized that she had not had the use of those funds, as she ought to have had, from the date of the trial judgment.

22 Here, it can also be said that the plaintiff ought to have had the award of \$40,000.00 for future loss of income earning capacity from the date of the trial judgment. The difficult question, is whether it makes a difference that the award is for a loss not yet suffered at the date of trial. There are some damage awards for future losses where the award is an estimate of the present lump sum value of a lost or diminished stream of future income. Such income streams are "discounted" on an actuarial basis to reflect the fact that a present lump sum award will earn interest at market rates. If the judgment for such a discounted lump sum is not paid promptly, this Court has recognized that an allowance to compensate for delayed payment of the trial judgment should be made. In **Larocque v. Lutz** (1981), 29 B.C.L.R. 300, [1981] 5 W.W.R. 1 (C.A.), Lambert J. A., for the Court, said at pp. 311-12:

In my opinion, the adjustment that is made to a damage award for non-payment after judgment, in order to compensate for an original calculation becoming inaccurate because of non-payment, is largely a question of fact which must be determined on the evidence in each case. When no evidence is led that is specifically directed to that question, we must make the best of the evidence that has been led for other purposes. But we must bear in mind that the purpose of the adjustment has nothing to do with the plaintiff being kept out of her money. It is to rectify a defect in the calculation, caused by the postponement of payment.

Furthermore, at p.315, this Court allowed interest to accrue on the judgment debt according to the terms specified in the Canada **Interest Act**, in addition to the order for adjustment. It was noted by Lambert J.A. that "some incentive for the prompt payment of judgment debts" was favoured by the Court.

23 In this case, while this Court's award for lost earning capacity is to compensate for anticipated diminished future earnings, the award was not based on actuarial calculations of the present value of a lost or reduced income stream. It was rather an attempt to estimate the extent to which the plaintiff's capacity to earn income, a capital asset, had been diminished in value. The award was not predicated on the idea that, with interest income earned over time, it would replace a lost income stream. And it was in no sense an award for loss suffered prior to the date of trial.

24 In my view, therefore, the interest on the award for future lost income earning capacity should be calculated from the date of judgment at trial as post-judgment interest, at the rate fixed by statute.

25 On 12 June 1991, post-judgment interest was payable under the provisions of the Canada **Interest Act** at five percent, annual simple interest. On 1 April 1992, those provisions ceased to be

applicable in British Columbia and were replaced by Part 2 of the British Columbia **Court Order Interest Act**. The rate prescribed by s-s. 7(1) is annual simple interest "equal to the prime lending rate of the banker of the government". Subsection 7(4) provides:

7. (4) Notwithstanding subsection (2), interest in respect of a judgment pronounced before the coming into force of this Part shall be calculated from the later of the date this Part comes into force or the date money is payable under the judgment.

26 The result is that interest on the award of \$40,000.00 for future lost income earning capacity is payable as post-judgment interest at five percent from 12 June 1991 to 30 March 1992 under the Canada **Interest Act**, and at the rate prescribed in s-s. 7(4) of the British Columbia **Court Order Interest Act**, from 1 April 1992 to the date of payment.

27 Post-judgment interest on the awards for non-pecuniary damages, past wage loss, and future care and income loss, all totalling \$22,596.50, should be calculated on a similar basis. That is, at simple interest at 5% per annum under the Canada **Interest Act** from 12 June 1991 to 30 March 1992; and as specified in s.7 of the British Columbia **Court Order Interest Act** thereafter, until paid.

"The Honourable Mr. Justice Finch"

I AGREE: "The Honourable Mr. Justice Goldie"

Reasons for Judgment of Chief Justice McEachern

28 As I delivered dissenting Reasons for Judgment on this appeal, I do not think it will be appropriate for me to express any opinion on the questions answered by Mr. Justice Finch with which Mr. Justice Goldie agrees.

29 The form of order, therefore, in my view, should indicate that I neither concur with nor dissent from these further decisions of my colleagues.

"The Honourable Chief Justice McEachern"