Date: 19980511
Registry: Vancouver

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**No. B940866**

BETWEEN:

**RANDALL BRENT MONAHAN**

PLAINTIFF

AND:

**MERVIN JOHN NELSON and KATHY LORRAINE NELSON**

DEFENDANTS

AND:

**No. B940867**

BETWEEN:

**RANDALL BRENT MONAHAN**

PLAINTIFF

AND:

**DOUGLAS BROOKS OLDHAM, BURNABY METRO LIMO LTD., JOHN STEWARD MULDER, POT MU WONG, SHU CHUAN CHANG, and WALLACE STANLEY HAROLD BRADLEY**

DEFENDANTS

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# SUPPLEMENTARY REASONS FOR JUDGMENT

# OF THE

# HONOURABLE MR. JUSTICE COULTAS

Counsel for the Plaintiff: F.G. Potts

Counsel for the Defendants: G.P. Brown/W.S. Clark

Place and Date of Hearing: Vancouver, B.C.
October 20, 21, 22, 1997
April 28, 1998

[1] These Reasons address "Costs".

[2] On April 28, 1998 during the course of submissions on costs, I made orders and gave my reasons for them. Mr. Potts, counsel for the plaintiff, has requested that I give written Reasons incorporating what I said and the orders I made. These are they.



[3] I have handed down three sets of Reasons in these actions - April 11 and 29, 1997 and March 10, 1998. In the April 11 and 29, 1997 Reasons, I awarded the plaintiff these damages in both actions:

| | |
|---|---|
| Non-pecuniary damages | 83,000.00 |
| Past wage loss | 16,065.00 |
| Past special damages | 2,246.60 |
| Future cost of care | 46,830.00 |
| Future loss of income | 175,000.00 |
| Total: | $ 323,141.60 |

[4] All evidence and submissions in the actions concluded on December 13, 1996 when judgment was reserved. In February, 1997 the plaintiff died before judgment had been delivered. His legal representative applied for an order that the judgment be dated *nunc pro tunc* to December 13, 1996. The defendants opposed the application, submitting, *inter alia*, that such an order would result in a windfall to the plaintiff's estate. On March 10, 1998 I ordered that the judgment be dated *nunc pro tunc* to December 13, 1996.

[5] At the hearing of the *nunc pro tunc* application, the issue of costs was partly argued. At that Hearing (October 20-22, 1997) Mr. Potts, then acting for the representative of Mr. Monahan's estate, sought an order for increased costs at a level of 80% of special costs, alternatively, double costs at a scale higher than Scale 3.

[6] The argument on costs was not completed in October 1997. Counsel agreed that the costs issue should be further argued after my decision on the *nunc pro tunc* application came down and it was so on April 28, 1998. At that time, Mr. Potts resiled from the position he had taken in the previous October and sought increased costs at 50% of special costs, alternatively, costs at Scale 4 or 5.

[7] Something must be said about Mr. Potts' position in October 1997 relating to increased costs. At that time, he did not know the outcome of his application to have the judgment antedated. He told the Court that his firm's actual time charges in the two actions to the end of trial totalled $109,000, not including taxes and disbursements. The firm had entered into a contingency fee arrangement with the deceased for 30% of recovery. Based on the quantum of damages awarded, the contingency fee would have exactly covered the actual time spent litigating the two actions to the end of trial. Were the application for a *nunc pro tunc* to fail, the damages awards would be reduced to $18,113.60 and the contingency fee limited

to 30% of that amount, resulting in a very great loss to the firm. Mr. Potts correctly submitted that would be an unjust result. He said in October:

> The factors the Court is obliged to consider are different than would be the case if we succeed in our application for a *nunc pro tunc* order. If we do not succeed, there will have been a determination of negligence on the part of the defendants, but by virtue of the operation of the statute (the ***Estate Administration Act***) and the demise of Mr. Monahan, they are not obliged to pay anything of that fault. And in those circumstances, I say the law is that the Court is obliged to award pretty much full indemnity for the legal fees, the theory being there is no harm done to the defendants because they have had a windfall benefit by virtue of the death and the estate ought not to be left with the consequences of having succeeded in its action, but for a juristic reason, being unable to collect.

[8] The legal representatives' application for a *nunc pro tunc* order succeeded resulting in a large windfall to the estate, for the major part of the damages awards covered future economic loss. For that reason alone, I conclude increased costs should not be awarded; there will be ample funds with which to pay Mr. Potts' legal bills on whatever basis he presents them and they can be paid with "windfall money".

[9] There are other reasons, too, why increased costs should not be ordered. The cases were not of unusual difficulty or importance. They did not raise important or difficult issues of law or fact. Liability in each case was admitted. Presenting and assessing past and future economic loss was not difficult or unusual.

[10] The principal issue was causation. To be decided was the cause of the plaintiff's herniated disc which was not diagnosed for a very long time after the first accident. That issue presented a very real problem for the plaintiff and it did so because he gave false information, albeit not intentionally false, to the defendants' medical expert and to Dr. Thompson, to whom he was sent either by his own counsel or by Dr. Ng, his family physician. He told both doctors that the radicular pain he experienced commenced very many months, if not years, after his first accident; in fact, it commenced soon after the first accident. They accepted what he told them and opined that it was unlikely that the disc herniation resulted from the accidents. That was the difficulty facing Mr. Potts, counsel for the plaintiff. I did from time to time during the course of the hearing on the *nunc pro tunc* issue, say the issues at trial were difficult. I meant by that, difficult for his counsel to put the defendants' medical evidence into proper prospective, given the plaintiff's incorrect subjective reports to them, and, of course, his credibility remained a live issue throughout because of his reports.

[11] His family physician and Dr. Gittens attributed some of his severe pain to the herniated disc when an M.R.I. revealed it. Drs. Boyle and Thompson did not, because of the apparent delay in the onset of radicular pain. But for the incorrect subjective reports, this action would have been relatively easy

to present and to resolve. But for them, it may never have been tried at all.

[12] In my opinion, costs should be awarded at Scale 3 in both actions.

[13] Calderbank letters were exchanged prior to trial. The defendants concede that double costs should be awarded to the plaintiff from April 25, 1996 to the present and that is ordered.

[14] Mr. Potts acted for the plaintiff in both actions which were tried together. Counsel agree there will be one set of double costs from April 25, 1996 to the present, to be allocated equally between the two actions.

[15] I order post-judgment interest from April 11, 1997.

"Coultas, J."