

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lee v. Bolduc*,
2024 BCCA 224

Date: 20240618
Dockets: CA48443; CA48444;
CA48445
Docket: CA48443

Between:

Esther Lee

Appellant
(Defendant)

And

Kayla Nikole Bolduc

Respondent
(Plaintiff)

– and –

Between:

Docket: CA48444

Delaina Mariele Olson

Appellant
(Defendant)

And

Kayla Nikole Bolduc

Respondent
(Plaintiff)

– and –

Between:

Docket: CA48445

Stacey Marie Stratton

Appellant
(Defendant)

And

Kayla Nikole Bolduc

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Abrioux

Supplementary Reasons to: *Lee v. Bolduc*, 2024 BCCA 7,
Vancouver Dockets M195574, M204255 and M211905.

Counsel for the Appellants: M-H. Wright
J. Walker

Counsel for the Respondent: T.F. Dennis

Place and Date of Hearing: Vancouver, British Columbia
October 26, 2023

Place and Date of Judgment: Vancouver, British Columbia
January 10, 2024

Written Submissions on Costs Received: April 30, May 21, and May 27, 2024

Place and Date of Supplementary
Judgment: Vancouver, British Columbia
June 18, 2024

Supplementary Reasons of the Court

Summary:

Supplementary reasons ordering the parties to bear their own costs of the appeal.

Supplementary Reasons for Judgment of the Court:

[1] The parties each apply in respect of costs arising out of this appeal, indexed at 2024 BCCA 7. The appellants seek an order of costs on the basis that they were substantially successful on appeal. The respondent seeks an order that each party bear their own costs of the appeal.

[2] The appeal concerned awards of loss of future earning capacity in relation to the respondent's loss of a medical career and reduced capacity for a nursing career.

[3] On the appeal, the appellants sought an order:

- a) setting aside and dismissing the award for loss of future earning capacity;
- b) in the alternative, reducing the award for loss of future earning capacity; or
- c) in the alternative, remanding the matter back to the trial judge for re-assessment of the award for loss of future earning capacity based on the evidence at trial.

[4] The appellants' primary position on appeal was that the award for loss of future earning capacity should be set aside in its entirety. At the hearing of the appeal, they abandoned the ground of appeal relating to the reduced capacity to earn income as a nurse.

[5] The Court found that the record did not support a finding that the respondent had a 75% chance of being admitted to a Canadian medical school. At best, the likelihood was found to be 20% and the damages for loss of future earning capacity were reduced from \$524,698 to \$450,000, that is approximately \$75,000.

[6] The principles that govern a costs award are set out in *Deegan v. L'Heureux*, 2023 BCCA 273:

[5] Under s. 44 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, costs of the appeal are ordinarily awarded to the substantially successful party. In *Pineau v. KMI Publishing and Events Ltd.*, 2023 BCCA 94, this Court neatly summarized its approach to determining the substantially successful party:

[3] In order to be considered the successful party on appeal, a party need not have succeeded on every point. Success is measured not by the number of successful grounds of appeal, but rather by the overall effect of the judgment. It is not the practice of this Court to finely parse the issues with a view to divvying up costs: *Chinn v. Hanrieder*, 2013 BCCA 413 at para. 6; *Olney v. Rainville*, 2010 BCCA 155 at para. 7; *Russell v. Craigflower Housing Cooperative*, 2022 BCCA 121 at paras. 7–8.

[7] The appellants argue that they sought a reduction of the award for loss of earning capacity, and that, as they had abandoned the ground of appeal relating to a 50% chance of being limited to part-time work as a nurse, the focus of the appeal was the judge's finding that pre-accident, the respondent had a 75% likelihood of becoming a medical doctor.

[8] They submit that at the hearing of the appeal, they argued that a reduction of \$150,000 for loss of future earning capacity in a medical career was "fair, reasonable, and factually supported". As a result, they contend that when this Court reduced the award by \$75,000, they were substantially successful in that they secured approximately 50% of the reduction they sought at the hearing of the appeal.

[9] The respondent focuses on the specific issue that they submit was argued at the appeal, being the 75% likelihood of the respondent being accepted to a Canadian medical school. They submit the appellants were unsuccessful on this point as they argued "there was no evidence for the trial judge to have made her finding".

[10] In our view, the appellants' submissions should be considered in their proper context which includes:

- Their primary position was that the award for loss of earning capacity should be set aside and dismissed, in that there was no evidence to substantiate such an award at all;
- At the commencement of the hearing of the appeal, they abandoned the ground of appeal relating to the award for the reduced loss of a nursing career; and
- They were successful on their alternative ground of appeal in relation to the finding there was a 75% likelihood of the respondent being admitted to a Canadian medical school with that percentage being reduced to 20%, such that the award for loss of earning capacity was then reduced from \$524,698 to \$450,000, that is approximately \$75,000.

[11] In our view, this case bears certain of the features in *Brophy v. Ploskon-Ciesla*, 2022 BCCA 425, where this Court allowed an appeal in respect of certain heads of damages by setting aside the awards of:

- \$255,000 for loss of earning capacity and substituting an award of \$75,000;
- \$17,199 for cost of future care and substituting an award of \$4,108; and
- approximately \$42,200 for future loss of housekeeping capacity and substituting an award of \$15,000.

[12] This Court concluded:

[7] In our view, the gravamen of the appellant's position on appeal was that the various pecuniary awards should be set aside because they had not been established on the evidence. This position did not prevail. We concluded that there was an evidentiary basis for what remained significant awards, even if much reduced from the trial awards. To this extent, the respondent succeeded on appeal.

[8] In these circumstances, having regard to the practicalities of the positions of the parties on appeal, we think the substance of the outcome is that success was divided. This is an appropriate case to order that each party bear their own costs.

[13] Having regard to the “practicalities of the positions of the parties on appeal” we would reach a similar conclusion in this case. On the one hand, the appellants were successful, to a degree, in advancing their alternative ground of appeal. And yet the award for loss of earning capacity, which the appellants first sought to have dismissed in its entirety, was reduced by what we consider to be the relatively modest amount of \$75,000.

[14] We are of the view that the substance of the outcome of the appeal is that success was divided. Accordingly, this is an appropriate case to order that the parties bear their own costs.

“The Honourable Chief Justice Marchand”

“The Honourable Madam Justice Newbury”

“The Honourable Mr. Justice Abrioux”