Jones v. Fabbi (c.o.b. Purity Dairy), [1973] B.C.J. No. 87

British Columbia and Yukon Judgments

British Columbia Supreme Court
Nelson, British Columbia
Hinkson J.
Heard: February 26 and 27, 1973.
Judgment: (Vancouver, B.C.) April 10, 1973.
Nelson Registry Nos. J1605/1963, SIIJ/64

[1973] B.C.J. No. 87 | 37 D.L.R. (3d) 27

Between William Owen Jones, plaintiff, and Romeo S. Fabbi and Stanley A. Fabbi, carrying on business under the firm name and style of Purity Dairy and Purity Dairy Limited, defendants, and William Owen Jones, plaintiff, and George Fleck and Robert W. Fleck, carrying on business under the firm name and style of Fleck Bros. and the said Fleck Bros., Bernard Riehl, Jr., Edward Kriese, Edward Seibert, Adolph Lang, Joseph Pogany, Jr., and Thomas Jensen, defendants

(38 paras.)

Counsel

R.H. Vogel, for the plaintiff. S.W. Enderton, for Fabbi et al. M.E. Moran, Q.C., for Fleck et al.

HINKSON J.

1 HINKSON J. This is an assessment of damages in two actions consolidated for trial. initially the actions were dismissed at trial in respect of liability. The Court of Appeal reversed that decision and held the defendants Fabbi et al (herein referred to as "the dairy") guilty of inducing breach of contract and the defendants Fleck et al (herein referred to as "the producers") guilty of breach of contract. On appeal to the Supreme Court of Canada that judgment was affirmed, (1972) 28 D.L.R. (3d) 224.

2 Mr. Moran informed me that since the original trial the defendant Siebert is deceased and that he does not appear on behalf of the estate of Siebert.

3 In the Supreme Court of Canada in the reasons for judgment of Ritchie J. he expressed concern as to the position of the producers. He states that counsel for the plaintiff indicated his client did not intend to proceed with steps to recover damages from the producers. Upon this assessment counsel for the plaintiff pressed his client's claim against the producers. He stated it is his client's position that the damages flowing from the tort of inducing breach of contract encompass the damages flowing from the producers' breach of contract but include other matters as well. Therefore he seeks damages against both the dairy and the producers upon the

basis that if the dairy pays the damage award his client will not be entitled to any additional recovery from the producers. Should he fail to make a full recovery from the dairy then he seeks to preserve his client's right to pursue the producers. Counsel for the producers took no exception to this approach to the matter.

4 Counsel agreed that for the purpose of this assessment the case on appeal to the Supreme Court of Canada constituted part of the evidence. In addition counsel for the plaintiff called four witnesses.

5 Mrs. Jones, the wife of the plaintiff, was called as a witness. She had kept the books for her husband during the time he had hauled the producers' milk in cans to the dairy between October, 1962 and the end of May, 1963. She prepared a statement based upon a three year projection from June 1, 1963 showing the income the plaintiff might reasonably expect to receive from his contracts with the producers and the expenses she estimated would be involved. These producers were all situate in the Creston area.

6 In the statement Mrs. Jones also included names of certain producers in the Cranbrook area who were dealing with the dairy prior to June 1, 1963. Jones did not have contracts to haul their milk in cans to the dairy. However Mrs. Jones included names and projected quantities of milk and revenue therefrom for such producers upon the basis that once the dairy switched over to bulk haul and bulk storage in the spring of 1963 Jones would have hauled the Cranbrook producers' milk as well.

7 Counsel for the defendants objected that the evidence with respect to the Cranbrook producers' anticipated production was hearsay. Mr. Vogel had the opportunity to call the Cranbrook producers but failed to do so. Instead he contended that as against the dairy the evidence, which he conceded was hearsay, was admissible on the basis that he was seeking damages at large against the dairy. He relied upon the decision in Richardson v. Mellish, (1824) 2 Bing. 229; 130 E.R. 294, as authority for admitting this hearsay against the dairy. An examination of what Best C.J. said in that case does not support that proposition. Therefore I disregard the portion of the statement which is hearsay. The plaintiff makes reference to the evidence of Blackmore and Cotton. Blackmore said at trial that he ceased milk production on July 1st, 1965. Cotton gave figures for production but these standing alone do not show what weight of milk might reasonably have been expected to be shipped by the Cranbrook producers. Dealing with the statement, it discloses a prospective revenue from the Creston producers during the three year term of the contract of approximately $29,000.00. The anticipated expenses are somewhat difficult to calculate. Jones had purchased a new truck for the bulk hauling contract. He anticipated doing the driving himself, performing the ordinary maintenance and repairs on the vehicle himself and economizing as much as possible because everything he saved by way of operating expenses he would realize in profit from the operation.

8 The plaintiff called Mr. Duggan, the principal and president of Kootenay Dairy Transport Ltd. That company presently does the bulk hauling for the producers to the dairy. Under cross-examination Mr. Moran elicited from Mr. Duggan the admission that looking at Exhibit 1, the statement prepared by Mrs. Jones, and confining himself to the contract with the Creston producers, he would not consider entering into a contract based upon the rates agreed to by Mr. Jones. Upon the basis of that evidence Mr. Moran submitted that the contract would have been unprofitable and that Jones suffered no loss as a result of the breach of it by the producers.

9 Counsel for the plaintiff submitted that so narrow a view of the matter should not be

entertained. He contended that in the light of the changing conditions that prevailed. in the spring of 1963 with respect to storage of milk by the producers and hauling of milk to the dairy, that Jones would have used his contracts with the Creston producers as a base for a wider operation which would have increased his revenue and also increased his costs. But he would have been able to spread his fixed costs over a wider base. Counsel for the defendants rejected this view upon the basis that there was no evidence that jones would probably have hauled for the Cranbrook producers in addition to his Creston customers.

10 An examination of the evidence at the previous trial supports the view that Jones intended to seek the hauling business of the Cranbrook producers when the bulk hauling commenced. Mr. Cotton, a witness called by the plaintiff, testified, Case p. 146, line 6:

> "Well, I went to see Mr. English numerous times, but one time in particular I remember, that was probably some time in May, shortly before they started hauling and I had asked him previously what they were going to charge me if they hauled and they said they didn't know. So I went to Cranbrook and got hold of Mr. Schultz and Mr. Decker.
>
> Q. Who are they?
>
> A. They are two shippers in Cranbrook.
>
> Q. Yes?
>
> A. And we went down to the Dairy and we spoke to Mr. English about hauling because Mr. Jones had given us a price but the Dairy wouldn't give us a price and we asked him what they were going to charge us to haul and he said he didn't know...."

11 Some evidence given by Mr. English at the previous trial is also of significance in this connection. He said, Case p. 197, line 22:

> "Q. Did you in the course of your meeting with these shippers, which of them were shippers, did you tell them Purity Dairy was going to insist on the milk being hauled in its vehicle?
>
> A. Anything that I have said to the producers at these meetings in this respect was that Purity policy was to haul their own milk and that the facilities in the plant only warranted the handling of one bulk tanker - one tanker.
>
> Q. What does that mean?
>
> A. It means that we have the facilities of washing and pumping out, this type of thing, of one tanker.
>
> Q. There wasn't an economic load for two tankers. There wasn't a sufficient quantity of milk to warrant an economic haul for two tankers, isn't that right?
>
> A. This, I don't know.
>
> Q. You knew that there was an economic haul for one tanker?
>
> A. Yes."

12 In addition to this evidence there is evidence that the Public Utilities Commission would not license a carrier whose proposed contract was not economically viable. Involved in this was the consideration as to the public need for additional carriers in any given area. Then there is the

evidence of Duggan, together with the contract, Exhibit 7, which shows in clause 11 that Kootenay Dairy Transport Ltd. now hauls for the producers in the Cranbrook and Creston area to the Purity Dairy at Cranbrook. The dairy called no evidence on the assessment and therefore I conclude that the situation remains unchanged since 1963 and that the dairy has the facilities to handle only one tanker. Upon this evidence I conclude that if Jones had hauled the bulk milk for the Creston producers he would probably have done so for the producers in the Cranbrook area as well. Further, if Jones was to be the only licensed carrier in the area then it is unlikely the dairy could have obtained a licence for a tanker of its own. I note that the dairy commenced on June 1, 1963 to haul with an unlicensed tanker. Further the dairy has since given uphauling the producers' milk and now has Kootenay Milk Transport Ltd. haul the milk. I conclude that if the producers had honoured their contractual obligations to the plaintiff it is probable that Jones would have been able to effect delivery to the dairy despite its threats. The dairy needed the milk in order to meet the requirements of its customers. Therefore I am unable to accept Mr. Moran's alternative submission that the producers' breach of contract did not cause any loss to the plaintiff, because even if they had permitted the plaintiff to collect their milk on and after June 1, 1963 he could not have effected delivery to the dairy. That is not my interpretation of the effect of the evidence.

13 There is a further matter to be considered. Jones had a contract with the dairy to back-haul products from Cranbrook to Creston. For this he received a flat payment plus a commission. In his action against the dairy he claimed damages for breach of this contract. At trial this claim was dismissed and no appeal was taken therefrom. It appears from the reasons for judgment at trial that in anticipation of the dairy hauling the milk itself it gave notice to Jones that it would do the back-haul when it commenced hauling the milk. Upon the basis that Jones accepted this notice of termination, his claim for breach of contract was dismissed. However, it is clear that the termination of the back-haul was linked to the commencement by the dairy of the hauling of the producers' milk. Upon the basis that only one tanker was going to be used in this operation it would seem reasonable to conclude that if the dairy had not wrongfully induced a breach of the contracts between the plaintiff and the producers, that Jones in hauling the producers' milk would likewise have continued to perform the back-haul for the dairy. Duggan apparently does not do so. He is a volume operator and explained that there was quite a bit of time involved in making the back-haul. But Jones was a small operator, he was doing the back-haul and I think it probable he would have continued to do so. The income from this source which Mrs. Jones estimated at approximately $14,000.00 over the three years of the contract with the producers, would not have appreciably increased Jones' cost of operation as he had to return from Cranbrook to Creston in any event.

14 These considerations lead me to conclude that the submissions of Mr. Moran must be rejected. The contract between Jones and the producers, viewed in this way, appears to indicate that he would have enjoyed a profit from it. The projections of Mrs. Jones can only be treated as rough calculations and likewise the expenses involved must to some degree remain uncertain. In this connection I note that Mrs. Jones' calculations were based on 549 trips while the contract called for 624 trips; these additional trips would have increased the expense of carrying out the Creston producers' contracts.

15 There is another consideration upon this aspect of the matter. Jones' contracts with the producers contained what Laskin J. has referred to as "this badly worded termination clause":

> "This Contract may be Cancelled by either party by: Contract may be terminated by Mutual Agreement with 90 days notice in writing. Option of contract renewal to be given 90 days before contract Termination."

Counsel for the plaintiff contended that clause contained an option to renew the contract in favour of the plaintiff.

16 Duggan testified that it is usual in the milk hauling business to have a hauling contract renewed. The hauler who has the contract has the necessary equipment, the required licences and the experience. Jones had enjoyed the confidence of the producers. They had contracted with him to haul their canned milk and had contracted with him to haul their bulk milk. They would have permitted him to do so but for the wrongful interference of the dairy. Duggan testified that if the contracts with the producers had been renewed at the end of the three years, and upon the assumption that Jones was hauling as well for the Cranbrook producers, the contracts at that time could have been sold to another hauler for $10,000.00. I conclude however that the foregoing clause does not contain an option to renew in favour of the plaintiff. To award damages for the possibility that the contracts might be renewed appears to me to be too remote. I would merely be speculating about the position at the end of the contracts.

17 The plaintiff also seeks to have an amount included in the award for the fact that a truck purchased by him in 1962 to haul the cans of the Creston producers was sold by a finance company. The plaintiff had made a down payment of $1,703.00 when he purchased the truck. He estimated he lost $2,400.00 when the truck was sold sometime about September, 1963. After the breach of contract by the producers on June 1, 1963 the plaintiff was unable to make the monthly payments due to the finance company. He then agreed that the finance company could sell the vehicle. He apparently lost his equity in the truck as a result of the sale. In my view this damage is too remote to recover for this claim against the producers. There is no evidence that the producers knew that the purchase of the truck had been financed or that breach of the contract would prevent the plaintiff from making the payments. Considering the principles discussed in Hadley v. Baxendale, (1854) 9 Ex. 341, Victoria Laundry (Windsor) v. Newman Industries (1949) 2 K.B. 528 and Czarnikow Ltd. v. Koufas, [1969] 2 A.C. 350, I conclude that such knowledge is not to be imputed to these defendants. Therefore this loss is not to be take into consideration in an award of damages for breach of contract.

18 In respect of all these considerations there are a number of contingencies involved. One important consideration is that Jones was essentially a one man operation and so everything depended on his continuing ability to perform the contracts.

19 Upon a consideration of the loss of profits suffered by the plaintiff as a result of breach by the producers of their contracts, excluding any allowance for the option to renew at the end of the three years, and after deducting the anticipated expenses of performing those contracts and then allowing for the contingencies, I conclude the loss to Jones by reason of the breach of contract by the producers amounted to $15,000.00.

20 Turning to a consideration of the damages flowing from the tort committed by the dairy, the plaintiff seeks to have the matter considered upon the basis that the damages are damages at large. Lumley v. Gye, (1853) 2 E. & B. 216; Exchange Telegraph Co. v. Gregory, (1896) 1 Q.B. 147. Upon the basis of the latter decision the plaintiff contended that it was not necessary to give proof of specific damage and that therefore it was not necessary to call the Cranbrook producers. Once the plaintiff established that he has suffered damage, counsel contended I

should award an appropriate sum for the damages flowing from the wrongful act of the defendants. In the preset case the plaintiff said, upon the basis of the decision in Platt v. British Medical Association, [1919] 1 K.B. 244 and Posluns v. Toronto Stock Exchange and Gardiner, (1965) 41 D.L.R. (2d) 210; affirmed (1966) 53 D.L.R. (2d) 193; (1968) 67 D.L.R. (2d) 165 (Supreme Court of Canada), that the damages should take into consideration the humiliation suffered by the plaintiff and the sum awarded must be based upon this consideration. As well, counsel for the plaintiff cited Rookes v. Bernard, [1964] A.C. 1129; Cassell & Co. Ltd. v. Broome, [1972] A.C. 1027; Bahner v. Marwest Hotel Co. Ltd. et al, (1969) 6 D.L.R. (3d) 322, affirmed (1970) 12 D.L.R. (3d) 646.

21 The law on this subject appears to be aptly summarized by the author of McGregor on Damages, 13th ed., at page 893, as follows:

> "The primary protection afforded by the tort ushered in by Lumley v. Gye is against business losses; business men cannot complain of injured feelings alone. If however pecuniary loss is shown, then Pratt v. British Medical Association is authority for allowing, in addition, damages for non-pecuniary loss."

22 In the present case I have concluded that the plaintiff suffered pecuniary loss as a result of the wrongful act of the dairy. It is necessary therefore to consider whether, in addition to the damages for pecuniary loss, the plaintiff is entitled to damages for non-pecuniary loss.

23 Counsel for the plaintiff relied upon the following events as showing that the dairy humiliated the plaintiff:

(1) On May 31, 1963 the plaintiff attended at the dairy to have the tank washed in preparation for commencing bulk hauling on June 1, 1963. After waiting five hours the plaintiff went elsewhere and had the tank washed;

(2) the dairy wrote letters to the plaintiff and induced the producers to write letters to the plaintiff terminating their contracts with him, unless he could obtain a new contract with the dairy to haul the milk, knowing, counsel asserted, that the dairy would not grant such contract;

(3) the plaintiff was compelled to seek the assistance of Mr. Somerfeldt to attempt to persuade the producers to honour their contractual obligations to the plaintiff;

(4) the plaintiff was compelled to consult a solicitor in order to recover some money owing to him from the dairy;

(5) the dairy successfully resisted an application by the plaintiff to obtain an interlocutory injunction;

(6) as a result of the breach of contract the plaintiff agreed with British Acceptance Corporation to sell one of his trucks because he could not afford to make the payments then due.

24 I do not regard the matters I have enumerated as evidence that the dairy humiliated the plaintiff. Therefore in assessing damages I approach the matter upon the basis of the pecuniary loss suffered by the plaintiff.

25 What, then, is the appropriate sum having regard to the pecuniary loss disclosed by the

evidence? The dairy was aware of the contracts between Jones and the producers. It was aware that only one tanker could be accommodated by the facilities at the dairy, thus the operation was by this factor limited to one tanker. It was aware that Jones had approached producers in the Cranbrook area to obtain the hauling of their bulk milk as well. It was aware that in regard to the back-haul the person hauling from Creston to Cranbrook was the logical one to perform the back-haul. I suppose that is precisely why it was referred to as a back-haul. When the dairy set out upon its wrongful course of action to induce the producers to breach their contracts so it could displace Jones in hauling their milk, the dairy knew that it was destroying the basis of his business operation and that incidental thereto he would suffer a loss over and above the loss resulting from the breach of contract by the producers.

26 Counsel for the defendant dairy did not contend that the loss of the Cranbrook shippers' business and the loss of the back-haul was too remote. I conclude that indeed they are not too remote a consequence to be taken into consideration in assessing damages against the dairy. In Quinn v. Leathem, [1901] A.C. 495, Lord Lindley said at page 537:

> "This violation of duty by the defendants resulted in damage to the plaintiff - not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage."

27 Salmond on Torts, 14th edition, at page 707 states the matter this way:

> "The defendant is held responsible for all those consequences which he actually desired and intended to inflict upon the plaintiff, however remote map be the chain of causation by which he effected his purpose."

28 In the present case the dairy knew and intended, in committing the tort, that the plaintiff would suffer the loss of the back-haul contract. Ordinarily, lawful termination of the back-haul contract would not give rise to any liability for damage. Here the termination of the contract was linked with the attempt of the dairy to take over the hauling of the producers' milk. To accomplish that objective the dairy resorted to the wrongful act of procuring a breach of contract. In assessing the damages flowing from that wrongful act I conclude I should have regard to the loss flowing from the termination of the back-haul contract. That act is inextricably bound up with procuring the breach of contract. English told Jones on March 27, 1963 that as soon as the tanks were calibrated the dairy would be hauling bulk milk plus the haul-back. On May 30 this was confirmed in writing by English. Once the breach had been procured it followed that Jones would lose the back-haul contract. Thus that loss flowed from the tort committed by the dairy.

29 Likewise the dairy knew and intended, in committing the tort, that the plaintiff would suffer the loss of the business of the Cranbrook producers. Therefore these are matters to be taken into consideration in assessing his damages.

30 McGregor on Damages, 13th ed. at page 893 states:

> "The type of damage that is likely to be inferred by the court is loss of profits. This may be the profit that the plaintiff would have made on the contract the breach of which the defendant has induced. Alternatively, it may be the profit that the plaintiff is prevented from making on other contracts."

31 In the present case it appears on the evidence that the plaintiff suffered a loss of profits on

the producers' contracts, on the back-haul contract and of the profit he would have made on the Cranbrook producers' shipments. Thus, I conclude these are all matters to be taken into consideration in assessing damages against the dairy. But in regard to the pecuniary loss suffered in respect of the Cranbrook producers, while I may take it into consideration., I am unable to measure it because of the course counsel for the plaintiff chose in not calling these producers. However I bear in mind the dictum of Lord Hailsham, L.C. in Cassell and Co. Ltd. v. Broome, supra, at page 1072: "In other words the whole process of assessing damages where they are 'at large' is essentially a matter of impression and not addition."

32 Turning to the truck which was sold by the finance company, the question is whether it was reasonably foreseeable that the wrongful act of the dairy would cause Jones to lose his equity in the vehicle; The Wagon Mound (No. 1), [1961] A.C. 388; King v. Gower (1967) 70 W.W.R. 581. There is no evidence that the dairy had knowledge that Jones had financed the purchase of the vehicle in 1962 and that he was making monthly payments to a finance company. I conclude it was not reasonably foreseeable that the tort would involve such loss and that it is too remote to take into consideration in assessing damages against the dairy.

33 I conclude, having regard to the foregoing considerations that the appropriate amount to award an these circumstances is $25,000.00.

34 During the three year period from June 1, 1963 Jones, after eleven months of unemployment, found a job and earned a total of $8,900.00. The defendants are entitled to have this sum taken into account by way of mitigation of damages.

35 As against the defendants the plaintiff seeks interest on the aforesaid amounts from the date of judgment at the first trial, January 12, 1966. I conclude that the plaintiff is so entitled; Gordon v. City of Victoria, (1900) 7 B.C.R. 339; Northwest Dredging Company v. Pioneer Towing Company Limited, British Columbia Court of Appeal, November 2, 1960, (unreported).

36 As well, the plaintiff seeks interest on the costs now to be taxed as a result of the judgments in the Court of Appeal, Supreme Court of Canada and here. In view of the wording of those judgments I conclude the plaintiff is entitled to such interest; Star Mining v. White (1910) 15 B.C.R. 161.

37 There will be judgments against the two sets of defendants accordingly.

38 Counsel may speak to the matter further, should it be necessary, in the course of drawing the formal judgments.

HINKSON J.

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