

Indexed as:
Bahan v. William Bartlett & Son Ltd.

Between
Mary Bahan, Olga Bahan, Iwan Bahan, Michael Bahan and
Stefan Bahan, Plaintiffs, and
William Bartlett & Son Limited, Salvatore Formusa, Cosima
Formusa and Frank Formusa, Defendants

[1990] O.J. No. 2168

Action No. 11132/86

Ontario Court of Justice - General Division
Toronto, Ontario

Gotlib J.

November 15, 1990

Practice -- Costs -- Party and party costs -- Successful party.

This was a determination of costs. The plaintiff brought an action for damages and members of her family brought claims under the Family Law Act. The matter was heard by a jury and took nine trial days. Four days before the trial, the plaintiff applied to amend her pleadings to plead the Sale of Goods Act and the Occupiers' Liability Act. On the first day of the trial, the plaintiff was permitted to plead only the Occupiers' Liability Act. The three individual defendants then successfully applied for nonsuit. The jury dismissed the plaintiffs claim against William Bartlett and Sons. The plaintiff was impecunious.

HELD: The defendant William Bartlett and Sons was awarded costs party and party costs and the individual defendants were awarded such costs up until the case against them was dismissed. While the plaintiff was impecunious, there was no reason not to award costs against her.

Statutes, Regulations and Rules Cited:

Family Law Act, 1986, S.O. 1986, c. 4. Occupiers' Liability Act, R.S.O. 1980, c. 322. Sale of Goods Act, R.S.O. 1980, c. 462.

David Zarek, for the Plaintiffs.

T. Collier, Q.C., for the Defendant, Bartlett.

Barry A. Percival, Q.C., for the Defendants, Formusa.

GOTLIB J.:-- The above-noted action came on for trial before a jury, and was heard October 15th, 16th, 17th, 18th, 19th, 22nd, 23rd, 24th and 25th, 1990. Six witnesses were heard, and the discovery of D. Lucas was read in as part of the plaintiff's case and reports of Dr. Trevor Gray and Dr. Kennie were filed as evidence on behalf of the defendant William Bartlett & Son Limited. At the commencement of trial, the court was advised that the Family Law Act claimants would not proceed with the Family Law Act claim. The defendant William Bartlett & Son Limited had agreed to the dismissal of that part of the action without costs. The defendants Salvatore Formusa, Cosima Formusa and Frank Formusa did not so agree.

On October 11th, 1990, the plaintiff gave notice that she wished to amend her statement of claim to plead also the Sale of Goods Act and the Occupiers' Liability Act. This court ruled on the first day of trial that an amendment to the Statement of Claim would be allowed to include the Occupiers' Liability Act, and the application to plead the Sale of Goods Act was denied.

On October 23rd, 1990, counsel for the defendant Salvatore Formusa, Cosima Formusa and Frank Formusa moved for non-suit on the ground that there was no duty of care by those defendants to this plaintiff and that the Occupiers' Liability Act did not apply in the circumstances and on the facts of this case. On October 24th, 1990, at 9:30 a.m. this court ruled that those matter of law that those defendants could not be considered occupiers under the Occupiers' Liability Act. Counsel for the defendants Formusa, and Mr. Salvatore Formusa were excused from the court at about 10:00 a.m. on that day.

The jury were instructed that the defendants Formusa had been let out of the action. On October 25th, 1990 the jury returned a verdict dismissing the plaintiff Mary Bahan's action against the defendant William Bartlett & Son Limited. In assessing costs, the jury was of the view that she was entitled to \$10,000.00 for pain and suffering.

As not all counsel were before the court at the time the jury returned its verdict, the court requested written submissions which have now been received and considered. Despite the impetuosity of the plaintiff, there is no reason why costs should not follow the event. Therefore party and party costs will be awarded to the defendant William Bartlett & Son Limited against the plaintiff Mary Bahan, to be assessed. Party and party costs will also be awarded to Salvatore Formusa, Cosima Formusa and Frank Formusa against all of the plaintiffs. With particular reference to the plaintiff Mary Bahan, the defendants Formusa shall have their costs up to 10:00 a.m. on October 24th, 1990. With respect to the family law plaintiffs the defendants Formusa shall have their costs up to the beginning of trial October 15th, 1990. If indeed no time was spent on the Family Law Act claims, as alleged by counsel for the plaintiff, that would become apparent when those costs are assessed.

The matter was pre-tried twice without a settlement being arrived at by the parties. Counsel for the plaintiff indicates that he made a formal offer to settle under the Rules, but has not furnished to the court a copy thereof. In any event that offer was not accepted by either of the defendants, and the jury's verdict did not approach the amount requested by the plaintiff in the formal offer to settle. The court has been advised of informal offers to settle by the defendants during the course of the trial, but these were clearly not taken up by the plaintiff.

GOTLIB J.