IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *J.D. v. Chandra,*
2014 BCSC 1272

Date: 20140710
Docket: M094259
Registry: Vancouver

Between:

J.D.

Plaintiff

And

Daniel Subhas Chandra

Defendant

- and -

Docket: M110495
Registry: Vancouver

Between:

J.D.

Plaintiff

And

Lauren Collier

Defendant

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment - Costs

Counsel for the Plaintiff:	Paul G. Kent-Snowsell
Counsel for the Defendants:	Lyle G. Harris, Q.C.
Place and Date of Hearing:	Vancouver, B.C. June 19, 2014
Place and Date of Ruling:	Vancouver, B.C July 10, 2014

Introduction

[1] The plaintiff was awarded damages of $516,398 for her injuries suffered in two accidents, the first one occurring when she was 17 years old and in her last year of high school. The trial judgment is indexed at 2014 BCSC 466.

[2] Both parties now appear to make submissions on costs.

Parties' Positions

[3] The plaintiff's position is that she should be awarded her entire costs of the action, but double costs for the conduct of the trial. This is because the plaintiff delivered an Offer to Settle to the defendants on the eve of trial, and substantially bettered her offer in the resulting judgment.

[4] The defendants' position is that double costs should not be awarded. The defendants submit that the offer was delivered too late, or to put it another way, too close to the trial date. In addition, the defendants submit that the judicial feedback they received at a Judicial Settlement Conference, just days before the plaintiff's Offer to Settle, justified the defendants' failure to accept the Offer to Settle.

[5] The defendants also argue that the plaintiff should be deprived of costs relating to the issue of whether or not the injuries she sustained in the accident caused her to lose the ability to attend medical school. In this regard, the defendants seek the costs of an expert they retained, Dr. Nix, and one-and-a-half days of trial which they attribute to this issue, and which includes the cross-examination of Dr. Nix as well as some of the cross-examination of the plaintiff.

Analysis

[6] I will first deal with the impact of the Offer to Settle, and then I will address the argument regarding divided success at trial.

Offers to Settle

[7] Rule 9-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, permits the court to take into account an offer to settle in making an award of costs.

[8] There is no dispute that the Offer to Settle made by the plaintiff in this case complied with that Rule.

[9] There are a number of costs options open to a court when taking into account an unaccepted offer to settle which the person making the offer bettered at trial. Some of these options depend on whether the offer to settle was one made by a defendant or a plaintiff.

[10] A typical result for a plaintiff, if the plaintiff's offer to settle is considered, is to award the plaintiff double costs of the proceeding after the date of delivery or service to the offer to settle, pursuant to Rule 9-1(5)(b). This takes into account that the plaintiff would normally be entitled to costs of success at trial. By doubling the costs after delivery of the offer to settle, the plaintiff is awarded an additional set of costs for having made reasonable efforts to settle.

[11] When a defendant is relying on an offer to settle the result is often to deprive the plaintiff of costs and to award the defendant the defendant's costs after the date of the defendant's offer, even if the plaintiff did succeed in obtaining a judgment at trial which would normally entitle the plaintiff to costs: see for example Rule 9-1(5)(a) and (d). This is roughly equivalent in concept to the situation where the plaintiff is awarded double costs for a reasonable offer, because in each case the offering party is given a set of costs they would not otherwise be entitled to as a reward for making a reasonable offer.

[12] Rule 9-1 lists some of the considerations the court may weigh in taking into account an offer to settle in awarding costs, as follows:

> (6) In making an order under subrule (5), the court may consider the following:
>
> (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
>
> (b) the relationship between the terms of settlement offered and the final judgment of the court;
>
> (c) the relative financial circumstances of the parties;
>
> (d) any other factor the court considers appropriate.

[13] Considering the second factor above, the relationship between the terms of settlement offered and the final judgment of the court, there is no question that the plaintiff obtained a final judgment that was better than her offer. She offered to settle for $200,000 plus costs. As noted, the trial judgment was more than double this. This factor weighs in favour of taking the offer to settle into account.

[14] As for the relative financial circumstances of the parties, there is no contest that the plaintiff was a student at the time of the trial and did not have any significant income that would afford her the luxury to ignore the risks of a trial. The defendants were represented by counsel for Insurance Corporation of British Columbia (ICBC), which is well-financed and could afford to take the risks of trial. This factor, therefore, also weighs in favour of taking the plaintiff's offer to settle into account.

[15] As to whether the offer to settle was one that ought reasonably to have been accepted, the defendants advance two arguments.

[16] One of the defendants' arguments is that the offer was delivered too close to the start of trial. The offer was delivered at the end of the day on Friday, January 31, 2014, and counsel for the defendants submits that he did not see it until the next day, Saturday, February 1, 2014. The trial was set to and did commence the following Monday, February 3, 2014.

[17] The shortness of time to consider the offer does give me pause. However, counsel for the plaintiff has pointed out case authorities where ICBC has taken the position that offers it has delivered to plaintiffs on the eve of trial ought to be considered by the court in depriving the plaintiff of costs. These arguments have been accepted in some cases, for example, see *Bevacqua v. Yaworski*, 2013 BCSC 29.

[18] As noted by Mr. Justice Voith in *Brewster v. Li*, 2014 BCSC 463, there is currently no requirement in the Rules that an offer be made within a specific time from the start of trial. The question of what is a reasonable time to consider an offer is "largely driven and governed by context" (para. 26).

[19] Here, the context was that counsel for the defendants had delivered an offer to settle on January 21, 2014; the parties had attended a Judicial Settlement Conference on January 29, 2014, and the defendants had delivered an additional offer to settle on January 30, 2014. This context suggests that the defendants were in a position where they were well able to analyze the risks of going to trial and the relative merits of each side's position.

[20] There was nothing complicated about the offers to settle which required lengthy analysis. The parties were just exchanging dollar amounts. There was no revealing new analysis of the issues or last minute disclosure of material information.

[21] The plaintiff's form of offer to settle adopted a form similar to that of the defendants.

[22] The defendants were represented by experienced counsel for ICBC. I find that the defendants were in a good position to be able to analyze and respond to the offer within hours, if not minutes. I find that the defendants had sufficient time to assess the reasonableness of the plaintiff's offer to settle.

[23] As a second argument, counsel for the defendants made submissions on this costs hearing that the court should take into account the defendants' perspective after attending a Judicial Settlement Conference between the parties conducted on January 29, 2014. Counsel for the defendants suggests that the key issue between the parties had to do with the risks of an award for future loss of earning capacity, and that the judge presiding suggested the risks were greater to the plaintiff than the defendant on that issue. The defendants submit that this means the defendants were reasonable in not accepting the plaintiff's offer.

[24] There are several reasons why I reject this submission.

[25] Firstly, counsel's submissions as to what a judge indicated on a settlement conference ought not to be admissible. There is no record of that proceeding unless one is ordered, and one has not been ordered. Counsel may well be taking the comment out of context or might not be remembering it accurately. This Court on

this costs hearing does not have the full context of the submissions made to or other comments made by the settlement conference judge.

[26] Secondly, a Judicial Settlement Conference judge does not make comments during a settlement conference with a view to predicting the outcome of a trial. A settlement conference judge is not an advisor to the parties. The settlement conference judge does not replace the role of counsel and the litigants themselves in assessing offers to settle.

[27] All parties attending a settlement conference know that there is a limited opportunity for the presiding judge to gain a fair appreciation of the facts and evidence. The submissions of the parties during the settlement conference may be influenced by posturing and might not be an objective reflection of the evidence or a studied exposition of the law. The judge may not have had the time or been asked to read the expert reports and will not have seen witnesses testify.

[28] Furthermore, there are a number of factors to take into account in trying to achieve a settlement which may not play a large role at trial. A prime example in this case was the possibility that the plaintiff was very reluctant to go to trial. As noted at para. 7 of the trial ruling, ultimately she applied for an order anonymizing her name. This was because she hoped to start a career in law and was very fearful that the evidence and claims could affect her future employability. During her evidence at trial she became quite visibly upset at the prospect that future employers might not hire her because of her difficulties with pain.

[29] There are strong policy reasons for not considering judicial comments at a settlement conference when taking into account the reasonableness of a party's position in rejecting a formal offer to settle. To find otherwise would seriously inhibit the candour of all parties at a settlement conference. It could turn judicial settlement conferences into an opportunity for parties to strategically shape their submissions for the ultimate goal of using the resultant judicial remarks against the other in later costs' applications. This kind of costs-seeking strategy should not be the focus or

side-effect of a judicial settlement conference. Rather, the focus should be on trying to settle the case.

[30] Of course if formal offers to settle are made by a party at or after a judicial settlement conference, these indeed can be considered, as they have been here. This is a far different thing than suggesting a party should be permitted to pick and choose a judge's comments on a judicial settlement conference to support the positions they took in respect of offers to settle.

Conclusion Regarding Impact of Offer to Settle

[31] In conclusion, I consider that the offer to settle made by the plaintiff in this case is one that ought to be taken into account in awarding costs. The defendants had time to consider the offer in the context of the exchange of offers that preceded it. The defendants knew that the plaintiff was not likely to be in a financial circumstance that allowed her to take the risk of losing at trial but that ICBC could afford the risk of trial, and they chose to take this risk. It is likely that the defendants also would be able to predict the plaintiff's extreme reluctance to go to trial due to her concerns as to how it might affect her future career but it is not necessary to make any finding in that regard.

[32] Considering all the circumstances, I consider it appropriate to award the plaintiff double costs for the trial and regular costs prior to trial.

Divided Success

[33] Rule 14-1(15) permits a court to award costs:

> (15)The court may award costs
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> (a) of a proceeding,
>
> (b) that relate to some particular application, step or matter in or related to the proceeding, or
>
> (c) except so far as they relate to some particular application, step or matter in or related to the proceeding
>
> and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

[34] The defendants argue that the court ought to award the defendants costs in relation to one issue at trial, which is whether or not the plaintiff's injuries caused her the loss of capacity to attend medical school and thus a loss of earning capacity as a medical doctor.

[35] It is correct that this was a sub-issue at trial of the broader issue of whether or not the plaintiff should be awarded damages for loss of earning capacity, and if so, the measure of those damages. It is also correct that the plaintiff did not succeed in proving this sub-issue. However, the plaintiff did succeed in proving the broader issue, loss of earning capacity.

[36] The defendants argued at trial that the plaintiff was not entitled to any award for loss of earning capacity.

[37] In *Sutherland v. Canada (A.G.)*, 2008 BCCA 27, the Court of Appeal held at para. 31 that the test for apportionment of costs under the predecessor Rule was:

> (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
>
> (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
>
> (3) it must be shown that apportionment would effect a just result.

[38] In *Sutherland*, the plaintiffs succeeded in proving nuisance, but otherwise lost the case. The trial judge found that 25 of 39 days of trial were taken up with the nuisance issue, and so apportioned costs accordingly. The Court of Appeal held that the trial judge erred by failing to take into account the fact that the defendants did not prolong the case unnecessarily with respect to their conduct on the issue of nuisance (at para. 34).

[39] There is no material difference between the interpretation of the current Rule and the predecessor Rule: *Lee v. Jarvie*, 2013 BCCA 515.

[40] I do not consider that it would be just to parse out the costs of this sub-issue for a number of reasons.

[41] First, it is difficult to say that the defendant's expert evidence, that of Dr. Nix, was in its entirety necessary at trial. The plaintiff opposed the admissibility of his opinion. The plaintiff did not put forward her own expert witness on this issue, and so Dr. Nix's evidence was not responding to a contrary opinion. A large part of Dr. Nix's opinion was determined to be inadmissible.

[42] Second, the plaintiff's position that she would have qualified to get into medical school but for the accident was an honestly held belief on her part. It was indeed her dream before the accident. The fact that she was injured made it difficult to predict what she would have achieved but for the accident. A plaintiff who is injured at a young age cannot be blamed for not having the historical record to rely on when trying to put forward scenarios as to what she might have achieved but for the accident.

[43] Third, as mentioned the issue of whether or not the plaintiff would have been able to attend medical school but for the accident was but a sub-issue of the larger issue of whether or not the plaintiff suffered a loss of earning capacity. Her evidence as to her pain and her difficulties concentrating in her studies was relevant to both the sub-issue and the larger issue. It is not possible to neatly parse out the evidence on the sub-issue. The evidence on the sub-issue, and argument, was not sufficiently distinct from the larger issue of loss of earning capacity and I find that it would not be possible to identify the time attributable solely to the sub-issue.

[44] I also find that the plaintiff did not unnecessarily prolong the course of trial on this sub-issue.

[45] Lastly, the fact remains that the plaintiff won the larger issue at trial, and that is, she did succeed in obtaining an award for damages for loss of future earning capacity, which loss was denied by the defendants. There was no divided success on the issue. It strikes me as an absurd result to suggest that she should be partially denied her costs simply because she did not succeed on one of her alternative theories as to what her future hypothetical career might have been but for her injuries.

[46] The approach of the defendants, if accepted, would invite every unsuccessful litigant to comb through every argument and piece of evidence submitted by the other party at trial for purposes of finding those that were not accepted by the trial judge and seeking a division of costs accordingly. This fails to recognize the complexity of presenting a case at trial and the complexity of legal arguments.

[47] In my view the defendants' approach would also not be in the interests of the administration of justice, as it would unduly complicate and extend the expense and turmoil of litigation. The law should facilitate simplified, predictable and speedy resolution of costs issues, in the interest of proportionality and access to justice, consistent with Rule 1-3(2).

[48] Litigants who have been through the long and arduous process of litigation through to completion of trial ought not to then be required to re-litigate excessively over costs issues except in exceptional cases. Most parties represented by counsel ought to be able to settle costs issues, rather than consider that costs issues are a roulette wheel to be spun in every case. Also in the interests of proportionality and access to justice, other parties waiting to come to court to resolve disputes on the merits should not have their wait unduly prolonged because the courts are clogged with disputes over the costs of litigation.

[49] Litigants should understand that the normal rule is that costs go to the successful party at trial, unless there is good reason otherwise: Rule 14-1(9). This is not one of those exceptional cases where there is good reason to deny the successful party a portion of her costs.

Conclusion: Divided Success

[50] The defendants' request for a divided costs award based on the fact that the plaintiff did not succeed on one argument she advanced at trial in support of her

claim for damages for future loss of earning capacity, despite the plaintiff succeeding in obtaining an award of such damages, is denied.

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The Honourable Madam Justice Susan A. Griffin