

CANADA / JUDGMENT

Assadimofrad v. Cowan

2020 BCSC 1276

COURT

Supreme Court of British Columbia

DECIDED

28 August 2020

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2020 BCSC 1276 Assadimofrad v. Cowan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Assadimofrad v. Cowan,

2020 BCSC 1276

Date: 20200828

Docket: M165449

Registry: Vancouver

Between:

Pooneh Assadimofrad

Plaintiff

And

Doris Margaret Cowan and William Donavon Cowan

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment - Re: Costs

(Via teleconference)

Counsel for the Plaintiff:

K. Miles

C. Caldwell

Counsel for the Defendants:

S Markovich

P. Harden

Place and Date of Hearing:

Vancouver, B.C.

June 11, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 28, 2020

- [1] This action arose as a result of a motor vehicle accident on August 27, 2014 in North Vancouver, B.C. The plaintiff's car was rear-ended by the defendant Ms. Cowan. The defendants admitted liability for the accident.
- [2] The trial was heard by a jury over 8 days, beginning on January 27, 2020. At issue were causation and quantum of damages.
- [3] Both the defendants and the plaintiff have brought applications seeking costs in this action. The plaintiff seeks taxable costs and disbursements throughout, as well as costs of her application. The defendants seek costs from the date of their offer to settle made on January 8, 2020, and costs at scale B for a second counsel for preparation and attendance at trial, as well as costs of their application. I will address both applications in my reasons.

I. Background

- [4] The plaintiff is a skilled dental hygienist, 48 years old at the date of trial, who was the primary breadwinner for her family. She alleged she suffered a number of injuries in the accident, including injuries to her neck, jaw, shoulders, and back, headaches, fatigue, insomnia, anxiety, post-traumatic stress, and depression.
- [5] While the plaintiff was able to continue working as a dental hygienist after the accident, she could not work for more than two consecutive days. She required a day off after two days of work to recover physically from the pain she experienced in doing her work. As a result she could only work 4 days each week. The plaintiff's life outside of work was compromised, and she no longer enjoyed the activities she did before the accident. Her emotional and family life suffered. She was no longer the active, busy, wife, mother, daughter and friend that she was before the accident. Her family members, employers, and co-workers gave consistent evidence that she had to reduce her hours of work, and her behaviour and personality were changed after the accident.

- [6] The plaintiff claimed loss of income, both past and future, arising from the fact that she was not able to work the same hours she did before the accident. This argument was advanced even though her income had increased after the accident. The plaintiff argued that her income would have risen even higher but for the accident, as she would have worked one more day each week.
- [7] The plaintiff also sought non-pecuniary damages and damages for loss of homemaking, and damages for costs of future care.
- [8] A number of expert witnesses were called in the trial. The plaintiff called expert evidence relating to her injuries from the following:
- a) Dr. Finlayson, an expert in physical and rehabilitation medicine, who gave opinion evidence on the diagnosis, prognosis and treatment of the plaintiff's musculoskeletal and psychological injuries,
 - b) Dr. Lu, a psychiatrist, who gave opinion evidence on the diagnosis and treatment of the plaintiff's psychiatric disorders, and
 - c) Ms. Ditson, an occupational therapist with Matheson certification, who gave opinion evidence on the evaluation of the plaintiff's functional and work capacity and cost of the plaintiff's future care.
- [9] The defendants called expert evidence relating to the plaintiff's injuries from:
- a) Ms. Branscombe, an occupational therapist, who gave opinion evidence on functional and work capacity evaluations and cost of future case assessments, and
 - b) Dr. Leith, an orthopaedic surgeon, who provided opinion evidence on the diagnosis, prognosis, treatment and rehabilitation of the plaintiff's orthopaedic and soft tissue and musculoskeletal disorders.
- [10] All of the plaintiff's experts gave opinion evidence which supported a finding that the plaintiff suffered from chronic, ongoing physical and psychiatric injuries as a result of the accident. Dr. Lu testified that the plaintiff suffered from a generalized anxiety disorder, together with chronic pain, which affected her recovery and her ability to function now and would continue to affect her into the future. Ms. Ditson and Dr. Finlayson testified that the plaintiff was not capable of working full time due to her injuries.
- [11] Dr. Leith, for the defence, agreed that the plaintiff sustained injuries in the accident, but differed from the plaintiff's experts in relation to his prognosis and the impact of the injuries on the plaintiff's work. Ms. Branscombe did not provide an independent assessment of the plaintiff's ability to perform her work, and limited her opinion to a critique of Ms. Ditson's opinion.

[12] On January 8, 2020 the defendants delivered an offer to settle to the plaintiff in the amount of \$265,189.30, plus costs and disbursements. On January 24, 2020 the plaintiff delivered an offer to settle in the amount of \$475,000, plus costs and disbursements.

[13] On February 6, 2020, the jury returned a verdict of \$105,200 for the damages suffered by the plaintiff in the accident, broken down as follows:

a)

Non-pecuniary damages

\$40,500

b)

Past wage loss

\$45,300

c)

Loss of future earning capacity

Nil

d)

Loss of housekeeping capacity

\$13,700

e)

Loss of housekeeping capacity

Nil

f)

Special damages

\$5,700

II. Analysis

[14] The parties rely on Rule 9-1 of the Supreme Court Rules which allows a court, when making a decision as to costs, to take into consideration any offers to settle which were exchanged before trial.

- [15] The law is well settled that the purpose of the Rule is to encourage parties to accept reasonable offers. Parties who make reasonable offers are rewarded with costs, and the party refusing a reasonable offer is penalized. *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, *Hartshorne v. Hartshorne*, 2011 BCCA 29, *Walfler v. Trinh*, 2014 BCCA 95.
- [16] In *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30, the court of appeal held:
- [71] One circumstance in which a court may order otherwise under R. 14- 1(9) is where the plaintiff fails to accept an offer to settle under R. 9-1. Rule 9-1(5) sets out the options that are open to a court in circumstances in which an offer to settle has been made:
- (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
- [72] When making an order under R. 9-1(5) the Court may consider the factors set out in R. 9-1(6):
- (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
- [17] In deciding whether to exercise my discretion to award the plaintiff her costs, or to award the defendants costs from the date of their offer, I may consider the factors described in Rule 9-1(6) above.

A. Was the offer one that ought reasonably to have been accepted?

- [18] The reasonableness of the offer must be assessed with reference to the circumstances existing at the time the offer was made, not with reference to the ultimate award. Further, the offer must be considered from the perspective of the party receiving the offer, and the court can consider the reasons why the person declined to accept the offer: *C.P. v. RBC* at para 97.
- [19] In January 2020 when the offers were exchanged, the plaintiff had evidence which supported a substantial claim for loss of earning capacity and costs of future care. At trial both the plaintiff and the defendants tendered economic evidence which supported a loss of future earnings claim. Liability was admitted, and the risk at trial was in relation to quantum.
- [20] In January 2020 the plaintiff was able to work only four days a week. The plaintiff asserted that her loss was approximately \$25,000/year for approximately 20 years, based on her loss of one day of work each week. There was substantial evidence that her condition would not improve and, in fact, could worsen. Regardless of the fact that the plaintiff had increased her income from the date of the accident, the plaintiff had a strong argument that her income would have increased even further had she been able to work a full work week, as she had prior to the accident.
- [21] The plaintiff had a strong report from a qualified occupational therapist who had spent hours examining and assessing her. This report supported the plaintiff's claim that she could not return to full time work, and her work hours may have to be reduced in the future. In addition, the occupational therapist provided a report which supported a substantial future care claim. The present value of the future cost of care claim advanced by the plaintiff was over \$200,000.
- [22] Finally, there was no indication that the plaintiff's credibility was under attack. There were no lay witnesses scheduled to contradict the evidence of the plaintiff's ability to perform her work. Rather, the plaintiff was supported by a number of witnesses, both family and work related, who supported the plaintiff's evidence of the impact of the accident on her life.
- [23] Considering recent awards of non-pecuniary damages, in January 2020 the plaintiff had a good case to advance a non-pecuniary claim in the range of \$70,000 to \$120,000.
- [24] No evidence was tendered by the defence to support a position that the mechanics of the accident were incapable of producing the injuries claimed. Rather, the defendant's own medical expert agreed that the plaintiff was injured in the accident. Further, the occupational therapist retained by the defence had not examined the plaintiff, and limited her report to a review of the plaintiff's expert's report.
- [25] On balance, I find that the plaintiff had a strong case in January 2020 which supported a claim in excess of \$265,189.30. I find that the offer from the defence was not a number which the plaintiff ought to have reasonably accepted.

B. What is the relationship between the offer and the judgment

- [26] The award at trial was more than 50% less than the defence offer. Ordinarily this would justify a costs award in favour of the defence. However, the fact that the award at trial provided a worse outcome for the plaintiff than the defence offer is not determinative in depriving the plaintiff of costs. As stated by Madam Justice Power in *Bains v. Antle*, 2017 BCSC 590, aff'd 2019 BCCA 383:
- [30] As previously noted, the jury's award was significantly less than the defendants' formal offers to settle -- the defendants initially offered \$185,000 new money and the jury awarded the plaintiff \$37,800 old money. On its face, this factor clearly favours denying the plaintiff her costs subsequent to her receipt of the defendants' first formal offer to settle.
- [31] However, as stated by Kelleher J. in *Smagh v. Bumbrah*, 2009 BCSC 623 at para. 13, "[d]ecisions on damages by juries are somewhat more difficult to predict than assessments by judges." Having regard to what was known to the parties prior to the commencement of this trial, I am not convinced that the plaintiff ought to have anticipated a jury award substantially lower than the defendants' final offer to settle.
- [32] I have taken into consideration this noticeable discrepancy, but I am mindful that this factor is not determinative and that in the circumstances, "the court should be cautious in placing too much weight on this factor" (*Smagh*, at para. 14).
- [27] In the case before me, the jury awarded past wage loss of \$45,300, but nothing for future wage loss. There was no medical evidence that the plaintiff had fully recovered from her injuries as of the date of trial. As such, I am not convinced that the discrepancy between the wage loss awards before and after trial is something which the plaintiff could have anticipated. This discrepancy highlights the caution which must be used in placing too much weight on a jury award.
- [28] Jury awards are particularly difficult for parties trying to anticipate likely outcomes, as jury awards are not published. Further, juries generally receive no case law to guide them on quantum assessments and, in the case of non-pecuniary awards, no comparison awards may be provided to them. Parties must rely on the case law established by judges when assessing likely outcomes at trial, but the outcome of a jury trial may depart substantially from a trial outcome before a judge.
- [29] When considering the offer against the judgment, the court in *Park v. Targonski*, 2016 BCSC 31 stated: "As was noted in *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1497, 'Costs should be a penalty for unreasonable conduct in the litigation, not a penalty for failing to guess the outcome.'" In the case at bar, I can find no unreasonable conduct on the part of the plaintiff, and I find that the jury's award was not an outcome which the plaintiff could have reasonably anticipated. As such, I decline to attach much significance to the difference between the jury award and the defence offer, even though that difference is substantial.

C. What are the relative financial circumstances of the parties

[30] The defendants were insured by ICBC. The plaintiff submits that ICBC is a large company with a history of handling billions of dollars, and is in a much better financial position than her. She submits that awarding costs in favour of ICBC would be harsh given her ongoing injuries and pain.

[31] I am not satisfied that the relative financial circumstances of the parties is relevant to the assessment of this case. As in *Park v. Targonski*, there is no evidence that ICBC used its financial resources to lever an unfair advantage. The court in *Smagh v. Bumbrah*, 2009 BCSC 623 stated:

[19] Although the matter is not settled, the emerging consensus appears to be that the financial position of ICBC is not determinative. As Butler J. said in *Arnold v. Cartwright Estate*, 2008 BCSC 1575, 86 B.C.L.R. (4th) 99, at para. 23:

[T]here will always be a substantial difference between the relative financial circumstances of the usual personal injury plaintiff and the defendant's motor vehicle insurer. That difference, in and of itself, is not enough for the Court to exercise its discretion to deprive the defendant of costs. If that was the intent of the new rule, it would have been more clearly articulated.

[20] This third factor is not helpful in this case.

[32] I agree with position stated in *Smagh*, and find that an assessment of the relative financial circumstances of the parties is not a helpful consideration in the case at bar.

D. Are there any other factors relevant to the issue

[33] I find that there are no other relevant factors which will assist me in my determination.

III. Conclusion

[34] The plaintiff was successful in this action. She did receive an award of damages, albeit substantially less than she argued for. She would ordinarily be entitled to her costs of the action. Because the defence made an offer on January 8, 2020, which she did not accept, Rule 9-1 comes into play and I have the discretion to order that the ordinary costs award be varied in favour of the defence.

[35] I decline to exercise my discretion to vary the ordinary costs order. I find that the defence offer, at the time it was made, was not an offer which the plaintiff reasonably ought to have accepted. I also find that the discrepancy between the jury award and the defence offer is not alone sufficient for me to deprive the plaintiff of her costs, for the reasons I have expressed above.

[36] I order that the plaintiff is entitled to her taxable costs and disbursements throughout this action, payable by the defendants.

[37] The application of the defendants for costs is dismissed.

"Baker J."

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