

CANADA / JUDGMENT

Bahniwal v. Johal

2021 BCSC 911

COURT

Supreme Court of British Columbia

DECIDED

12 May 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 911 Bahniwal v. Johal IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bahniwal v. Johal, 2021 BCSC 911 Date: 20210512 Docket: M42166 Registry: Penticton Between: Parbjeet Kaur Bahniwal Plaintiff And Kuldeep Johal and Devinder Johal Defendants Corrected Judgment: The text of the judgment was corrected at paragraphs [32], [34], [35] and [36] on June 10, 2021 Before: The Honourable Mr. Justice G.P. Weatherill Reasons for Judgment re: Costs and Future Expenses Counsel for the Plaintiff: J. Poon Counsel for the Defendants: T.J. Decker Date of Plaintiff's Written Submissions: April 30, 2021 Date of Defendants' Written Submissions May 5, 2021 Place and Date of Judgment: Kelowna, B.C. May 12, 2021

Introduction

- [1] On February 19, 2021, I issued reasons for judgment, indexed as 2021 BCSC 269, awarding the plaintiff \$92,151 in total damages, including \$4,000 for future care costs ("Judgment Amount"). The parties have now made written submissions on costs.
- [2] The Judgment Amount ended up being less than a formal offer to settle made by the defendants on October 15, 2019 (approximately 15 months prior to the start of the trial) in the amount of \$101,000 "new money" plus costs ("Defendants' Offer"). Notwithstanding that she did not beat the Defendants' Offer, the plaintiff seeks full costs and disbursements throughout the litigation, or alternatively, full costs and disbursements to the date of the Defendants' Offer plus disbursements incurred thereafter.
- [3] The defendants assert that their offer to settle was a legitimate and reasonable attempt to settle the claim, that the plaintiff acted unreasonably in rejecting it, and that she ought to be penalized in costs. They seek an order that the plaintiff have her costs to the date of the Defendants' Offer and that they be entitled to costs thereafter. In the alternative, that defendants argue that each party should bear their own costs.
- [4] The defendants also seek an order pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act] in respect of benefits payable under Part 7 of the Insurance (Vehicle) Regulation, BC Reg. 447/83 [Regulation] that of the award of \$4,000 for future care costs, the sum of \$3,620 be deducted, leaving \$380 to be included in the Judgment Amount.

Background

- [5] On January 28, 2017, the plaintiff, age 61, was involved as a right-seat passenger in a single motor vehicle accident. The trial was originally set to commence on November 18, 2019, but could not be heard because no judge was available. It ultimately commenced before me on January 26, 2021, and concluded on January 29, 2021.
- [6] On October 1, 2019, the defendants made a formal offer to settle the plaintiff's claim for \$45,000 plus proven wage loss and special damages. On October 15, 2019, the defendants increased that offer to \$101,000. That offer was never withdrawn.
- [7] On October 16, 2019, the plaintiff offered to settle her claim for \$225,000 and on October 29, 2019, reduced it to \$150,000. On December 19, 2020, the plaintiff withdrew all previous offers and on January 21, 2021, offered again to settle her claim for \$225,000.
- [8] The Judgment Amount was broken down as follows: General Damages (\$60,000 x 90%): \$54,000.00 Special Damages: 1,800.00 Past Wage Loss: 2,351.00 Loss of Future Earning Capacity: 30,000.00 Loss of Housekeeping Capacity: Nil Future Care Costs: 4,000.00 Total: \$92,151.00 Costs
- [9] Rule 14-1(9) provides that a successful party at trial is to be awarded costs unless the court otherwise orders. Rule 9-1 addresses the impact of an offer to settle on the exercise of the court's discretion in relation to costs. Rule 9-1(5) provides the following options:
- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
- (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.
- [10] Rule 9-1(6) sets out the various factors the court may consider in making an order under Rule 9-1(5):
- (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.
- [11] The purpose of offers to settle is to promote settlement by encouraging parties to make reasonable offers to settle before trial. This objective can only be achieved if there is an expectation by both parties that if reasonable offers of compromise are not accepted, cost penalties will flow: *Tisalona v. Easton*, 2017 BCCA 272 at para. 83 [*Tisalona*].
- [12] A plaintiff who rejects what turns out to be a reasonable offer to settle, will usually face some sanction in costs, otherwise the importance of certainty and consequence in applying Rule 9-1 would be undermined: *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at para. 95, citing *Wafler v. Trinh*, 2014 BCCA 95 at para. 81.
- [13] The ultimate question is whether, in all the circumstances, it was unreasonable for the plaintiff to decline to accept the defendants' offer: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at paras. 30-31. Whether or not the plaintiff was acting reasonably in the circumstances is to be assessed without reference to the award which was made at trial, but rather under the circumstances which existed when the offer was open for acceptance: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27. In other words, the reasonableness of the plaintiff's decision to reject the offer must be considered without the benefit of hindsight: *Bains v. Antle*, 2019 BCCA 383 at para. 34 [*Bains*]. Discussion Costs
- [14] As is evident from my reasons, I was not impressed with the plaintiff as a witness. I did not believe that she was suffering as much pain and loss of function as she suggested. I felt she was embellishing her case for the purposes of increasing her damage award. I summarized my findings at para. 83 of my reasons as follows:
- [83] In sum, the plaintiff's evidence was not convincing. I do not accept that her post-Accident physical or psychological condition was as dire as she, and her Family, portrayed it. I did not believe much of Sandeep or Raj's evidence [the plaintiff's son and daughter-in-law] regarding the plaintiff's functional difficulties either. Much of it defied common sense. Given the complicated family dynamics in the Home and the obvious bias and lack of objectivity, their evidence is of limited value.
- [15] Although I accepted that the accident caused soft tissue injuries to her neck and left shoulder regions, I did not accept that her injuries impacted her function as much as either she, or her children, suggested.

- [16] On the issue of costs, the plaintiff asserts that the evidence as it existed prior to the start of the trial, including the medical opinions of Dr. Giantomaso, a physiatrist, Dr. Okorie, a psychiatrist, and Dr. Smallwood (the plaintiff's family doctor who prepared a medical report that was not tendered at trial), dated October 16, 2017, April 26, 2019, and September 26, 2017, respectively, justified her decision to reject the Defendants' Offer and proceed to trial. She says that the evidence, as she understood it at the time, made it reasonable for her to expect she would receive an award in excess of the Defendants' Offer. She says that it would have been difficult for her to have anticipated that I would have found her credibility (and that of her two children) lacking. She says that she had every confidence in her case and that my credibility findings could not have been anticipated. She contends that the expert evidence supported her injuries and it was not unreasonable for her to have confidence in the strength of her case, particularly given that liability had been admitted and the only question was the plaintiff's degree of success, citing to Tisalona.
- [17] This is not a case, she argues, where she knowingly misled experts or otherwise knowingly misrepresented her pre-accident or intervening medical issues. The fact that every case involving soft tissue injury claims raises credibility issues does not in itself, mean that she ought reasonably to have accepted a settlement offer that was substantially less than her damage claim, citing *Talwerdi v. Green*, 2019 BCSC 1891 at para. 26. In the circumstances, she says, it was not unreasonable for her to have rejected the Defendants' Offer of settlement. She says that this Court should be cautious in equating that she guessed wrongly with having been unreasonable in rejecting the offer, citing *Lumanlan v. Sadler*, 2009 BCSC 142 at para. 35.
- [18] In any event, the plaintiff points out that the damage award was very close to the Defendants' Offer and does not favour the exercise of discretion to deny her costs after the date of the Defendants' Offer, citing *Parker v. Martin*, 2017 BCSC 1161; *Mitchell v. Fonseca*, 2020 BCSC 395.
- [19] She also argues that the relative financial circumstances of the parties favours that she be entitled to her costs throughout. She points out that her disbursements alone since the Defendants' Offer approach \$35,000. She argues that the defendants, who are insured by ICBC, are in a far better financial position to cover costs than the plaintiff: *Bains; Cairns v. Gill*, 2011 BCSC 420 at para. 51; *Garib v. Archibald*, 2016 BCSC 1082 at para. 30.
- [20] She also points out that the original trial date of November 8, 2019, was lost due to lack of court time, which resulted in unavoidable expert cancellation fees.
- [21] Respecting the plaintiff's argument on costs, and as was pointed out in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 74, litigants must "make a careful assessment of the strength or lack thereof of their cases. . .".
- [22] In an effort to prove her claim (including a significant loss of future earnings claim), the plaintiff relied heavily on the expert reports of Drs. Okorie and Giantomaso.

- [23] The defendants point out, and I agree, that both Drs. Okorie and Giantomaso did not support the plaintiff's position that her issues were permanently disabling. Their reports would have been available to her shortly after their respective dates. This should have been considered by the plaintiff when assessing the reasonableness of the Defendants' Offer. Additionally, Drs. Okorie and Giantomaso's opinions were based, for the most part, on the plaintiff's own history and subjective reporting which was incomplete and somewhat vague.
- [24] Dr. Okorie noted that the plaintiff had no anxiety or symptoms of depression most weeks and she "reported normal mood with congruent appropriately reactive affect". He diagnosed her as having an "adjustment disorder with mixed anxiety and depressed mood", which is a very common disorder. His opinion was that "this disorder does not cause her any disability". Dr. Okorie believed that with a combination of counselling and structured exercise, she would have complete remission of her adjustment disorder.
- [25] Dr. Giantomaso described her pain as "mild" and that, with appropriate treatment, she would have decreased pain and increased function, endurance, and an improved mood.
- [26] The defendants argue, and I agree, that she should have been aware of the weaknesses in her medical evidence upon which she relied.
- [27] In my view, in the weeks and days leading up to the commencement of the trial, when the evidence was marshalled, the list of witnesses was finalized, and trial preparation was complete, the plaintiff's expectations of receiving a significant loss of future earnings award should have been tempered. At that point, she should have accepted the Defendants' Offer which still remained open for acceptance. By then, it was reasonable for her to accept that the defendants had made a legitimate attempt to settle her claim and the chances of doing better after trial was remote.
- [28] In all the circumstances and considering the factors set out in Rule 9-1(5) and (6), I make the following order on costs:
- a) the plaintiff is entitled to her Scale B costs from the commencement of the litigation through to the commencement of the trial; and
 - b) the parties will bear their own costs from and after January 26, 2021. Section 83 deduction
- [29] The future care cost component of the Judgment Amount was broken down as follows:
- a) 10 counselling sessions at \$200 each (\$2,000); and
 - b) 20 kinesiology sessions at \$100 each (\$2,000).
- [30] There is no question that the plaintiff is an "insured" under s. 78 of the Regulations and is therefore entitled to receive benefits under Part 7 of the Regulations.

- [31] ICBC accepts that the award for future psychological counselling and kinesiology are necessary and that the amounts that I awarded are reasonable. In the defendants' written submissions they say:
17. ICBC accepts the Court's conclusions regarding the plaintiff's costs of future care for kinesiology are reasonable and necessary and that the plaintiff is entitled to benefits (up to the amounts prescribed by the Court) pursuant to Table 1 of Schedule 3.1 of the Regulation. ICBC waives the need for continued certification under subsection 88(1.01) and 98 of the Regulations, the power to require an assured to undergo treatment under section 90 of the Regulations, and the power to require an insured to submit to a medical examination under section 99 of the Regulations.
18. ICBC irrevocably, unequivocally and unconditionally agrees to pay under Part 7 of the Regulation the cost of future care described herein up to the amounts allowed pursuant to the Regulation as incurred and submitted to ICBC by the plaintiff for reimbursement and up to the amounts prescribed in the reasons for judgment.
- [32] Counselling sessions that were awarded in the amount of \$2,000 must be deducted pursuant to s. 83 of the Act. The defendants concede this is a reasonable and medically necessary expense and pursuant to s. 88(1) of the Regulation, the plaintiff is entitled to receive them as a Part 7 benefit. The plaintiff was awarded 10 sessions at \$200 per session. According to the April 20, 2021 version of the Regulations, ICBC pays \$120 per session (Schedule 3.1). Accordingly, the amount to be deducted is \$1,200, leaving a balance of \$800 to be included in the Judgment Amount.
- [33] With respect to the \$2,000 award for future kinesiology, the defendants concede that these expenses are to be considered reasonable and medically necessary pursuant to s. 88(1) and s. 3.1 of the Regulations and agree that the plaintiff is also entitled to receive these benefits under Part 7. The plaintiff was awarded 20 sessions at \$100 per session. ICBC pays \$78 per session. Accordingly, the amount to be deducted is \$1,560, leaving a balance of \$440 to be included in the judgment.
- [34] ICBC accepts its obligation to pay these benefits under Part 7. Accordingly, from the total cost of future care award of \$4,000, the amount to be deducted pursuant to s. 83 of the Act is \$2,760, leaving costs of future care awarded in the judgment of \$1,240.
- [35] Accordingly, the net judgment will be: General Damages (\$60,000 x 90%): \$54,000.00 Special Damages: 1,800.00 Past Wage Loss: 2,351.00 Loss of Future Earning Capacity: 30,000.00 Loss of Housekeeping Capacity: Nil Future Care Costs: 1,240.00 Total: \$89,391.00 Summary
- [36] The plaintiff will have judgment for \$89,391.00 plus costs until January 26, 2021, the date the trial began. Each party will bear their own costs thereafter. "G.P. Weatherill J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/09/2021BCSC0911cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/bahniwal-v-johal-2021>

Prepared on 26 October 2026 · Esheria