

CANADA / JUDGMENT

Bains v. Antle

2019 BCCA 383

COURT

British Columbia Court of Appeal

DECIDED

22 October 2019

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2019 BCCA 383 Bains v. Antle

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Bains v. Antle,

2019 BCCA 383

Date: 20191022

Docket: CA44421

Between:

Gursharon Kaur Bains

Respondent

(Plaintiff)

And

Stephanie Rae Antle, Sangam Bains and Bobby Bains

Appellants

(Defendants)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated

April 10, 2017 (Bains v. Antle, 2017 BCSC 590, Victoria Docket 14-4378).

Oral Reasons for Judgment

Counsel for the Appellants:

S. Hoyer

R.W. Parsons

Counsel for the Respondent:

S. Missaghi

Place and Date of Hearing:

Vancouver, British Columbia

October 10, 2019

Place and Date of Judgment:

Vancouver, British Columbia

October 22, 2019

Summary:

Prior to trial, the plaintiff (respondent) in a personal injury action rejected the defendants' (appellants') formal offer to settle for a sum that significantly exceeded the sum of damages awarded by a jury. The appellants challenge the trial judge's refusal to attach any costs consequences under Rule 9-1 to the offer, arguing that she erred in principle in her interpretation and application of the factors in Rule 9-1(6). Held: Appeal dismissed. The trial judge did not err in the exercise of her discretion to award costs to which the respondent would have been entitled had the offer not been made.

Introduction

- [1] DICKSON J.A.: This appeal concerns the scope of judicial discretion to award costs to a successful plaintiff who rejects an offer to settle for a sum substantially in excess of that finally awarded. The respondent, Gursharon Kaur Bains, was the plaintiff in the underlying personal injury action. The appellants, Stephanie Rae Antle, Sangam Bains, and Bobby Bains, were the defendants. Approximately one month before trial, the appellants offered to settle Ms. Bains' claim for \$185,000, but she did not accept the offer. Following a 10-day jury trial, the jury awarded her damages of \$37,800.
- [2] Ms. Bains applied for her costs of the action as the successful party in the action. The appellants applied for their costs after the date of the formal offer to settle pursuant to Rule 9-1(5) of the Supreme Court Civil Rules. In reasons indexed as 2017 BCSC 590, the trial judge concluded that, given the state of the evidence known to Ms. Bains prior to trial, it was not

unreasonable for her to reject the appellants' offer to settle. Taking into account this and other factors, she awarded costs of the proceeding throughout to Ms. Bains and dismissed the appellants' costs application.

- [3] The appellants appeal the costs award, contending that the judge erred in her interpretation and application of the Rule 9-1(6) factors. In their submission, properly interpreted and applied, those factors support the imposition of costs consequences for Ms. Bains' failure to accept their reasonable offer, which substantially exceeded the jury award.
- [4] I am not persuaded that the judge erred in the exercise of her discretion. For the reasons that follow, I would dismiss the appeal.

Background

- [5] On January 17, 2013, Ms. Bains was injured in a motor vehicle accident. She was a passenger in a vehicle turning left in an intersection when it collided with a vehicle proceeding through. Ms. Bains sued the appellants, claiming she suffered from chronic myofascial shoulder pain which impaired her ability to work and care for her young children. In the action, she sought damages for pain and suffering, past loss of income, loss of future earning capacity, future cost of care, and special damages. The appellants admitted liability, but disputed the quantum of damages claimed.
- [6] At the time of the accident, Ms. Bains was employed full-time as a medical claims adjudicator, earning approximately \$60,000 annually. After it occurred, she stopped working for approximately two weeks, then participated in a gradual return to work program. By May 2013, she had returned to work full-time, but soon decreased her work time to four hours daily. She stopped working entirely in September 2013 after an orthopedic surgeon, Dr. Yoneda, diagnosed left shoulder tendinitis/bursitis.
- [7] In April 2014, Ms. Bains gave birth to her first child and commenced a one-year maternity leave. She returned to work part-time from April to October 2015, when Dr. Yoneda recommended that she stop work entirely due to "chronic left shoulder tendinopathy", which she did. In January 2016, she gave birth to her second child and commenced another one-year maternity leave. During both maternity leaves, Ms. Bains collected Employment Insurance, which her employer topped up. When the trial was held in October 2016, Ms. Bains was still on maternity leave.

Expert Reports

- [8] Prior to trial, Ms. Bains obtained reports from six experts, including an orthopedic surgeon (Dr. Chin), a physiatrist (Dr. MacKean), a registered occupational therapist (Mr. Jackson), and a physiotherapist and rehabilitation consultant (Ms. Phillips). Dr. Yoneda did not prepare a medical-legal report, but his notes and reporting letters were produced. Dr. Chin and Dr. MacKean agreed that Ms. Bains suffered from chronic injuries to her left shoulder and neck, that her symptoms were unlikely to resolve completely, and that she would have difficulty

returning to work full-time. Like Dr. Yoneda, both doctors conducted physical examinations of Ms. Bains in reaching their opinions. Like Dr. Yoneda, both noted subjective and objective signs of injury.

- [9] Mr. Jackson performed a two-day functional capacity evaluation of Ms. Bains. He, too, opined that it was likely Ms. Bains would not succeed in returning to her previous job full-time. Ms. Phillips provided an estimate of costs related to the future care that, in her opinion, Ms. Bains would require. The two other expert reports Ms. Bains obtained were from a vocational consultant (Mr. Bruce) and an economist (Dr. Young). Mr. Bruce provided an opinion regarding Ms. Bains' employment prospects, while Dr. Young provided an estimate of substantial future earning losses.
- [10] For their part, the appellants retained a neurologist (Dr. Dost) to examine Ms. Bains, which he did in August 2016. However, they did not obtain a report from Dr. Dost. According to Ms. Bains, in the course of the physical examination, he stated that she suffered from "bad myofascial symptoms". The appellants also obtained a records review report from an orthopedic surgeon (Dr. Hummel), an accident reconstruction report (Mr. Gough) and two reports from occupational therapists (Ms. Walker and Ms. Wong).
- [11] In his records review report, Dr. Hummel commented that there was no consensus on diagnosis, that it was unclear whether Ms. Bains "has acute recurrent pain, chronic pain or chronic pain syndrome" and that there were "minimal clinical objective findings". Although he did not review photographs or repair estimates of the other vehicle, Mr. Gough opined that the impact to the vehicle in which Ms. Bains was a passenger would probably have resulted in a speed change of 10 km/h or less. Ms. Walker challenged some of Ms. Phillips' future treatment recommendations and supported others. Ms. Wong summarized some of the other expert reports.

Settlement Negotiations

- [12] Armed with their expert reports, the parties engaged in settlement negotiations. On September 19, 2016, Ms. Bains made a formal offer to settle in the amount of \$675,000 plus costs and disbursements at Scale B. On September 20, 2016, the appellants responded with their own formal offer to settle in the amount of \$185,000 "new money" plus costs. The following day, counsel for Ms. Bains advised counsel for the appellants that, based on her experts' "unassailable opinions", she would seek pecuniary damages in excess of \$1,500,000.
- [13] On September 26, 2016, the appellants presented a new formal offer to settle for \$185,000 "old money", including approximately \$6,000 in Part 7 benefits. On October 13, 2016, Ms. Bains made a final formal offer to settle in the amount of \$337,500 "new money" plus costs and disbursements.

Trial and Costs Application

[14] Ms. Bains testified at trial, as did her husband and her expert witnesses. The appellants did not call any trial witnesses, but they challenged Ms. Bains' claim on cross-examination. For example, counsel for the appellants cross-examined Ms. Bains regarding the timing of her reported symptoms, her pre-existing conditions, and the reasons she stopped working in her pre-accident occupation. He also argued that there were inconsistencies in the medical opinions and sought to cast doubt on the severity of Ms. Bains' symptoms and the extent of her disability.

[15] The jury awarded Ms. Bains \$37,800.00 as follows:

Non-pecuniary damages for pain and suffering:

\$20,000.00

Past loss of income:

\$13,000.00

Future earning capacity:

NIL

Cost of future care:

\$ 2,000.00

Special damages:

\$ 2,800.00

[16] After the trial, Ms. Bains applied for costs of the proceeding as the successful party. The appellants argued that they should receive their costs following the date of the first formal offer to settle, which was September 20, 2016.

Reasons for Judgment

[17] The judge began her reasons by summarizing the evidence regarding Ms. Bains' injuries and prognosis. After noting that Ms. Bains called six expert witnesses and that both medical doctors agreed she would have difficulty returning to her full-time work, she described the issue of wage loss and future cost of care as "significant". She referred briefly to the evidence of Ms. Bains' husband and noted that, while they challenged the claim on cross-examination, the appellants did not call any expert witnesses. She also noted that the appellants obtained the records review report of Dr. Hummel and retained Dr. Dost to examine Ms. Bains, but did not call him as a witness at trial.

- [18] Next, the judge discussed the various settlement offers exchanged prior to trial and the parties' competing positions on their costs applications. She described Ms. Bains' argument that it would not have been reasonable to accept either formal offer given her confidence that she had a substantial claim, including a substantial claim for loss of future earning capacity. She also noted Ms. Bains' argument that the appellants' rebuttal report by Ms. Walker supported a "fairly large claim for costs of future care" and that her family was "financially devastated" as a result of the trial.
- [19] As to the appellants' position, the judge described their argument that the plaintiff took a gamble by attempting to obtain over a million dollar award for a soft tissue injury, but she lost the gamble. She also commented that they offered over five times what the jury awarded and argued their offer was reasonable and ought to have been accepted when it was delivered.
- [20] The judge set out Rule 9-1(4)-(6) and considered each of the enumerated factors: whether the offer was one that ought reasonably to have been accepted; the relationship between the terms of the settlement offered and the final judgment of the court; and the relative financial circumstances of the parties. She cited *Bailey v. Jang*, 2008 BCSC 1372, for the proposition that the court must not review the evidence in hindsight. She also distinguished this Court's decision in *Paskall v. Scheithauer*, 2014 BCCA 26, on the basis that Ms. Bains was not contending that she was unable to assess the reasonableness of the defendants' offer. Rather, Ms. Bains submitted that, based on the evidence, neither offer provided an incentive to settle and that rejecting them was reasonable.
- [21] The judge found that Ms. Bains had a good sense of the evidence available to both sides, which informed her opinion of the appellants' offers. She went on to conclude that, while the appellants' first formal offer to settle was genuine and despite some of her tactically inflated negotiating positions, Ms. Bains' decision to reject the offer was reasonable. In explaining this conclusion, the judge noted that "[t]he evidence available to the plaintiff at the time that the settlement offers were rejected included expert reports in respect of past wage loss, loss of future earning capacity, and cost of future care." She also noted that Ms. Bains considered relevant comparator cases in assessing the range for non-pecuniary damages and found that her case was "like most cases in which the 'plaintiff cannot be expected to know in advance how the Court might assess her credibility in the witness box'".
- [22] Turning to the relationship between offer and judgment, the judge acknowledged that the significant disparity "clearly favour[ed] denying the plaintiff her costs subsequent to her receipt of the defendants' first formal offer to settle." However, citing *Smagh v. Bumbrah*, 2009 BCSC 623, she stated this factor deserves less weight in the context of a jury trial, given the difficulty in predicting how a jury will assess damages. Although she considered the noticeable discrepancy in making the costs award, she also considered what the parties knew prior to commencement of the trial. She was not convinced Ms. Bains should have anticipated a substantially lower jury award. As to the relative financial positions of the parties, the judge found that an order requiring Ms. Bains to pay the "well-funded"

appellants' costs would result in a "pyrrhic victory that could have the effect of discouraging plaintiffs from pursuing valid claims."

- [23] Based on all the circumstances, the judge decided not to exercise her discretion under Rule 9-1(4) and (5). Accordingly, she dismissed the appellants' costs application and awarded Ms. Bains her costs throughout.

On Appeal

- [24] The appellants contend that the judge erred in her interpretation and application of each of the factors in Rule 9-1(6)(a)-(c). Emphasizing that costs principles are designed to promote settlement by encouraging parties to assess the risks of litigation and make informed decisions, enhance predictability and consistency in costs awards, achieve an even-handed outcome between the parties and promote the efficient determination of disputes, they say a party's refusal to accept a reasonable offer should result in costs consequences in order to achieve these objectives. They go on to submit that their offer was reasonable and the judge erred in treating Ms. Bains' "subjective" assessment as determinative of whether she ought reasonably to have accepted it. Further, they submit that she erred in failing to consider the credibility risks inherent in the claim, treating the unpredictability of jury trials as a reason for Ms. Bains to reject the offer, and considering comparator cases when juries do not base their non-pecuniary awards on precedent.
- [25] In support of their submissions, the appellants argue that Ms. Bains' claim was largely based on self-reporting and thus dependent on the jury's assessment of her credibility. They say she was aware of their intention to advance their case based on cross-examination and she should have anticipated possible adverse credibility findings by the jury in assessing the strength of her claim. They also say that her inflated valuations of the claim during negotiations showed a lack of confidence in its strength and a failure to assess the claim rationally. They say further that their offer corresponded to Ms. Bains' claim for past losses and non-pecuniary damages, which put her on notice that they disputed the future loss aspect of the claim and she should have considered this in assessing whether to accept it when it was made.
- [26] Based on the foregoing, the appellants argue that it was unreasonable for Ms. Bains to reject their offer and that the judge erred in concluding otherwise.
- [27] The appellants also argue that the judge erred in placing insufficient weight on the relationship of the offer to the amount awarded at trial based on the unpredictability of jury trials. In their submission, the mode of trial ought not to be considered in connection with this factor because doing so deprives the court of an objective benchmark from which to assess the offer. As to the relative financial positions of the parties, the appellants say the judge erred in considering the insurer's financial position absent any evidence that it used its financial advantage in an untoward manner and in considering whether a costs award for the appellants would result in a pyrrhic victory for Ms. Bains.

[28] Ms. Bains responds that costs awards are highly discretionary and entitled to significant appellate deference. In her submission, the judge appropriately considered and applied the relevant factors based on a full appreciation of the evidence and applicable case authorities. She says that costs principles should not be applied in such a way as to deter parties from bringing meritorious, but uncertain, claims out of fear of a burdensome costs order and submits that allowing the appeal would undermine the wide discretion afforded to trial judges under the Rules.

Issues

[29] The sole issue for determination is whether the judge erred in principle in exercising her discretion not to award any costs to the appellants.

Discussion

Standard of Review

[30] As both parties recognise, the standard of review is highly deferential. This Court will only interfere with a costs award if the trial judge erred in principle or if the award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

Rule 9-1

[31] The costs of a proceeding are awarded to the successful party, unless the court orders otherwise: Rule 14-1(9). However, Rule 9-1 permits the court to make alternative costs awards when a party has made a formal offer to settle. Sub-rules (4), (5) and (6) provide:

Offer may be considered in relation to costs

(4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Cost 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.

Considerations of court

- (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.

[32] Trial judges have broad discretion in making costs awards under Rule 9-1, including the discretion to award costs as if the offer had not been made: Rule 9-1(5)(c); *Tisalona v. Easton*, 2017 BCCA 272 at para. 94. As Justice Hunter explained in *Tisalona*, the evolution of the rule reflects the challenge of reconciling the expectation of a costs penalty in defined circumstances with the desirability of preserving judicial discretion to achieve justice for the parties before the court. Prior to enactment of the rule in its current form, the Rules provided for entitlement to costs based on the date a formal offer to settle was delivered. However, in 2008 the predecessor to Rule 9-1 was enacted to provide for the exercise of a broad judicial discretion and thus "to ameliorate the effects of the rigid application of [the rule providing for entitlement] adopted by this court in its earlier decisions": *Roach v. Dutra*, 2010 BCCA 264 at paras. 50, 52.

[33] While the judicial discretion provided by Rule 9-1 is broad, it must, of course, be exercised judicially and in a principled manner: *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at paras. 73, 88. In assessing the costs options under Rule 9-1(5), the court may consider the factors in Rule 9-1(6), although these factors are not mandatory: *Giles* at para. 88.

Did the judge err in concluding that it was not unreasonable for Ms. Bains to reject the offer to settle?

[34] As the judge recognised, the court must consider the first factor under Rule 9-1(6)(a) without the benefit of hindsight. In other words, only the circumstances in existence at the time of the offer are relevant, not the award made at trial: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26; *Bailey v. Jang*, 2008 BCSC 1372 at para. 24. The question is not whether the offer itself was reasonable, but whether it was unreasonable to refuse it: *Cottrill* at para. 30. In answering this question, the court may consider the recipient's subjective reasons for rejecting the offer, but must also decide whether those reasons are objectively reasonable:

C.P. v. RBC Life Insurance Co., 2015 BCCA 30 at para. 97.

- [35] In *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, this Court set out several factors that may be considered in assessing the reasonableness of refusing an offer. They include: the timing of the offer; whether it had some relationship to the claim; whether it could easily be evaluated; and whether some rationale for it was provided.
- [36] The relationship of the offer to the claim is relevant because it speaks to whether a plaintiff should be penalized for proceeding to trial in hopes of achieving more than what was offered. It is not unreasonable for a plaintiff to refuse an offer that is a fraction of the amount sought, provided the plaintiff had reasonable confidence in her claim: *Cottrill* at para. 32; see also *Tisalona* at para. 102; *Wafler v. Trinh*, 2014 BCCA 95 at paras. 53, 64-65. In several decisions below, the court has considered this relationship to be important where there was objective evidence supporting a plaintiff's claim for loss of earning capacity although the claim was ultimately rejected at trial. For example, in *Payne v. Lore*, 2010 BCSC 1313, Justice Wedge found that, had the plaintiff's claim for future income loss been successful, the defendants' offer would have fallen well short of the award at trial and, therefore, it was not unreasonable for the plaintiff to refuse the offer: at paras. 28-29. In *Parker v. Martin*, 2017 BCSC 1161, Justice Ball noted that by the time the offer in question was received, the plaintiff had retained expert medical witnesses whose opinions supported his belief that there was a "real and substantial possibility of future income loss": at para. 26.
- [37] A further relevant consideration under Rule 9-1(6)(a) may be whether the plaintiff knew her claim was largely dependent on the court's assessment of her credibility: *Wafler* at para. 73; *Gehlen v. Rana*, 2011 BCCA 219 at paras. 50-51. This is because there is more risk in proceeding to trial where a claim lacks objective evidence and, therefore, refusal of a reasonable offer may be unreasonable.
- [38] In my view, the judge was in the best position to assess the reasonableness of Ms. Bains' rejection of the appellants' offer. She sat through the 10-day trial and had the benefit of a deep appreciation of the evidence available to Ms. Bains at the time her decision was made.
- [39] Contrary to the appellants' submission, the judge did not treat Ms. Bains' subjective assessment of her case as determinative of whether she ought reasonably to have accepted the offer. It is apparent from her reasons that she considered Ms. Bains' claims for loss of earning capacity and cost of future care to have objective support in the evidence, including that of the appellants' own experts. As the appellants point out, their offer did not include the claims for loss of earning capacity. In my view, it was open to the judge in the circumstances to find it was not unreasonable for Ms. Bains to reject an offer that, while genuine, left out potentially significant claims.
- [40] I also see no error in the judge's conclusion that there was no obvious reason for the jury to negatively assess Ms. Bains' credibility. The medical evidence included both subjective and objective findings of injury by three doctors and, as the judge noted, there was nothing to suggest that Ms. Bains misled any of the experts. Nor was the judge obliged to find that Ms.

Bains lacked confidence in the strength of her case or failed to assess it rationally based on her tactical assertion in the course of negotiations, as the appellants' submission seems to imply. The judge reached the opposite conclusion on these matters, as she was entitled to do based on the evidence.

[41] I would not accede to the appellants' arguments on this aspect of the appeal.

Did the judge err in placing insufficient weight on the relationship of the amount awarded or the relative financial positions of the parties?

[42] The second enumerated factor for consideration in Rule 9-1(6) concerns the reasonableness of the offer itself, assessed against the objective measurement of the trial award: C.P. at para. 99. This Court has held that "a plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs, even in circumstances in which it cannot be said that the plaintiff should have accepted the offer": Wafler at para. 81. However, it is open to the trial judge to determine how much weight, if any, to place on this factor: *British Columbia v. Salt Spring Ventures Incorporated*, 2015 BCCA 343 at para. 20; Wafler at para. 82; and Smagh at para. 13. As I have noted, none of the factors in Rule 9-1(6) are mandatory: Giles at para. 88.

[43] I see no error in the judge's assessment of the second factor. She recognized that the significant discrepancy between the appellants' offer and the award at trial favoured awarding the appellants their costs following the date of the offer. However, she was mindful that this factor is not determinative. In my view, her consideration of the mode of trial did not compromise her appreciation of the jury's objective measurement of the damages. It simply placed that measurement into context, namely, an award of damages made in a jury trial.

[44] As to the third factor, in *Smith v. Tedford*, 2010 BCCA 302, this Court held that a party's insurance coverage may be considered under this factor and, in C.P., clarified that whether it should be considered in a given case will be determined by the facts: at para. 101. In this case, the judge noted that Ms. Bains was a person of modest means, that the costs award the appellants sought would "result in a pyrrhic victory" and that granting it could have a chilling effect on plaintiffs generally. In doing so, she was, in my view, merely considering the financial circumstances of the plaintiff and commenting on the overall interests of justice implicated by the application, individually and generally. I see no error in her application of this factor in the circumstances of the case.

Conclusion

[45] Based on the judge's reasons as a whole, I am satisfied that she exercised her discretion in a judicial and principled manner. She considered the relevant factors, the positions of the parties, and the specific facts of the case. None of these were typical. However, the order she made was expressly contemplated by Rule 9-1 and, in the final analysis, she was not persuaded to award the appellants their costs following the date of the offer taking into account all of the circumstances as she understood them having sat through the trial. While

the case was unusual, bearing in mind the broad discretion provided by Rule 9-1 and the high degree of appellate deference that applies, I would not interfere with the award.

[46] I would dismiss the appeal and order the appellants to pay Ms. Bains her costs of the appeal.

[47] NEWBURY J.A.: I agree.

[48] SAUNDERS J.A.: I agree.

[49] NEWBURY J.A.: The appeal is dismissed.

"The Honourable Madam Justice Dickson"

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Prepared on 26 October 2026 · Esheria