
CANADA / JUDGMENT

Currie v. Taylor

2013 BCSC 1071

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Supreme Court of British Columbia

DECIDED

18 June 2013

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2013 BCSC 1071 Currie v. Taylor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Currie v. Taylor,

2013 BCSC 1071

Date: 20130618

Docket: M116089

Registry: New Westminster

Between:

Jason Michael Currie

Plaintiff

And

Karen Lorraine Taylor and

Daniel Allan Sharp

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment on Costs

Counsel for Plaintiff:

J.P. Prodor

Counsel for Defendants:

V.R.K. Orchard, Q.C.

D. Claassen

Place and Date of Trial:

April 2 - 5, 2012

April 10, 2012

Written Submissions of the Plaintiff received:

November 21, 2012

Written Submissions of the Defendant received:

December 20, 2012

Place and Date of Judgment:

New Westminster, B.C.

June 18, 2013

I. introduction

- [1] This trial concerned the liability for a motor vehicle accident in June 2008. The trial was held on April 2 - 5 and 10, 2012 and judgment was given October 23, 2012. The plaintiff was found to be 75% liable for the accident and the defendants 25% liable. The defendant Taylor was the owner of the vehicle driven by the defendant Sharp at the time of the accident.
- [2] The plaintiff seeks costs for the entirety of this action at two-thirds of the amounts provided for in Scale B of the Supreme Court Civil Rules.
- [3] On March 12, 2012, the defendants offered to settle the plaintiff's liability claim on the basis that the plaintiff was 59% liable for the accident and the defendant was 41% liable.
- [4] The defendants submit that the plaintiff should recover 25% of his costs up to the time of the defendants offer to settle and that the defendants should receive 100% of their costs from the date of their offer until the end of the trial.
- [5] The plaintiff is a 41 year old man who suffered extremely serious injuries as a result of the car accident. The accident occurred on Highway 97 near Vernon B.C. when the plaintiff entered the highway from an intersecting side road and his vehicle was struck by the defendant Sharp. Reasons for judgment indexed as 2012 BCSC 1553 outline the details of the collision.

II. PositionS of the parties

- [6] The plaintiff argues that he is destitute and survives on a disability payment from ICBC of approximately \$1,100 per month. He lives in a derelict residence in Vernon, B.C.
- [7] The plaintiff's Part 7 benefits pursuant to the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 have been extinguished.
- [8] After the defendants' final offer to settle on March 12, 2012, the plaintiff made a formal offer to settle on March 23, 2012. The offer proposed to settle the liability issues at 75% in favour of the plaintiff and 25% in favour of the defendants.
- [9] The defendants have presented a bill of costs to the plaintiff totalling \$30,000.32 which includes an account for an engineering expert in the sum of \$13,262.72. To date, the plaintiff's disbursements exceed \$56,000. The plaintiff's submissions did not disclose the portion of those disbursements attributable to the liability aspect of the proceedings to date.
- [10] The plaintiff argues that in making an order for costs, the Court should use its discretion to grant the plaintiff recovery of 66% costs of the entire action.
- [11] The defendants argue that s. 3(1) of the Negligence Act, R.S.B.C. 1996, c. 333 limits their obligation to pay the plaintiff's costs to an amount in proportion to their measure of the responsibility for the accident. They argue the plaintiff has failed to demonstrate that such an award would be unjust.
- [12] Second, the defendants argue that Rule 9-1 is intended to facilitate settlements and reduce the cost of trials. The defendants argue their success on this trial significantly exceeded their pre-trial offer and it would have been reasonable for the plaintiff to have accepted that proposal. If the defendants do not receive their costs incurred after making the offer, they submit the goals of the rule in encouraging settlements will be threatened.

III. ANALYSIS

- [13] The issues of trial costs in this case involve a consideration of s. 3(1) of the Negligence Act and the apportionment of costs as a function of the division of liability in a claim. The second step in the analysis involves the consideration of Rules 9-1(4) to 9-1(6) and 14-1(9) of the Supreme Court Civil Rules.

- [14] Section 3(1) of the Negligence Act states:

Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

- [15] Rule 14-1(9) is the usual rule governing costs. It states:

Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

[16] The impact of a settlement offer in this action is dealt with under the portions of Rule 9-1(4) which provide:

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

[17] Rule 9-1(5) provides:

- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (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.

[18] This application also engages Rule 9-1(6) which outlines factors that may be considered when making an order under Rule 9-1(5). The rule provides as follows:

- (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.

[19] The plaintiff relies on the decision of this Court in *Wong-Lai v. Ong*, 2012 BCSC 1569 as support for the proposition that the analysis is a two-step process starting with the Negligence Act and following with a consideration of the Rules relating to costs. He argues that Wong-Lai bears a close resemblance to facts in this case.

[20] The plaintiff argues that Rule 14-1(9) stating that costs follow the event does not apply in this case. The plaintiff relies on *Moses v. Kim*, 2007 BCSC 1820 and the summary of factors to be considered in exercising the discretion when a party seeks costs on a different basis than is provided in the Negligence Act. Gray J. said:

[13] The authorities demonstrate many factors the court has considered in exercising this discretion. Among them are the following:

- (a) the seriousness of the plaintiff's injuries;
- (b) the difficulties facing the plaintiff in establishing liability;
- (c) the fact that in settlement negotiations the amount offered was substantially below the ultimate amount;

- (d) whether the plaintiff was forced to go to trial to obtain recovery;
 - (e) the costs of getting to trial;
 - (f) the difficulty and length of the trial;
 - (g) whether the costs recovery available to the plaintiff, if costs are apportioned according to liability, will bear any reasonable relationship to the party's costs in obtaining the results achieved;
 - (h) the positions taken by the parties at trial, in particular whether the positions taken were appropriate and reasonable in the circumstances;
 - (i) whether the defendants made any settlement offers;
 - (j) the ultimate result of the trial; and
 - (k) whether the plaintiff achieved substantial success that would be effectively defeated if costs were awarded pursuant to s. 3(1) of the Negligence Act.
- [21] The plaintiff argues that it would be unjust in the circumstances of this case to adopt the "costs follow the event" rule.
- [22] The defendants argue that the Court must consider whether the plaintiff has met the onus of demonstrating an injustice if it is ordered that the plaintiff is limited to 25% of his costs up to date of trial.
- [23] Where liability is divided but the defendant has suffered no loss or damage, the defendant will be required to pay the same proportion of the plaintiff's costs as the defendant is liable for the plaintiff's damages but the plaintiff is not liable to pay any portion of the defendant's costs: *Flatley v. Denike* (1997), 32 B.C.L.R. (3d) 97 (C.A.).
- [24] The analysis of a request to depart from s. 3 of the Negligence Act turns on the plaintiff's ability to persuade the Court that assessing the costs in that proportion would be unjust: see *Sartori v. Gates*, 2011 BCSC 419 at para. 104; *Rimmer v. Township of Langley*, 2007 BCSC 340 at para. 13.
- [25] In approaching these questions, the Court first examines the liability for costs under the Negligence Act followed by a separate analysis of issues arising under the Rules: *Miller v. Boughton*, 2011 BCSC 632 at para. 22; *Bedwell v. McGill*, 2008 BCCA 526 at para. 29.
- [26] The parties made their submissions paralleling the factors identified in *Moses*. I will deal with each party's submissions under those headings.

A. The seriousness of the plaintiff's injuries

- [27] The plaintiff argues that he has pleaded and intends to prove the catastrophic extent of his injuries. The defendants argue that the seriousness of the plaintiff's injuries is not relevant to this issue because the trial was limited to the question of liability and thus, the extent of

the plaintiff's injuries should be a neutral factor. Mr. Currie obviously suffered serious injuries that have dramatically changed his life. If the seriousness of the injuries has any role to play in a cost analysis, it does not matter if the litigation was focused solely on liability. The lawsuit is about the plaintiff's pursuit of compensation for consequences of the defendants' negligence; it seems that this factor favours the plaintiff's position and is not a neutral influence because it addresses the injustice of simple adherence to s. 3(1) of the Negligence Act.

B. The difficulties faced by the plaintiff in establishing liability

- [28] The plaintiff argues that he faced significant hurdles in adducing the evidence to prove the defendants' negligence. He argues that expert evidence was expensive to obtain, the defendants failed to testify, and the defendants' discovery evidence was confusing and contradictory. He argues that these factors warrant a departure from the usual rule.
- [29] The defendants adopt the suggestion that the plaintiff's case involved significant difficulties. They argue that the difficulties inherent in the plaintiff's case militate against exercising discretion to abandon the normal rule. They argue that the magnitude of those difficulties should have motivated the plaintiff to abandon the action and accept its offer of accepting 41% of the liability.
- [30] In this case, each party argued that the other was 100% liable for the collision.
- [31] In my view, the plaintiff's difficulties in establishing liability were not out of the ordinary when considering the normal challenges of proving fault in intersection collisions. The use of forensic engineering evidence is common in these cases. There was abundant first-hand evidence from witnesses to the accident that was helpful in the assessment of liability. The plaintiff argues that the defendants' evidence was completely unbelievable and would have been exposed as untruthful if the defendant Sharp had testified at trial. However, the plaintiff chose to tender only the defendants' contradictory discovery evidence as part of the plaintiff's case and, in so doing put the question of the defendant Sharp's recollection of the events in issue. This strategy clouded the analysis. He could have called the defendant as an adverse witness and simply cross-examined him under Rules 12-5(20) and (26). This process would have enabled the plaintiff to deal directly with issues touching on his credibility. In my view, the difficulties faced by the plaintiff are a neutral factor in assessing costs under the Negligence Act.

C. Was the amount offered in settlement substantially below the ultimate amount

- [32] The defendants offer substantially exceeded the plaintiff's judgment in the action. The plaintiff argues that while he may not have been required to go to trial, the ultimate settlement was only 41% of the value of the plaintiff's catastrophic injuries.

[33] The defendants argue that the difference between the judgment and their offer was substantial. The plaintiff argues that the difference was modest but the amount recovered is more than 40% below the defendants' settlement offer. Although the defendants' proposal would likely have resulted in a reduction in the plaintiff's damages of several hundred thousand dollars, his failure to accept the settlement will have compounded that loss. In my view, the difference does not justify a variation to the rule.

D. Whether the plaintiff was forced to go to trial to obtain recovery

[34] The defendants argue that the facts heavily favour applying the presumption of costs set out the Negligence Act. The plaintiff acknowledged that he was forced to allow her to obtain recovery; he says that 41% offered was inadequate and the difference in the amount claimed justified his attempt to achieve a better result. This factor weighs in favor of the defendants' position.

E. The costs of getting to trial

[35] The plaintiff claims this was "obviously an expensive trial, in which liability was hotly contested". He argues that the defendants' settlement offer and the plaintiff's damages are largely dependent on the plaintiff's expert evidence.

[36] The defendants argue that the costs of completing this liability trial should be a neutral factor in assessing the plaintiff's claim of injustice.

[37] Counsel's assertion that the plaintiff's disbursements exceed \$56,000 is, without a breakdown of disbursements between the liability and damages issue, not that helpful. It may be that most of these disbursements addressed the liability issue as opposed to damages. I do not know. The plaintiff obtained and used one expert opinion and relied on a second report prepared by the RCMP traffic analyst.

[38] I am unable to draw any conclusions from the differences between the costs incurred by the plaintiff and the defendants. This is a neutral factor.

F. The difficulty and length of the trial

[39] Although the plaintiff's claim required considerable attention to detail, this trial was neither abnormally difficult nor lengthy. This factor is neutral in my assessment of the plaintiff's claim for a variance from the Negligence Act.

G. Whether the costs recovery available to the plaintiff, if apportioned according to liability, will bear any relationship to the parties' costs in obtaining the results achieved

- [40] Under this factor the plaintiff argues that he will recover significant damages from the defendants with the liability apportionment 25% in his favor. He argues that those damages would not have been recovered if he had not commenced this proceeding and presented cogent evidence supporting the claim. He suggests that the expert evidence needed for the trial was a significant factor in the formation of the defendants' settlement proposal.
- [41] The defendants suggest that the plaintiff's expert evidence will have no impact on the amount of damages that the plaintiff might be awarded. In the face of the defendants' offer, they argue that the plaintiff's refusal to accept a proposal resulted in a poor outcome for the plaintiff and increased costs to both parties. This factor militates in favor of the presumption in the Negligence Act.

H. The positions taken by the parties at trial

- [42] The defendants argue that each party advanced a reasonable position at trial and that this factor should be neutral in assessing the plaintiff's pursuit of need of costs differing from the allocation presumed in the Negligence Act. The plaintiff did not disagree and I conclude that this factor supports the allocation of costs in proportion to the defendant's liability.

I. Whether the defendants made any settlement offers

- [43] The defendants offered to settle the issues in the trial by accepting 41% liability for the accident. The plaintiff offered to accept 25% of the liability. The plaintiff argues that he achieved substantial success in obtaining judgment and this factor should influence the Court to deviate from the statutory presumption.
- [44] In my view, this factor is neutral in the circumstances of this case.

J. The ultimate result of the trial

- [45] The plaintiff argues that he obtained substantial success in affixing liability to the defendants for his injuries. The defendants argue that damages have yet to be determined and the only result pertinent to the costs issue is the plaintiff's judgment that the defendants were only 25% at fault; this was not substantial success in the trial. In my view the facts relevant to this factor militate in the defendants' favour and do not assist the plaintiff.

K. Whether the plaintiff obtained substantial success that would effectively be defeated if costs were awarded pursuant to s. 3(1) of the Negligence Act

- [46] The defendants argue that the plaintiff's outcome would have been better if he had accepted the offer at 41%. As a result, they say that this factor does not infer that an injustice will occur if the plaintiff is restricted to costs at 25%.
- [47] The plaintiff argues that if he is denied costs at 66%, the disbursements alone will radically reduce his recovery. The evidence is insufficient to support this conclusion.

- [48] In my view, the circumstances in Wong-Lai are substantially different than those in Mr. Currie's case. In Wong-Lai the Court considered the s. 3(1) questions and concluded that:
- a. the trial dealt with liability and damages and the Court did not think settlement of the liability issue would have obviated the need for a trial on damages;
 - b. the plaintiff did not act unreasonably in rejecting the settlement offer due to the short amount of time that the offer was open for acceptance; and,
 - c. the judge was able to conclude that if the plaintiff was required to bear 75% of the costs, the disbursements alone would have reduced her recovery by 63%.
- [49] In this case, there is no breakdown of the amount of the plaintiff's disbursements that relate to the liability portion of this claim.
- [50] Mr. Currie's claim was limited to the issue of liability and did not involve the other issues of damages considered in Wong-Lai. In this proceeding there were no ambiguities in the offer to settle that could have influenced the plaintiff in declining the settlement proposal.
- [51] The defendants refer to this Court's decision in Rimmer, which also considered a claim for costs on a liability only trial. In Rimmer neither party made a settlement offer and following the trial the defendant was found 60% responsible for the accident. In the absence of a settlement offer, it was appropriate to leave the decision on liability to the trial court. In Rimmer the Court applied the general rule set out in s. 3 of the Negligence Act. In this case the plaintiff was in a better position than the plaintiff in Rimmer; Mr. Currie could have accepted the offer and avoided a trial whereas the plaintiff in Rimmer was compelled to proceed to trial to obtain a remedy.
- [52] The defendants also rely on Heppner v. Zia, 2009 BCSC 369 which involved a fifteen day trial on liability and damages. The plaintiff was found 50% liable and was awarded substantially less damages than he claimed at trial. Cohen J. concluded that the plaintiff had not achieved substantial success that would be defeated by apportionment under the Negligence Act.
- [53] In Sartori the plaintiff recovered judgment for an amount exceeding the defendant's offer. Wilson J. concluded that the plaintiff would have recovered some damages if he had accepted the offer but that the costs of trial were ordinary and the defendant's offer was close to the amount awarded. Accordingly, the Court did not deviate from the ordinary rule of awarding costs proportionate to the damages.
- [54] In my view, Wong-Lai is distinguishable from the facts of this case. The features of this case are more closely matched with the facts in Rimmer. The effect of the defendants' offer in this case strongly favors adherence to the usual rule.

- [55] The plaintiff has not met his obligation to demonstrate that the award of costs as prescribed by s. 3(1) of the Negligence Act will result in an injustice. The factors addressed by the parties do not, on balance, support a departure from the normal rule apportioning costs in the same proportion as the findings in the plaintiff's favour. Accordingly, the plaintiff will be entitled to 25% of his costs.

IV. offer to settle

- [56] The second step in this assessment of costs concerns the defendants' claim to 100% of its costs following its offer to settle on March 21, 2012. Rule 9-1(6) informs the Court on the factors to be considered; it is a discretionary decision.
- [57] Rule 9-1(6) is a permissive clause; the Court can refuse to consider a settlement offer if the plaintiff could have reasonably refused the proposal: *Dodge v. Shaw Cablesystems Ltd.*, 2009 BCSC 1765 at para. 18.
- [58] In *Dodge*, the Court concluded that the plaintiff could not reasonably have accepted an "all in offer" which was open for only two days.
- [59] The plaintiff argues that he acted reasonably in declining to accept the March 12, 2012 offer. Mr. Currie argues that the facts relating to the cause of the collision were difficult to determine and that he proceeded to trial knowing that the opinion of Sergeant Nightingale, the RCMP traffic analyst, might prevail. He said the assessment of the reasonableness of his decision was not to be weighed in a "hindsight analysis." He argues that the assessment of the offer ought to be measured as at the time it was received. The plaintiff notes the information and opinion evidence that he had when the offer was received included Sergeant Nightingale's report and the opinion of the other expert, Dr. Amrit Toor. Both experts had given opinions helpful to the plaintiff's case. He argues that the Court should accept that this evidence reasonably influenced the plaintiff in rejecting the offer and that the offer should not be considered a factor at this stage.
- [60] The defendants accept that the analysis under Rule 9-1 looks to the time that the offer was made or was open for acceptance. The defendants argue that the plaintiff has admitted there were "significant difficulties in establishing liability." These difficulties began with the fact that the plaintiff was a servient driver at a stop sign and about to enter a through highway. Mr. Currie was obligated to yield to traffic on the highway that posed a hazard. In analyzing his prospects before the trial he would have been aware that he bore the burden of proof that he had not seen the oncoming vehicle before impact. The defendants argue that these factors put the plaintiff in a position where there was a substantial risk he could be found wholly at fault for the accident and that the 41% liability offer ought reasonably to have been accepted.

- [61] The plaintiff relies on *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1497, (varied on other grounds in 2011 BCCA 516) at para. 19, where the Court suggested that leeway and relief be extended to litigants who honestly but mistakenly assess the strength of their positions. However, McEwan J. endorsed the view stated by Goepel J. in *A.E. v. D.W.J.*, 2009 BCSC 505 that the defendant's reasonable offer cannot be ignored, because to do so would undermine the purpose of the Rule.
- [62] Although the plaintiff's success was substantially less than the defendants' offer, I am satisfied that the plaintiff was not unreasonable in declining to accept the offer made only 12 days before the commencement of trial. He did not know at that stage that the defendant Sharp would elect not to testify. Notwithstanding his option to call the defendant Sharp as an adverse witness, this fact might have been an important consideration as the defendant's discovery evidence included somewhat contradictory statements. When the offer was made, questions about the defendant's evidence together with the plaintiff's experts' opinions understandably gave him confidence that his chances of success were better than 41%. As McEwan J. said in *Fan*:
- [19] The reintroduction of judicial discretion in costs certainly serves the ends of justice. Costs should be a penalty for unreasonable conduct in the litigation, not a penalty for failing to guess the outcome. In this regard, Courts must, I think, extend some leeway to litigants holding honest but, ultimately, mistaken views of their claims. It is generally better that such expectations be disposed of at law, rather than discouraged. The public should not be given the impression that there is no reasonable access to a legal resolution. It must be recognized that some people will only be comfortable if they "hear it from the judge." This should be a valid option for those who seek it, not a form of deemed unreasonableness. As such, inducements to settle, and to avail oneself of alternate dispute resolution, ought to complement rather than obstruct judicial determinations.
- [63] I am satisfied that the plaintiff was reasonable in his expectation that the ultimate decision on liability could have exceeded 41%.

A. The relationship between the offer and the final result

- [64] It is clear that the plaintiff's success fell significantly short of the defendants' offer; I consider that factor to weigh in favour of the defendants' claim for costs from the date of the offer.

B. Relative financial circumstances of the parties

- [65] The defendants accept that the plaintiff is financially disadvantaged and that they are represented by an insurer. The defendants' bill of costs has been presented in the sum of \$30,000.32 whereas the plaintiff has disclosed an expenditure of disbursements exceeding \$56,000. The plaintiff has not provided a draft bill of costs and I accept that the majority of those disbursements may relate to the issue of quantum. There is simply insufficient evidence on this point to influence the decision.
- [66] However, I am guided by the comments of Sewell J. Wong-Lai where he said:
- [52] I have also given consideration to the relative financial circumstances of the parties. The plaintiff has very limited means. The defendants are covered by insurance and in a very real sense it is the defendants' insurer who is at risk in this action. I am entitled to take this factor into consideration in exercising my discretion: see *Smith v. Tedford*, 2010 BCCA 302, 7 B.C.L.R. (5th) 246. Given these circumstances, it is obvious that the relative financial consequences of depriving the plaintiff of her costs are much greater to the plaintiff than to the defendants.
- [67] I accept that there is a significant disparity between the financial resources of the parties and that the plaintiff has very limited means whereas the defendants are supported by an insurer and are at little risk in this action.
- [68] I will not order the plaintiff to pay the defendants' costs after the delivery of their offer to settle. I have accepted the plaintiff's arguments: there was a reasonable explanation for the plaintiff's failure to accept the offer, the magnitude of the plaintiff's claim is substantial, and there is a substantial discrepancy in the resources of the parties.
- [69] Accordingly, the plaintiff will recover 25% of his costs at Scale B until the date of trial. The defendants will not recover costs.

"Armstrong J."

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Prepared on 26 October 2026 · Esheria