

CANADA / JUDGMENT

Godbout v. Notter

2019 BCSC 1481

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 1481 Godbout v. Notter

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Godbout v. Notter,

2019 BCSC 1481

Date: 20190903

Docket: M29180

Registry: Chilliwack

Between:

Edward Joseph Godbout

Plaintiff

And

Cole Kenneth Notter

Defendant

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment on Costs

Counsel for the Plaintiff:

J. Zacharias and B. Corwin

Counsel for the Defendant:

T. Hande

Place and Date of Submissions on Costs:

Chilliwack, B.C.

July 25 & August 8, 2018

Place and Date of Judgment:

Chilliwack, B.C.

September 3, 2019

- [1] These reasons concern an application for costs by the plaintiff following a ten day trial, the reasons for judgment are indexed as *Godbout v. Notter*, 2018 BCSC 1043. The successful plaintiff seeks double costs on Scale B of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR], as well as trial preparation and attendance at trial for two counsel.
- [2] In the reasons for judgment, the plaintiff succeeded in obtaining a judgment totalling \$583,199.36 for non-pecuniary damages, past wage loss, future lost earnings, future care costs, loss of housekeeping capacity and special damages. Both liability and causation were in issue at trial, the defence having relied heavily on a plea that the plaintiff was contributorily negligent. Several witnesses were called on the issue of liability along with accident reconstruction experts for each party.

Double Costs

- [3] The trial of this action had been set for trial for nine days commencing February 6, 2017.
- [4] Prior to the trial, the plaintiff made an offer to settle to the defendant at a mediation held December 1, 2016 which totalled over \$561,000. Substantial information had been disclosed by the time of the mediation including expert reports which would have allowed for a comprehensive assessment of the issues including the chances of success and quantum. Examinations for discovery of both parties had been conducted prior to the mediation.
- [5] Not having reached a settlement at the mediation, on January 30, 2017, the plaintiff delivered a formal offer to settle in an amount of \$300,000 which was open for acceptance up to 4:00 p.m. on the last business day prior to the commencement of the trial which would have been February 3, 2017. The defendant rejected the plaintiff's formal settlement offer.
- [6] The plaintiff's formal offer was made after further disclosure of witness statements and expert reports including a responsive expert report.
- [7] On February 3, 2017, the defendant issued a formal offer to settle for the amount of \$100,000. The defendant's offer was also rejected.

- [8] Due to the unavailability of a judge for the trial scheduled for February 6, 2017, the trial was adjourned and was re-scheduled to July 31, 2017, for nine days. Unfortunately, the defendant was seriously injured in a workplace accident with the effect that the defendant was unable to appear at the trial on July 31, 2017. As a result, on July 28, 2017, I ordered the trial to proceed on July 31, 2017, on the issue of quantum only and that liability issues were to be tried at a later date which turned out to be in December of 2017.
- [9] Of significance were facts recited in an Agreed Statement of Facts on liability which were agreed to prior to the liability portion of the trial, which included an admission that the defendant had lost control of his vehicle prior to the accident and that he left his vehicle sitting diagonally on the inside lane of Highway 1 where it was struck by the plaintiff's tractor / trailer or semi-unit. The defendant's vehicle was black, there was very little if any light at the time of the accident and the defendant also admitted he did not leave any lights on after abandoning his vehicle prior to the accident.
- [10] Rule 9-1 (4), (5); and R. 9(6) of the SCCR authorize this Court to consider offers to settle in exercising its discretion to award double costs. The SCCR indicate relevant considerations in assessing double costs:

Rule 9-1 - Offers to Settle

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:
- (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;

Considerations of Court

- (6) In making an order under subrule (5), the court may consider the following:

whether the offer to settle was one that ought to reasonably have been accepted, either on the date that the offer to settle was delivered or served or on any later date;

the relationship between the terms of settlement offered and the final judgement of the court;

the relative financial circumstances of the parties;

any other factor the court considers appropriate.

- [11] The law relating to double costs is not in dispute. Both counsel have relied upon the decision of *Hartshorne v. Hartshorne*, 2011 BCCA 29 at paras. 25 and 27 [Hartshorne]:

- [25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" (A.E. v. D.W.J., 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing MacKenzie v. Brooks, 1999 BCCA, 623, Skidmore v. Blackmore (1995) 2 B.C.L.R. (3d) 201 (C.A.), Radke v. Parry, 2008 BCSC 1397. In this regard, Mr. Justice Frankel's comments in Giles are apposite:
- [74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:
- [D]eterring frivolous actions or defences". Houweling Nurseries Ltd. v. Fisons Western Corp. (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
 - "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
 - "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: Bedwell v. McGill, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 AT PARA.33;
 - "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourage[ing] the continuance of doubtful cases or defences": Catalyst Paper Corporation v. Companhia de Navegacao Norsul, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.
- [12] The parties' submissions focused on whether the formal offer of the plaintiff made on January 30, 2017 "ought to reasonably been accepted" per R. 9-1(6)(a).
- [13] The reasonableness of an offer is to be considered in light of the circumstances existing at the time the offer was made and during the period it was left open for acceptance, without reference to the ultimate award the court made (Hartshorne at para. 29; Jones v. Arjun, 2015 BCSC 1881).
- [14] The formal offer of January 30, 2017 for \$300,000 represents a considerable reduction from the plaintiff's previous offer made during a mediation totaling over \$561,000.
- [15] Based upon the evidence which would have been available to both parties by January 2017, including examination for discovery transcripts, witness statements and the expert reports which had been exchanged by that time and having heard or seen the evidence at trial, the reduction in the plaintiff's offer was not likely due to weaknesses in the plaintiff's case. It is more likely that the formal offer represented a serious attempt to resolve the action before trial and to finalize the uncertainty of proceeding with a client who was experiencing PTSD

and anxiety and would benefit from closure of the litigation.

- [16] Furthermore, the defence's response of a counter-offer of \$100,000 did not reflect "a careful assessment of the strength or lack thereof of their cases throughout the course of the litigation" (see Hartshorne at para. 25 citing Catalyst Paper Corp. v. Companhia de Navegação Norsul, 2009 BCCA 16 at para.16).
- [17] The defence refers to the decision of Fan (Guardian ad litem of) v. Chana, 2009 BCSC 1497, rev'd 2011 BCCA 516, in which it was stated at para. 19 " In this regard, Courts must, I think, extend some leeway to litigants holding honest but, ultimately, mistaken views of their claims ". I agree with that decision, however, the defendant's counter-offer reflects more of a "nuisance" offer as opposed to an honest assessment of the risk of a much higher judgment. Even if the court had found contributory negligence in a significant proportion, the damages which would have been awarded in that case would most likely substantially exceed the amount of the counter-offer.
- [18] Finally, an award of \$300,000 was well within the range of outcomes that could reasonably been expected at trial which involves a reflection of the relative financial circumstances of the parties. At para. 153 and following of the reasons for judgment at trial, I referred to the defence position in his written submissions at para. 76 where it was alleged " the plaintiff has failed to adduce admissible evidence or a reliable expert opinion on which to gauge that wage loss", a submission I rejected. There was considerable evidence upon which to gauge a past wage loss including evidence that the plaintiff had worked consistently since high school, including Dr. Dodds' report and testimony and the fact that the plaintiff was only able to return to part-time work commencing December 2014.
- [19] The evidence revealed that Mr. Godbout was forced to live on savings and the generosity of his life partner and was in a very difficult financial position as of January 2017. Considering the financial circumstances of the plaintiff, those of the defendant's insurer and the risks of trial, it is reasonable to assume that the defendant was hopeful Mr. Godbout would accept considerably less than what could have been expected as an award at trial due to his financial circumstances.
- [20] I conclude, based upon the circumstances and the considerable law on the issue of double costs, that the offer of \$300,000 ought reasonably to have been accepted by the defendant in or about January 2017 and that the plaintiff is entitled to double costs under R. 9-1.

Costs for Two Counsel

- [21] Mr. Godbout was represented by two counsel at trial, senior counsel Mr. Zacharias and his junior counsel, Ms. Corwin.

- [22] In submissions on costs, the plaintiff has detailed the contributions of Ms. Corwin which included her taking notes, preparing witnesses and witness statements, preparing a Notice to Admit, dealing with expert witnesses, their reports and preparing for cross-examination of defence expert witnesses. Ms. Corwin also undertook the direct examination of one witness. At trial, the plaintiff called seven lay witnesses and six expert witnesses.
- [23] The assistance of junior counsel eases the burden on senior counsel who benefits from the information gathered by junior counsel and whose involvement facilitates more efficient and cost-effective submissions. That appeared to be the case here.
- [24] I am satisfied that Ms. Corwin's efforts contributed to an efficiently conducted trial with complex issues, especially regarding the PTSD and anxiety issues of Mr. Godbout.
- [25] The defence's submissions on the issue of costs for two counsel focus on the lack of any provision in the SCCR to compensate a successful party for the use of additional counsel. Counsel for the defence refers to the decision of Mr. Justice Saunders in *Thom v. Canada Safeway Limited*, 2015 BCSC 2026 [Thom]:
- [43] There are several recent decisions of this court in which additional awards of party and party costs have been made to account for the reasonable participation of two counsel, in view of the complexity of the trial. The practice appears to have originated in this province with *Chen v. Beltran*, 2011 BCSC 41, in which justification for the award was said to be found in the approach taken in two Ontario trial decisions. Similar costs awards have since been made in *Burnett*, supra, *Wallman v. Doe*, 2014 BCSC 968; *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1842; *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2014 BCSC 1962 (It appears also that the participation of two counsel was a factor considered by the court in awarding a fixed amount of costs in *Popa v. Oland*, 2015 BCSC 919)
- [44] None of these decisions referred to there being any basis in the Supreme Court Civil Rules, nor in their predecessor, the Rules of Court, upon which such an award could be founded. In that regard, it does not appear that the court, in any of those cases, was directed to the comment made by Mr. Justice Tysoe in *Midland Mortgage Corp v. Jawl v. Bundon* (1997), 9 C.P.C. (4th) 236 (BCSC), where, at para. 16 he noted:
- ... if an extra counsel is justified, the amount of special costs will be increased but the tariff for ordinary costs is unaffected by the addition of a second counsel . .
- [45] To some extent, awards of costs are a matter of discretion. The scope of the court's discretionary power may, however, be circumscribed by the Rules. This is set out in the decision of Mr. Justice Goepel in *A.E. v. D.W.J.*, 2009 BCSC 505, where he said:
- [48] The discretion a Supreme Court judge has in awarding costs was summarized in *Stiles v. British Columbia (Worker's Compensation Board)* (1989), 38 B.C.L.R. (2d) 307 at 310, 39 C.P.C. 2(d) 74 (C.A.);

The power of a Supreme Court judge to award costs stems from s. 3 of the Supreme Court Act which confirms that the judges of the Supreme Court have the inherent powers of a judge of superior court of record. The power to award costs is governed by the laws in force in England before 1858 and by the enactments, including the Rules of Court, affecting costs made in British Columbia since 1858. Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Ins. Co.* (1981) 28 B.C.L.R. 230 (C.A.) [additional citations omitted]. The discretion must be exercised judicially, i.e. not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court . .

[49] In *Cridge* [v. Harper Grey Easton & Co., 2005 BCCA 33], Lowry J.A. noted the right of the Lieutenant Governor in Council to restrict the exercise of a Supreme Court judge's discretion in awarding costs at para. 23:

While, subject to abiding by established principles, a Supreme Court judge has a broad discretion in awarding costs, it remains open t the Lieutenant Governor in Council in promulgating the Rules of Court to restrict the exercise of that discretion as may be appropriate where it is thought that do do so will achieve a desired objective . .

[50] A trial judge cannot impose cost sanctions tha tare not authorized by the Rules . . .

[46] To the extent that complexity of a case supports the involvement of two counsel, that complexity may be recognized in an award of costs under Scale C. Other than that, and with due respect to those who have found in favour of such awards, I find only a very limited authority in the Rules under which an additional costs award for the participation of two counsel might be granted. Specifically, Appendix B, s. 2(4) provides that the value for each unit on the tariff for the proceeding, or any step in the proceeding, may be set at 1.5 times the value that would otherwise would apply, but only if after fixing the scale of costs, the court finds that an award on the basic scale would, because of "unusual circumstances", be "grossly inadequate or unjust". I can make no such finding in the circumstances of this case.

[47] The Rules provide no other basis for such an award of increased party and party costs.

[48] To the extent recent decisions of the court listed above would appear to support awards of double costs in circumstances less stringent than those set out in s. 2(4), I would regard those decisions, with respect, as not being binding authority due to the provisions of the Rules not having been considered (in accordance with *Re Hansard Spruce Mills Limited*, [1954] B.C.J. No. 136).

[26] The plaintiff refers to several authorities of this Court in which an award of costs for two counsel have been granted, some of which have been referred to above.

[27] The first of those cases is *Water's Edge Resort Ltd. v. Canada* (Attorney General), 2014 BCSC 1962, a decision of Madam Justice Ross in which she referred to the decision of *Wallman v. Doe*, 2014 BCSC 968 [Wallman]:

Order for Costs of Two Trial Counsel

[32] Canada seeks an order for the costs of two trial counsel, citing *Wallman v. Doe*, 2014 BCSC 968 [Wallman], where Mr. Justice G.C. Weatherill stated at para. 13:

Dealing next with the application for costs of two counsel. As I have stated, this was a complex claim involving many technical issues and many witnesses. A significant volume of documents and evidence had to be amassed, digested, and presented. The attendance of two counsel on behalf of the plaintiff allowed the trial to proceed smoothly and efficiently. It enabled counsel to provide the court with extensive and comprehensive summaries of the evidence and submissions immediately following the close of evidence.

[33] Canada submits that as in *Wallman*, the present case involved many issues, significant volumes of documents, and a number of witnesses. Canada submits that in the present case the involvement of more than one counsel permitted the trial to proceed smoothly and efficiently. WER submits the use of more than one counsel was not justified, noting that WER retained one trial counsel for the duration of the trial.

[34] I do not agree that the present case presented the same level of complexity as *Wallman*. However, I am satisfied that the complexities in the present litigation justified the involvement of more than one trial counsel. I do not agree that the choice made by WER determines the issue. In my view the involvement of more than one trial counsel and the division of responsibility did facilitate an efficient trial process. I conclude that an award for two trial counsel is reasonable and appropriate.

[28] In *Wallman*, the court found the use of two counsel to be reasonable. However, the court reduced the costs of using co-counsel by 30% due to the lengthy video evidence tendered at trial, which obviated the need to have co-counsel for the entirety of the trial (*Wallman* at para. 15).

[29] The plaintiff also referenced the decision of *Chen (Litigation guardian of) v. Beltran*, 2011 BCSC 41 in support of an award of costs for two counsel where appropriate and reasonable.

[30] The test in the decisions quoted by the plaintiff is whether the use of two counsel is "appropriate and reasonable" in the circumstances of the trial. The decisions referred to by the plaintiff do not deal with the issues raised by *Goepel, J. (as he then was) in A.E. (Litigation guardian of) v. D.W.J.*, 2009 BCSC 505, *aff'd* 2011 BCCA 279, respecting the ability of a justice to make an award of costs for two counsel due to there being no provision in the SCCR to cover that situation.

[31] In the circumstances of the case before me, I agree that it was necessary for the plaintiff to have two counsel at trial due to the number of witnesses, the nature of the considerable expert testimony and reports, the length of the trial and contributed to the efficient conduct of the trial. I agree that counsel for the plaintiff were well organized, made efficient use of court time and called witnesses whose evidence was relevant and helpful in making a determination in this case. The facts on liability as well as the plaintiff's injuries relating to

PTSD and anxiety together were not of the common, "run-of-the-mill" type and the work required by counsel justifies an award greater than Scale B.

- [32] For all the reasons I previously mentioned, I find there were unusual circumstances that rendered Ms. Corwin's involvement necessary - further, as indicated by Saunders J. in Thom at para. 46, I would find it to be "grossly inadequate and unjust" to not award additional costs where both counsel were necessary and useful to the court where Appendix B, s. 2(5), applies.
- [33] In light of Saunders J.'s words referred to above regarding an alternative to an award for full costs for two counsel and the appropriateness of two counsel representing the plaintiff, I award the plaintiff double costs under Scale B at 1.5 times the appropriate amount under s. 2(5) of Appendix B.

Conclusion

- [34] The plaintiff is entitled to double costs on Scale B from after the date of the formal offer of the plaintiff and costs for two counsel at 1.5 times the double Scale B costs for trial. Costs are also payable by the defendant at Scale B for the period up to the date of the formal offer.

"Jenkins J."

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