
CANADA / JUDGMENT

Healey v. Chung

2020 BCSC 783

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 783 Healey v. Chung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Healey v. Chung,

2020 BCSC 783

Date: 20200527

Docket: M98684

Registry: New Westminster

Between:

Douglas Healey

Plaintiff

And

Sun Im Sunnie Chung

also known as Sun I. Chung

Defendant

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

T.L. Spraggs

D. O'Neill

Counsel for the Defendant:

J.R. Walsh

S. Gakhal

Place and Date of Hearing:

New Westminster, B.C.

March 13, 2020

Place and Date of Judgment:

New Westminster, B.C.

May 27, 2020

Introduction

- [1] In December 2005 the plaintiff was injured when he walked through a Vancouver crosswalk and was knocked to the ground and struck by the defendant's car ("the accident").
- [2] Following a trial, an appeal and a second trial, the plaintiff was awarded damages of \$246,729 in reasons indexed at 2019 BCSC 1429.
- [3] This application concerns the plaintiff's claim for costs for both trials and for double costs based on his offers to settle made February 1, 2013 and December 28, 2018. He also requests a calculation of pre judgment and post judgment interest.
- [4] The defendant argues that the plaintiff is entitled to costs at Scale B from commencement of the action to December 2012 and from February 3, 2015 to conclusion of the 2019 trial. She claims to be entitled to costs from December 2012 to February 3, 2015 because the award of damages in the first trial was less than the defendant's offer to settle made November 27, 2012.

Background

- [5] The plaintiff filed a Writ of Summons on May 2, 2006. After two trial dates were lost, the trial began February 4, 2013 ("the first trial") and was continued on August 21, 2013; judgment was given March 4, 2014 in reasons indexed at 2014 BCSC 429.
- [6] The defendant admitted liability on the Saturday before commencement of the first trial.
- [7] In the first trial the plaintiff was awarded \$52,652 in damages. The plaintiff appealed the trial order and argument concluded in November 2014. Judgment allowing the appeal was given February 3, 2015 indexed at 2015 BCCA 38 and the plaintiff's case was remitted for a new trial ("the 2019 trial").
- [8] The judgment in the 2019 trial included the following awards:

a. Non-Pecuniary Damages

\$95,000

b. Past Loss of Earning Capacity

\$68,940

c. Future Loss of Earning Capacity

\$60,000

d. Cost of Future Care

\$5,000

e. Loss of Housekeeping Capacity

\$10,000

f. Special Damages

\$7,789.13

TOTAL

\$246,729.13

[9] Prior to commencement of the first trial, the parties exchanged multiple settlement offers. The defendant's only formal offer before either trial proposed settlement for \$101,000 and was delivered November 27, 2012. The plaintiff made an offer on January 30, 2013 and a second offer on February 1, 2013 at \$225,000. This last offer was made on the last business day before the first trial.

[10] In allowing the appeal from judgment in the first trial, the Court of Appeal concluded that the trial judge incorrectly relied on opinions contained in consultation reports obtained from the family doctor's records and accepted as "expert reports". Although the proposed use of those reports was not objected to by the plaintiff before the trial began, the Court concluded that the reports were not admissible because they were not crafted for the purpose of the trial and did not contain the necessary information to permit the trial judge to consider the opinions in the context of the issues before the court: see 2015 BCCA 38 at para. 28.

[11] In overturning the trial judgment, the Court of Appeal also concluded the trial judge had overlooked and misapprehended evidence pertaining to the plaintiff's credibility.

[12] The defendant renewed her offer to settle the claim for \$101,000 and costs made on November 27, 2012. Notwithstanding that the 2012 offer expired on the last business day before the first trial commenced she claimed that this was not a new offer but a simple confirmation that the 2012 offer remained open for acceptance until the last business day before the first trial began. Thus, the defendant's offer still included the usual reservation

that the defendant intended to bring the offer to the trial judge's attention on the question of costs. In my view, the defendant's 2012 offer expired in 2013 and her 2019 assertion that her offer had not been withdrawn or expired was incorrect, however, nothing turns on this discrepancy.

[13] The plaintiff did not withdraw his 2012 \$225,000 global settlement offer until he forwarded his second proposal on December 28, 2018 offering a full settlement of his claims for \$173,300. Both parties' settlement offers expired before the 2019 trial started on January 7, 2019.

[14] At the 2019 trial, the plaintiff sought damages between \$480,000 and \$1,097,000.

The Law

[15] The Supreme Court Civil Rules, B.C. Reg. 168/2009, [Rules] address the issues of costs. Rule 14-1(9) stipulates costs must be awarded to a successful party unless otherwise ordered.

[16] In cases where settlement offers have been made Rule 9-1 provides the framework that informs the court's discretion where costs are in issue. It provides:

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.

[am. B.C. Reg. 119/2010, Sch. A, s. 21.]

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.

[17] In this case, both parties rely on the principles concerning double costs claims set out in *Hartshorne v. Hartshorne*, 2011 BCCA 29 [Hartshorne], at paras. 25- 27:

(ii) The double costs rule and its guiding principles

[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), 1995 CanLII 1537 (BC CA), 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), 1988 CanLII 186 (BC CA), 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 CanLII 1537 (BC CA), 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 "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.

[26] Rule 37B(6) of the Rules of Court (which is now R. 9-1(6) of the Supreme Court Civil Rules and remains the same as its predecessor) lists the following factors to be considered in making an award for double costs under R. 37B(5)(b):

- (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 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.

[27] The first factor - whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted: *Bailey v. Jang*, 2008 BCSC 1372, 90 B.C.L.R. (4th) 125 at para. 24; *A.E. v. D.W.J.* at para. 55. As was said in *A.E. v. D.W.J.*, "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

Parties' Positions

I. The Defendant

[18] The defendant submits that the plaintiff should have ordinary costs at Scale B from the commencement of the action until the defendant's 2012 formal offer and the defendant should receive her costs for the first trial up to the decision published by the Court of Appeal. Finally, the defendant contends the plaintiff should have ordinary costs at Scale B from February 3, 2015 until the conclusion of the action.

[19] The defendant contends that her offer up to and including 2012 reflected the evidence extant at the time and the plaintiff acted unreasonably in rejecting those offers. She contends that the consequences of the Court of Appeal decision should not "fall at the feet of the defendant". She was wholly successful in the first trial and should not be penalized in costs because of the result in the 2019 trial. She claims her positions throughout were not frivolous or deserving of punishment by way of costs.

[20] Moreover, the defendant submits the plaintiff was not "substantially successful" because the amounts awarded for his damages were substantially less than his claims made at trial.

- [21] The defendant contends the plaintiff was an unreliable witness at the first trial and her refusal to accept the plaintiff's offer to settle was not unreasonable. She argued that a double cost award would be disproportionate and unfair to her. She also contends that Mr. Justice Ball's judgment reflected the reasonableness of her continued reliance on her 2012 offer and rejection of the plaintiff's offer.
- [22] She also contends the burden of proof rests with the plaintiff to prove the defendant should have accepted the plaintiff's offer.
- [23] Alternatively, she argued that it was reasonable for the defendants to refuse the plaintiff's offer in part, because it had not been broken down by heads of damage and could not be evaluated by the defendant. Further, she contends the first offer did not have any relationship to the evidence extant at the time. Overall, the defendant said the plaintiff's offers were not delivered in a timely fashion and could not have been reasonably assessed by her.
- [24] She contends that the plaintiff's second offer did not provide a "genuine incentive" to the defendant to settle. This position was predicated on the fact that the plaintiff's second offer reflected an entitlement to costs from steps following the 2012 offer including costs of the first trial.
- [25] Next, she contends the court has a broad discretion in considering awards for costs in that a litigant who has "not been candid with the court at least in some instances ought not to be rewarded with double costs even if her damage award exceeds the offer."
- [26] On this point, the defendant says the plaintiff lacked reliability which eroded the reliability of his testimony and the opinions of experts relying on the plaintiff.
- [27] Last, she contended that because of the long history of the litigation, the costs sought by the plaintiff would exceed the amount of his "likely legal fees" and this would be unfair to the defendant.

II. The Plaintiff

- [28] The plaintiff seeks double costs from the date of his February 1, 2013 settlement offer. He argued that failing an award for double costs from the first offer, the defendant would not be adequately penalized for refusing his offer that should have been accepted before the first trial, as was contemplated in *Hartshorne* at para. 25.
- [29] He argued it is not sufficient that the defendant believed she had a good defence to the plaintiff's claims; he complains the defendant did not negotiate with him from 2015 to 2018 and the only proposal made by the defendant after the Court of Appeal decision was the same offer to settle for payment of \$101,000 and costs.
- [30] He contends the court can consider an earlier offer after it is withdrawn and a second offer has been made: see *ICBC v. Patko*, 2009 BCSC 578 [Patko] at paras. 34-35.

Issues

[31] The questions to be decided on this application are:

- a. is the plaintiff entitled to costs on the entire proceeding including the first trial until judgment in the 2019 trial;
- b. is the defendant entitled to costs from the date of her November 27, 2012 settlement offer until the decision rendered by the Court of Appeal in 2015;
- c. is the plaintiff entitled to double costs from:
 - i. his 2013 settlement offer until judgment in the 2019 trial;
 - ii. the 2015 Court of Appeal decision to judgment in the 2019 trial; or
 - iii. from the December 28, 2018 offer until judgment in the 2019 trial.

Discussion

I. Costs for both Trials

- [32] The issue of the plaintiff's entitlement to costs based on his success at trial was argued by the defendants relying in part on *Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2018 BCSC 105. That case involved a 238-day trial involving discrete issues concerning the Francophone education rights and facilities claimed by the plaintiffs including transportation, community claims and systemic claims.
- [33] The plaintiff referred to the Court of Appeal decision in *Loft v. Nat*, 2014 BCCA 108, addressing costs claimed in a personal injury action. Mr. Justice Goepel gave clear directions in cases similar to the instant:
- [46] Pursuant to Rule 14-1(9), costs in a proceeding must be awarded to the successful party unless the court otherwise orders. At its most basic level the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case: *Service Corporation International (Canada) Ltd. (Graham Funeral Ltd.) v. Nunes-Pottinger Funeral Services & Crematorium Ltd.*, 2012 BCSC 1588, 42 C.P.C. (7th) 416.
- [47] In this proceeding Mr. Loft was awarded damages for injuries he had suffered in the motor vehicle accident. The respondents had denied liability until shortly before trial. Although the damage award was far less than sought, Mr. Loft was the successful party. The fact that he obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving him of costs: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328, 320 D.L.R. (4th) 637.

- [34] The court also discussed the discretionary element in costs awards in circumstances warranting departure from the general nature of the statement in the rule. He noted that misconduct in the course of litigation or failure to accept an offer under Rule 9-1 can inform a decision to deny a costs order to an otherwise successful plaintiff. He also noted that where some issues involve inquiries into unsuccessful claims on discrete questions, the use of trial time can lead to costs awards against the party advancing those claims. He cautioned that these types of orders are not regular and should be confined to "relatively rare cases" (para. 49).
- [35] This principle was also endorsed in *Han v. Park*, 2015 BCCA 324 at para. 54; discrepancies between the award of damages and the amount sought do not deprive the successful plaintiff of costs. The establishment of liability under the cause of action is sufficient to warrant a costs order.
- [36] In this case, the plaintiff made two offers between 2012 and 2019; he was successful in obtaining damages exceeding both of those amounts offered. The defendant on the other hand made a single offer in 2012 which was less than one half of the amount awarded in the 2019 trial.
- [37] While I accept the plaintiff was not successful in establishing his damages claimed for each head of damage, I am not persuaded that there is any basis to conclude that he was not substantially successful overall and I do not exercise my discretion to make any order denying the plaintiff costs or portions of costs claimed.
- [38] Next, the plaintiff seeks to recover his costs of the aborted trial and all costs from the commencement of this litigation to judgment. The plaintiff contends that the decision in *Melgarejo-Gomez v. Sidhu*, 2002 BCCA 400 [Melgarejo-Gomez], informs the court that in cases involving more than one trial after a successful appeal, costs are in the discretion of the trial judge hearing a second trial.
- [39] The usual rule governing costs of multiple trials favours an award to the successful party in the second trial. *Davey C.J.B.C.* addressed this question in *Norstrand v. Olsen*, 1968 CanLII 579, 68 D.L.R. (2d) 645 (B.C.C.A.) [Norstrand] and referred to the usual rule. He said:
- 3 It is clear from *Errico v. British Columbia Electric R. Co., Ltd.*, 23 B.C.R. 468, [1917] 2 W.W.R. 238, and *Robinson v. Point Grey*, [1927] 2 D.L.R. 471, [1927] 3 W.W.R. 211, 38 B.C.R. 243, that the usual rule is that the costs of an abortive trial follow the event of the new trial even though the mistrial was caused by some erroneous ruling of the trial Judge upon some untenable point taken properly, forensically, by counsel for the respondent.
- 4 However, some other direction conformable to the justice of the case may be made in special or unusual cases: e.g., *Swift v. David* (1910), 15 B.C.R. 70 [affd 44 S.C.R. 179], where respondent at the outset of the trial took an objection in law to the plaintiff's case, and secured its dismissal before the evidence had been heard, instead of having the point set down and argued as a point of law in accordance with the rules. In *Carty v. British Columbia Electric R. Co., Ltd.* (1911), 16 B.C.R. 3, the

defendant admitted liability and went to trial before Judge and jury on the quantum of damages; this Court set aside an award of \$15,000 as excessive and ordered a new trial. It ordered the plaintiff to pay the costs of the abortive trial, because there was no possibility of the plaintiff recovering and holding a verdict for that amount on the new trial, yet he was bound to recover something, and therefore succeed. To order the costs of the first trial to follow the event of the second would necessarily require the defendant to pay the costs of both trials. That was considered unfair, especially since it was the plaintiff who persuaded the jury to award excessive damages. The case was considered to be an exceptional one.

[40] Thus, the general rule is that successful plaintiffs will be entitled to costs of a first trial where a successful appeal leads to a second trial and the plaintiff succeeds at the second trial. This statement of the general principle has been endorsed often by the Court of Appeal; see *Win Sun Produce Co. Ltd. v. Albert Fisher Canada Ltd.*, 1999 BCCA 94; *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2017 BCCA 176; *Joy v. Atkinson*, 2009 BCCA 230; *Davidson v. Schatz*, [1998] B.C.J. No. 3151, 28 C.P.C. (4th) 260 (S.C.).

[41] This issue was also addressed in *Orkin on the Law of Costs* (2nd ed.), which describes the general principle that following a successful appeal, costs of the first trial are awarded to the successful appellant subject to the court's discretion to order otherwise. The author says, at 802.11:

Where the appellate court orders a new trial the usual rule is that the costs of the first trial follow the event of the second trial. The British Columbia practice called for allowing the trial judge at the second trial to decide the issue of costs of an abortive first trial. However, the Saskatchewan Court of Appeal declined to follow this practice and saw nothing wrong with awarding the costs of the abortive trial rather than leaving the issue to the second trial judge.

In special circumstances an appellate court may award the costs of the first abortive trial to a successful appellant, for example where the conduct of respondent's counsel had contributed substantially to the need for a new trial.

[42] In my view, absent special or unusual circumstances I must exercise my discretion in favour of the plaintiff in this case. Special circumstances were discussed by Davey C.J.B.C. in *Nordstrand*; he observed a trial judge may take into account the fact that a plaintiff's excessive damages claim was successfully appealed on that point and a new trial is ordered because of the excessive award. He said costs to the successful plaintiff might be denied where "there was no possibility of the plaintiff recovering and holding a verdict for that amount on the new trial". Similarly, where one party has behaved badly or caused a mistrial, it would be appropriate for trial judges to exercise their discretion to refuse costs for the first trial: see *Orkin*, at p. 58.

[43] In *Gordon v. Ahn*, 2017 BCCA 334, the Court confirmed that decisions concerning costs of abortive trials are in the discretion of the trial judge and the economic means of litigants are not, generally, a valid reason for awarding costs in that litigant's favour.

- [44] In my view, the defendant bears the burden of proving exceptional circumstances warranting a departure from the general principle of Rule 14-1(9) entitling the plaintiff to costs of the first and second trials.
- [45] In this case, the defendant argued that she was totally successful in the first trial and ought not be penalized in costs because the plaintiff succeeded on appeal and at the subsequent trial. She contends that based on the principles set out in *Hartshorne and Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 [Giles], the plaintiff was not "substantially successful" when considered in light of the amount of damages claimed and the amount awarded in both trials.
- [46] In the circumstances of this case, I am satisfied that there was no misconduct or responsibility attributable to the plaintiff concerning the Court of Appeal's reasoning. Moreover, the defendant advocated for the admission of the impugned consultation report at trial and defended that position on the appeal. If there were error or fault for the requirement of a second trial, the defendant bears substantial responsibility. If anything, the plaintiff's success at the 2019 trial is compelling evidence that the first trial ended badly without his fault; overall, the new trial was in large measure caused by the defendant's approach to the claim.
- [47] I find that costs should be awarded to the plaintiff in accordance with the usual rule for both trials. There were no special circumstances that might warrant a departure from the usual rule that might trigger different discretionary considerations of special circumstances as described in *Melgarejo-Gomez*.
- [48] I can find no basis to conclude that the defendant would be entitled to costs of the first trial. The defendant was not successful in this litigation and cannot rely on a decision, overturned on appeal, to support her claim for costs of the first trial.
- [49] The plaintiff established liability against the defendant at the first trial and was the successful party notwithstanding shortcomings in his claims. In the final result, he was awarded damages under each head of damage claimed.
- [50] The plaintiff is entitled to recover all of his costs from the commencement of the trial to the conclusion of the 2019 trial. The only remaining issues are whether the plaintiff is entitled to double costs from the date of his November 2012 settlement offer to the conclusion of the 2019 trial or from the date of his second settlement offer made on the eve of the 2019 trial.

II. Double Costs

- [51] The defendant's settlement offer of \$101,000 was made November 27, 2012 and expired immediately before commencement of the trial. On January 10, 2013, the plaintiff forwarded copies of all reports he intended to rely on at the trial including a report from Dr. Cecil Hershler served January 10, 2013. That letter was followed by the plaintiff's February 1, 2013 offer to settle his claims at \$225,000; this offer did not have an expiry date similar to the

defendant's settlement offer. The next offer to settle was the plaintiff's offer made December 28, 2018 to accept \$173,000 in settlement of his claims; that offer contained an expiry one business day before the trial commenced.

- [52] The parties do not disagree that the principles outlined in *Hartshorne* are applicable. The defendant argued that the plaintiff's first offer had been revoked and he was limited to reliance on his second offer alone. Second, she said it was reasonable for the defendants to refuse to accept the first offer because it was not unambiguous and could not be easily evaluated by the defendant because there was no breakdown between the heads of damage claimed. She also contended that the first offer had no relationship to the evidence extant at the time because the plaintiff's circumstances indicated he did not have an impaired earning capacity claim. She also contends the first offer was delivered in an untimely fashion.
- [53] The plaintiff's second offer included an entitlement to costs accruing after the 2012 formal offer and specifically including the costs of the first trial. The defendant contends that this condition was "entirely inconsistent with the normal costs rules". In my view the defendant misconceived the general rule that that costs of both trials would usually be awarded to the successful appellant and plaintiff in the second trial.
- [54] Finally, the defendant argued that the court has broad discretion to consider appropriate circumstances in assessing a claim for double costs. She relied on *Griffith v. Larsen*, 2014 BCSC 2005 at paras. 5-6.
- [55] The analysis of the double costs issue is informed by Rule 9-1(6) which guides the court's discretion in considering offers to settle: *Brewster v. Li*, 2014 BCSC 463 [Brewster] at para. 14. This analysis does not rely on an assessment of the offers contrasted with the judgment. The first question is whether the offer ought reasonably to have been accepted on the date the offer was delivered or on any later date.
- [56] Offers made too late for reasonable consideration can be ignored when double costs are claimed. The timing of offers is crucial when considering the defendant's opportunity to weigh and consider the offer: See *Uppal v. Rawlins*, 2010 BCSC 11; *Brewster*.
- [57] In this case, the plaintiff's first offer was extant for almost six years during which interval the defendant made no adjustment to her proposal notwithstanding the results of the appeal and additional evidence tendered by the plaintiff.
- [58] On the question of the plaintiff's entitlement to double costs after settlement offers were made, the plaintiff referred to *Patko* which involved circumstances similar to this case. In *Patko* the defendant had made a settlement offer that was revoked one year later. The offer was replaced by an offer at a lesser sum before the action against the defendant was dismissed and the defendant argued this offer ought reasonably to have been accepted. The plaintiff argued that the first offer had been withdrawn and could not be considered on the question of costs.

[59] The defendant contends that I am limited to considering the plaintiff's second offer given on the eve of the 2019 trial and I should look only at double costs after that date. Grauer J. (as he then was) examined the relevance of multiple offers and framed the question regarding similar circumstances in Patko:

[36] Both offers constitute an "offer to settle" within the meaning of Rule 37B(1)(a). Although the first offer was indeed revoked, it was outstanding for a full year. The real question is whether, notwithstanding its eventual withdrawal, it was an offer that ought reasonably to have been accepted while it remained open. To treat it this way is, in my view, consistent with the object described by Cumming J.A. in Skidmore.

See also: Hughes v Hughes, 2019 BCSC 2204 at para. 17.

[60] Here, the plaintiff's offer was extant from early in February 2013 until December 2018. The plaintiff's second offer was communicated in the afternoon of December 28, 2018 in anticipation of the trial date that began January 7, 2019 and was at a lesser sum than the 2013 offer.

[61] I am satisfied it is appropriate to take into account plaintiff's earlier settlement offer outstanding until shortly before the 2019 trial commenced when it was replaced with a lower offer.

[62] I do not accept the defence contention that the plaintiff's first offer was not made in a timely way and that the defendant was unable to assess the offer in the time before the trial began. On January 10, 2013 the plaintiff informed the defendant that he would rely on 14 reports at trial. These included medical reports, work capacity evaluations, economists report and vocational testing material. The defendant had conducted examinations for discovery of the plaintiff and would have had 24 days to analyze all of the evidence and respond with its view as to the global amount of damages they would be prepared to pay.

[63] The defendants contend that at the time of the first trial she had properly assessed the plaintiff's claim with particular emphasis on the fact the plaintiff and his spouse had agreed he would remain in the home and provide childcare while she took employment outside the home. Further, the defendant was aware the plaintiff had begun working with North Shore Pest Detective some months before the plaintiff's 2013 offer was made. She argued that these features of the plaintiff's life were properly reflected in her settlement offer at \$101,000.

[64] She contends this state of affairs was reflected in Ball J.'s trial reasons and she should not be faulted for rejecting the plaintiff's offer when the final judgment in the first trial was less than the defendant's offer to settle.

- [65] However, the defendant did not alter her settlement offer to reflect any revised assessment of the claim or her risks on proceeding to trial between 2013 and January 2019. She had the benefit of new medical opinions from a physiatrist in November 2017 and a second opinion from the plaintiff's psychiatrist in August 2018 without any subsequent revision of her assessment.
- [66] On all of the facts pertaining to the plaintiff's claim known in February 2013, I find it was not reasonable to expect the defendant to accept the plaintiff's November 2012 settlement offer in light of all of the evidence that had been revealed to that time. In part the offer was not broken down, was delivered late in the day and could not reasonably have been evaluated.
- [67] Conversely, I find it was not reasonable to have expected the plaintiff to accept the defendant's settlement offer on the facts known at the time. Credibility was a major issue influencing the defendant's assessment; I do not accept that it was unreasonable that the plaintiff believed he would be believed at trial.
- [68] By contrast, the plaintiff's appeal was successful on the admissibility issue of the consultant's opinions in clinical records and on some misapprehension of other evidence by the trial judge. By August 2018 there were additional medical reports available and the defendant continued to rely only on a 2009 opinion from her consulting orthopedic surgeon.
- [69] By September 2018 the defendant had been presented with the plaintiff's particularized damages claims at the first trial and had sufficient evidence to make a better informed decision concerning the plaintiff's claim and she acted unreasonably in not accepting that offer at that time.
- [70] The next issue is the relationship between the terms of the settlement offer and the final judgment. On that point, I am satisfied that the plaintiff's trial judgment exceeded his first offer by some \$21,000 and the second offer by \$70,000.
- [71] The differences between the judgment and the offer highlight the policy described in Hartshorne and Giles. Offers to settle must be taken seriously if they are to promote early settlement and avoid litigation costs. Much would have been saved if the defendants had accepted either of the plaintiff's offers. The fact that the defendant did not revisit her assessment is a decision that ought to be repudiated by the court; the resulting costs and consequences of the 2019 trial could easily have been avoided. The defendant did not take into account the court's directions in Hartshorne.
- [72] I am also required to take into account the relative financial circumstances of the parties. There was little evidence concerning the plaintiff's circumstances except the trial evidence about his employment and finances. He did not provide an affidavit on this costs hearing and I am satisfied that the financial circumstances of the parties is a neutral factor in the assessment of double costs.

- [73] If I was to consider that ICBC played a significant role in the litigation, and there was other persuasive evidence concerning the plaintiff's financial circumstances and his retainer agreement with his solicitor, the analysis might have been different.
- [74] The defendant argued that if the plaintiff recovers costs for both trials and double costs for any portion of that time, his recovery might well exceed the actual fees payable to his solicitor. As indicated, there is no evidence concerning that relationship and it would not be appropriate for me to speculate. The plaintiff's case was litigated over 14 years to trials and an appeal. Throughout six of those years, the plaintiff's settlement offer was outstanding and rejected by the defendant without evidence of further reconsideration as events evolved.

Interest

- [75] the plaintiff claimed to be entitled to court order interest on the word for past loss of earning capacity. He contends the past earning capacity claim is "in the nature of a pecuniary loss" and attracts interest under s. 1 of the Court Order Interest Act, R.S.B.C. 1996, c. 79.
- [76] He also seeks an order for post judgment interest running from the date of the judgment but not the date costs are determined.
- [77] The defence concedes the plaintiff's entitlement to interest on his past income loss and past loss of opportunity. She contends that interest should be calculated for past losses by treating the award as a stream of income to be received over six month increments after the cause of action arose and ending on the date of judgment.
- [78] In *Sharma v. Chan*, 2017 BCSC 1651, Voith J. confirmed that claims for loss of earning capacity were in the nature of pecuniary claims and attract court order interest. The defendant asserts that the plaintiff's past loss of opportunity cost should be treated as a stream of income received evenly over a period of time starting six months after the cause of action arose and ending on the date of judgement with interest calculated accordingly: see *M.B. v. British Columbia*, 2002 BCCA 142 at para 96.
- [79] The defence also argues that the plaintiff's claim for special damages should be calculated in six month increments to the date those special damages were incurred: see *Workshop Holdings Limited v. CAE Machinery Ltd.*, 2006 BCSC 389 at para 29.
- [80] I accept the position advanced by the defendant that court order interest should be calculated periodically at six month intervals. If the parties are unable to agree that the defendant's calculations set out in paragraphs 22 and 23 of her supplementary submissions are correct, the question of that calculation should be referred to the registrar for an inquiry and a certified report.
- [81] Finally, I accept the plaintiff's submissions concerning the calculation of interest on costs set out at para .25 in *McKittrick v. Iskic*, 1999 CanLII 5635.
- [82] The plaintiff's entitlement to interest on costs will run from the date of judgement.

Conclusion

[83] In the result, I am satisfied the plaintiff should have his costs at Scale B from the commencement of the proceeding until September 2018 when the new evidence had been produced and more was known about the plaintiff's long term circumstances. Further from September 2018 to the conclusion of the trial the plaintiff will have double costs.

"Armstrong J."

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