

CANADA / JUDGMENT

Honeybourn v. Aghdasidehaji

2022 BCSC 1085

COURT

Supreme Court of British Columbia

DECIDED

28 June 2022

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2022 BCSC 1085 Honeybourn v. Aghdasidehaji

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Honeybourn v. Aghdasidehaji,

2022 BCSC 1085

Date: 20220628

Docket: M182693

Registry: Vancouver

Between:

Michelle Barbara Honeybourn

Plaintiff

And

Kamroosh Aghdasidehaji and Mahnoosh Jafarieh

Defendants

Before: The Honourable Mr. Justice Blok

Reasons for Judgment on Costs

Counsel for the Plaintiff:

J. Fisher

Counsel for the Defendants:

C. Jago

Place and Dates of Trial:

Vancouver, B.C.

June 3, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 28, 2022

I. Introduction

- [1] On February 17, 2022, I granted judgment in favour of the plaintiff, Michelle Honeybourn, in the amount of \$182,923.15. She now seeks an award of double costs as a result of a formal offer to settle she made on October 22, 2021 (the "Offer"), as the amount of the Offer was lower than the award made at trial.
- [2] She also seeks other costs orders: (1) an order allowing all disbursements incurred prior to August 12, 2020, the date the Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020, as amended by B.C. Reg. 31/2021 [Disbursements Regulation], came into effect; and (2) double disbursements after the date of the offer for those disbursements not subject to the Disbursements Regulation. Although not an order as such, at the hearing she also sought the actual assessment of her costs by the Court.
- [3] The defendants argue that the plaintiff has not shown the Offer ought reasonably to have been accepted, noting the available evidence at the time of the offer indicated no substantial exposure for damages for either loss of earning capacity or loss of housekeeping capacity. While they agree that the disbursements incurred by the plaintiff prior to August 12, 2020 are not subject to the cap created by the Disbursements Regulation, they say those disbursements must still be assessed by the registrar. Finally, the defendants submit it has been established by case authority that a party cannot be awarded double disbursements.

II. Trial Positions, the Award and the Offer

- [4] At trial, the plaintiff sought damages totalling about \$298,000, while the defendants submitted that damages should be in the range of about \$87,600 to \$107,600.
- [5] As already noted, the total award was \$182,923.15. This was made up by the usual heads of damages, including non-pecuniary damages (\$90,000), damages for lost earning capacity (\$45,300, which was based on one year's income) and loss of housekeeping capacity (\$15,000), as well as amounts for past income loss, cost of future care and special damages.
- [6] The parties agree that amounts totalling \$22,650.81 are to be deducted from the award pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, bringing the net award to \$160,272.34.

- [7] In the Offer, the plaintiff offered to settle her claim for the net amount (or "new money") of \$149,000. The difference between the Offer and the award is \$11,272.34.
- [8] Although the Offer forms the basis of the plaintiff's application, for context she notes that she made an earlier offer to settle on May 28, 2020 in the amount of \$175,248.19, which also was less than the ultimate award (though it is unclear how s. 83 deductions applied to that offer), as well as a later offer made October 28, 2021 for \$139,000 which, after s. 83 deductions, was \$21,272.34 less than the net award from trial.
- [9] The trial of this matter commenced on November 1, 2021. The Offer was made on October 22, 2021, 10 days prior to trial. By its terms, it was open for acceptance until October 26, 2021. The defendants did not argue they had insufficient time to consider the Offer.
- [10] The later offer of October 28, 2021 was made on the Thursday prior to the commencement of the trial the following Monday. It was open for acceptance until October 29, 2021.

III. Positions of the Parties

A. Plaintiff

- [11] The plaintiff submit that because of the Disbursements Regulation the disbursements she incurred prior to the effective date of the Disbursements Regulation should be treated differently from those incurred afterward. The Disbursements Regulation limits the recovery of disbursements (except for "excluded disbursements") to six percent of the total award.
- [12] The plaintiff provided a number of calculations showing how disbursements that would otherwise be claimable are now limited by the Disbursement Regulation. If her pre-August 12, 2020 disbursements are not allowed, the shortfall is about \$12,000. If her pre-August 12, 2020 disbursements are allowed, the shortfall is about \$3,200. In other words, in both instances there will be disbursements the plaintiff has paid that she will not be able to recover.
- [13] The plaintiff notes that her latter two offers were made with the explicit intention of avoiding substantial cancellation fees by her experts. Because the Offer was not accepted, she incurred significant disbursements (which she estimated at about \$13,000) that by reason of the Disbursements Regulation she is unable to recover in full. She argues that this now creates a significant strategic advantage in favour of insured defendants in vehicle injury cases, and she submits this is an additional factor to take into account when considering whether the Offer ought to have been accepted.
- [14] The plaintiff submits the Offer was made at a time when there was sufficient knowledge and information to fully evaluate the case, including experts' reports and evidence from the plaintiff's examination for discovery. The plaintiff says the defendants ought to have accepted the Offer.

- [15] As for her application for double excluded disbursements - which here relate to the hearing fees - the plaintiff relies on *Gonzales v. Voskakis*, 2013 BCSC 1274 [Gonzales]. The plaintiff acknowledges there are cases to the contrary, but says those cases relied, at least in part, on the argument that double disbursements would be a "windfall", whereas by virtue of the Disbursements Regulation, in this case double disbursements would simply allow her to recover more of her actual disbursements. There would be no windfall.

B. Defendants

- [16] The defendants acknowledge that the plaintiff is entitled to all proper disbursements incurred prior to August 12, 2020, when the Disbursements Regulation came into force.
- [17] The defendants submit that the reasonableness of the Offer must be considered from the defendants' perspective. There were three medical-legal reports (two from plaintiff's experts and one from a defence expert), plus the discovery evidence of the plaintiff, and none of these suggested either a real and substantial possibility of a future income loss or a basis on which a separate housekeeping award could be made. Counsel spent some time referring to particular excerpts from the medical reports in support of their submission on this point.
- [18] The defendants say there was a sound basis for their settlement position and they should not be penalized for failing to guess the correct outcome.
- [19] As for the plaintiff's claim for double the excluded disbursements, counsel referred to *Moore v. Kyba*, 2012 BCSC 577 [Moore], *Kaban Resources Inc. v. Goldcorp Inc.*, 2020 BCSC 1982 [Kaban Resources] and *Rhodes v. Surrey (City)*, 2021 BCSC 1274 [Rhodes], all of which came to a conclusion different from the conclusion in *Gonzales*. The defendants also note that *Gonzales* concerned a different aspect of Rule 9-1 (the offers to settle rule) than the one at issue here. In this case, the provision at issue is Rule 9-1(5)(b), not (d) as it was in *Gonzales*, and (b) gives the court the discretion to award double costs "for all or some of the steps taken in the proceeding" after the delivery of the offer. The defendants submit that incurring disbursements is not a "step taken in the proceeding".

C. Plaintiff's Reply

- [20] The plaintiff argues that incurring a disbursement is a "step taken in the proceeding" and is therefore captured by the provision.
- [21] As for the defendants' submissions concerning the plaintiff's work and household capacity, counsel noted that all of the experts agreed the plaintiff had ongoing struggles, and the plaintiff's family physician noted the plaintiff had gone a full year without doing housekeeping in the post-accident period.
- [22] Finally, the plaintiff noted the defendants had not argued that they did not have sufficient time to consider the Offer.

IV. Discussion

A. Rules 9-1(5)(b) and 9-1(6)

[23] Rule 9-1(5)(b) provides that in a proceeding in which a plaintiff has delivered a formal offer to settle, the court may award double costs of all or some of the steps taken in the proceeding after the delivery of the offer.

[24] Rule 9-1(6) lists the factors the court may consider in making that determination. These are:

- 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.

B. The Disbursements Regulation

[25] Section 5 of the Disbursements Regulation reads as follows:

5 (1) In this section:

"disbursement limit" means, in relation to a vehicle injury proceeding,

- (a) the amount that is 6% of the total award of damages assessed by the court in the vehicle injury proceeding or, if an offer to settle the vehicle injury proceeding is accepted, 6% of the amount offered, or
- (b) if the court dismisses the vehicle injury proceeding or, at the conclusion of the vehicle injury proceeding, does not make an award of damages, the amount determined by the court;

"excluded disbursements" means the following:

- (a) fees payable to the Crown under the Supreme Court Civil Rules;
 - (b) fees payable to the sheriff for non-refundable deposits in civil jury trials under the Supreme Court Civil Rules;
 - (c) disbursements incurred by a party if the court ordered the costs of the proceeding to be paid as special costs;
 - (d) disbursements incurred for an expert report on the issue of liability, if the court ordered that those expenses are excluded disbursements.
- (2) Only the following may be allowed or awarded to a party in a vehicle injury proceeding as disbursements:
- (a) disbursements up to the disbursement limit;

- (b) excluded disbursements.
- (3) The limits set out in subsection (2) do not apply
 - (a) to a vehicle injury proceeding if
 - (i) a notice of trial was filed and served before August 12, 2020, and
 - (ii) the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding is before June 1, 2021, or
 - (b) to a vehicle injury proceeding if
 - (i) a notice of trial was filed and served before August 12, 2020,
 - (ii) the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding is on or after June 1, 2021, and
 - (iii) the court is satisfied that the party necessarily or properly incurred disbursements before August 12, 2020 in excess of the disbursement limit.

C. General Principles

[26] In *Hartshorne v. Hartshorne*, 2011 BCCA 29, the Court of Appeal said:

[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"

[Citations omitted.]

[27] The court also endorsed comments made in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282, at para. 73 [Giles], concerning the purposes for which costs rules exist:

- a) to deter frivolous actions or defences;
- b) to encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect;
- c) to encourage litigants to settle whenever possible, thus freeing up judicial resources for other cases;
- d) to have a winnowing function in the litigation process by requiring 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
- e) to discourage the continuance of doubtful cases or defences.

[28] The following comments from *Giles* are also instructive:

- [88] I appreciate there are no mandatory factors under Rule 37B(6) [the double costs rule of the time] and that trial judges have discretion to take into account whatever factors they consider appropriate in a given case. However, the ultimate discretion as to double costs must be exercised in a just, principled, and consistent way. One of the goals of Rule 37B is to promote settlement by imposing consequences on parties who have refused to accept an offer that ought reasonably to have been accepted. While it may not invariably be the case, I consider that it would be generally antithetical to that goal to penalize an unsuccessful plaintiff with double costs for proceeding to trial in the face of an unreasonable offer. Virtually all litigation comes with a degree of risk. When faced with settlement offers, plaintiffs must carefully consider their positions. However, they should not be cowed into accepting an unreasonable offer out of fear of being penalized with double costs if they are unable to "beat" that offer. Put somewhat differently, plaintiffs should not be penalized for declining an offer that did not provide a genuine incentive to settle in the circumstances.
- [29] The Court of Appeal summarized the law on the subject in *C.P. v. RBC Royal Life Insurance*, 2015 BCCA 30 [C.P.]:
- [94] The underlying purpose of the offer to settle rule was set out in *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". 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" ;
 - "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect" ;
 - "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases ;
 - "[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" .

[95] A plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs. To do otherwise would undermine the importance of certainty and consequences in applying the Rule. The importance of those principles was emphasized by this Court in *A.E. (Litigation Guardian of) v. D.W.J.*, 2011 BCCA 279] at para. 41:

[41] This conclusion is consistent with the importance the Legislature has placed on the role of settlement offers in encouraging the determination of disputes in a cost-efficient and expeditious manner. It has placed a premium on certainty of result as a key factor which parties consider in determining whether to make or accept an offer to settle. If the parties know in advance the consequences of their decision to make or accept an offer, whether by way of reward or punishment, they are in a better position to make a reasoned decision. If they think they may be excused from the otherwise punitive effect of a costs rule in relation to an offer to settle, they will be more inclined to take their chances in refusing to accept an offer. If they know they will have to live with the consequences set forth in the Rule, they are more likely to avoid the risk.

[Most references omitted.]

[30] The Court of Appeal quoted with approval that same passage from C.P. in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26.

D. Analysis

[31] I discuss the Rule 9-1(6) factors under the headings that follow, although I will leave the first factor to the end.

Relationship Between the Offer and Award

[32] The offer was for \$149,000, the net judgment amount was \$160,272.34, and the difference between the two is \$11,272.34.

[33] Neither side addressed this factor in their submissions. The difference is not large, but it is not trifling either. I conclude it is a factor modestly in favour of the plaintiff.

Relative Financial Circumstances of the Parties

[34] I appreciate that there is a vast disparity in the financial circumstances of the parties, as there is in every case involving an insured defendant. In C.P., at para. 101, the court cited with approval a statement from *Mazur v. Lucas*, 2011 BCSC 1685, that "while insurance coverage is not automatically a factor to be considered against the insured party, the facts of the particular case will govern whether it should be considered, and if so, what weight should be given to it".

[35] In this case, because of the constraints on disbursements imposed by the Disbursements Regulation the defendants had materially less risk in terms paying the significant trial disbursements and the plaintiff had much more, which exacerbated the financial disparity between the parties. As plaintiff's counsel explained, this was a significant factor for the plaintiff in this case given her particular personal circumstances. I agree.

[36] Accordingly, I conclude this factor favours the plaintiff.

Other Factors

[37] The parties did not raise any other factors, save the one I return to now.

Whether the Offer Ought Reasonably to Have Been Accepted

[38] The defendants maintain that, in the evidence available to them prior to trial, there was nothing to suggest any proper basis for awards for loss of future earning capacity and loss of housekeeping capacity.

[39] To put this in context, Ms. Honeybourn was employed as an early childhood educator and worked with young children, a job that had physical aspects to it. The frequent picking up of children is the most obvious example of the physical work involved.

[40] In making these submissions, the defendants have been somewhat selective in their evidentiary references and characterizations. For example, the defendants did not refer to the remarks of the plaintiff's physiatrist Dr. Hawkeswood that Ms. Honeybourn "is likely to experience ongoing pain on account of injuries sustained in the subject accident", and that Ms. Honeybourn herself expressed concerns to Dr. Hawkeswood about her ability to carry on with her work given her ongoing low back pain. Dr. Hawkeswood also made recommendations that included clinical counselling to help the plaintiff with pain coping and acceptance strategies, which indicates the serious nature of the pain she was experiencing and of her coping difficulties. Defence physiatrist Dr. Tam noted the plaintiff's report of daily constant low back pain and his diagnosis was one of chronic low back pain. He also noted the plaintiff had modified her work duties due to her ongoing low back pain and that her work tasks exacerbated her back pain. He also noted that she had modified her household duties. At her examination for discovery (which I note was somewhat dated), Ms. Honeybourn testified that there were limitations in what she could do at work.

[41] I also note there were numerous references in the clinical records of the plaintiff's family doctor, Dr. Tomaszewski, indicating that the plaintiff's symptoms were not improving throughout 2019, 2020 and 2021.

- [42] From the medical and other evidence available up to the start of trial it ought to have been foreseeable that some award for loss of future earning capacity was within a range of reasonable outcomes in this case. While I concluded that the plaintiff's reduced capacity for working with infants in particular did not give rise to a real and pecuniary loss in future, I found the following:
- [140] That is not, however, the end of the matter. I am satisfied there is a real and substantial possibility of pecuniary losses associated with other aspects of her future employment. In the event of a closure of an employer's business or facility, I expect the plaintiff may well take longer to find other employment given her more limited capabilities. Also, she may have to take time off due to flare-ups or other physical setbacks, and she may have to reduce her work hours somewhat as she ages or approaches retirement age. I also conclude there is also a real, although more limited, possibility she may have to revert to part-time work.
- [43] Similarly, there was a basis on which the defendants ought to have reasonably concluded there could be some award for loss of housekeeping capacity.
- [44] At minimum, the defendants ought to have factored in the possibility that the evidence might come out more strongly in favour of the plaintiff than they thought.
- [45] The defendants say that there was a sound basis for their settlement position and they should not be penalized for "guessing incorrectly". That may be true so far as it goes, but I conclude it was not reasonable for the defendants to assume that victory was assured on the two heads of damages in question. Also, "guessing incorrectly" is not the test; if it was, double costs might never be awarded where a party fails to accept a reasonable offer from an opposing party.
- [46] Accordingly, I conclude that the plaintiff's offer is one that the defendants ought reasonably to have accepted.
- [47] All of the applicable factors set out in Rule 9-1(6) are in the plaintiff's favour. As the court said in C.P., a party who rejects a reasonable offer to settle "should usually face some sanction in costs", given the various reasons the Court of Appeal set out in the full quote reproduced earlier.
- [48] For these reasons, I conclude the plaintiff should have double costs after the date of the Offer.

E. Disbursements Incurred Prior to August 12, 2020

- [49] It emerged at the hearing that this issue was not contentious given the position of the defendants that the plaintiff's disbursements incurred prior to August 12, 2020, the date the Disbursements Regulation came into effect, are not captured by the limitations set out in that regulation. I made an order to that effect at the hearing, though I noted these were to be assessed by the registrar in the absence of an agreement between the parties.
- [50] The plaintiff had asked that I assess her costs. I declined to do so. Although there are some specific instances where the court may award lump sum costs, if costs are to be assessed they are to be assessed by the registrar: Rule 14-1(4).

F. Double Disbursements

- [51] The plaintiff seeks double disbursements after the date of the Offer which, here, means double the court hearing fees, as these particular disbursements are exempt from the limitations set out in the Disbursements Regulation. She relies on Gonzales in support of her argument.
- [52] Gonzales did not involve a claim or award for double disbursements. Instead, the case involved a defendant who made an offer to settle well in excess of the award at trial and who sought an award of costs, including disbursements, after the date of his offer. The plaintiff in that case argued that "costs" did not include "disbursements" and so the defendant should not get any disbursements. The court concluded that the use of the word "costs" did not limit the court's discretion in also awarding disbursements. In coming to this conclusion, the court declined to follow Moore (which dealt with a different provision, the double costs provision), which had held that "costs" within that provision did not include disbursements.
- [53] The "double disbursements" issue also arose in Lafond v. Mandair, 2017 BCSC 1081 [Lafond], Kaban Resources and Rhodes. In each of those cases, the court found that Rule 9-1(5)(b) did not allow for double disbursements.
- [54] The plaintiff sought to distinguish those cases by arguing the Disbursements Regulation now eliminates or reduces the "windfall" element of double disbursements, which had been one of the rationales for rejecting it. I do not accept that as a distinguishing factor and, in any event, the fact remains that Rule 9-1(5)(b) refers to a doubling of costs for "steps in the proceeding" and incurring a disbursement is not a step in the proceeding, as each of Lafond, Kaban Resources and Rhodes have confirmed. I conclude these cases remain good law despite the enactment of the Disbursements Regulation.
- [55] I also conclude that the consistent approach reflected in these three decisions means the point has been settled, and the principle in Re Hansard Spruce Mills Ltd., [1954] 4 D.L.R. 590 (B.C.S.C.) obliges me to follow those decisions.

[56] The plaintiff's application for an order allowing her to recover double her excluded disbursements after the date of the Offer is therefore dismissed.

V. Conclusion

[57] In summary:

- a) The disbursements claimed by the plaintiff incurred prior to August 12, 2020 are not subject to the Disbursements Regulation;
- b) The plaintiff shall have double costs for all steps in the proceeding after the date of the Offer; and
- c) The plaintiff's application for an order allowing double her excluded disbursements after the date of the Offer is dismissed.

[58] The plaintiff has been substantially successful on the main costs issue in dispute and, given that this hearing was a "step in the proceeding", she shall have double the tariff items applicable to this hearing as well as her associated disbursements.

"Blok J."

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