
CANADA / JUDGMENT

Johnson v. Heer

2020 BCSC 1751

COURT

Supreme Court of British Columbia

DECIDED

23 October 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1751 Johnson v. Heer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johnson v. Heer,

2020 BCSC 1751

Date: 20201023

Docket: M168613

Registry: Vancouver

Between:

Kristen Johnson

Plaintiff

And

Gurbakash Heer

Defendant

Before: The Honourable Mr. Justice Majawa

Oral Reasons for Judgment

Re Application for Double and Uplift Costs

(In Chambers)

Counsel for the Plaintiff:

J. S. Grewal

H. Dhillon

Counsel for the Defendant:

M. Dorner

Place and Date of Oral Submissions:

Vancouver, B.C.

October 21, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 23, 2020

Introduction

- [1] On August 10, 2020, I issued reasons for judgment in this personal injury action. Those reasons are indexed at 2020 BCSC 1168. The trial was heard over four days from June 29 to July 3, 2020, and I awarded the plaintiff a total of \$147,512.18. The award was comprised of the following amounts:
- 1) non-pecuniary losses - \$75,000;
 - 2) past loss of income - \$9,538;
 - 3) future loss of income - \$40,000;
 - 4) cost of future care - \$9,800; and
 - 5) special damages - \$13,174.
- [2] Special damages had been agreed to by the parties before trial.
- [3] The plaintiff seeks an order for double tariff costs from the time following the delivery of her offer on December 17, 2019, to settle the matter for \$97,500. The plaintiff also seeks uplift costs for trial and trial preparation.
- [4] The defendant concedes that double costs are appropriate but argues that the costs should be calculated on the fast-track rules. He opposes the award for uplift costs.

The Offers to Settle

- [5] The defendant made an offer to settle in the amount of \$41,000 on December 2, 2019. As mentioned above, the plaintiff countered on December 17th in the amount of \$97,500. The trial was originally set to commence on January 21, 2020, for three days. However, the trial was adjourned on the day of trial because there was no judge available to hear the matter.

- [6] The parties agreed to have the matter re-set for June 29, 2020. Counsel for the defendant requested that an additional day be added, to which the plaintiff agreed. The day before the originally scheduled trial, the parties came to an agreement with respect to the special damages in the amount of \$13,174.
- [7] Between January and June 2020, a number of other offers were either reissued or made. On May 19, 2020, the defendant reissued his offer of \$41,000. In light of the agreement the parties had reached on special damages, the offer was essentially for \$27,826 for non-pecuniary damages and any remaining heads of damages.
- [8] On June 17, 2020, the plaintiff reissued the formal offer to settle at \$97,500, and on June 23, 2020, the plaintiff issued a new formal offer to settle for \$80,000. All of the plaintiff's offers remained open until the close of business on the last business day before the trial was scheduled to commence.
- [9] The defendant concedes that the plaintiff's December 17, 2019, offer is one that ought reasonably to have been accepted, and that the plaintiff is consequently entitled to double costs from that date pursuant to Rule 9-1(5) of the Supreme Court Civil Rules [Rules]. However, the amount of the costs award is still to be determined.

Issues

- [10] In light of the defendant's concession and the position the parties have taken at this hearing, there are two issues remaining for me to decide;
1. Is the plaintiff's award of costs to be based on the tariff, or is it to be based on the provisions applicable to fast track cases?
 2. Is the plaintiff entitled to additional increased or uplift costs for the conduct of the trial and trial preparation pursuant to s. 2(5) of Appendix B of the Rules?

The Applicability of the Fast-Track Rules

- [11] The defendant takes the position that this proceeding was subject to the fast-track rules. This position seems to be based entirely on the fact that the plaintiff filed a notice of fast-track action. The record shows that the plaintiff filed a notice of fast-track action on December 1, 2017.
- [12] The defendant argues that the plaintiff is entitled to costs in the amount of \$22,500 pursuant to R. 15-1(17) and this court's decision in *Peacock v. Battel*, 2013 BCSC 1902. In essence, the defendant submits that as the trial lasted more than two days then pursuant to the fast-track rules, the plaintiff is entitled to \$11,000 of costs. An additional \$1,500 is added for each day of trial beyond three days such that the normal fast track costs award would be \$12,500. Conceding that double costs are appropriate and that some accommodation should be made for the costs incurred before the December 17th offer was made, the defendant submits that the plaintiff is entitled to \$22,500 which is slightly less than double the \$12,500 of normal

fast-track costs.

[13] The four criteria of a fast-track action are set out in R. 15-1. They are conjunctive, and thus if any one of them applies, then fast-track costs are to be awarded: *Saopaseuth v. Phavongkham*, 2015 BCSC 45 at para. 24 [*Saopaseuth*]. The criteria are:

- 1) the amount claimed must be \$100,000 or less;
- 2) the trial of the action must be completed in three days;
- 3) the parties to the action consent; or
- 4) the court makes an order that the fast-track rules apply.

[14] I agree with counsel for the plaintiff that filing a notice of fast-track action does not in itself turn an action into a fast-track action. One of the four criteria referred to above must still apply. Where none of the criteria apply, the mere filing of a notice does not convert a claim into a fast-track action, and consequently, there is no onus to apply to the court to have the action removed from that track. This is what Justice Bernard held in *Saopaseuth* at paras. 23 and 32.

[15] In this case, I am satisfied that none of the four conditions of R. 15-1 apply. Three of the conditions are non-controversial. However, the fourth requires some further analysis. The three uncontroversial conditions are as follows:

- 1) The court has never ordered that R. 15-1 applied.
- 2) Although the trial was originally set for three days, a fourth day was added more than six months before the trial finally commenced. I also note the fourth day was added at the defendant's request.
- 3) The plaintiff did not claim a total amount of less than \$100,000. The amount claimed is not specified in the notice of civil claim, and at trial the plaintiff claimed, and was awarded, more than \$100,000 in total.

[16] The fourth way in which a matter can be classified as a fast track matter is if the parties consent. Counsel for the defendant submits that the fact the plaintiff filed a notice of fast track is sufficient to prove that there was consent to have the fast-track rules apply. I disagree.

[17] When one looks at the surrounding circumstances, it is clear that there is no agreement the fast-track rules applied, notwithstanding the fact the plaintiff filed the notice. In coming to this conclusion, I have considered the following factors.

[18] First, none of the documents filed after the notice of fast track was filed were endorsed with the words "Subject to Rule 15-1." This includes two sets of trial certificates and two sets of trial briefs. This is the case for both the plaintiff's and the defendant's documents.

- [19] Second, two trial management conferences were held, one shortly before each trial date. Neither of the Masters presiding at these trial management conferences noted that the action was a fast-track action.
- [20] Third, although the trial was originally set for three days, the defendant requested to add an additional day, and four days was in fact required to complete the trial.
- [21] Fourth, the original trial was set at a date more than two years after the plaintiff filed a notice of fast-track action.
- [22] Finally, having seen the notice of fast-track action in the court file, I asked the parties their position on whether the action was a fast-track action at the very outset of the trial. Counsel for the plaintiff advised the court that the matter had originally been considered to be a fast track matter and stated that it had "fallen by the wayside" now that the trial was scheduled for four days.
- [23] He further commented that the fast-track rules would be applicable if the amount awarded to the plaintiff was under \$100,000. (Presumably he made this comment pursuant to R. 14-1(1)(f)(i).). He said that the costs awarded would not be subject to the fast-track limits if more than \$100,000 in damages were awarded. Counsel for the defendant did not provide any comments to the Court that were contrary to this assertion.
- [24] Taken cumulatively, the above factors suggest there was no agreement and thus no consent that the action was subject to the fast-track rules. In the circumstances, the defendant should have taken steps to ensure whether both parties were proceeding under the same understanding regarding the fast-track rules. At the very least, the defendant should have advised the court and the plaintiff that they were of the view that the fast-track rules applied when provided with an opportunity to do so at the outset of the trial.
- [25] I find that the fast-track rules in respect of the assessment of costs are not applicable to this matter and that the costs should be assessed in accordance with Tariff B.

Uplift Costs

- [26] The plaintiff seeks increased costs pursuant to subsection 2(5) of Appendix B of the Rules. Costs awarded under this section are often referred to as "uplift costs." This section provides that the court may order that the value of each unit be 1.5 times the value that would otherwise apply if "as a result of unusual circumstances" a cost award under the usual scale would be "grossly inadequate or unjust."
- [27] The plaintiff seeks uplift costs for the tariff items for the trial preparation and the trial itself. Courts have found a number of factors to be relevant to determining whether circumstances are unusual such as misbehaviour of the party, the importance of a matter to a party and actions that unnecessarily added to the complexity of the litigation (*Globalnet Management Solutions Inc. v. Aviva Insurance Company*, 2020 BCSC 1361 at para. 30).

- [28] The plaintiff does not allege that the defendant or its counsel misbehaved in any way. Rather it points to the position taken by the defendant at trial when considered in light of the offers made as amounting to unusual circumstances that warrant the award of uplift costs.
- [29] At this time, it is also relevant to note the purpose of a costs award in general. In *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 74, our Court of Appeal described the purpose for orders for costs as:
- a) deterring frivolous actions or defences;
 - b) encouraging conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect;
 - c) encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; and
 - d) serving a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength of their cases throughout the course of litigation and by discouraging the continuance of doubtful cases.
- [30] I note that the issue of costs is in the discretion of the trial judge.
- [31] I also note this is not a case where the defendant strenuously defended the claim. To the contrary, liability was admitted, the defendant elected not to call any evidence at all and he did not require the plaintiff to undergo any independent medical examination. The defendant readily conceded that the plaintiff was credible.
- [32] The defendant had enough information about the plaintiff's claim to make an offer on December 2, 2019, and he had conceded that the plaintiff's December 17, 2019 offer should have been accepted. After the parties settled on special damages, the defendant reissued its \$41,000 offer. However, as mentioned above, that offer was effectively an offer to settle the remaining claims for the various heads of damages for \$27,825. I do not view this offer as a good faith attempt to settle the matter. In my view, this amount did not bear a reasonable relationship to the evidence, which the defendant was fully aware of at the time the offer was made, or of the plaintiff's prospect of success. Most interestingly, the defendant's position evolved such that it would appear the defendant was also of the view that this offer was not capable of settling the matter and that it had severely undervalued the plaintiff's claim.
- [33] This brings me to what I consider to be the unusual circumstances that warrants an award of uplift costs on the specific facts of this case. At trial, the defendant submitted that the plaintiff's damages ought to be in the range of \$69,943 to \$111,943. The lower range of the defendant's submission was some \$28,942 higher than the defendant's own formal offer to settle, which remained open until the eve of trial. Even more unusual is that the upper range of the defendant's submission was \$31,943 higher than the plaintiff's final formal offer to settle, (which also had remained open until the eve of trial), and \$14,443 higher than the

plaintiff's original formal offer to settle.

- [34] In these circumstances, it would appear the only reason the defendant did not accept either of the plaintiff's offers was to simply force the plaintiff to go to trial. This conduct required the plaintiff to expend even more funds than it already had. It is difficult to fathom why the defendant would force the trial to proceed when it could have settled the trial for less money than it submitted the plaintiff was entitled to at trial.
- [35] While the defendant is not required to make an offer, it did. Moreover, while the defendant is not required to accept an offer, they have agreed that they should have. Clearly, this concession is not based solely upon the benefit of hindsight after the judgment was rendered. The defendant knew at the time of trial that it should have accepted the plaintiff's offer, as evidenced by their submission at trial that the range the plaintiff was entitled to was more than the plaintiff had offered. Instead, the defendant forced the plaintiff to trial to obtain what the defendant itself obviously considered to be a fair result, when there was a clear and open way to avoid the need for the trial at all.
- [36] Moreover, I note that this trial proceeded a matter of just a few weeks after the court resumed limited operations following its closure due to the COVID-19 pandemic. The pandemic was at its relatively early stages at the time of the trial, and public health officials had urged British Columbians to limit their exposure to public places to only essential matters. In the circumstances I have described, attendance at this trial was not essential and it exposed the plaintiff, her husband, her mother, her counsel and defence counsel to an increased risk of exposure to the virus. In these unusual circumstances, I find that an award of costs on the usual scale would be unjust, and I exercise my discretion to award uplift costs to the plaintiff for trial preparation and attendance at trial for items 34 and 35 of the Tariff.

Conclusion

- [37] In summary, I am satisfied the action was not subject to the fast-track rules, and the plaintiff is entitled to costs at Scale B. The defendant has conceded that it ought to have accepted the plaintiff's December 17, 2019, offer and I am satisfied that this is an appropriate concession. Therefore, the plaintiff is entitled to her ordinary costs and disbursements through December 16, 2019, and she will be entitled to double costs thereafter to the end of trial.
- [38] Due to the unusual circumstances of this case, the award of uplift costs pursuant to s. 2(5) of Appendix B of the Rules is also appropriate. Thus, in addition to the costs award above, the plaintiff is entitled to uplift costs for four days of trial for items 34 and 35 of the tariff.
- [39] The plaintiff is also entitled to ordinary costs of this application.

"Majawa J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/17/2020BCSC1751.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/johnson-v-heer-2020>

Prepared on 27 October 2026 · Esheria