
CANADA / JUDGMENT

Khunkhun v. Titus

2011 BCSC 1677

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 1677 Khunkhun v. Titus

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khunkhun v. Titus,

2011 BCSC 1677

Date: 20110908

Docket: M083559

Registry: Vancouver

Between:

Rupinder Kaur Khunkhun

Plaintiff

And:

Eugene Donald Titus

Defendant

Before: The Honourable Mr. Justice Willcock

Oral Reasons for Judgment - Costs

In Chambers

Counsel for Plaintiff:

Kevin C. Jarvis

John M. Rice

Counsel for Defendant:

Jeffrey Joudrey

John P.C. Miller

Place and Date of Hearing:

Vancouver, B.C.

September 6, 2011

Place and Date of Judgment:

Vancouver, B.C.

September 8, 2011

- [1] THE COURT: The trial of this matter was heard by me sitting with a jury from April 18 to May 4, 2011. Liability was admitted. The nature and extent of the plaintiff's injuries and the quantum of damages were in issue. The plaintiff advanced a claim described in her trial brief as having a value of \$961,000. In argument, the plaintiff claimed, in addition to unspecified non-pecuniary damages, gross income loss to trial in excess of \$100,000 and future pecuniary losses in the range of 265,000 to \$663,000.
- [2] On May 4, the jury assessed damages at the global sum of \$45,500 consisting of non-pecuniary damages of \$9,000, gross past income loss of \$25,000, and loss of income earning capacity of \$11,000. The issue to determine on this application is the appropriate order as to costs of the proceedings.

BACKGROUND

- [3] The plaintiff sought general damages for pain and suffering and the loss of enjoyment of life resulting from what she claimed to be a significant and disabling vestibular injury as a result of a September 17, 2006 motor vehicle accident. The injury was documented by an eminently qualified specialist in ear, nose and throat diseases, Dr. Longridge.
- [4] The plaintiff complained of dizziness, headaches, sleep disturbance, driving limitations, and concern about her ability to do her job, all of those problems continuing intermittently from the date of the accident to trial. While most mild traumatic vestibular injuries resolve the plaintiff sought to establish at trial that symptoms of her vestibular injury had continued and worsened. She argued that she was the exception to the rule of uneventful recovery, a recognized exception described by Dr. Longridge, and indeed the defendant's expert in this field.

- [5] The plaintiff sought to establish, based on evidence of her personality and long work history, that she would always work if she could do so. She had evidence that she tried an early return to work but could not tolerate the demands of her job. When she later returned, she laboured under what she says was a strain. That strain was noted by co-workers who testified at trial.
- [6] Due to her optimism, her private nature and her desire not to be affected by her injury, she testified that she said nothing about her ongoing symptoms to colleagues. She thought that her problems would resolve over time and, for that reason, sought no further treatment after she noted improvement in 2007. She said she was patient, and although she was describing symptoms to her doctors in 2007 and 2008, she sought no treatment for headaches or dizziness. Plaintiff's counsel attributed the lack of complaints at work, plaintiff's positive work evaluations, and the absence of complaints in the medical records through much of 2007 and 2008 to the plaintiff's hope that she would recover, like most people that suffer from vestibular injuries uneventfully.
- [7] Defendant's counsel argued that is, in fact, what happened: that Ms. Khunkhun recovered uneventfully in accordance with the rule rather than the exception. The defendant put before the jury a substantial evidentiary record of improvement over the six months following the accident, including a report to Dr. Travelos in January 2008 and the first report drafted by Dr. Robinson in September 2008. These reports, coupled with the discontinuance of medication prescribed to Ms. Khunkhun and the discontinuance of vestibular exercises, the absence of reported complaints to physicians, her return to work and the return to some activities such as biking, were all relied upon as evidence of substantial recovery. The defence theory required the jury to reject the evidence of Ms. Khunkhun that her symptoms improved but continued to be significant throughout, and had worsened at times, to trial to the point where at trial she had some fear or concern with respect to her future.
- [8] It was the position of Ms. Khunkhun that she suffered a total loss of income for four and a half months and when she later took an unpaid leave of absence. She claimed a partial loss of income during a period of graduated return to work.
- [9] The defendant argued that Ms. Khunkhun suffered only four and a half months lost income and perhaps some loss during the graduated return to work as she was over her injuries by mid 2007 and thereafter her post-accident income was consistent with her pre-accident income. The defendant said the unpaid leave of absence in 2009 and 2011 was not causally related to the motor vehicle accident of 2006.
- [10] The plaintiff sought an award for loss of income earning capacity. She led evidence that her injuries had not completely resolved. She expressed fear that if her symptoms did not improve, she would be unable to continue in her employment. Dr. Robinson and Dr. Segal testified that she was still suffering from and might continue to suffer from headaches and dizziness for an indeterminate period.

- [11] Ms. Khunkhun testified that her condition made it difficult for her to concentrate and to perform to her own high expectations. She said she had been prevented from seeking advancement, as a result, and that she feared that she might be prevented from working at all in the future as a lab technician.
- [12] There were significant credibility issues at trial. The defendant took the position that the claim was wholly dependent upon the weight given by the jury to the plaintiff's accounts of her subjective symptoms, particularly headaches and dizziness.
- [13] On March 30, 2011, about three weeks before trial, counsel for the defendants wrote to the plaintiff's counsel offering to pay the plaintiff the sum of \$70,000 "after taking into account part 7 benefits paid or payable pursuant to section 25 of the Insurance Motor Vehicle Act" and "after taking into account any advances paid to date." The amount offered was stated to include prejudgment interest but to exclude disbursements incurred by the plaintiff up to the date of delivery of the offer.
- [14] The offer stated, among other things, strangely, that the defendant reserved the right to bring it to the attention of the Court of Appeal or the Supreme Court of Canada for consideration in relation to costs. The plaintiff recognizes that this was an apparent error and it was the defendant's intention to bring the offer to the attention of this court in the event the plaintiff recovered less than the amount of the offer.
- [15] The defendant now seeks an order that the plaintiff receive only her disbursements to the date of delivery of the offer and that she be liable to pay the defendant costs and disbursements for March 30, 2011 to date.

APPLICABLE LAW

- [16] Rule 4-1 sets out the general rule that costs of a proceeding must be awarded to the successful party unless the court otherwise orders. Rule 9-1 sets out the cost implications of offers to settle. It provides as follows in s. (4)-(6):
- (4) The court may consider an offer to settle an exercise in the court's discretion in relation to costs.
- (5) In a proceeding which an offer to settle has been made the court may do one of following:
- (d) If an 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.
- (6) In making an order under (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; and
 - (d) any other factor that the court considers appropriate.
- [17] The cost provisions of the rules of court are intended to serve a compensatory purpose, to permit successful litigants to cover their costs. They are also intended to further the objectives summarized in *Sartori v. Gates*, 2011 BCSC 419, as follows:
- (a) deterring frivolous actions or defences;
 - (b) encouraging conduct that reduces the duration and expense of litigation and discouraging conduct that has the opposite effect;
 - (c) encouraging litigants to settle wherever possible, thus freeing up judicial resources for other cases; and
 - (d) winnowing litigation, 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 by discouraging the continuance of doubtful cases or defences.

ANALYSIS

- [18] Where successful party fails to accept a pre-trial settlement offer that exceeds her ultimate recovery, that failure should have some cost consequences.
- [19] The Rules give the court unfettered discretion with respect of costs: see *Bailey v. Jang*, 2008 BCSC 1372. The question before me in this case is the extent of the cost consequences that should flow from Ms. Khunkhun's decision to take this case to trial rather than to accept the offer of March 30, 2011. This is clearly not a case where there should be no consequences of that refusal. The order for costs should not be that which would otherwise be made had there been no offer to settle. The plaintiff is therefore not entitled to her costs throughout on the usual scale. On the other hand, the defendant does not seek double costs from the date of the offer onward. It is conceded that the consequences of the failure to accept the offer should not be as punitive as possible.
- [20] The parties have argued for orders in the mid range of the possible spectrum, from an order that the plaintiff recover costs to the date of the offer and the defendant recover costs thereafter, to an order that there be costs to the plaintiff to the date of the offer and no costs thereafter. The effect of the former order, given the parties proposed bill of costs, would be that after payment of costs and disbursements the plaintiff would be substantially indebted to the defendant without seeing any of the proceeds of her claim and owe at least the costs of disbursements to her counsel.

- [21] Defence costs as set out in a draft bill before me are estimated to amount to \$47,800 and disbursements to \$15,982, a total in excess of \$63,000. A significant portion of costs and disbursements were likely incurred after the settlement offer.
- [22] The effect of the latter order would be that the plaintiff would recover her judgment less her own post-offer disbursements, most of her disbursements, which amounted to \$26,651 in total. Her net recovery would amount to marginally more than \$20,000.
- [23] Where on the spectrum of outcomes should this case sit? The answer should depend upon my assessment of the criteria set out in the rules.

4-1(6)(a): Was the offer one that ought reasonably to have been accepted?

- [24] The reasonableness of the plaintiff's decision not to accept the defendant's offer to settle is not to be assessed in hindsight. The jury's verdict is not to be considered. This is set out in *Bailey v. Jang*, and also *Cairns v. Gill*, 2011 BCSC 420.
- [25] Bearing in mind all of the evidence before me now and the evidence that I heard at trial, I am of the view that it was reasonable on the part of the plaintiff to reject the settlement offer of March 30, 2011. No aspect of the claim advanced was frivolous. The plaintiff did not unnecessarily lengthen the expense or duration of the litigation. To use one test, I do not consider that reasonable counsel aware of all of the evidence in this case but unaware of the jury award ought to have encouraged the plaintiff to accept the offer at the time it was made or up to the date of the rendering of the jury's award. I do not regard this as a case where the plaintiff should have freed up the judicial resources used to assess her claim. I am of the view that the plaintiff might have made a careful assessment of the strengths and weaknesses of her case at the commencement and throughout the course of this litigation and not accepted the settlement offer that was made to her. In summary, I find that it was entirely reasonable on the evidence for the plaintiff to prefer taking this case to the jury to accepting the offer that was made to her before trial. I adopt here what was said in *Sartori v. Gates* at para. 67.

The plaintiff had the right to test to the extent of the range of damages by trial adjudication.

4-1(6)(b): the relationship between the terms of settlement offered and the final judgment of the court

- [26] The award of the jury amounted to about 70% of the offer to settle. Disparities of 20% have, in other cases, been held to be substantial. This disparity is a factor to consider but here, I find as did Mr. Justice Kelleher in *Smagh v. Bumbrah*, 2009 BCSC 623, at paras. 13-14, this factor is not in itself determinative:

I agree with counsel for the plaintiff that the court should be cautious in placing too much weight on this factor.

4-1(6)(c): the relative financial circumstances of the parties

[27] In *Smith v. Tedford*, 2010 BCCA 302, the Court of Appeal discussed the apparent conflict in two decisions of this court as to whether ICBC's assumption of the defence was a relevant consideration under the costs rule. Those cases were *Bailey v. Jang*, and *Radke v. Parry*, 2008 BCSC 1397. Mr. Justice Lowry for the Court of Appeal in *Smith v. Tedford* concluded at paragraph 19:

While I recognize arguments over the implications of a defendant's insurance coverage being considered in relation to an award of costs may go back and forth, like the judge [in the court below] I consider precluding such from consideration renders an assessment of the parties' relative financial circumstances, at least in a case of this kind, very artificial indeed. Clearly, with ICBC having assumed the defence, the financial ability to defend was much greater than the financial ability to prosecute, and that is of no small importance to considering whether and to what extent the financial circumstances of the parties, relative to each other, bear on an award of costs where, as here, there has been an offer of settlement made ten days before a trial for the assessment of personal injury damages which was not accepted until the seventh day of the trial.

[28] In my view, ICBC should now regard this question as settled and ought not to persist in the argument made before me that insurance cannot be considered in an assessment of costs. As Mr. Justice Burnyeat stated in *Martin v. Levigne*, 2010 BCSC 1610, at para. 25, the question has been settled.

[29] The plaintiff earns an income of \$60,000 per annum. Her husband is also employed. She will not be impoverished by an award on the scale being considered. The personal defendant, on the other hand, will not feel the effects of the judgment as to costs. Effect on his insurer will not be felt in the large scheme of things unless this judgment is regarded as a precedent applicable wherever a jury award exceeds an offer to settle in a motor vehicle case. It is not intended to be such a precedent. This case is specific to its facts.

4-1(6)(d): any other factors that the court considers appropriate

[30] The plaintiff, in the course of submissions before me on costs, spoke to the conduct of the defence and the nature of the argument advanced at trial by the defence as factors that ought to be considered under this head. I reject that submission and the submission that the conduct of either party was such as to warrant consideration in relation to costs.

[31] Having considered these factors, I adopt the reasoning of Madam Justice Humphries in *Lumanlan v. Sadler*, 2009 BCSC 142 (although double costs are not being sought in the case at bar), where she said at para. 53:

There should be some consequence in costs as a result, but in my view, it would be unfair and excessively penal to award double costs against the plaintiff, especially where these costs would not have been available under the rule in place when the offer was presented. Given the significant injury to the plaintiff, which was caused by the defendant's foolish and reckless behaviour, and the effect on the award of a further reduction for costs, even if not doubled, and taking into account all of the above considerations, in my view it would not be fair or just to

require the plaintiff to pay ICBC's costs after the date of the offer.

[32] I find that the plaintiff is entitled to her costs and disbursements to the date of the offer.

Each party will bear their own costs after the date of the offer, up to and including trial.

"P. Willcock J."

The Honourable Mr. Justice P. Willcock

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