
CANADA / JUDGMENT

Kostecki v. Li

2015 BCSC 1356

COURT

Supreme Court of British Columbia

DECIDED

31 July 2015

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2015 BCSC 1356 Kostecki v. Li

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kostecki v. Li,

2015 BCSC 1356

Date: 20150731

Docket: M122019

Registry: Vancouver

Between:

Merima Kostecki

Plaintiff

And

Bin Li and Hai Yun Wang

Defendants

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Counsel for the Plaintiff:

F. Jiwa

Counsel for the Defendants:

J.M. Thom

Place and Date of Hearing:

Vancouver, B.C.

September 29, 2014

Written Submissions of the Plaintiff

December 19, 2014

Written Submissions of the Defendants:

January 9, 2015

Reply Submissions of the Plaintiff:

January 21, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 31, 2015

1. INTRODUCTION

[1] This application deals with costs arising from the outcome of a personal injury trial. The issues that need to be resolved are (1) whether the plaintiff is entitled to double costs as a result of her formal offers to settle and (2) the extent to which costs should reflect proceedings that exceeded the original time estimate for trial.

[2] As I did in the reasons for judgment following trial (2014 BCSC 1056), I will refer to the plaintiff by her post-accident married surname of Grace.

2. BACKGROUND

[3] The trial focused on the injuries that Ms. Grace had suffered in a rear-end collision in April of 2010. The essential question was whether the effects of these soft tissue injuries had continued for more than a year following the accident.

[4] While I accepted her evidence that she was still experiencing these effects to a certain extent at the time of trial, there were inconsistencies in that evidence that caused me to reject two aspects of it.

[5] First, I found that comments that she had made to a neurologist and a physiotherapist in 2011, to the effect that her symptoms had diminished somewhat, contradicted her evidence that they have been continuous.

[6] Second, I found that she had minimized the inevitable impact of having a child on her activity level and the time she had available for exercise.

[7] My conclusion was:

[94] The upshot of all of this is that while I am satisfied that Ms. Grace's symptoms from the accident have continued, I also find that there has been a gradual degree of improvement in them, interrupted by flare-ups, essentially as she indicated on her examination for discovery. Thus while I accept that the situation is ongoing, I do not find that there has been the largely uninterrupted discomfort level that she described, or that it has interfered with her work and life to the full extent that she alleged. It also seems clear that further meaningful periods of relief from the worst of these effects can be expected, although there is no current prospect of their complete cessation.

[8] I also dismissed Ms. Grace's claim for impairment of her future earning capacity. In essence I found that the evidence did not demonstrate that the effects of her injuries precluded her from achieving the future career goals that she had described.

[9] Based on the evidence that I did accept, I awarded Ms. Grace the following damages:

Non-pecuniary Damages:

\$42,000.00

Cost of Future Care:

\$5,000.00

Special Damages:

\$1,875.71

Total:

\$48,875.71

3. OFFERS TO SETTLE

[10] Ms. Grace's counsel delivered two formal offers to settle before trial, which I will discuss. However on this application her counsel has also included evidence of additional informal settlement discussions, mainly with an adjuster for the defendants' insurer.

[11] As counsel for the defendants points out, this disclosure offends against the class privilege that applies to settlement discussions, whether or not they are explicitly designated as being "without prejudice". To come within an exception to this privilege, a defendant must show that, on balance, a competing public interest outweighs the public interest in encouraging settlement: *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] 2 S.C.R. 623 at paras. 13-16, 19. The privilege also ceases to apply if it becomes necessary to prove the existence or scope of a settlement: *Union Carbide Canada Inc. v. Bombardier Inc.*, [2014] 1 S.C.R. 800 at para. 35.

- [12] I am unable to identify any countervailing public interest in favour of disclosing these discussions and it is not alleged that an agreement was ever reached. I infer that they were disclosed in an effort to give context to the rejection of Ms. Grace's formal offers, and perhaps also to illustrate the intransigence of the instructing adjuster in the face of her counsel's increasingly moderate positions. Regardless of their purpose, I am unable to take them into account when resolving the current issue.
- [13] Counsel for the defendants does not dispute that Ms. Grace's two formal offers to settle were in the proper form for the purposes of Rule 9-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [14] The trial was set to begin on January 29, 2013. On January 10, Ms. Grace's counsel delivered the first formal offer, for \$45,000. It was open for acceptance until January 28. On January 23, her counsel delivered the second formal offer, for \$30,000. It was also open for acceptance until January 28.
- [15] On January 24, counsel for the defendants responded with a formal offer of \$22,500.
- [16] The relevant portions of Rule 9-1 provide:

Cost options

- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
- (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

Considerations of court

- (6) In making an order under subrule (5), the court may consider the following:
- (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] The governing principles when applying these sections are helpfully described in *Hartshorne v. Hartshorne*, 2011 BCCA 29:
- [25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing

the party who declines to accept such an offer" (A.E. v. D.W.J., 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing MacKenzie v. Brooks, 1999 BCCA 623, Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201 (C.A.), Radke v. Parry, 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in Giles are apposite:

[74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:

- "[D]eterring frivolous actions or defences": Houweling Nurseries Ltd. v. Fisons Western Corp. (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
- "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
- "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: Bedwell v. McGill, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
- "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "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.

[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.

[18] In support of double costs, Ms. Grace's counsel emphasizes the extensive opportunity that the defendants would have had to consider the evidence and the merits of their case by the time that these offers were delivered. This fast track litigation had been ongoing for eight months so there had been ample opportunity to consider these matters. Further, the defendants were not requesting any additional disclosure and their counsel had confirmed his readiness to proceed to trial at the trial management conference without expressing any concerns about their state of readiness. Counsel says that the situation was analogous to the

one described by Madam Justice Griffin in *J.D. v. Chandra*, 2014 BCSC 1272:

- [20] There was nothing complicated about the offers to settle which required lengthy analysis. The parties were just exchanging dollar amounts. There was no revealing new analysis of the issues or last minute disclosure of material information.
- [19] While conceding that there was sufficient time to assess the offers, the defendants' counsel argues that they contained no rationale for the numbers that were sought in them, nor any breakdown of the amounts among the various heads of damages. In this regard, he relies on the decision in *Currie v. McKinnon*, 2012 BCSC 1165 at paras. 23 and 29 as an example of the absence of such information as a factor weighing against a double costs award.
- [20] The significance of this omission to the defendants' decision about whether to settle is that the claim for past income loss was not abandoned by Ms. Grace until the beginning of trial and there was also no advance basis on which the defendants could have predicted the fairly limited amount of time that she would actually devote to proving her claim for impairment of future earning capacity at trial. In other words, as far as they would have known when assessing the formal offers, both heads of damages were fully in play.
- [21] More fundamentally, counsel submits that the defendants had valid concerns about Ms. Grace's credibility that they were entitled to pursue, and which were vindicated to a considerable extent by the deficiencies in her evidence that I have described. Pursuit of such concerns should not be extinguished by a punitive costs award.
- [22] Finally, there are said to be broader concerns about fairness and proportionality. The defendants say that Ms. Grace was likely to have received the allowable maximum of \$6,500 of the pre-trial costs for fast track litigation, because those costs are usually awarded even for settlement well before trial (see for example *Berekoff v. McMath*, 2013 BCSC 2032). It would be unfair for her to receive double those costs for an offer that was provided in the midst of the "final sprint" to trial. And, an award of costs that with disbursements comes within \$4,000 of the total damages, as the order sought by Ms. Grace would, must surely fail any reasonable test of proportionality.
- [23] In response, Ms. Grace's counsel notes that in *Currie* double costs were still assessed as of the point when the party who had received the offer "had a reasonable opportunity to review and consider the defendants' offer and ask any questions they deemed necessary if they thought clarification was necessary", despite the absence of detail in the offer itself.
- [24] He also points out that the disbursements in the present case increased markedly after the offers were made, indicating that substantial work and expense was incurred in this supposedly superfluous "final sprint" once the offers were not accepted. Further, while proportionality is an important overall objective of the Rules, there is no authority for the proposition that a basis for declining to order double costs when it is otherwise appropriate is a minimal difference between the damages and the amount of costs that would result.

- [25] First of all, I would not say that there was anything particularly complex about this case from the point of view of assessing the defendants' potential risks at trial. While every case has its unusual features, Ms. Grace's situation still fell within the general parameters of cases involving soft tissue injuries suffered in motor vehicle accidents.
- [26] Given the relatively low total amounts being proposed in the two offers, I also do not think it would have been particularly meaningful to the defendants' counsel to know how the offer was broken down among heads of damages, or whether past wage loss or impairment of future earning capacity featured prominently in them. This was transparently not a situation in which such claims, which can run into the many hundreds of thousands of dollars, were going to be the central feature of a settlement. This was about getting down to a palatable number for both sides, and I think the defendants' counsel was sufficiently equipped to do that.
- [27] As a result, I cannot find that that absence of further details in the formal offers weighs against the reasonableness of accepting them.
- [28] I also do not find anything untoward in costs being doubled following the delivery of a reasonable offer, even if the maximum level of ordinary pre-trial fast track costs would already have been justified. As the decision in *Gichuru v. Pallai*, 2012 BCSC 1316, aff'd 2013 BCCA 60 demonstrates, the usual double-costs analysis still applies in fast track cases. In any event, there is a basis in the present evidence to find that considerable further preparation was done between the rejection of the second offer and trial.
- [29] Lastly, while proportionality is obviously a vital consideration in all applications of the Rules, I am not convinced that in itself it can serve as a cap on costs awards that are otherwise justified under them, merely because the costs would be almost as much as the damages.
- [30] Where I do find more substance is in the defendants' contention that they had significant issues with Ms. Grace's credibility that they wished to explore at trial and that this militated against the acceptance of offers in these amounts. The contradictions that caused me to reject her evidence that her symptoms were undiminished and that child care had little impact on her activities could well have led to broader negative findings about her evidence in general. As it happened, I found that she was being truthful about the persistence of her symptoms and awarded her non-pecuniary damages at the lowest end of the range of cases that her counsel had provided, but that was by no means an inevitable outcome.
- [31] As the cases that the defendants relied on at trial demonstrate (see para. 74 of the trial reasons for judgment), there is a considerably lower range of non-pecuniary awards for injuries that resolve in a year or less. The highest award put forward by the defendants was \$15,000, although the high end of this range may be slightly higher than that. Regardless, it still falls considerably below Ms. Grace's second offer. It was not unreasonable for the defendants' counsel to anticipate that he could persuade a court that she fell within that range and to spurn an offer that was roughly double its maximum in pursuit of that

objective.

- [32] Therefore, I cannot be satisfied that either of Ms. Grace's formal offers ought reasonably to have been accepted.
- [33] As to the relationship between the offers and the final judgment, there is no question that the judgment was much higher than the second offer. As it was in the case of the reasonableness analysis however, I see this more as a function of the way that the central issue of credibility, which I have said could have been resolved differently by another reasonable trier of fact, impacted on the range of damages available, rather than as a factor in favour of doubling or increasing costs.
- [34] Finally, as the defendants' counsel pointed out, there is no evidence of the financial positions of the parties, as envisioned by Rule 9-1(6)(c).
- [35] After taking these considerations into account, my conclusion is that there is not a proper basis to award double costs to Ms. Grace.

4. LENGTH OF TRIAL

- [36] The trial proceeded on January 29, 2013. The evidence completed on the morning of January 31 and the matter went over for final submissions the following day.
- [37] During the defendants' final submissions I raised the question of whether the defendants needed to prove the allegedly inconsistent statements by Ms. Grace to the neurologist and the physiotherapist in order for them to have any contradictory weight.
- [38] As a result, on February 18, 2013, counsel for the defendants applied to re-open the trial to call that evidence. On February 22 I gave reasons (2013 BCSC 2451) allowing the re-opening only with respect to the evidence of the neurologist, Dr. Beckman.
- [39] Counsel then conducted a deposition of Dr. Beckman on this point, which was entered as evidence on the trial by consent. Revised final submissions were made on March 13, 2013.
- [40] Ms. Grace's counsel submits that this is a situation in which I should exercise my discretion pursuant to Rule 15-1(a) and order additional costs to reflect his appearances at the application to re-open, the ruling on that application and the deposition of Dr. Beckman.
- [41] The defendants' counsel concedes that Ms. Grace is entitled to the full costs of the original three days that were set for trial, plus \$1,500 per day for what he argues were the only actual additional days of trial -- February 1 and March 13, 2013. This totals \$14,000 plus tax. He maintains that the application to re-open should be treated in the same way as a pre-trial application and subsumed in the award of costs for the pre-trial portion. The deposition of Dr. Beckman should also be considered a pre-trial step. Finally, he argues that the attendance to hear the reasons on the re-opening application was brief, required no preparation and is not meaningfully different from an attendance by counsel to receive oral trial reasons, which does not normally result in costs.

- [42] Rule 15-1(15), which deals with costs in fast track litigation, provides:
- (15) Unless the court otherwise orders or the parties consent, and subject to Rule 14-1 (10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:
- (a) if the time spent on the hearing of the trial is one day or less, \$8,000;
 - (b) if the time spent on the hearing of the trial is 2 days or less but more than one day, \$9,500;
 - (c) if the time spent on the hearing of the trial is more than 2 days, \$11,000.
- [43] The trial taking longer than originally scheduled is the kind of special circumstance that permits a court to "otherwise order" despite these prescribed costs: *Yip v. Saran*, 2014 BCSC 1593.
- [44] Dealing first with the application to re-open on February 18, 2013, I can say without hesitation that it was part of the trial. It was brought to permit the defendants to re-open their case on the trial to adduce further evidence and was separated from the main trial only by the necessity of counsel considering his position and assembling the necessary material. Ms. Grace should therefore be entitled to costs of \$1,500 for that day. In reaching this conclusion I have kept in mind that in *Batyka v. Barber*, 2014 BCSC 769, the trial judge awarded "costs in the cause" in relation to an application to re-open a trial. That application, like this one, was made on a date after the trial evidence had been completed. I am reluctant to accept this as authority for the proposition that such an application is not part of the main trial for costs purposes in the absence of any indication that the trial judge was directed to that specific issue.
- [45] I agree with the defendants' counsel that nothing of substance occurred on the day I gave my reasons on the application - February 22 - and that no costs should be payable in relation to that appearance.
- [46] The deposition of Dr. Beckman raises an interesting issue. Counsel for the defendants cites authority in which a video deposition of an expert witness was treated as a pre-trial examination for costs purposes: *Carson v. Henyecz*, 2013 BCSC 197, but frankly concedes that no case deals directly with the present situation. Contrary to his understanding (he was not counsel at trial) Dr. Beckman's deposition was taken by a court reporter and was not video recorded, so nothing was played in court at the resumption of trial on March 13. Counsel simply filed the transcript by consent and then submissions began. This means there will not be any double-counting with the award of trial costs for March 13 if something is awarded for attending the deposition as well.
- [47] Attempting to resolve this at the level of basic principle, Dr. Beckman was permitted to be called at trial to give evidence on a relevant issue for the benefit of the defence. According to the submissions of the defendants' trial counsel on March 13, Ms. Grace's counsel took the very reasonable position that this could be done by a deposition rather than making the

witness appear in court. That co-operative approach, which should be encouraged, did not change the fundamental character of the evidence as trial evidence. I can well understand why the registrar in Carson would take a different view of a deposition that had been completed in advance of trial. Exercising my discretion to do what seems fairest on this point, I award an additional \$500 in trial costs for this attendance by counsel.

5. CONCLUSION

[48] Therefore the total award of trial costs to Ms. Grace here is \$16,000 plus tax.

[49] Success on this application has been evenly divided, so each party will bear their own costs with respect to it.

The Honourable Mr. Justice T.A. Schultes

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