
CANADA / JUDGMENT

Long v. Thanas

2020 BCSC 2203

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2203 Long v. Thanas

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Long v. Thanas,

2020 BCSC 2203

Date: 20201113

Docket: M168211

Registry: Vancouver

Between:

Joseph David Long

Plaintiff

And

Kristian Peter Thanas

Defendant

Before: The Honourable Madam Justice Horsman

Oral Reasons for Judgment

Counsel for Plaintiff:

R.E. McCardell

Counsel for Defendant:

M. Trischuk

Place and Date of Hearing:

Vancouver, B.C.

November 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 13, 2020

- [1] THE COURT: The plaintiff applies for an order for double costs from the date of an unaccepted formal offer to settle and an award of special or increased costs in relation to the defendant's pursuit of liability defences that the plaintiff says were without merit.
- [2] In this action the plaintiff claimed damages for injuries he suffered when he was struck by a car driven by the defendant while riding his bicycle on Burrard Street in Vancouver. The plaintiff was riding in a designated bicycle lane. The defendant made an illegal right-hand turn into the plaintiff's path.
- [3] In reasons for judgment released December 30, 2019, indexed at 2019 BCSC 2255, I held that fault for the accident was solely attributable to the defendant. I awarded the plaintiff a total of \$163,460 in damages.
- [4] The damages awarded at trial substantially exceed the amount of the plaintiff's formal offer to settle which was delivered to the defendant six days prior to the start of trial. The offer was obviously not accepted. The plaintiff seeks an order that the defendant pay his costs as double costs from the date of the unaccepted offer.
- [5] The plaintiff also says that an award of special or increased costs is justified by the defendant's delayed admission of liability and continued pursuit of a contributory negligence defence that ultimately failed.
- [6] The issues for me to resolve on this application are, accordingly, whether the plaintiff should be awarded double costs from the date of the unaccepted offer and whether the defendant should pay a portion of the plaintiff's costs as special or increased costs.

BACKGROUND

Issues at trial

- [7] I will briefly review the issues at trial by way of providing context to the costs issues.
- [8] At the start of the trial, liability and damages were both in dispute. The defendant admitted liability for the accident only in the course of final argument at trial. He continued to maintain that the plaintiff was also at fault in failing to take reasonable care to avoid the accident. The particulars of the plaintiff's alleged negligence were that: (i) he had allowed the brake pads on his bicycle to wear down to the point that he could not safely stop, and (ii)

he ought to have anticipated the defendant's illegal right-hand turn and slowed his speed. For the reasons set out at paras. 72 to 76 of the judgment, I rejected the defence of contributory negligence.

- [9] In terms of the damage assessment, there was no dispute between the parties that the accident caused injuries to the plaintiff's left shoulder, arm, elbow, forearm and leg. All of these injuries had resolved by the time of trial with the exception of the injury to the plaintiff's left shoulder. The plaintiff also continued to experience pain in his right shoulder. The defendant denied that this was caused by the accident.
- [10] The plaintiff tendered expert reports from two witnesses, Dr. Heather Finlayson, a physiatrist, and Dr. Jeffrey Pike, an orthopedic surgeon. The defendant tendered an expert report from Dr. William Yu, an orthopedic surgeon.
- [11] The expert witnesses agreed that the accident caused the plaintiff to suffer an injury to the rotator cuff in his left shoulder and that the injury was unlikely to resolve in the foreseeable future.
- [12] There was a dispute between the experts as to whether the accident had also caused the plaintiff's right shoulder pain. Drs. Finlayson and Pike opined that the plaintiff's right shoulder pain resulted from compensatory overuse due to the injury caused to his left shoulder in the accident. In Dr. Yu's opinion the right shoulder pain was not causally related to the accident. I concluded that Dr. Yu's opinion was premised on a mistaken factual assumption about the timing of the onset of right shoulder pain. I accepted the opinions of Drs. Finlayson and Pike.
- [13] I awarded the plaintiff non-pecuniary damages in the amount of \$80,000 and damages for loss of future earning capacity in the amount of \$75,000. The defendant had resisted any award for loss of future earning capacity, arguing that the evidence did not establish a substantial possibility of a future income loss given that the plaintiff had continued to work full-time after the accident. The plaintiff argued, and I accepted, that the evidence did establish a substantial possibility of a future impairment of the plaintiff's earning capacity despite the fact that he was presently able to work full-time. The plaintiff's witnesses included one of his co-workers, Georgina Fitzgerald, who testified that she had to assist the plaintiff in completing work tasks on a daily basis due to his shoulder injury.

The formal offer to settle

- [14] On September 24, 2019, the plaintiff delivered a formal offer to settle for the sum of \$75,000 in new money, plus disbursements and costs. The offer was open for acceptance up until 3:30 p.m. on September 27, 2019. The trial began on September 30, 2019.
- [15] The offer letter does not itself set out a rationale for the proposed settlement. However, the offer was preceded by an exchange of communication between counsel in which the plaintiff did articulate a rationale. In an email to defence counsel sent September 18, 2019,

plaintiff's counsel justified his position that non-pecuniary damages in this case would likely be in the range of \$80,000. The email cites four precedents establishing the range. Plaintiff's counsel also explained, by reference to the examination for discovery evidence of the defendant, the fear of the weaknesses of the defendant's liability defences.

- [16] By this time the plaintiff had also served his witness list and will-say statements, which included the contact information for Ms. Fitzgerald. The will-say statement indicated that Ms. Fitzgerald's anticipated evidence included her "observations of the Plaintiff's work limitations after the Collision."
- [17] On September 26, 2019, the defendant served a formal offer to settle in the sum of \$40,000 plus costs and disbursements. The defendant's offer does not include an explanation of the rationale for the settlement amount. It does not comment on the points raised by the plaintiff's counsel about the anticipated range of non-pecuniary damages or the problems with the defendant's position on liability.

ANALYSIS

Application for double costs

- [18] I will begin with the defendant's application for double costs.

Legal framework

- [19] In a proceeding in which a plaintiff has served a formal offer to settle, Rule 9-1(5)(b) of the Supreme Court Civil Rules provides that the court may award double costs of all or some of the steps taken in the proceeding after the service of the offer. The factors which guide the court in making such an order are set out in Rule 9-1(6):
- (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.
- [20] The purpose of Rule 9-1 is to encourage the early settlement of disputes by rewarding a party who makes a settlement offer that should have been accepted and penalizing the party who declines to accept such an offer: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.

- [21] The question of whether an offer "ought reasonably to have been accepted" [per Rule 9-1(6) (a) of the Supreme Court Civil Rules] must be examined under the circumstances existing when the offer was open for acceptance and not by reference to the ultimate judgment. This inquiry has both a subjective and objective component. The court may take into account the reasons why the plaintiff declined the offer, but must also consider whether those reasons are objectively reasonable: *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at para. 97.
- [22] In light of the wording of Rule 9-1(6), the issue is not whether the offer is reasonable but whether it was unreasonable for the plaintiff to refuse it: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 30 [Cottrill].
- [23] The fact that it may be reasonable for a party to refuse an offer does not necessarily immunize that party from the consequences of failing to accept a reasonable settlement offer, as other factors may weigh in favour of a costs sanction: *Cottrill* at para. 32.

Discussion

- [24] I now turn to the application of the factors listed in Rule 9-1(6).
- (a) Whether the offer ought reasonably to have been accepted
- [25] The first factor under Rule 9-1(6)(a) is whether the plaintiff's offer ought reasonably to have been accepted by the defendant, having regard to the circumstances existing at the time the offer was open for acceptance.
- [26] The following are the relevant circumstances that existed as of the date of the plaintiff's formal offer to settle:
1. All expert reports had been served. The consensus of the experts, including the defendant's expert Dr. Yu, was that the plaintiff's left shoulder injury was causally related to the accident.
 2. There were medical records available to the defendant that cast doubt on the factual assumption that underlay Dr. Yu's opinion on the cause of the plaintiff's right shoulder pain.
 3. The defendant had examined the plaintiff for discovery and therefore had notice of the plaintiff's evidence of the injuries and their impact.
 4. The plaintiff had delivered will-say statements and witness lists including contact information. The defendant could have easily ascertained that Ms. Fitzgerald's evidence would lend support to the plaintiff's claim for loss of future earning capacity.

5. The defendant had been examined for discovery and his discovery evidence exposed the weakness of his defence on liability. Among other things, the defendant testified in discovery that: he had no recollection of the scene of the accident or the geography of the area that it occurred; he was colour blind and therefore would be unable to distinguish the dedicated bicycle lane by its green colour; and he had no memory of illegally turning right in to the plaintiff's lane of travel and no explanation for why he did so.
 6. The plaintiff had provided the defendant with case precedents to support his suggested range of non-pecuniary damages.
- [27] The defendant did not provide a rationale in the correspondence that rejected the plaintiff's offer to settle. From the submissions that the defendant made on this application, I infer that he believed that a liability defence was not hopeless. The plaintiff says that the defendant's liability for the accident and the plaintiff's contributory negligence were triable issues and it was not unreasonable for the defendant to pursue these issues to trial.
- [28] Assuming these were the defendant's subjective reasons for not accepting the settlement offer, I conclude that they were not objectively reasonable. Even if the liability issues were triable, and in my view they were only marginally so, the defendant was still required to assess the strengths and weaknesses of his case in deciding whether to accept the plaintiff's offer. He cannot resist the cost consequences of an unaccepted offer by simply resting on his entitlement to elect to take his chances at trial rather than settle. It was of course open to the defendant not to accept the plaintiff's offer; however, he did so at the risk of cost sanction. The very purpose of a formal offer under Rule 9-1 is to encourage litigants to engage in such risk analysis by putting them on notice of the potential cost consequences of an unaccepted offer to settle.
- [29] By the time the plaintiff served his offer to settle, the risk of proceeding to trial rather than accepting the offer ought to have been obvious to the defendant. The medical evidence, including the evidence of the defendant's own expert, uniformly supported the conclusion that the accident caused the plaintiff's injury to his left shoulder and that his future recovery was uncertain.
- [30] The expert reports, will-say statement of the plaintiff's collateral witnesses and his own examination for discovery evidence provided support for the plaintiff's claim that the injury impaired his daily functioning as well as his future earning capacity. The defendant would have been able to assess the weakness of the liability defence in light of his own admissions in discovery that he could not recall any of the circumstances of the accident, including his reason for making an illegal right-hand turn across a dedicated bicycle lane.
- [31] The plaintiff offered a rationale for his settlement offer, and it was an offer that the defendant could easily evaluate. The offer included the significant compromise by the plaintiff to the extent that he was willing, for settlement purposes, to focus on his anticipated damages for non-pecuniary loss at the exclusion of other heads of loss. The plaintiff justified the amount of the offer by reference to relevant case authority. The offer

was delivered six days in advance of trial and it was open for acceptance for three days. The defendant did not argue that he had insufficient time to consider it.

[32] In my view the plaintiff's formal offer to settle was one that ought reasonably to have been accepted by the defendant, having regard to the circumstances that existed at the time the offer was open for acceptance.

(b) The relationship between the offer and final judgment

[33] In regard to the factor of the relationship between the offer and final judgment, there is no question that the amount awarded to the plaintiff at trial substantially exceeds the amount of the offer. The offer refers to "new money"; however, I am advised by counsel that the amount received by the plaintiff prior to trial, in the form of either advances or Part 7 benefits, was negligible. The defendant has a pending application to seek deductions from the future care award under the authority of s. 83 of the Insurance (Vehicle Act), however the maximum available of the deduction is less than \$5,000.

[34] The plaintiff's recovery at trial is therefore at least double the amount of his formal offer to settle. This is a factor that strongly favours an award of double costs.

(c) Relative financial positions of the parties

[35] In regard to the relative financial positions of the parties, while the plaintiff's financial circumstances are no doubt less advantaged than the defendant's insurer, there is no evidence that the insurer properly used its financial advantages in the litigation: Cottrill at para. 34. As such, I consider the relative financial positions of the parties to be a neutral consideration.

(d) Other considerations

[36] The defendant does not point to any other considerations that militate against an award of double costs. The defendant was of course represented and served throughout by a sophisticated and well-resourced party. As noted, there is no suggestion that the defendant was unable to properly evaluate the plaintiff's formal offer to settle and assess the risks of proceeding to trial rather than accepting it.

Conclusion

[37] I conclude, therefore, that the factors listed in Rule 9-1(6) of the Supreme Court Civil Rules favour an award of double costs to the plaintiff from the date of his unaccepted formal offer. I agree with the plaintiff that such an award is consistent with the overarching purpose of Rule 9-1. There should be some cost consequences to the defendant in failing to accept a reasonable settlement offer in these circumstances.

Application for special or increased costs

[38] I turn now to the plaintiff's application for special costs or alternatively increased costs.

[39] The plaintiff seeks an award of special or increased costs for one half day attendance at trial and one day of trial preparation. He says the trial was "unnecessarily and unjustifiably prolonged" by the defendant's continued denial of liability until final argument and continued advancement of a contributory negligence defence. The plaintiff asked me to infer that a discussion had been made not to call the defendant as a witness at trial at an early date without making the non-attendance clear to the plaintiff. Thus, the plaintiff says he was put to wasted time and expense.

[40] An award of special costs may be warranted where the party's conduct in a litigation may properly be characterized as reprehensible. As held by our Court of Appeal in the leading decision of *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (C.A.) at para. 17:

the word "reprehensible" is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

[41] It is clear, in my view, that the defendant's liability defences were weak. I have already highlighted the discovery evidence of the defendant and will not repeat it. It should not have taken much deliberation for the defendant to conclude that a finding he was at fault in the accident was inevitable. The defence of contributory negligence was also weak because it required the trier of fact to draw inferences (for example, that the plaintiff would have been able to avoid the collision with new brake pads) that had no grounding in the evidence.

[42] I have taken the weaknesses of the liability defences into account in awarding double costs to the plaintiff from the date of this formal settlement offer. For the reasons stated, I consider that the defendant failed to sufficiently and objectively evaluate the weaknesses of this case in rejecting the offer. It was an offer he ought to have accepted.

[43] However, the mere fact that the defendant opted to pursue liability defences that had little hope of success does not, in my view, constitute reprehensible conduct that is deserving of rebuke in the form of an order for special costs. This is not a case in which a party advanced claims that were unfounded, recklessly made, accused the other party of fraud or dishonesty, or were pursued out of malice or for some improper purpose. A meritless claim alone will not necessarily attract an award of special costs: *Chung v. Quay Pacific Property Management Ltd.*, 2020 BCSC 1016 at para. 20.

[44] In the present case the most that can be said is that the defendant may have delayed too long in admitting liability, failed to communicate the decision not to call the defendant as a witness in a timely way, and pursued a weak contributory negligence defence. In my view this is not conduct sufficiently reprehensible to attract an award of special costs in the circumstances of this case.

- [45] While the plaintiff says the defendant's conduct unduly lengthened the trial, it is not apparent to me that this is so. The plaintiff would have testified regardless of whether the defendant had formally admitted liability or abandoned the contributory negligence defence prior to trial. His testimony necessarily would have covered the circumstances of the accident because the mechanism of the injury was relevant to causation and damages. There were no other witnesses on liability. The plaintiff concedes that he cannot identify discrete portions of the trial that address liability rather than damages.
- [46] For many of the same reasons, I conclude that an award of increased costs pursuant to 2(5) of Appendix B of the Supreme Court Civil Rules is also not justified. Increased costs require "unusual circumstances" that render costs awarded on the scale determined by the court grossly inadequate or unjust. Before a party's conduct may constitute unusual circumstances, it must be deserving of some form of rebuke, even if it falls short of conduct that would justify a special costs award. Unlike special costs, increased costs are not intended to punish the offending party, but rather to indemnify the other party for the increased costs associated with the time and effort required to respond to misconduct in litigation or deal with a trial that is unnecessarily lengthened or delayed: *Kemp v. Vancouver Coastal Health Authority Ltd.*, 2016 BCSC 1541 at para. 26.
- [47] In the present case I conclude that the defendant did not engage in misconduct that is deserving of rebuke, and he did not unnecessarily delay or lengthen the trial. There are no unusual circumstances in this case that would justify an award of increased costs.
- [48] My dismissal of the plaintiff's application for special or increased costs should not be taken to condone the defendant's conduct in failing to engage in a more realistic and objective assessment of his prospects for success on the liability issues at trial. However, I am of the view that this is a matter more properly addressed in this case in the context of the plaintiff's request for double costs.
- [49] In the circumstances of this case, the defendant's failure to formally admit liability sooner or abandon his contributory negligence defence does not warrant an award of either special or increased costs.

ORDERS

- [50] I therefore make the following orders on this application:
1. The plaintiff is entitled to his costs of the action from the defendant at Scale B up until September 24, 2019, and thereafter it is double costs;
 2. The plaintiff's application for special or increased costs is dismissed.
- [51] MR. TRISCHUK: My Lady, if I just would make a quick note about costs of this application.
- [52] THE COURT: The plaintiff can recover the costs of this application as double costs because it is a step that came after September 24, 2019.

- [53] MR. TRISCHUK: I would just submit that as success was divided and the plaintiff was not successful in the special or increased costs, that each party would bear their costs on this application.
- [54] THE COURT: Mr. McCardell.
- [55] MR. MCCARDELL: Well, I would say that we were successful in terms of the main application, which was to compel the double costs, and there should be some costs awarded for that. Also, we're in a position where we're entitled to double costs for this step, so I agree with Your Ladyship's award that it should be double costs to the plaintiff.
- [56] MR. TRISCHUK: Just on that, in terms of success, My Lady, the two unsuccessful parts of the application required just as much time as the successful portion in terms of my preparation and argument, and that's my rationale for each party having their own costs.
- [57] THE COURT: All right. Well, I consider that this application was necessary regardless because of the plaintiff's request for double costs, and so it should be included within the costs that plaintiff is entitled to recover under the first term of my order.
- [58] Are there any other points of clarification before we conclude?
- [59] MR. MCCARDELL: No. Thank you, My Lady.
- [60] MR. TRISCHUK: Thank you, My Lady.
- [61] THE COURT: All right. We are adjourned.

"Horsman J."

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