

CANADA / JUDGMENT

Morris v. Robinson

2019 BCSC 1467

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 1467 Morris v. Robinson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Morris v. Robinson,

2019 BCSC 1467

Date: 20190712

Docket: M-130993

Registry: Victoria

Between:

Jiva Jemal Morris

Plaintiff

And:

Erin Nadine Robinson

Defendant

- and -

Docket: M-164701

-Registry: Victoria

Between:

Jiva Jemal Morris

Plaintiff

And:

Wanita Hambly and Keith Hambly

Defendants

Before: The Honourable Mr. Justice MacKenzie

Oral Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

M.H. Martin

Counsel for the Defendants:

S.P. Casey

Place and Date of Hearing:

Victoria, B.C.

April 30, 2019;

and July 9 and 12, 2019

Place and Date of Judgment:

Victoria, B.C.

July 12, 2019

- [1] THE COURT: The plaintiff in this action, Mr. Morris, makes an application for a mistrial pursuant to the inherent jurisdiction of the court to prevent an unfair trial. He also seeks costs on this application.
- [2] Mr. Morris was involved in a motor vehicle accident in March 2011 involving the defendant Ms. Robinson. On July 5, 2016, he was in another accident. Ms. Hambly was the operator of the vehicle that rear-ended Mr. Morris's vehicle on this occasion. Both accidents were of relatively modest impact. In the first accident, Mr. Morris sustained injuries to his lower back, neck, and right shoulder. In the second accident, he aggravated some of those injuries and also suffered injuries to his left shoulder and right knee.
- [3] The majority of Mr. Morris's injuries can, in my view, be properly described as "soft tissue".
- [4] The two actions were joined and heard by a jury in October 2018. While Mr. Morris submitted to the jury that an award of approximately \$1.7 million, as well as non-pecuniary damages, was justified, the jury returned a verdict of \$151,500 in total damages. The trial lasted approximately 20 days and the jury deliberated for two days. Once the verdict was announced in open court, counsel for the defendants made a motion that judgment be

entered in the amount of the jury verdict. I asked the plaintiff's counsel if she had anything to add and she queried the circumstances in which a jury could be polled, but the motion was not objected to. I granted the defendants' motion and entered judgment.

- [5] The first question to be asked in the present application is whether the court has jurisdiction to entertain the plaintiff's application for a mistrial, after the jury verdict has been entered as a judgment of the court upon the application of the defendants.
- [6] As noted, the plaintiff's application is not being made pursuant to Rule 12-6 of the Rules. Rather, it is being made pursuant to the inherent jurisdiction of the court to declare a mistrial when, as the plaintiff submits, "trial fairness has been compromised".
- [7] In this regard, the plaintiff relies on the decision of our Court of Appeal in *Oberreiter v. Akmal*, 2009 BCCA 557, where D. Smith J.A., concluded that a trial judge retains jurisdiction to entertain an application for a mistrial after a jury verdict has been entered in a civil jury case. In reaching this finding, Justice Smith relied on the Supreme Court of Canada's observations in *R. v. Burke*, where the majority held the trial judge retain jurisdiction to "alter an error in a recorded verdict after a jury in a criminal case had been discharged."
- [8] In *Burke*, the majority concluded a trial judge should have discretion after a jury is discharged to "settle upon the proper remedy for the irregularity that occurred [during the trial]"; paragraph 72.
- [9] Given the general observations of the court in *Burke*, counsel for the plaintiff submits the Court of Appeal held in *Oberreiter* that a trial judge continues to have the authority to declare a mistrial after a jury has been discharged. I agree there is no dispute on this specific point. However, at paragraphs 24 and 25 in *Oberreiter*, Justice Smith stated:
- [24] It is settled law that until a judgment or order has been entered, a trial judge continues to be seized of the matter before him or her. ...
- [25] In my view, there is no conflict in the authorities and none were provided that would suggest that a trial judge, before judgment is entered, does not retain jurisdiction to address a trial fairness issue. ...
- [10] I am satisfied there is no doubt that the court does retain remedial jurisdiction to declare a mistrial on an issue that goes to trial fairness after a jury verdict has been rendered and the jury discharged, but at the same time, in my view, Justice Smith clearly states that the trial judge only has jurisdiction to declare a mistrial "until a judgment or order has been entered".
- [11] In an attempt to support his position that the court retains jurisdiction to entertain a mistrial application after a jury has been discharged and judgment entered by the court, the plaintiff relies on a 1978 decision of Justice Bouck, *Force v. Gibbons*, [1978] B.C.J. No. 744, which referred to the rule prior to 1976 that required the plaintiff or defendant to specifically request a jury verdict be entered as a judgment of the court. In that case, Justice Bouck concluded that a jury verdict is not a judgment and judgment will only be entered when the

court, on a motion from counsel or on its own motion, enters judgment, the former being what occurred in the present case.

- [12] In *Force*, Justice Bouck asked counsel for the plaintiff if he intended to make a motion for judgment. Counsel replied he did not because, in his view, the changes in the 1976 rules made such a motion unnecessary. Justice Bouck disagreed and, not surprisingly, concluded that a jury verdict and a court judgment are "two different kinds of animals". As a result, he concluded:

Following a verdict by a jury some form of application to the presiding judge is necessary in order to translate the jury's verdict into a judgment of the court. If it is not made by either side the judge alone may order the entry of judgment on his own motion.

- [13] As a result, I am of the view that not only does the decision by Justice Bouck not support the plaintiff's jurisdictional position, it in fact supports the conclusion that once the court enters judgment upon a motion by counsel, the trial judge does not have jurisdiction to then entertain an application for a mistrial.
- [14] Mr. Morris also relies on *Ramcharitar v. Gill*, 2007 BCSC 561. At paragraph 4 of the chambers decision, Justice Macaulay considered the following threshold issue:
- [4] The defendant argued that the court, having granted the application for judgment [following the jury verdict], is *functus officio*. In my view, the court is not *functus* until the judgment has been formally entered. See *MacKinnon v. National Money Mart ...* and *Harrison v. Harrison ...*
- [15] I note that the two authorities cited by Justice Macaulay are cases about orders that had not been entered after judge-alone proceedings. Thus, I read his distinction between "granting the application for judgment" and the judgment being "formally entered" as a distinction between a court granting an application for judgment and the registry entering a resulting order. In the case before me, the former has occurred, whilst the latter has not.
- [16] I accept without reservation that the fact that I granted the defendants' application for judgment following the jury verdict does not mean I am *functus* with respect to other matters. This is quite clearly illustrated by the fact that I am now entertaining a contested application as to costs. However, I am not persuaded that the fact that I am not yet *functus* means I still have jurisdiction to entertain the plaintiff's mistrial application.
- [17] In *Oberreiter*, Justice Smith suggested the inherent jurisdiction to address the trial fairness issue is tied to whether or not a trial judge remains "seized of the matter". This, in my view, is more logical than Mr. Morris's suggestion that a trial judge retains inherent jurisdiction to enter a mistrial application up until they become *functus*, regardless of whether or not a jury verdict has been entered as a judgment of the court. I also note that the Court of Appeal's decision in *Ramcharitar* did not engage directly with the procedural issues Justice Macaulay considered at paragraph 4 of his chambers reasons and that, in any event, *Oberreiter* is a more recent appellate decision than *Ramcharitar*.

- [18] In my view, Justice Smith's decision in *Oberreiter* is clear. Once judgment is entered, the court does not have jurisdiction to declare a mistrial. While this does not preclude me from dealing with post-judgment issues such as costs, I am not persuaded I have jurisdiction to entertain the plaintiff's application for a mistrial based on an allegedly unfair trial.
- [19] In addition, as counsel for the defendants has emphasized, the plaintiff has filed a notice of appeal where he will presumably be advancing an application for a mistrial on the basis of what Mr. Morris submits was ongoing inappropriate conduct during the trial on the part of counsel for the defendants, the same grounds advanced before me in the present application.
- [20] If the appeal proceeds, the Court of Appeal will not be precluded from entertaining a mistrial application by Mr. Morris at that time.
- [21] Even though I have concluded I have no jurisdiction at this point in time to consider Mr. Morris's application for a mistrial, I will briefly state for the sake of completeness that, notwithstanding what I consider to be the legitimate concerns addressed by counsel for the plaintiff, especially with respect to counsel for the defendants' opening statement to the jury, even if I retain jurisdiction, I would not be persuaded that in these particular circumstances it would be appropriate to grant Mr. Morris's application for a mistrial, given the lateness of the application some months after judgment had been entered and after counsel had apparently been exchanging correspondence and trying to approve a final order.
- [22] I also pause here to note that I accept what counsel for Mr. Morris has said, that the delay in getting the actual application before the court from early in the new year to today's date was because of those discussions with opposing counsel. But nevertheless, in the present case, the concerns expressed by Mr. Morris's counsel are not new. In that regard, plaintiff's counsel during the trial took the relatively unusual step of objecting to portions of defendants' counsel's opening statement on, if my recollection is correct, two occasions. I was satisfied she was justified in doing so, and I admonished defence counsel for essentially making a closing statement in the "guise of an opening statement", instead of simply providing a "road map" for the benefit of the jury with respect to the evidence he anticipated the defendants' witnesses would be providing.
- [23] The following day, counsel for the plaintiff again expressed her concerns about the nature of the opening statement by defendants' counsel, submitting it was "highly prejudicial and entirely inappropriate". At that point in time, counsel for the plaintiff added she was still "thinking through" her options. However, while I agreed with her that defendants' counsel's opening statement was at times inappropriate, she had not made an application for a mistrial.

- [24] Whilst I recall stating I would be reluctant to declare a mistrial after 15 days of evidence, I advised counsel that she must do what she believed was in her client's best interests, and that if there was a formal application for a mistrial forthcoming, I would hear full submissions and rule on that specific application when and if it was advanced.
- [25] No application for a mistrial was forthcoming, even though all of the concerns the plaintiff now expresses with respect to the manner in which the defendants' counsel conducted the trial, both in his cross-examination and in his opening and closing statements, were all known to plaintiff's counsel before the jury returned with what the plaintiff undoubtedly considered was a most disappointing judgment.
- [26] In other words, prior to the jury's verdict, plaintiff's counsel was aware of and expressed her legitimate concerns about everything she now complains of. Counsel could have made a formal application for a mistrial at the conclusion of the defendants' opening statement, at the conclusion of the evidence, after the defendants' counsel's closing submission, during the day that counsel and the court discussed the charge to the jury, or during the jury's two days of deliberations.
- [27] In my view, it was at one of those stages in the trial that the plaintiff should have sought a mistrial, as all of the issues that he now complains of were clearly front and centre in counsel's mind.
- [28] The situation in the present case is therefore dramatically different from the circumstances in *Oberreiter* where an irregularity only became known to counsel and the court after a verdict had been entered, but before judgment was entered by the court. I also note that in *Oberreiter* there had been no application by counsel that the jury verdict be entered as a judgment of the court. Conversely, as the defendants have properly emphasized on this particular application, where the plaintiff was aware of all of the alleged improprieties on the part of counsel for the defendants, and yet decided to proceed and take a chance on receiving a favourable verdict rather than seeking a mistrial and, if successful, starting over again.
- [29] So for these reasons, even if I was of the view I had jurisdiction to entertain this application, given the proper time, in my view, for advancing such an application was any time prior to the jury's verdict or before judgment was entered, I am not satisfied it would be appropriate to declare a mistrial at this point in time.
- [30] I now turn to the issue of costs. The plaintiff seeks costs on the basis that even though the ultimate verdict was far less than the almost two million dollars he suggested was appropriate, he is still entitled to his costs on Scale B, given that he was successful at trial. In this regard, the defendants acknowledge the plaintiff is entitled to costs up to a certain point. Therefore, the primary issue is whether the plaintiff should be denied his costs after the defendants sent a formal offer to settle, approximately one and a half business days prior to the commencement of the trial.

- [31] At the outset, I will state I am mindful of an offer sent by counsel for Ms. Robinson to the plaintiff on August 18, 2016, offering to settle the action involving Ms. Robinson for approximately \$184,000, an offer that apparently remained open for over two years. This offer did not, however, include any reference to the accident involving Ms. Hambly, which had occurred about six weeks earlier on July 5, 2016. Moreover, as emphasized by counsel for Mr. Morris, in my view, this was not a formal offer that would be relevant to the issue of costs as it did not comply with Rule 9-1(1)(c)(iii) which requires inclusion of a statement that the party making the offer is reserving the right to bring the offer to the attention of the court for consideration in relation to costs after judgment has been pronounced.
- [32] The Robinson trial was originally set for January 2017, but on October 18, 2016, it was adjourned as the plaintiff submitted his injuries from the two incidents were likely indivisible and the two actions should be tried together. Following this, on August 2, 2018, the plaintiff made a formal offer to settle both actions for \$675,000, in addition to past Part 7 advances, plus costs and disbursements. The defendants declined to accept. There were no further offers until October 2018, just before the trial was scheduled to commence.
- [33] On October 11, the defendants offered to settle both actions for \$300,000 less Part 7 benefits paid to date in the amount of \$13,230, plus costs and disbursements to the plaintiff up to the delivery of the offer. The offer also stated that costs and disbursements would be payable to the defendants from the date of the delivery of the offer. In my view, it is this formal offer to settle both of these actions that is relevant to the question of costs.
- [34] The offer was faxed to plaintiff's counsel's office at about 11:20 a.m. on Thursday and was open until noon on Sunday, the day before the trial was set to commence. As a result, the offer was open for one and a half business days from the time it was faxed until its expiration. The plaintiff submits that the lateness of the offer did not provide him with sufficient time to engage in a careful appraisal of the merits of the offer and, as such, was not an offer that ought reasonably to have been accepted by him.
- [35] In addition, as noted, plaintiff's counsel submits the offer was somewhat ambiguous, in that it stated that the defendants' costs and disbursements following delivery of the offer would be subtracted from the offered amount. The plaintiff submits it was unclear to him what the defendants' costs and disbursements following delivery of the offer would be, and therefore this ambiguity in the offer added complexity to the plaintiff's appraisal of whether to accept the offer. On this particular point, I do agree with the defendants when they say that these costs and disbursements would, in all likelihood, have been nominal. This, however, begs the question as to why incorporate this term at all.
- [36] At the same time, I appreciate the defendants' counsel's observation that counsel for Mr. Morris made no inquiry as to the specifics of the costs consequence and therefore this should not unduly weigh in favour of costs for the plaintiff with respect to an allegation of the offer being ambiguous.

- [37] The legal principles applicable to the issue of costs in this case are set out in Rule 9-1 of the Supreme Court Rules. Sub (4) states that:
- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.
- [38] The dominant purpose of Rule 9-1 is to promote reasonable settlements, to attach some consequences for failure to accept reasonable settlement offers, and to discourage the continuation of doubtful claims: see *Brewster v. Li* and *Catalyst Paper Corporation*.
- [39] Subrule 9-1(5) sets out the costs options where there has been an offer to settle as follows:
- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
- (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled 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;
 - (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;
 - (c) award to a party, 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, costs to which the party would have been entitled had the offer not been made;
 - (d) if the 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.
- [40] Subrule 9-1(6) applies to decisions made with respect to Rule 9-1(5). I will read sub (6). It states:
- (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.
- [41] When the court is considering offers to settle when determining the question of costs, every case must be judged on its own facts. As Justice Dardi said in *Bennett v. Scanlan*, with a reference to the past:

No inflexible "seven-day" rule is imposed by the Rules ... The proper issue for consideration is whether, in all the circumstances, the offeree had a reasonable opportunity to consider the offer

[42] Moreover, it is well settled that the question is not whether the offer was reasonable, but whether it was unreasonable for the plaintiff not to accept the offer.

[43] In these particular circumstances, I have no hesitation in concluding that the defendants' offer was reasonable, especially of course when considered in light of the jury's verdict. The problem in this case is whether it was reasonable to expect the plaintiff to accept this particular offer when it was only open for one and a half business days prior to the commencement of the trial, expiring as I have mentioned on Sunday at noon.

[44] In support of their respective positions, both counsel have provided me with several authorities dealing with costs applications in general and the timing of offers to settle litigation. I do not propose to refer to them all, I have considered them all. I do, however, note that two authorities the defendants refer to where an offer sent two days and five days respectively prior to trial were considered sufficient in timeliness for a plaintiff to properly consider those offers, involved relatively simple, straightforward property disputes with no expert evidence, and in the case where five days was considered sufficient time for a plaintiff to consider an offer, it was known in advance that the plaintiff in that case had committed perjury.

[45] Those cases generally also refer to credibility in general, and I will simply state on this particular point, I am of the view that Mr. Morris's credibility in this particular case was no more nor no less than the usual difficulty that surrounds the self-reporting of a person who is complaining of soft-tissue injuries.

[46] Returning to the question of authorities, Mr. Morris referred to, amongst other authorities, these decisions: *Anderson v. Pieters*, where an offer made six days prior to trial was deemed not sufficient time to warrant costs consequences; *Gichuru v. Smith*, four days before trial an offer was sent which was considered not to be sufficient time; and then *Dodge v. Shaw Cablesystems*.

[47] Similarly, in the decision of *Wormald*, Justice Funt said:

It is not a surprise that offers may be made in the weeks and days before trial.

[48] He then went on to state that the plaintiff in that particular case "did not face any particular challenges which would have made a review of the first offer not practical within one week."

[49] In this particular case, I am of the view that the decision in *Dodge v. Shaw Cablesystems* is apropos to the present situation. In that case, Justice Masuhara held that it was unreasonable for the defendant to have expected the plaintiff to accept an offer that expired on the Friday before trial, and as such was only available for consideration for two business days. As Justice Masuhara stated at paragraph 15:

when an offer to settle is received, counsel and client are required to make a careful appraisal of the merits, taking into account complex and subjective factors in appraising the eventual outcome of a trial, in this case, a jury trial. Complexity is increased where the plaintiff is asked to evaluate an "all-in" offer where, by the very nature of the offer, the actual amount offered in discharge of the action is not immediately apparent.

- [50] In addition, in the present case, on the Friday before the trial was set to commence before a jury, the defendants advised the plaintiff of a new witness, one of Mr. Morris's neighbours, despite an order by the trial management judge that all parties exchange their final witness lists 14 days prior to the commencement of the trial.
- [51] According to the will-say statement the defendants provided to the plaintiff, this witness would potentially provide evidence that would be significantly damaging to Mr. Morris's claim. The statements suggested the witness would state that there may have been unlawful activity at the Morris residence vis-à-vis his cultivation of cannabis under a Health Canada licence, and/or that Mr. Morris had been observed doing strenuous physical work at his home, thereby potentially undermining his claim for a significant damages award.
- [52] Counsel for Mr. Morris speculates that this was an attempt by the defendants to intimidate the plaintiff into accepting the offer to settle that was still on the table that Friday afternoon.
- [53] As a result, the plaintiff submits that on the last business day before the trial, he was having to take into consideration this new witness. The fact that the defendants never did call this last-minute witness is immaterial, but one does wonder why the plaintiff was only advised of this next-door neighbour on the last business day prior to trial, while counsel was attempting to digest the defendants' last-minute offer.
- [54] Finally, given that the plaintiff had nine expert reports which supported his claim for damages, I am satisfied, as the cases have referenced, he had good reason to have confidence in the strength of his case, at least to a certain extent, notwithstanding the unpredictability of any jury trial and notwithstanding the ultimate jury verdict in his particular case.
- [55] On this point, I also note, as counsel for Mr. Morris has pointed out, the defendants' witnesses acknowledged that Mr. Morris incurred some injuries in the two accidents, but it was the severity of these injuries and the ultimate impact on Mr. Morris's future which was the primary contentious issue.
- [56] In my view, this is another factor which militates in favour of the plaintiff being granted costs, and militates against costs being awarded to the defendants after the offer was forthcoming, or that each party bear their own costs from October 11, 2018 onward.
- [57] In my view, the comments of Justice Masuhara in Dodge are also relevant, once again, where at paragraph 17 he states:

Furthermore, liability remained a significant issue before trial. The case was hard fought. The jury heard or was presented evidence from at least nine expert doctors and two engineers. There was a real possibility that the jury could have awarded an amount in excess of the offer to settle. It is not, however, for this Court to engage in a hindsight analysis and compare the final result with the amount offered in assessing the reasonableness of the plaintiff's decision to reject the offer: Bailey at para. 24.

[58] At paragraph 18, Justice Masuhara concluded:

Since I have decided that it was unreasonable for the defendant to expect that the plaintiff would accept the offer within two days, the policy underlying Rule 37B, which is to encourage the settlement of disputes by rewarding the party who makes a reasonable offer and penalizing the party who declines to accept such an offer, is not engaged. Accordingly, as permitted I decline to consider the defendant's offer to settle in exercising my discretion relating to costs.

[59] I am also mindful of the comments of our Court of Appeal in *Hartshorne v. Hartshorne* at paragraph 27 where the court states:

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* ...

[60] Given these judicial observations, I am satisfied that the court should avoid placing too much weight on the relationship between the offer to settle and the ultimate jury verdict, notwithstanding Rule 9-1(6)(b). As Justice Power found in *Bains v. Antle*:

Having regard to what was known to the parties prior to the commencement of this trial, I am not convinced that the plaintiff ought to have anticipated a jury award substantially lower than the defendants' final offer to settle.

[61] In my view, this is especially so in the present claims where Mr. Morris's past and future legal use of marihuana to allegedly alleviate his pain and discomfort was a significant and rather novel aspect of his claim, an issue that played an overwhelming role in the substantial claim for cost of future care, something in the neighbourhood of \$900,000.

[62] Finally, I do note that pursuant to Rule 9-1(6)(c), the relative financial circumstances of the parties can be taken into consideration by the court in determining whether the plaintiff should be denied all of the costs incurred throughout this proceeding or with respect to when the offer was made. Again, I rely on Justice Power's comments in *Bains* where at paragraph 36 she says:

. the financial evidence at trial supports the fact that the plaintiff was a person of modest means. Having already concluded that the settlement offer was not one which ought to have reasonably been accepted, it is evident that an order requiring the plaintiff to either pay the well-funded defendants' costs, or in the alternative denying the plaintiff her costs, from [the offer date] onwards, would result in a pyrrhic victory and could have the effect of discouraging plaintiffs from pursuing valid claims.

[63] While I agree with the defendants when they say Mr. Morris is not impecunious, I am of the view he is clearly of relatively modest means. His wife is a registered nurse and I take that into consideration, but Mr. Morris earns about \$2,200 a month selling cars. He has a daughter and another child on the way. His mother-in-law has apparently loaned Mr. and Mrs. Morris some \$300,000 for the purchase of their residence, and moreover, it can hardly be said that Mr. Morris received a substantial award from the jury that would offset any adverse or partial costs award.

[64] On that last point, I am cognizant of the observations of Gomery J. in a case called Kobetitch, where he states that insurance coverage should carry little or no weight unless the insurer uses financial resources in a manner that distorted the trial process. I cannot say that that occurred in this particular case, but I do note that Justice Gomery then went on to refer to the substantial award the plaintiff received, such that the parties' relative financial circumstances was not a material consideration in the case before him.

[65] So even though there was no untoward conduct vis-à-vis the financial strength of the insured in this particular case, the amount of the award being in my view quite modest, coupled with Mr. Morris's financial circumstances, militates in favour of a costs award being made to the plaintiff.

[66] I also note the observations of Justice Voith in *Wafler v. Trinh* appear to be somewhat inconsistent with the observations of Justice Gomery. But be that as it may, I do not think I need to add anything else on that particular point.

[67] In this analysis, I am fully aware of the comments of our Court of Appeal in *Hartshorne* that referenced *C.P. v. RBC Life Insurance*, where the court stated that:

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".

[68] I am also aware of the general principles in those cases that the purpose of the rules is to deter frivolous actions or defences, to encourage conduct that reduces the duration and extents of litigation, and to discourage conduct that has the opposite effect, to encourage litigants to settle whenever possible in order to free judicial resources for other cases, to require litigants to make a careful assessment of the strength or lack thereof of their cases, and discourage the continuance of doubtful cases or defences.

- [69] In the end, being guided by these principles and having regard to the totality of the circumstances in this particular case, a case which I consider to be a less than routine personal injury action, I am not satisfied the formal offer made by the defendants on October 11, 2018, was one that ought to have been reasonably accepted by the plaintiff and, coupled with the other factors that are relevant in this analysis that I have referred to, I am persuaded that the plaintiff is entitled to his costs at Scale B and disbursements.
- [70] As far as this particular application is concerned, it is clear that success has been divided equally vis-à-vis the mistrial application and the costs application, and as such each party will bear their own costs on this particular application.
- [71] So Mr. Casey, thank you very much.
- [72] MR. CASEY: My Lord, just -- just one clarification. There was the -- there will be an order for the advance of I think it was --
- [73] THE COURT: That goes without saying, in my view.
- [74] MR. CASEY: Of 13,000 odd dollars, yes, okay, thank you.
- [75] THE COURT: Okay, yes, yes. Ms. Martin, that is clear?
- [76] MR. CASEY: Thank you, My Lord.
- [77] MS. MARTIN: Yes, we just have to verify what that number is.
- [78] THE COURT: Yes, I do not think there is any dispute on that, based on what we discussed before, and all the rest, I will leave up to you and thank you very much.
- [79] MR. CASEY: Thank you, My Lord.
- [80] MS. MARTIN: Thank you, My Lord.
- "The Honourable Mr. Justice B.D. MacKenzie"

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