

CANADA / JUDGMENT

Sharma v. Kandola

2020 BCSC 1414

COURT

Supreme Court of British Columbia

DECIDED

23 September 2020

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

2020 BCSC 1414 Sharma v. Kandola

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sharma v. Kandola,

2020 BCSC 1414

Date: 20200923

Docket: M150735

Registry: Vancouver

Between:

Simone Sharma

Plaintiff

And

Kulwinder Singh Kandola

Defendant

Before: The Honourable Mr. Justice Ball

Supplementary Reasons for Judgment

on Costs

Counsel for the Plaintiff:

W.D. MacLeod

Counsel for the Defendant:

R.C. Brun, Q.C.

Place and Date of Trial:

Vancouver, B.C.

August 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 23, 2020

Introduction

- [1] These are reasons for judgment arising from an order of the Court of Appeal of British Columbia, which order referred the issue of trial costs to this Court. This file was originally before this Court as a motor vehicle accident trial from September 10-13 and October 4, 2018. The Court found that the defendant was wholly responsible for the motor vehicle accident and assessed damages of \$165,828.06, together with Court Order Interest and Costs (Sharma v. Kandola, 2019 BCSC 349).
- [2] The defendant appealed the aforesaid judgment. The appeal was heard by the Court of Appeal on May 26, 2020, and on June 9, 2020, the Court of Appeal determined that the appeal should be granted, but only to the extent that the respondent is liable for the accident at an apportionment of 25%. At para. 26 of the Reasons of the Court of Appeal, Harris J.A. said "[i]n these circumstances, even though I would allow the appeal, I regard success to have been mixed, and would order each party to bear their own costs. I would remit the disposition of trial costs to the trial judge."
- [3] Hence, it is the task of this Court to determine the apportionment of trial costs in light of the finding of the Court of Appeal.

Positions of the Parties

- [4] The position of the defendant was summarized in the Court of Appeal as follows:
- [25] Mr. Kandola's main position in the court below was that the respondent was wholly liable for the accident. Indeed, he brought a no evidence motion at the completion of the plaintiff's case. As I see it, the possibility of apportionment was treated as a remote possibility. In this Court, Mr. Kandola maintained in his factum that the appeal should be allowed, an order entered that the respondent was wholly liable for the collision, and the action dismissed. The request for a new trial was put as an alternative, although it was the order sought at the conclusion of the oral hearing.

- [5] The position of the defendant has not changed since the commencement of this action; that is, the plaintiff was the sole cause of the collision and the plaintiff is wholly responsible for her own damages. The defendant's position following the Court of Appeal's decision is that the plaintiff's award for costs should be reduced by 25%, pursuant to s. 3(1) of the Negligence Act, R.S.B.C. 1996, c. 333, which provides:

Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

- [6] The plaintiff seeks an order that the defendant pay 100% of the regular costs of trial on Scale B, plus disbursements up until September 15, 2019, and then double costs thereafter. The plaintiff also seeks an order that the plaintiff be awarded post-judgment interest on the costs and disbursements from March 14, 2019, until payment.
- [7] The plaintiff places emphasis on the phrase "[u]nless the court otherwise directs" to draw the Court's attention to its discretion to depart from s. 3(1) of the Negligence Act, relying on the authority of *Moses v. Kim*, 2009 BCCA 82 at para. 70. In the *Moses* case, liability was divided by the trial judge so that Mr. Moses was 65% liable and Mr. Kim was 35% liable. The trial judge awarded the plaintiff 90% of his trial costs (2007 BCSC 1820); which were reduced to 75% by the Court of Appeal, for an error not present in the case at bar.
- [8] Based on the authorities reviewed in that case, the trial judge in *Moses* listed a number of factors in exercising the discretion noted above, including the following:
- (a) the seriousness of the plaintiff's injuries;
 - (b) the difficulties facing the plaintiff in establishing liability;
 - (c) the fact that in settlement negotiations the amount offered was substantially below the ultimate amount;
 - (d) whether the plaintiff was forced to go to trial to obtain recovery;
 - (e) the costs of getting to trial;
 - (f) the difficulty and length of the trial;
 - (g) whether the costs of recovery available to the plaintiff, if costs are apportioned according to liability, will bear any reasonable relationship to the party's costs in obtaining the results achieved;
 - (h) the positions taken by the parties at trial, in particular whether the positions taken were appropriate and reasonable in the circumstances;
 - (i) whether the defendants made any settlement offers;
 - (j) the ultimate result of the trial; and

- (k) whether the plaintiff achieved substantial success that would be effectively defeated if costs were awarded pursuant to s. 3(1) of the Negligence Act:

(See *Forsyth v. Sikorsky Aircraft Corp*, 2002 BCCA 231, and *Logeman v. Rossa*, 2006 BCSC 692.)

- [9] In this case, the plaintiff suffered serious injuries which changed the patterns of her life. In the collision, she struck the left side of her head and shoulder on the interior of her car which caused continued debilitating pain in her head, neck, back and left side, and resulting dizziness. Later, she was diagnosed with post-concussion syndrome. Continued experience of pain symptoms by the plaintiff led to a diagnosis of anxiety. Her approach to university was put on a slower basis with fewer classes.
- [10] The defendant would never acknowledge liability, so the plaintiff was forced to go to trial and prove her case. Defence counsel worked hard to sustain his client's position.
- [11] The defendant never offered any amount of money, apart from a proffered waiver of costs. The amount of the judgment obviously exceeded any costs that might have been awarded.
- [12] The error found to have occurred in the *Moses* case was the trial judge's consideration of Mr. Moses' legal fees as a relevant factor in departing from the "usual rule". That said, the plaintiff here is a newly-graduated high school student beginning a university degree, and the defendant is an apparently-established business owner supported in this litigation by an insurer. The resources of the parties are not equal.
- [13] I have heard no evidence nor submissions on the quantum of legal fees paid by the plaintiff for the assistance of counsel in this case. It would not be proper to take such fees into account in any event.
- [14] In *Moses*, however, the plaintiff was "found 65% liable for a collision that he claimed he was not in any way at fault"; and he was awarded damages which "amounted to about a quarter of what he sought and a third of what he was assessed": *Moses* at para. 77. In reducing Mr. Moses' costs from 90% to 75%, the Court of Appeal relied on *Bourelle v. Andrychuk* (1998), 61 B.C.L.R. (3d) 191 (C.A.), to find that the trial judge erred in considering the amount of Mr. Moses' legal fees. The applicability of *Bourelle* to the case at bar is not clear because the error of a reference to legal fees has had no place in the decision in this case.
- [15] In the case at bar, the defendant adopted the position that he had no liability and refused to consider a clearly reasonable offer to settle by the plaintiff. The offer, when compared to the outcome of the case, was revealed to be remarkably reasonable and ought to have been considered for settlement of the case. The plaintiff's damages, unlike the plaintiff in *Moses*, are 75% of the total damages. The plaintiff was significantly successful on the issues of liability and damages, obtaining well in excess of the amount she was prepared to accept.

- [16] A factor for consideration in this case is what the plaintiff refers to as the defendant's "unyielding position on liability". The defendant took the position, apparently supported by its insurer, that he was utterly blameless for the collision which was entirely the fault of the plaintiff. Consistent with that position on April 24, 2018, the defendant served an offer to settle based on a waiver of costs and disbursements by the defendant in exchange for dismissal of the action.
- [17] This offer by the defendant was open for acceptance until August 9, 2018. The offer was rejected by the plaintiff.
- [18] The plaintiff offered to mediate, but the defendant refused to participate. The defendant then restated the aforesaid offer to settle, which was again rejected by the plaintiff.
- [19] At trial, however, the defendant did not testify voluntarily and took the stand only when required to do so by a Notice of Intention to Call Adverse Party as a Witness. The defendant also called as a witness, Mr. Dhaliwal. At para. 47 of the Reasons for Judgment, this Court found that: "[t]he testimony of Mr. Kandola and Mr. Dhaliwal suggesting that the Sharma vehicle cut off the Kandola vehicle in the eastbound lane simply has no air of reality, and is not credible or reliable". At para. 21 of the Reasons of the Court of Appeal, this finding of fact is sustained as the Court found that "[o]n the basis of the judge's findings, the appellant was at fault in a variety of different and cumulative ways".
- [20] Another factor to be considered, which is consistent with the defendant's position that the plaintiff was entirely responsible for the accident, was that the defendant brought a no evidence motion at the completion of the plaintiff's case at trial, thereby treating any suggestion of an apportionment of liability as a remote consideration.

Double Costs

- [21] The plaintiff, however, delivered an offer to settle to the defendant for the sum of \$50,000, plus assessable costs and disbursements. It is the plaintiff's position that the quantum of this offer, which is substantially below the amount claimed and awarded at trial and now in the Court of Appeal, reflected a risk which the plaintiff believed might be realized; that liability would be divided. The defendant did not respond to the plaintiff's offer. The trial followed.
- [22] The plaintiff was awarded damages at trial which exceeded the offer to settle by a factor of three. Taking into account the effect of the Court of Appeal's decision, the plaintiff's award of damages exceeded the offer by the plaintiff by a factor of more than two.
- [23] The plaintiff relied on Rule 9-1(6) of the Supreme Court Civil Rules, B.C. Reg. 169/2009, which provides:

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 the 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.

[24] In the case at bar, however, the defendant did not agree to pay double costs following the trial decision. An application for double costs was scheduled before the trial court to be heard on August 20, 2019. On August 19, 2019, the defendant agreed to sign the draft order which provided for double costs, and the order was subsequently entered.

[25] While there are a number of binding authorities which have provided commentary on Rule 9-1, such as *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26, given the defendant's consent to an order that the plaintiff be granted double costs as claimed, this discussion is unnecessary.

Conclusion

[26] In the case of *Giles v. Westminster Savings Credit Union*, 2010 BCCA 282, Frankel J.A stated:

[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 (B.C. 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 (B.C. C.A.) at para. 28;

- "[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 (B.C. C.A.) 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 Corp. v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 (B.C. C.A.) at para. 16.

[27] Following these statements of purpose, the defendant in this case failed to properly assess the risk of a substantial portion of liability being imposed. That failure led to the refusal to consider a reasonable offer of settlement made by the plaintiff and the proceeding of a defence that had little likelihood of success and used scarce judicial resources.

- [28] As noted above, the plaintiff in the Moses case was far less successful than he hoped to be (found 65% responsible for the accident) and was, after appeal, awarded 75% of the costs in the case. In the case at bar, the plaintiff was more successful than she had hoped and the defendant's unyielding position on liability had far less success than he had hoped.
- [29] Based on a review of the cases cited, and the submissions of counsel, I have concluded to exercise the court's discretion to depart from s. 3(1) of the Negligence Act. The plaintiff is awarded 90% of her taxable costs of trial on Scale B, plus disbursements up until September 15, 2019, and then double costs, on the same basis, thereafter. The plaintiff is also awarded post-judgment interest on the costs and disbursements from March 14, 2019, until payment.
- [30] The plaintiff is entitled to costs of this application on Scale B as a matter of ordinary difficulty.

"Ball J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/14/2020BCSC1414.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/sharma-v-kandola-2020-bcsc-1414>

Prepared on 29 October 2026 · Esheria