

CANADA / JUDGMENT

## Sidhu v. Hiebert

2023 BCSC 1367

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1367 Sidhu v. Hiebert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sidhu v. Hiebert,

2023 BCSC 1367

Date: 20230809

Docket: M082472

Registry: Vancouver

Between:

Arshdeep Singh Sidhu

Plaintiff

And:

Jan Abram Hiebert, Balwinder Kaur Sidhu, Rajvinder Singh Sidhu,

Surinder Singh Rattan, Nissan Canada Inc., Nissan Motor Co., Ltd.,

Nissan North America, Inc., Abbotsford Nissan Ltd.

Defendants

And:

Insurance Corporation of British Columbia, Jan Abram Hiebert,

Balwinder Kaur Sidhu, Rajvinder Singh Sidhu, Surinder Singh Rattan,

Nissan Canada Inc., Nissan Motor Co., Ltd.,

Nissan North America, Inc. and Abbotsford Nissan Ltd.

Third Parties

Before: The Honourable Madam Justice Forth

Reasons for Judgment Re: Costs

These Reasons for Judgment have corrected at paras. 25 and 118e)

on August 23, 2023

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Place and Dates of Trial:

Vancouver, B.C.

May 31- June 2, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 9, 2023

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## **Introduction**

[1] This trial took place over 46 days over several months in 2021 and then for a further 10.5 days in 2023. The plaintiff was nine years old in January 2008 when he was hit by a drunk driver, Jan Hiebert, ("Hiebert") while riding in his parents' Nissan the ("Accident"). The trial decision is indexed at 2022 BCSC 1024 (the "Trial Reasons") with the decisions on the deferred issues of damages indexed at 2023 BCSC 813 and 2023 BCSC 1021.

[2] The plaintiff was rendered a ventilator-dependent quadriplegic as a result of the injuries he suffered in the Accident. The liability findings were as follows:

1. Hiebert was found to be 90% liable for the Accident.
2. The Sidhu defendants were found to be 10% liable for the Accident.
3. The action against the Rattan defendant was dismissed.
4. The total damages awarded were just over \$17 million.

Trial Reasons at para. 1113; 2023 BCSC 1021 at para. 42.

[3] The claim by the plaintiff against the Nissan defendants was settled in July 2020 by way of a BC Ferries agreement. As a result, at the trial ICBC and the defendants pursued a claim against Nissan. I found no fault against the Nissan defendants: Trial Reasons at para. 494.

## Issues

[4] The cost issues for determination are:

1. Is the plaintiff entitled to costs against ICBC and the Sidhu defendants? If so, at what scale?
2. Is the plaintiff entitled to "uplift costs"?
3. Is the Rattan defendant entitled to costs against the plaintiff? If so, at what scale?
4. What is the impact of the offer to settle made by the Rattan defendant?
5. Should there be a Sanderson or Bullock order made against ICBC and the Sidhu defendants, so that they, instead of the plaintiff, would be responsible for the costs of the Rattan defendant.

Issue 1: Is the Plaintiff entitled to costs against ICBC and the Sidhu defendants? If so, at what scale?

[5] No party disputes that the plaintiff is entitled to his costs against ICBC and the Sidhu defendants and that those costs be at Scale C. After considering the relevant factors set out in *Mort v. Board of School Trustees of School Board No. 63 (Saanich)*, 2001 BCSC 1473 at para. 6, it is clear that the considerations supporting this was a case of more than ordinary difficulty. I agree that this case falls within Scale C for matters of more than ordinary difficulty.

Issue 2: Is the Plaintiff entitled to uplift costs?

## Legal Principles

[6] The Supreme Court Civil Rules, Appendix B, ss. 2(5) and (6) allow for an "uplift" costs award, also known as "increased" costs award, where there are unusual circumstances and an award of costs under the appropriate scale of costs would be grossly inadequate or unjust:

- (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).
- (6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).
- [7] Uplift costs are meant to indemnify the successful party where there are unusual circumstances, not punish the unsuccessful party, with the inquiry being highly fact-specific: *Shen v. West Continent Development Inc.* (BC0844848), 2022 BCSC 462 at paras. 30-31.
- [8] Misconduct by an unsuccessful party may constitute "unusual circumstances", but misconduct is not the only factor. Justice Allan in *380876 British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 at para. 37 cited the following factors that may constitute unusual circumstances and justify increased costs:

Misconduct by the unsuccessful party in the litigation;

The serious nature of the allegations;

The complexity or difficult of the issues in the litigation; and

The importance of the litigation to the parties or to the development of the law generally.

[Citations omitted.]

- [9] These factors were confirmed by the Court of Appeal for British Columbia in *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 at para. 58, leave to appeal to SCC ref'd, 37817 (8 March 2018). The Court also acknowledged that complexity and importance are also relevant considerations in determining the applicable scale of costs under s. 2(3) of Appendix B: J.P. at para. 58.
- [10] If a party seeking uplift costs relies on misconduct as an "unusual circumstance", that party must show that there was misconduct deserving of rebuke: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCSC 1675 at para. 67; *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181 at para. 41.
- [11] While the presence of second counsel in a litigation may be appropriate to support a finding of complexity, as explained by Justice Dillon in *Pinch (Guardian ad litem of) v. Morwood*, 2016 BCSC 1907 at paras. 16-19, quoting *Thom v. Canada Safeway Limited*, 2015 BCSC 2026 at para. 46, there is "very limited authority in the Rules under which an additional costs award for the participation of two counsel might be granted". The test remains whether there was

"unusual circumstances" and whether the scale costs would be "grossly inadequate or unjust".

#### Position of the Parties

##### Position of the Plaintiff

- [12] The plaintiff argues that there were several unusual circumstances that warrant awarding uplift costs which included:
- a. The issues at hand were extremely important to the plaintiff, but also to the development of law of social host liability, products liability and damages in catastrophic personal injury claims;
  - b. The issues were extremely complex, as evidenced by the number of expert witnesses required at trial; and
  - c. Two counsel were justified at trial in order to promote the smooth and efficient litigation of the issues, particularly given the length of the trial.
- [13] The plaintiff relied on the case of *Ding v. Prévost, A Division of Volvo Group Canada Inc.*, 2023 BCSC 518, in which the Court awarded additional uplift costs to one of the defendants, Prévost, despite finding no misconduct by other parties. The Court based the award of uplift costs on the complexity of the case and importance of the case not only to Prévost, but to other similar manufacturers in Canada as well as regulatory bodies: *Ding* at paras. 66-68.
- [14] The plaintiff submits that the Court may consider the disparity of costs between the cost amount award and the costs incurred when considering whether an uplift is warranted.

##### Position of ICBC

- [15] ICBC submits that there are no unusual circumstances warranting uplift costs. It says that if there has been no inappropriate conduct, an award of uplift costs is not appropriate. It submits that the decision in *Berthin* provides that unusual circumstances requires the unsuccessful party's conduct be worthy of rebuke. It argues that the plaintiff did not raise any substantive issues with the conduct of the defence of the action by ICBC or the Sidhu defendants.
- [16] It argues that *Ding*, which is currently under appeal, was wrongly decided in not considering the unsuccessful party's conduct in determining if uplift costs ought to be awarded and instead focusing on only the complexity and importance of the litigation. It also argues that since the plaintiff is receiving costs at Scale C, it is not appropriate to also award uplift costs for two counsel and for the complexity and importance of the litigation.
- [17] ICBC further argues that costs at Scale C would not be grossly inadequate or unjust when considering the settlement offers that were made to the plaintiff and the plaintiff's knowledge of the ultimate recovery available to him. The plaintiff, with the knowledge of the

limited potential recovery, made a purposeful decision to pursue this matter to trial without regard to the cost consequences of a lengthy trial. ICBC says it was therefore the plaintiff that caused the costs of this significant trial and not ICBC and, as such, ICBC should not be the one responsible for paying the plaintiff's uplift costs.

- [18] Finally, ICBC argues that the plaintiff has provided no evidence as to the costs incurred by him in the litigation and this failure should bar any consideration of this factor: *Gill v. Borutski*, 2021 BCSC 1762 at paras. 35-36.

## Relevant Facts

- [19] I provide an overview of the facts which demonstrate the complexity of the litigation in the analysis of the scale of costs to be paid to the Rattan defendant. The following facts pertain to the settlement offers that were made to the plaintiff and the plaintiff's knowledge of the ultimate recovery available to him.
- [20] The plaintiff, in his original statement of claim filed on June 12, 2008, named Rattan as a defendant, along with Hiebert and the Sidhu defendants.
- [21] On May 5, 2010, the Rattan defendant made an assignment into bankruptcy. On July 5, 2012, the Rattan defendant obtained a conditional order of discharge, pending payment of \$10,281. The Rattan defendant completed the terms of his conditional discharge and on March 1, 2018, received his absolute discharge from bankruptcy. On April 11, 2013, the plaintiff applied for, and was granted, in the Rattan defendant's bankruptcy proceeding, a declaration from the Court that the plaintiff was entitled to the benefit of any indemnity provided to the Rattan defendant by any insurer with respect to this action and the obligation of any insurer to pay the plaintiff pursuant to any insurance policy.
- [22] On July 27, 2010, Hiebert, the intoxicated driver, assigned himself into bankruptcy. On April 28, 2011, Hiebert obtained an absolute order of discharge. On April 11, 2013, the plaintiff applied for and was granted in the Hiebert bankruptcy proceeding, a declaration from the Court that the plaintiff was entitled to the benefit of any indemnity provided to Hiebert by any insurer with respect to this action and the obligation of any insurer to pay the plaintiff pursuant to any insurance policy. Hiebert carried a third party policy of \$200,000 at the time of the Accident.
- [23] On April 15, 2011, the plaintiff was involved in a second accident while a passenger in a vehicle driven by his father. On September 4, 2012, he commenced an action against the driver of the other vehicle, Robert Vivier, and owner of the other vehicle, Williams Roofing & Drainage Ltd., and his parents (the "Vivier Action").
- [24] On March 30, 2018, counsel for the Rattan defendant made a BC Ferries settlement offer to the plaintiff. He offered to waive costs in exchange for a discontinuance of the action.

- [25] On March 19, 2020, ICBC issued a formal offer to the plaintiff of \$200,000, plus costs and disbursements, being the entire amount of Hiebert's policy limits. A term of the offer was that ICBC would pay to the plaintiff the pro-rata share of costs, as per the liability percentage awarded, if any, against Hiebert.
- [26] On July 30, 2020, the Sidhu defendants, and the defendants Vivier and Williams Roofing & Drainage Ltd. in the Vivier Action, (collectively, the "Motor Vehicle Defendants") issued a formal offer to settle in the amount of \$3,750,000 broken down as follows:
- i. Sidhu Defendants Policy Limits  
\$2,000,000
  - ii. Hiebert Policy Limits  
\$200,000
  - iii. Contribution from Defendants - 2nd MVA  
\$50,000
  - iv. Costs and disbursements  
\$1,500,000
  - Total  
\$3,750,000
- [27] On June 2, 2021, on behalf of the Motor Vehicle Defendants, ICBC made a formal offer to settle to the plaintiff in the amount of \$4,000,000. A term of this offer included a provision that if the plaintiff decided to proceed to trial against the Rattan defendant and was not successful and an order for costs was made against him in favour of Rattan, that ICBC would indemnify the plaintiff in the amount of \$100,000 towards payment of the Rattan defendant's taxable costs and disbursements from trial.
- [28] On June 17, 2021, on behalf of the Motor Vehicle Defendants, ICBC made a further formal offer to settle in the amount of \$4,100,000, including the same \$100,000 cost indemnity offer.
- [29] The trial commenced on June 21, 2021.
- [30] On August 6, 2021, on behalf of the Motor Vehicle Defendants, ICBC made a further formal offer to settle in the amount of \$4,100,000 all inclusive.
- [31] The plaintiff did not respond to any of the offers made by ICBC nor made a settlement offer to ICBC.

## Analysis

- [32] This is not a case in which there was any misconduct by the unsuccessful defendants. Misconduct was not alleged by the plaintiff. The submission of ICBC was that if there is no inappropriate conduct, an award of uplift costs is not appropriate. I disagree. The caselaw suggests that conduct deserving of rebuke is not a requirement of an award of uplift costs--it is only one of the factors to consider.
- [33] The Court of Appeal in J.P. confirmed the factors which could constitute unusual circumstances as identified in 380876 at para. 37--these factors include the seriousness and complexity of the litigation and the importance of the litigation: J.P. at para. 58. In addition, the Court confirmed that these two factors are also relevant considerations in determining the applicable costs scale under Appendix B s. 2(3): J.P. at para. 58. The Court ultimately finds:
- [59] In our view, fixing costs at Scale C is sufficient to address the complexity and importance of the issues in the civil trial. We are unable to identify "unusual circumstances" that render costs at Scale C "grossly inadequate or unjust".
- [34] While the Court of Appeal found that costs at Scale C were sufficient to address the complexity and importance of the issues in J.P., the Court appears to leave open the possibility that unusual circumstances could render costs at Scale C grossly inadequate or unjust in some circumstances.
- [35] While the Court in Ding did not cite the J.P. decision, it appears to be an application of this principle. In Ding, the Court found that the matter was one of more than ordinary complexity, justifying costs at Scale C for all parties, but it was only the additional complexities and ramifications for the defendant Prévost that warranted uplift costs: Ding at para. 69.
- [36] In my view, reviewing the factors listed in 380876 at para. 37, this litigation presented unusual circumstances.
- [37] First, the importance of this litigation for the plaintiff cannot be overlooked. While litigation for most plaintiffs injured in an accident are undoubtably important, the ramifications of the award are more severe for this plaintiff. As a result of the Accident the plaintiff lost the ability to move anything below his neck and he has limited movements of his mouth, tongue, and eyes. As I noted in the Trial Reasons, without care attendants to ensure that the plaintiff's ventilator is functioning properly, he will die.
- [38] Second, this litigation was not only important to the parties, but to the development of the law respecting product liability; social host liability; and a number of damages issues including the deductibility of publicly funded benefits, lost years deductions, loss of interdependency and the cost of future care for catastrophically injured plaintiffs. The outcome of the litigation could have reverberated throughout the insurance industry.

- [39] Third, I have no hesitation in finding that the litigation was complex and required a great deal of legal analysis by both counsel and the Court. As noted, I provided an overview of the factors which demonstrate the complexity of this litigation in the analysis of the scale of costs to be paid to the Rattan defendant. They are equally applicable here. In addition, I pause to note that while the presence of additional counsel is not always indicative of a matter's complexity, on many days of trial the Sidhu defendants had four counsel, ICBC had two counsel, and the Rattan defendant had three counsel during the presentation and defence of the social host liability claim. The awarding of Scale C does compensate the plaintiff to a certain extent for the two counsel, but the need for two counsel, and the multiple counsel representing the various defendants, supports the complexity of the matter.
- [40] I further accept that the Court can consider the disparity between the amount awarded and the costs incurred when considering an uplift: *Monenco Ltd v. Commonwealth Insurance Co.*, 1999 BCCA 133 at paras. 7-11; *On Call Internet Services Ltd. v. TELUS Communications Co.*, 2010 BCSC 1031 at paras. 11-12. As noted in ss. 2(6), a disparity alone is not sufficient to create the necessary component of grossly inadequate or unjust. ICBC and the Sidhu defendants argue that evidence is needed to support that there is a disparity of costs and the plaintiff has failed to tender any evidence. As noted in *Shen*, it is not necessary to provide evidence of the actual legal fees incurred in every case: at para. 36.
- [41] I am not persuaded that the *Gill* case is of assistance to me in considering this issue. As the Court noted in the *Gill* case, the case did not fall outside the ordinary run of cases involving plaintiffs seeking significant damages for injuries in a motor vehicle accident and the ordinary scale of costs would not be grossly inadequate or unjust: at paras. 34-35. The action involved one defendant, an eight-day trial in which liability was not seriously contested, and there was a measure of consensus among the expert witnesses: at paras. 2-3.
- [42] In my view, although the precise amount of the disparity is not known, it is clear that this proceeding, along with the pre-trial applications, the number of examinations for discovery, the extensive document production, the complexity of the issues, the 56.5 days of trial and the fact that the action started in 2008 and concluded in 2023, all supports that there will be a significant disparity between the costs awarded and the actual legal fees incurred. Further support for this comes from the discrepancy between the undisclosed Nissan settlement and the amount of money the plaintiff placed in the discretionary trust. It can be inferred from the discrepancy that a large sum went to pay legal fees and disbursements.
- [43] I am not persuaded by the argument put forth by ICBC that the plaintiff is to blame for this matter proceeding to trial. The decision to accept or reject a settlement offer is a judgment call that counsel have to make. In light of the fact that the acceptance of any of the offers would have eliminated the plaintiff's ability to collect any uninsured portion of a potential judgment against the Sidhu defendants and the lack of any financial information on whether the Sidhu defendants may have other assets or funds, I cannot find that the plaintiff's failure to accept the offers is one that supports the denial of uplifted costs. The approach taken by

the plaintiff was not unreasonable.

[44] In my view, an award of costs to the plaintiff at Scale C will be grossly inadequate and unjust in the uniquely complicated and important nature of this multi-party proceeding. It is my view that the plaintiff is entitled to an award of uplift costs.

Issue 3: Is the Rattan Defendant entitled to costs against the Plaintiff? If so, at what scale?

[45] There is no dispute that the Rattan defendant was successful in having the claim against him dismissed. In accordance with Rule 14-1(9), he is entitled to costs unless the Court otherwise orders: *Loft v. Nat*, 2014 BCCA 108 at para. 46.

[46] The Rattan defendant seeks to have the costs assessed at Scale C, being a matter of more than ordinary difficulty. Under s. 2(3) of Appendix B, in fixing the appropriate scale, a court may take into account:

- (a) whether a difficult issue of law, fact or construction is involved;
- (b) whether an issue is of importance to a class or body of persons, or is of general interest;
- (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

[47] The thrust of the argument made by the plaintiff, ICBC and the Sidhu defendants is that the Rattan defendant only participated to defend the social host liability claim and did not fully participate at the trial in respect to other issues. Accordingly, it is argued that the Rattan defendant should only be entitled to costs at Scale B. I disagree.

[48] It is accurate that at trial the Rattan defendant, although present for the vast majority of the trial, did not play an active role in conducting examinations of the other parties and witnesses. However, I agree that it was necessary for them to participate in listening to the evidence and reporting back to their client. I accept the submission of the Rattan defendant's counsel, that if there had been any shortcomings in the defence at trial, he would have participated. There was a duty on counsel to be aware of what was transpiring in the court room and to consider the various evidentiary issues.

[49] The other factors in determining the degree of difficulty or importance of a matter are set out in *Mort* at para. 6:

- (a) The length of the trial;
- (b) the complexity of the issues involved;
- (c) the number and complexity of pre-trial applications;
- (d) whether or not the action was hard fought with little or nothing being conceded along the way;
- (e) the number and length of Examinations for Discovery;

- (f) the number and complexity of Experts' Reports; and
  - (g) the extent of the effort required in the collection and proof of facts.
- [50] A consideration of these factors support that this matter far exceeded a case of ordinary difficulty. I further note that in addition to being the trial judge, I was the case management judge assigned to manage this matter to trial. It was clear to me that this was a complex piece of multi-party litigation that took an extraordinary amount of time and energy to manage.
- [51] I will provide an overview of the various factors.
- [52] The trial was 56.5 days long and for the main portion of the trial was conducted as an electronic trial using the CaseLines platform. There was a total of 43 witnesses called of which 26 were expert witnesses. The common book of documents contained 211 documents, totalling 12,653 pages. In addition, there were additional exhibits marked of just under 6,000 pages.
- [53] The issue surrounding the claims of contributory negligence against the plaintiff, social host liability, products liability, and the significant damages made the trial factually complex. The social host liability issues were challenging in that one was dealing with an event that occurred in 2008, 13 years earlier. It required an assessment of Mr. Hiebert's level of intoxication at various times. I accepted that the actions of the Rattan defendant fell into the exception in *Childs v. Desmoreaux*, 2006 SCC 18, and had to conduct an *Anns* analysis on whether a novel duty of care existed.
- [54] The parties served 67 expert reports and called a total of 26 experts at trial. As at the time of the jury strike application in February 2020, "100 expert reports [had] been served, authored by 55 different experts": *Sidhu v. Hiebert*, 2020 BCSC 183 at para. 33. The time spent by all counsel in reading and assessing these many reports takes the case well outside of a case of ordinary difficulty.
- [55] There were 20 examinations for discovery conducted. The plaintiff points out that the Rattan defendant only appeared at seven of those discoveries. If the Rattan defendant did not attend the discovery he would not be entitled to the applicable units.
- [56] There were nine judicial management conferences and ten trial management conferences to assist in getting this matter to trial. I note that the various litigation management orders were lengthy and detailed.
- [57] There were a total of 13 pre-trial applications, some of which were lengthy, including the three-day summary trial brought by the Rattan defendant in 2011 and the three-day jury strike application in 2020.

- [58] There was the further complexity of the BC Ferries Agreement that the plaintiff entered into with the Nissan defendants, which required an application for a bar order and an application respecting the disclosure of the settlement agreement.
- [59] No party disputes that the case was hard fought, and understandably so. The plaintiff suffered catastrophic injuries and was seeking a very large award. The length and detail of the closing submissions of the parties were daunting, collectively covering over 1,100 pages: the plaintiff consisted of a total of 523 pages, ICBC of 163 pages, the Sidhu defendants of 296 pages, and the Rattan defendant of 151 pages. The case authorities cited by the parties exceeded 300.
- [60] I agree with the submission of the plaintiff's counsel that the determination of whether social host liability is a viable cause of action under British Columbia law would have had wide-reaching repercussions for society at large, including a significant impact on the insurance industry for homeowners' policies. The same sentiment was expressed by counsel for the Rattan defendant in the offer that was made on March 30, 2018: "The ramifications of a finding of liability on a social host would reverberate across the country and impact innumerable social settings that play out on a daily basis for Canadian citizens".
- [61] The product liability claims against Nissan involved issues relating to the fit of seatbelts for children, which had wide-ranging repercussions to the automotive industry across Canada.
- [62] The Rattan defendant had to consider all of the evidence and decide what role he would play at the trial. I am not persuaded that because counsel did not cross-examine specific witnesses or experts that in turn reduces this to a matter of ordinary difficulty. I disagree with the plaintiff's assertion that the Rattan defendant was required only to deal with the issue of social host liability and not other issues. The fact that the Rattan defendant chose not to ask questions does not create a basis to deny the party costs. Counsel elected to be present and not to ask unnecessary questions or to prolong the trial in doing so. That is an approach that should be commended and not penalized in costs.
- [63] The plaintiff submits that counsel for the Rattan defendant only spoke on approximately 11 trial days based on a review of the trial transcripts--the suggestion being that the Rattan defendant should only get the units for the days in trial when he spoke. I am not prepared to endorse this approach. This would overly complicate, particularly in lengthy trials, the assessment of costs to require that an analysis be done of when a particular counsel spoke and when that counsel sat and listened. Aside from the actual difficulty in assessing this when trial transcripts are not available, it ignores the reality that counsel is in the courtroom listening to the evidence and is available to advance a position if necessary.
- [64] Based on my view as both the case management and trial judge, the complexity of the matter facing the Rattan defendant supports that an assessment of costs at Scale C is warranted.

Issue 4: What is the impact of the Offer to Settle made by the Rattan Defendant?

[65] The Rattan defendant seeks an order of double costs from March 18, 2018, based on the plaintiff's refusal to accept a formal offer to settle.

## Legal Principles

- [66] Subrule 14-1(9) provides that "costs of a proceeding must be awarded to the successful party unless the court otherwise orders." Subrule 9-1(4) provides that the Court may consider offers to settle in exercising its discretion in relation to costs. These 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": *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25; *Khan v. School District No 39 (Board of School Trustees)*, 2021 BCSC 2611 at para. 10.
- [67] Subrule 9-1(5) provides that the Court may do one or more of the following in a proceeding in which an offer to settle has been made:
- (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.
- [68] In making an order pursuant to subrule 9-1(5), the Court may consider the following, at subrule 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.

- [69] In determining whether the offer to settle was one that ought reasonably to have been accepted, the ultimate award should not be considered. Instead, the Court must determine whether acceptance was reasonable at the time. It is not an assessment of whether the offer was itself reasonable, but rather, whether it was unreasonable for the plaintiff to refuse it: *Kobetitch v. Belski*, 2018 BCSC 2247 at paras. 24-25, cited with approval in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at paras. 30-31.
- [70] This includes both subjective and objective components: *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at para. 97, leave to appeal to SCC ref'd 3636 (10 September 2015). Reasonableness may be assessed by considering factors including 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, whether some rationale for the offer was provided, or other relevant factors: *Hartshorne* at para. 27. The Court is entitled to take into account the reasons why a party declined to accept an offer to settle, but it must consider whether those reasons are objectively reasonable: *C.P.* at para. 97.
- [71] In considering the relationship between the terms of the settlement offer and the final judgment, the Court may make an objective measurement of the reasonableness of the offer and the decision to reject it: *C.P.* at para. 99.
- [72] In considering the relative financial circumstances of the parties, "while insurance coverage is not automatically a factor to be considered against the insured party, the facts of the particular case will govern whether it should be considered, and if so, what weight should be given to it": *C.P.* at paras. 100-101, quoting *Mazur v. Lucas*, 2011 BCSC 1685.
- [73] The Court is also entitled to consider any other relevant factors: *C.P.* at para. 103.

#### Relevant Facts

- [74] On June 12, 2008, the plaintiff named Rattan as a defendant and sought damages against him.
- [75] The Rattan defendant served a summary trial application seeking to have the action dismissed against him. The summary trial was heard on June 16-17 and August 19, 2011, before Justice Johnston. On October 13, 2011, the summary trial application was dismissed, with reasons indexed at 2011 BCSC 1364. Of significance is the following:
- [56] Because I am persuaded that this case should be decided on a full record of evidence at trial, I conclude that I should leave to trial the question of whether motorists can reasonably rely on a social host to not exacerbate an obvious risk by continuing to supply alcohol to an apparently impaired guest who the host knows will drive away from the party. It seems to me that justice requires that I allow the parties to develop the evidence and argument on a full trial.

- [76] On March 30, 2018, the Rattan defendant served a formal offer to settle to the plaintiff, in which he offered to waive his costs in return for the plaintiff discontinuing all claims against him under a BC Ferries agreement. This offer was not accepted.

## Analysis

### Reasonable Acceptance

- [77] The Rattan defendant submits that the offer ought reasonably to have been accepted since it was made approximately 10 years after the commencement of the claim, well after the plaintiff was in possession of all facts needed to consider the offer, including witness statements, discovery evidence, and expert reports on the social host liability claim. In addition, the seminal authority regarding the principles to apply had already been decided by the Supreme Court of Canada in *Childs v. Desormeaux*, 2006 SCC 18, and no other litigant in Canada had succeeded in establishing a social host liability claim.
- [78] The plaintiff submits that acceptance of the offer was not reasonable because the issue of the Rattan defendant's liability would still be live. At the time the offer was made, the other defendants alleged negligence against Rattan. The plaintiff says that if he had accepted the offer, an ultimate finding of liability against Rattan, combined with a finding of contributory negligence against the plaintiff, would have resulted in the plaintiff's inability to recoup for the portion of liability assessed against Rattan. Therefore, the decision not to accept the offer was not unreasonable.
- [79] ICBC and the Sidhu defendants both support and adopt the plaintiff's submissions with respect to the issue of double costs for the Rattan defendant. The Sidhu defendants further submit that there was no information disclosed after the claim was advanced that diminished its strength, and that the claim cannot be characterized as "very tenuous". Rather, they say that the settlement offer was a "walk away" offer, in which a party is provided with an offer to walk away in return for the waiver of the other party's entitlement to costs. In reference to the principles outlined in the case *Casses v. Canadian Broadcasting Corporation*, 2016 BCSC 949, the Sidhu defendants say that the settlement offer contains no genuine compromise, and the plaintiff therefore ought not to have reasonably accepted it.
- [80] In light of the catastrophic injuries suffered by the plaintiff and his significant care needs, the offer made would have only compensated the plaintiff for the costs up to that point in time. However, the plaintiff would have been faced with the likelihood that the other defendants would have continued to pursue the social host claim. The risk to the plaintiff would have been a potential reduction in the amount of recovery by the percentage fault attributed to the Rattan defendant.

- [81] I disagree that the claim against the Rattan defendant, as described by his counsel, was "very tenuous". The evidence supported that Mr. Rattan knew that Mr. Hiebert had been drinking prior to his arrival at Mr. Rattan's residence, provided Mr. Hiebert alcohol during the time at the Rattan residence, and knew that Mr. Hiebert was intoxicated to the point he should not be driving when he left Mr. Rattan's residence. These factors distinguish the case from the facts in Childs, and in particular, the comments of the Court at para. 30.
- [82] I am not persuaded that in March 2018 the plaintiff should have reasonably accepted the Rattan offer of a waiver of costs. This factor favors the plaintiff.

### **Relationship between the Terms of the Settlement Offered and the Final Judgment of the Court**

- [83] The Rattan defendant was successful in defeating the claim and as a result the plaintiff would have been better off accepting the offer. This factor favors the Rattan defendant.

### **The Relative Financial Circumstances of the Parties**

- [84] The Rattan defendant argues that the financial circumstances of the parties support double costs. He says that the plaintiff has succeeded against the other defendants and obtained a significant sum that dwarfs any costs awarded in this matter. This submission considers the ultimate result of the litigation, not the way in which the parties' financial circumstances influenced the litigation and contemplation of the offer to settle. Further, this submission ignores the reality of what monies will likely be available to the plaintiff to satisfy his award. The combination of the Nissan Settlement funds and the amount of monies available to the plaintiff is likely significantly less than the amount he needs in order to pay his care costs alone for the remainder of his life. I find this factor to be neutral in my assessment.
- [85] Despite the ultimate result of this litigation, at the time the offer was made the plaintiff, as well as the Sidhu defendants and ICBC, maintained that the Rattan defendant was liable for a portion of the Accident. It was reasonable for the plaintiff to proceed to trial against the Rattan defendant. And, further, accepting the offer could have had a significant impact on the ability of the plaintiff to recover damages. There is always a significant risk to the plaintiff when settling with one defendant and proceeding against the others. In this case, the Rattan defendant was offering nothing, except some cost contribution, to compensate the plaintiff for the catastrophic injuries he had suffered.
- [86] In conclusion, I am not persuaded that in the circumstances of this case that an award of double costs should be made.

Issue 5: Should there be a Sanderson or Bullock Order made against ICBC and the Sidhu defendants, so that they, instead of the Plaintiff, would be responsible for the costs of the Rattan defendant?

[87] The plaintiff seeks an order that the costs incurred by the successful Rattan defendant be paid by the unsuccessful defendants, the Sidhu defendants and ICBC, pursuant to a Sanderson or Bullock order.

## Legal Principles

[88] Under a Sanderson order, an unsuccessful defendant is ordered to directly pay the cost of a successful defendant; under a Bullock order, the successful plaintiff is ordered to pay the costs of a successful defendant and recover such costs as a disbursement against an unsuccessful defendant: Justice G. Peter Fraser, John W. Horn K.C. & Justice Susan A. Griffin, *The Conduct of Civil Litigation in British Columbia*, 2nd ed. Loose-leaf (Markham: LexisNexis, 2007) at para. 38:19 [Conduct of Civil Litigation], as quoted in *Provost v. Dueck Downtown Chevrolet Buick GMC Limited*, 2021 BCCA 15 at para. 16.

[89] The authority in the Rules for a Sanderson or Bullock order is in Rule 14-1(18) which allows for the order to be made if "the costs of one defendant against a plaintiff ought to be paid by another defendant". It is a discretionary order.

[90] The rule does not list any criteria for the exercise of the discretion, but the cases have established a two-part test: first, whether it was reasonable for the plaintiff to have joined the successful defendant in the action and, second, whether it is just and fair in the circumstances to make the order. The first part of the test has been referred to as a threshold issue: *Provost* at para. 17.

[91] The first part of the test addresses the reasonableness of the joinder of the parties. None of the parties take issue with the reasonableness of the joinder of the Rattan defendant.

[92] The second part of the test is whether it is fair and just to make the order. While there are many factors that may contribute to an assessment of what is fair and just, this assessment primarily involves the consideration as to whether the unsuccessful defendant did something to justify a Sanderson or Bullock order. In *Provost*, the Court said:

[18] In *Grassi*, Justice Southin noted that "[t]here must be something which the unsuccessful defendant did, such as asserting the other defendant was the culprit in the case, to warrant his being made to reimburse the plaintiff for the successful defendant's costs": at para. 33 (emphasis added). Justice Southin elaborated:

34 orders under Rule 57(18) [now Rule 14-1(18)] are not restricted to cases where the unsuccessful defendant in the course of the litigation has blamed the successful defendant but may extend to acts of the unsuccessful defendant which caused the successful defendant to be brought into the litigation.

[Emphasis and additions added in *Provost*.]

[93] Justice Burke applied *Provost* in *Belpacific Excavating & Shoring Limited Partnership v. Crown and Mountain Creations Ltd.*, 2022 BCSC 412 noting:

[55] Whether it is "just and fair" to grant such an order requires "some conduct on the part of the unsuccessful defendant to justify the award": Provost at para. 19. A common example of such conduct is asserting the other defendant was solely liable: Provost at para. 18. As Justice Watchuk noted in *Singh v. Chand*, 2020 BCSC 1268, "[a]lthough other factors are potentially relevant, the predominant consideration remains whether the unsuccessful party tried to shift responsibility onto the successful party, or necessitated its inclusion in the action": para. 42.

[94] The onus is on the party seeking the order to show that it ought to be granted: 0915406 B.C. Ltd. v. 0834618 B.C. Ltd., 2013 BCSC 1529 at para. 15.

[95] Once the threshold is met, the rest of the analysis is highly contextual and fact-based. In *Robertson v. Wing*, 26 B.C.L.R. 225 at 228, 1980 CanLII 2581 (C.A.), Justice Lambert noted:

Once the threshold question is answered affirmatively then the discretion of the trial judge arises. Of course, he may exercise it either way. It is a true discretion. Whether he grants a Bullock order, or not, must depend on his assessment of the circumstances of the case. In my opinion it is inappropriate to trammel that discretion by endeavouring to extract principles from those cases where the discretion was exercised and from those cases where it was refused. The threshold question must be answered affirmatively; the discretion must be exercised judicially; and that is all.

Position of the Parties

### Position of the Plaintiff

[96] The plaintiff submits that the Sidhu defendants and ICBC each pleaded that the Rattan defendant was liable for the Accident and never resiled from that position. They both attempted to shift the responsibility onto the Rattan defendant and actively pursued allegations of liability against him, including calling their own evidence on the issue and vigorously pursuing him in argument.

[97] The plaintiff argues that faced with the plea of the Sidhu defendants and ICBC that Rattan had caused or contributed to the Accident, he was left with no choice but to continue his claim against the Rattan defendant. He submits it would be neither fair nor just to require the plaintiff to pay the costs of the successful Rattan defendant in light of this action.

### Position of ICBC and the Defendants

[98] The Rattan defendant takes no position on which party should pay his costs, only that his costs be paid. If a Sanderson order is granted, he argues that there should be a joint order that the plaintiff, ICBC, and the Sidhu defendants are responsible for the costs.

- [99] ICBC and the Sidhu defendants oppose a Sanderson or Bullock order. ICBC and the Sidhu defendants both take no position on the reasonableness of the plaintiff to have joined the Rattan defendant in this action, but say it would not be fair or just in these circumstances for this Court to make such an order.
- [100] ICBC and the Sidhu defendants both argue that the facts and reasoning in the Alberta decision of *Ward v. Ward*, 2011 ABQB 465, are relevant and persuasive to this case, despite Alberta using a different test to grant Sanderson or Bullock orders.
- [101] In *Ward*, the plaintiff was riding as a passenger in Gerald Ward's vehicle when it collided with a vehicle driven by Jason Dixon. The plaintiff sued Mr. Dixon and Gerald Ward, and Mr. Dixon also sued Gerald Ward. Similar to the case before me, Gerald Ward had an insurance limit of \$200,000. Mr. Dixon was fully insured. An offer to settle both claims against Gerald Ward at this policy limit was made, but was not accepted.
- [102] At trial, the Court found Gerald Ward 100% liable. The plaintiff sought a Sanderson or Bullock order so that Gerald Ward would pay Mr. Dixon's costs. The Court did not grant this order. The Court found that the plaintiff made the strategic choice to maintain an action against Mr. Dixon, knowing Gerald Ward's policy limit was likely insufficient to cover his award, so it would be unjust and unfair to award the costs of Mr. Dixon to be paid by Gerald Ward when, had the plaintiff accepted Gerald Ward's settlement offer, he would not have had to defend the action: *Ward* at 31-33.
- [103] ICBC argues that it was the plaintiff alone in this case who chose to litigate this matter through a very lengthy and costly trial, and therefore it is the plaintiff who should be responsible for the Rattan defendant's costs.
- [104] ICBC submits that the Court, in exercising discretion as to costs, should consider the formal offers to settle made: Rule 9-1(4). ICBC and the Sidhu defendants argue that the plaintiff should not be permitted to obtain a Sanderson order on the basis that it was the plaintiff that chose to litigate by not accepting the formal offers to settle made.

## Analysis

- [105] First, I agree that the threshold question of whether it was reasonable for the plaintiff to have joined the Rattan defendant has been met. As outlined above, the question of social host liability following *Childs* was still a live issue. This was reaffirmed to the plaintiff in *Johnston J.*'s rejection of the Rattan defendant's summary trial application in 2011 BCSC 1364. As the threshold has been met, I will next consider whether the order is just and fair in the circumstances.

- [106] It is clear that both ICBC and the Sidhu defendants actively pursued the allegations of negligence against the Rattan defendant in the pleadings and at trial. Both of these parties also made a claim of contributory negligence as against the plaintiff. If the plaintiff had been found contributorily negligent, this would have severed the joint liability of the defendants.
- [107] It is my view it would be just and fair to have the unsuccessful Sidhu defendants and ICBC pay the successful Rattan defendant's costs. It is clear that ICBC and the Sidhu defendants asserted that the Rattan defendant was one of the culprits in the case throughout the long history of this proceeding. ICBC and the Sidhu defendants both pleaded that the Rattan defendant caused or contributed to the plaintiff's injuries. The Sidhu defendants also filed a third party notice against the Rattan defendant. Both ICBC and the Sidhu defendants opposed the Rattan defendant's application for summary trial on the social host issue: *Sidhu v. Hiebert*, 2011 BCSC 1364 at para. 19. At trial, they continued their attempt to shift the blame onto the Rattan defendant in their various submissions. They both asserted in their opening statements that the Rattan defendant was liable and was negligent. During the trial, ICBC and the Sidhu defendants called evidence from two witnesses, Baljinder Bhushan, Mr. Rattan's niece, and Cst. Paul Sovio, an Abbotsford police officer, and submitted the toxicology report of Carolyn Kirkwood, who also testified, in support of the social host liability claim. In their closing submissions, they both argued Rattan's liability and sought an apportionment of fault against him. They further sought a finding of contributory negligence against the plaintiff which if found, would have severed joint liability.
- [108] If the ICBC and the Sidhu defendants had been prepared to abandon their claims of negligence against the Rattan defendant, and the Sidhu defendants to discontinue the third party notice they had filed against the Rattan defendant, then it would have been the plaintiff's sole choice to determine whether to continue the claim against the social host, with the applicable costs consequences if he was unsuccessful. However, that did not happen. ICBC and the Sidhu defendants chose to continue to advance the allegations of the social host liability. This distinguishes these circumstances from those in *Ward*.
- [109] This case can be, to an extent, distinguished from the *Provost* decision, however, there are also many similarities. *Provost* involved a multi-action trial. Following the trial, a defendant successfully appealed a finding of liability against them, and the Court was required to consider whether the now successful defendant's costs ought to be paid by the unsuccessful defendant or the plaintiffs. The Court rejected the unsuccessful defendant's submission that he did not "actively attempt to attach any blame" to the successful defendant, as he expressly pleaded this in one of his responses to civil claim: at paras. 23-24. The Court of Appeal noted that even though the unsuccessful defendant did not make submissions on the issue of the successful defendant's liability at trial, he could still obtain the benefit of a finding in that regard and he was responsible for involving the successful defendant in the proceedings: at paras. 22, 26.

- [110] The Court made Sanderson orders in favour of all of the plaintiffs: at para. 37. In the circumstances of two of the individual plaintiffs, the Court noted that "the outcome of the liability contest was of no import to" them and it mattered not which defendant was liable: Provost at paras. 29-30, 33-34. In the words of the Court of Appeal, the plaintiffs "should not have the potential for [their] judgement funds to be eroded by the liability contest between" the defendants: at paras. 30, 34.
- [111] The plaintiff in this case did care and also pursued the negligence claim against the Rattan defendant forcefully at trial. This was understandable when considering the very significant damages that the plaintiff suffered. However, I am not persuaded that this distinction is enough to deny the plaintiff a Sanderson order. Unlike in Provost, a factor that favours the order is that the Sidhu defendants and ICBC dedicated a significant portion of their efforts at trial to attributing liability to the Rattan defendant. Further, given the positions of ICBC and the Sidhu defendants, the plaintiff found himself in a position in which withdrawing his claim against the Rattan defendant could have resulted in an inability to obtain further recovery.
- [112] In *Burdett (Guardian Ad Litem) v. Mohamed*, 2010 BCSC 310, a plaintiff seeking a Sanderson order claimed she was required to maintain her claim against a successful defendant since ICBC, participating as a third party, had not only pleaded the plaintiff was contributorily negligent, but also that the successful defendant caused the accident: at para. 66. The Court found that a Sanderson order was appropriate in the circumstances; the plaintiff had no choice but to continue her claim against the unsuccessful defendant given that ICBC continued to claim that they had caused or contributed to the accident: at para. 70-71.
- [113] Unlike in *Ding*, I do not agree that the pleadings by ICBC nor the Sidhu defendants could be characterized as pro forma: *Ding* at para. 52. The allegation made by ICBC and the Sidhu defendants was that the Rattan defendant caused the accident by virtue of his negligence as a social host, and they continued to advance this position at trial.
- [114] I have considered the ICBC and Sidhu defendants' submissions that the plaintiff's decision not to accept certain settlement offers should influence my consideration as to whether granting a Sanderson or Bullock order is fair and just in the circumstances, based on Rule 9-1(4).
- [115] In these circumstances, I do not find that the plaintiff's decision not to accept the various settlement offers prohibits the plaintiff from now obtaining a Sanderson or Bullock order. I have already found that the plaintiff's decision not to accept the settlement offers was not unreasonable. As noted by Justice Watchuk in *Singh v. Chand*, 2020 BCSC 1268 at para. 42 "[a]lthough other factors are potentially relevant, the predominant consideration remains whether the unsuccessful party tried to shift responsibility onto the successful party, or necessitated its inclusion in the action". This is precisely what the ICBC and Sidhu defendants did. I find that such an order is a fair and just exercise of my discretion in these circumstances.

[116] In *Towson v. Bergman*, 2009 BCSC 978 at para. 82, Justice Gray described the decision between a Sanderson or a Bullock order as an "apportionment of risk" guided by the question: "[a]s between the plaintiff and the successful defendant, who should bear the risk that the unsuccessful defendant will be unable to pay costs?". In *Provost* at para. 31, the Court of Appeal quotes from *Conduct of Civil Litigation* at para. 38.19 where the authors write:

Where all parties are solvent, it does not matter much which form of order is made. The advantage of a Sanderson order in such a case is confined to avoiding circuitousness.

[117] To avoid circuitousness, I exercise my discretion that a Sanderson order is most appropriate, thus requiring ICBC and the Sidhu defendants to pay the costs to which the plaintiff would have otherwise paid the successful Rattan defendant.

## Conclusion

[118] In summary, I find that:

- a) The plaintiff is entitled to his costs against ICBC and Mr. and Ms. Sidhu at Scale C;
- b) The plaintiff is entitled to uplift costs;
- c) The Rattan defendant is entitled to his costs against the plaintiff at Scale C;
- d) The Rattan defendant is not entitled to double costs against the plaintiff; and
- e) The plaintiff is entitled to a Sanderson order with the costs of the Rattan defendant paid by ICBC and Mr. and Mrs. Sidhu.

"Forth J."

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