
CANADA / JUDGMENT

Uppal v. Chung

2017 BCSC 356

COURT

Supreme Court of British Columbia

DECIDED

6 March 2017

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2017 BCSC 356 Uppal v. Chung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Uppal v. Chung,

2017 BCSC 356

Date: 20170306

Docket: M130654

Registry: Vancouver

Between:

Gaganjit Singh Uppal

Plaintiff

And

Kulwinder S. Chung, Sovereign Vehicle Leasing Ltd., Seven Horses Transport Ltd., Neha Sawal,
and Ashok Kumar Sawal

Defendants

Before: The Honourable Madam Justice H. MacNaughton

Reasons for Judgment - Costs

The Plaintiff, Gaganjit Singh Uppal:

In Person

Counsel for the Defendants:

D. Bretton

Written Submission of the Defendants:

February 16, 2017

Written Submission of the Plaintiff:

February 21, 2017

Written Submission of the Plaintiff's Former Counsel, A. Ueland:

February 24, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 6, 2017

Background

- [1] On January 18, 2017, I released reasons for judgment after a 12-day trial commencing on November 21 and concluding on December 6, 2016. Those reasons are cited as: *Uppal v. Chung*, 2017 BCSC 80 (the "Decision"). The trial dealt with Gaganjit Singh Uppal's claim for damages arising from two separate motor vehicle accidents.
- [2] The first accident occurred on May 20, 2011, when Mr. Uppal collided with a semi-trailer truck driven by Kulwinder Chung. The truck was leased by Mr. Chung from Sovereign Vehicle Leasing Ltd. and the two trailers were owned by Seven Horses Transport Ltd., Mr. Chung's employer. Mr. Chung, Sovereign Vehicle Leasing Ltd., and Seven Horses Transport Ltd. were all named as defendants in the action.
- [3] The second accident was on December 4, 2012. Mr. Uppal turned left in front of a vehicle driven by Neha Sawal and owned by her father, Ashok Sawal. Both Sawals were named as defendants in the action.
- [4] I awarded Mr. Uppal a total of \$40,000 in non-pecuniary damages and \$20,000 in net past wage loss all attributable to the first accident for which I found Mr. Chung wholly responsible. The award was against Mr. Chung only. Mr. Uppal's claims with respect to the second accident were dismissed.
- [5] My conclusions were set out at paras. 222-224 of the Decision as follows:
 - [222] With respect to the first MVA, I have concluded that Mr. Chung was solely responsible for it.
 - [223] Mr. Uppal led no evidence and made no arguments to substantiate his claim of negligence on the part of Sovereign Vehicle Leasing Ltd. or Seven Horses Transport Ltd., and his claims against them are dismissed.
 - [224] With respect to the second MVA, I have concluded that Mr. Uppal was solely responsible for it. As a result, Mr. Uppal's claim against Ms. Sawal and Mr. Sawal are dismissed.

- [6] As the parties had not addressed the issue of costs, I directed the parties to agree on a schedule for the exchange of written submission which were to be filed within 45 days of my Decision.
- [7] The defendants filed their submission on February 16, 2017. Mr. Uppal filed his responsive submissions on February 21, 2017. Unsolicited submissions were filed by Adam Ueland, Mr. Uppal's former counsel, on February 24, 2017.
- [8] Mr. Uppal was represented by Mr. Ueland until Mr. Ueland filed a notice of intention to withdraw on July 6, 2016. Mr. Uppal and the defendants did not object to Mr. Ueland's withdrawal as counsel.
- [9] Mr. Uppal attended a trial management conference ("TMC") before Madam Justice Fitzpatrick on October 24, 2016. The court discussed the fact that Mr. Uppal had not served any expert medical or economic evidence. On October 27, 2016, prior counsel for the defendants wrote to Mr. Uppal to follow up on the TMC. In particular, counsel advised Mr. Uppal about the Supreme Court Civil Rules dealing with expert evidence including Rules 11-2, 11-6 and 11-7 and explained the consequences to Mr. Uppal of not having served expert evidence. In particular, counsel wrote:

should you attempt to admit expert opinion(s) into evidence at trial, please be advised we will object on the basis that you have not provided proper notice and failed to comply with the Rules. We will ask the court that the evidence be excluded or alternatively, that the trial be adjourned.

- [10] Counsel went on to explain that the defendants would take no position if Mr. Uppal sought to adjourn the trial, given the information that was provided to him by Justice Fitzpatrick. Counsel also confirmed that Mr. Uppal declined to make an adjournment request at the TMC.
- [11] The parties attended a mediation on November 3, 2016 and the matter did not settle.
- [12] The defendants served an offer to settle the action by letter dated November 4, 2016. That offer expired on November 14, 2016 without being accepted. The defendants revoked the first offer and served another offer to settle on November 15, 2016 (the "Offer"). It was open for acceptance until November 30, 2016, eight days after the trial commenced. The Offer was not accepted.
- [13] Both offers had the same terms which were that ICBC would pay Mr. Uppal an amount of \$75,000, and costs, after taking into account Part 7 benefits paid or payable, minus advances, including court order interest and not including settlement costs. Both offers attached, as Appendix A, standard terms and conditions of settlement, including the allowance for set-off.
- [14] In the November 15, 2016 letter containing the settlement offer, defendants' counsel said:

The defendants reserve the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in the proceeding. The defendants further reserve the right to bring all previous offers delivered by the defendants, whether under Rule 37, Rule 37A, Rule 37B, Rule 9-1 or otherwise, to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in the proceeding.

The enclosed Appendix A reserved a similar right to bring the Offer to the attention of appellate courts.

- [15] In his affidavit, Colin MacArthur, the ICBC adjuster, says that the Offer was put forward regarding the first accident because it was always the defendants' internal position that there was no liability on the part of the defendants in the second accident. ICBC had always held Mr. Uppal at fault for it and, in September 2014, he had been convicted for failing to yield to Ms. Sawal.
- [16] However, both offers were made on behalf of all of the defendants and in respect of both accidents.
- [17] The defendants sent follow up letters to Mr. Uppal advising him to obtain independent legal advice before trial since he had not filed any expert reports. On November 8, 2016, counsel sent him copies of the relevant Rules dealing with expert reports and explaining the limits on the use of clinical records at trial. The letter advised that the defendants were preparing for trial and put Mr. Uppal on notice that, if the trial was subsequently adjourned, the defendants would seek their costs be thrown away.
- [18] The letter also advised Mr. Uppal about the financial consequences of an offer to settle should he proceed to trial and be awarded an amount less than a defendants' offer. In particular, it said:

If we serve a formal Offer on you under the Rules, you do not accept it and you are awarded less than the amount of the Offer, we will ask the Court to order that you pay our legal costs and disbursements for having to go ahead with the trial when the Offer should have been accepted.

- [19] Counsel for the defendants advised Mr. Uppal that she did not represent him but urged him to seek independent legal representation emphasizing, in bold, that, at the very least, he should seek legal advice about the contents of her letter and its possible ramifications at trial.
- [20] On November 9, 2016, counsel for the defendants again wrote to Mr. Uppal explaining that, as he had failed to file a Trial Record and Trial Certificate, the matter had been struck from the trial list. She advised him of the process for seeking short leave to seek an order permitting him to file a late trial certificate. She asked for an up-to-date list of documents and for a trial brief outlining the witnesses he would be calling. Counsel explained that although the defendants had served expert reports, she was not committing to call the experts as witnesses and that, if she chose not to do so, he could call them as his own

witnesses but they would be required for cross-examination.

- [21] Counsel also referred to the possible cost consequences to Mr. Uppal in various scenarios. She again urged him to seek independent legal representation.
- [22] The parties attended a further TMC with Master Muir on November 16, 2016. At that time, Mr. Uppal was again cautioned about representing himself, the lack of expert medical evidence and his ability to seek a trial adjournment. Mr. Uppal said he wanted to proceed to trial. Orders were made about the exchange of witness lists and summaries of evidence.
- [23] The trial commenced on November 21, 2016. As I said at para. 5 of my reasons:
- [5] Mr. Uppal was represented by counsel until the summer of 2016. He was not represented at the trial. At two trial management conferences, and in correspondence from the defendants' counsel, he was urged to seek counsel either to represent him or to give him advice about the various procedural steps necessary to present his case. At the commencement of trial, I asked him whether he was seeking an adjournment, and he advised me that he was not and just wanted to get the trial over with.

The Parties' Positions on Costs

- [24] The defendants submit that:
- a) Mr. Uppal be awarded his costs of the action against Mr. Chung at scale B as assessed or ordered, up to and including November 15, 2016, the date of the Offer;
 - b) Mr. Chung be awarded his costs against Mr. Uppal from November 16, 2016 onwards under Rule 9-1(5)(a) and (d) having beaten the Offer;
 - c) that Mr. Uppal's and Mr. Chung's costs be set off against each other; and
 - d) Mr. and Ms. Sawal be awarded costs against Mr. Uppal for units and disbursements pertaining to the second motor vehicle accident, in their entirety, under Rule 9-1(5)(c), as Mr. Uppal's case against Mr. and Ms. Sawal was dismissed.
- [25] Mr. Uppal opposes the costs orders sought. He alleges that his claim was mainly for what he says are the very serious injuries he suffered in the first accident. He maintains that his injuries are primarily a result of the first accident and that they were aggravated for a few months by the second accident which did not result in any new injuries.
- [26] Mr. Uppal suggests that it would have been necessary to discuss the second accident during the trial even if he had only proceeded with his claim with respect to the first accident.
- [27] Mr. Uppal complains that ICBC adopted a "very rigid stance" of holding him solely at fault for the first accident and that they were determined to take the matter to trial and had made a nominal offer on July 24, 2014 of \$10,000.

- [28] Mr. Uppal appears to suggest that ICBC's rigid stance led to his counsel's resignation which then put him at a significant disadvantage both in retaining new counsel and, when he was unable to find new counsel, appearing at trial on his own. He says that he did not have the resources to arrange for expert medical evidence and that medical experts prefer to work for lawyers as opposed to lay persons. In effect, Mr. Uppal's submissions are that, as a layman, he was at a disadvantage leading up to and throughout the trial.
- [29] He seeks his costs of the trial. He acknowledges that his award was less than the Offer. However, he submits that, because the Offer related to Part 7 benefits and did not "accept 100% liability" on the part of Mr. Chung, which would have affected Mr. Uppal's insurance rates going forward, he had a valid reason to decline to accept it.

The Applicable Law on Costs

- [30] The general rule with respect to costs is that they follow the event. In this case, Mr. Uppal was successful with respect to his claim with respect to the first accident and unsuccessful with respect to his claim on the second.

- [31] Rule 14-1(9) of the Rules provides:

Costs to follow event

14-1(9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

- [32] Rule 14-1(17) provides for set-off costs:

Set-off of costs

14-1(17) If a party entitled to receive costs is liable to pay costs to another party, a registrar may assess the costs the party is liable to pay and may adjust them by way of deduction or set-off or may delay the allowance of the costs the party is entitled to receive until the party has paid or tendered the costs the party is liable to pay.

- [33] In a proceeding in which an offer to settle has been made, R. 9-1(5) sets out certain cost options and R. 9-1(6) sets out certain considerations which the court may take into account. Those Rules provide as follows:

Cost options

9-1(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.

Considerations of court

9-1(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.

[34] As Mr. Uppal's award was no greater than the amount of the defendant's Offer, the defendants seek their costs in respect of all steps taken in the proceeding after November 15, 2016, the date of their Offer.

[35] As the BC Court of Appeal said in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25, citing a number of earlier decisions, the rules on costs are intended to encourage 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.

[36] I will apply the considerations set out in R. 9-1(6) to this case.

Should Mr. Uppal have accepted the Offer?

[37] This consideration looks at the circumstances which existed at the time the Offer was made rather than the award that was made using hindsight: *Hartshorne* at para. 27.

[38] Mr. Uppal believed that almost of the physical and psychological difficulties he continued to experience at trial were primarily as a result of the first accident and were not as a result of his long-standing diabetes, his wife's health crisis, the death of his father, or the natural aging process. The difficulty with his belief, as I set out in paras. 6, 157-160, 164, and 186-187 of the Decision, is that it was not supported by objective expert medical evidence called by Mr. Uppal. Rather, I accepted the only expert medical evidence of Dr. Rickards, a defence medical expert, who was not shaken on cross-examination. Dr. Rickards' evidence did not

support Mr. Uppal's subjective belief.

- [39] By November 15, 2016, Dr. Rickards' opinion had been available to Mr. Uppal for some time. The defendants had also served their other expert reports. The defendants had advised Mr. Uppal that they might not call their experts at trial.
- [40] Also by that date, the parties had already attended the TMC with Justice Fitzpatrick where she explained to Mr. Uppal the risks of proceeding to trial without medical evidence. They had also attended the November 3 mediation at which, presumably, the defendants' position with respect to their assessment of the claim would have been made clear. The parties were also well into their trial preparation having completed discoveries. All of the information Mr. Uppal needed to assess his chances of succeeding was available to him.
- [41] As the Offer mirrored the defendants' earlier November 4, 2016 offer, Mr. Uppal had ten business days and three weekends to consider and seek advice with respect to it. Even with respect to the Offer, he had three business days and the weekend to consider it before the trial commenced, and it was available for acceptance until the seventh day of trial. During that time, if Mr. Uppal had questions about the Offer, he could have sought clarification.
- [42] I conclude that the Offer was straightforward and Mr. Uppal had sufficient time to consider it. Mr. Uppal did not make a counter-offer in response to it.
- [43] In addition, during the course of the trial, counsel for the defendants wrote to Mr. Uppal advising him that the Offer was to expire on November 30. At that stage in the trial, Mr. Uppal had completed his evidence, as had his daughter and daughter-in law. He had cross-examined Dr. Rickards. Mr. Chung had given his direct evidence and Constable Jeffrey had completed his evidence. Mr. Uppal was in a position to assess the evidence to that point.
- [44] Although Mr. Uppal was a self-represented litigant, in this case, defence counsel and the court explained to him the risk he was taking in proceeding to trial without any medical evidence. Even if he could not find counsel to represent him at trial, after Mr. Ueland withdrew, he could have sought legal advice about the need for expert medical evidence or advice about the terms of the Offer.
- [45] The possibility of an adjournment of trial was discussed on a number of occasions, including on the first day of trial, but Mr. Uppal chose to proceed.
- [46] The fact that Mr. Uppal was self-represented is not the defendants' fault. As this Court said in *Mac v. Mak*, 2016 BCSC 1804 at para. 39, while self-representation is a factor the court may consider, it does not exempt a party from the application of the Rules.

What is the relationship between the terms of settlement and the final judgment?

- [47] In this case, Mr. Uppal was offered \$75,000 and was awarded \$60,000.

- [48] In light of the fact that Mr. Uppal relied on cases in which the award for non-pecuniary damages ranged between \$100,000 and \$175,000, an offer of \$75,000 was not far out of the range. In each of the cases Mr. Uppal relied on, the Court had before it some medical evidence. Mr. Uppal should have factored into his consideration of the Offer the risk he had been advised he was taking in proceeding to trial without medical evidence. Objectively, that made the Offer one that should have been seriously considered.
- [49] Mr. Uppal's employer's records demonstrated a quantifiable loss of wages following the first accident. Mr. Uppal knew his earning pattern between 2008 and 2010. He also knew what he earned on his gradual return to work. He could have calculated his past wage loss.
- [50] The reason he thought he was entitled to more for loss of future income or capacity was his belief that he was incapable of doing any job. I did not accept his evidence in that regard as set out in paras. 188-191 of the Decision as it was not supported by objective medical evidence and Mr. Uppal demonstrated his capability during the 12-day trial.

What are the relative financial circumstances of the parties?

- [51] Mr. Uppal has submitted an affidavit in which he says that he has been unable to return to work, as a result of his injuries, and he does not believe that he will be able to "get back to [the] competitive work force" in the near future. He also swore that he has had no stable source of income since December 2012, which has resulted in considerable financial hardship. He is totally dependent on his son's income for survival and his medical care.
- [52] I accept his evidence in that regard. However, as is clear from his communications with his former counsel, which Mr. Uppal put in the record before me, that he was warned about the financial risk of proceeding to trial and not succeeding on the issue of liability. After discussing his interview with the independent witness to the first accident, Mr. Ueland said:

He is a very good witness for the defence In my opinion, the court will believe this witness. If the court [does so] you will lose you[r] claim because you will be found at fault for the accident. You will also owe ICBC for their costs and disbursements for the entirety of your claim. This could amount to \$50,000 or more.

In regards to you[r] second accident, the other driver is also bringing a claim against you. As a result, they will fight for liability against you in that action. As we found out in traffic court, we will most likely lose that claim as well.

- [53] Although that advice was based on Mr. Ueland's assessment of liability for both accidents, his advice was clear.
- [54] Mr. Uppal responded that he was "determined to face trial for 2 reasons. 1) Moral and 2) Financial. I am facing 2 scenarios: 1) Quit and lose everything. 2) Face Trial: And I may lose or win." (as written).

- [55] In those circumstances, Mr. Uppal's financial difficulties and the choice he made to proceed in light of them were informed choices.
- [56] There is no evidence that the fact that the defendants were represented by their insurer led to unnecessary or protracted proceedings which resulted in undue or unfair cost consequences. Nor was there evidence that the defendants' insurance coverage created some unfair advantage which resulted in unnecessary costs being incurred.
- [57] In fact, in this case, defence counsel was put to additional cost and expense of providing detailed letters outlining Mr. Uppal's responsibilities under the Rules and explaining evidentiary points. In addition, she provided additional copies of documents for Mr. Uppal and the Court during the trial. She cooperated in making Dr. Rickards available for cross-examination, despite not being advised in advance by Mr. Uppal that he was required for cross-examination, and interrupted her case to permit Mr. Uppal to call Robert Gander, the defence functional capacity evaluator, as a part of his case. Finally, this trial would have been completed in less than the 12 days it actually consumed had Mr. Uppal been represented.

Are there any other factors I should consider?

- [58] I am satisfied that the first three factors under R. 9-1(6) adequately address all of the circumstances of this case.

Conclusion

- [59] For the reasons set out, I conclude that the appropriate cost order is that Mr. Uppal be entitled to his costs of the action against Mr. Chung at scale B, as assessed by a Registrar of the Court up to and including November 15, 2016, the date of the defendants' Offer.
- [60] Mr. Chung is entitled to his costs of the action against Mr. Uppal, at scale B, as assessed by a Registrar of the Court from November 16, 2016 onwards, including his costs of these submissions.
- [61] Pursuant to R. 14-1(17), I order that Mr. Uppal's and Mr. Chung's costs be set off against each other.
- [62] I also conclude that, as a result of the dismissal of Mr. Uppal's claims against Neha and Ashok Sawal, they are entitled to their costs against Mr. Uppal at scale B.
- [63] Mr. Uppal is directed to prepare a bill of costs in accordance with Form 62 of the Rules and deliver it to the defendant's counsel within 30 days of the date these reasons are released.
- [64] The defendants have provided a draft bill of costs in their materials. They are directed to prepare separate bills of costs for the claims arising from both accidents and deliver them to Mr. Uppal within 30 days of the date these reasons are released.

[65] If the parties are unable to resolve the appropriate costs, or the set off amount, the bills of costs are to be assessed before a Registrar of this Court.

Submissions from Plaintiff's Former Counsel

[66] In written submissions filed February 24, 2017, on behalf of Simpson Thomas & Associates ("STA"), Mr. Ueland seeks an order that STA be paid its disbursements, in the amount of \$3,934.04, directly by the defendants and, although the submission is incomplete, appears to seek payment of those disbursements prior to any funds being provided to Mr. Uppal.

[67] STA has waived any claim for interest on disbursements they incurred on Mr. Uppal's behalf and for fees for professional services during the period in which it represented Mr. Uppal.

[68] STA's submissions do not say that it has a solicitor's lien.

[69] In light of my order for set-off of any costs owing to Mr. Uppal as against costs he owes to Mr. Chung, after the date of the Offer, and costs owing by Mr. Uppal to the Sawal's, it is extremely unlikely that Mr. Uppal will have anything left of his damage award.

[70] The submissions made do not support an entitlement to an order in favour of STA.

"MacNaughton J."

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