
CANADA / JUDGMENT

Wafler v. Trinh

2012 BCSC 1708

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1708 Wafler v. Trinh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wafler v. Trinh,

2012 BCSC 1708

Date: 20121116

Docket: M074472

Registry: Vancouver

Between:

Robert James Wafler

Plaintiff

And

Cuong Trinh

Defendant

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:

Joseph P. McStravick

Counsel for the Defendant:

Guy P. Brown

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 19, 2012

Place and Date of Judgment:

Vancouver, B.C.

November 16, 2012

- [1] The parties have applied to settle the terms of the order that ensues from a jury's verdict made on February 3, 2012. That verdict followed a ten day trial. The parties have agreed on a number of necessary and relevant calculations that arise from the jury's award. They do not agree on an appropriate order regarding costs.

The Jury's Verdict and Subsequent Calculations

- [2] The jury assessed damages totalling \$70,000 for the plaintiff's non-pecuniary loss, past wage loss and special damages. No formal order was entered because a number of calculations had to be performed with respect to court order interest, income tax deductions, and deductions for Part 7 benefits paid.
- [3] The parties have agreed that judgment should be entered in the amount of \$53,111, reflecting deductions for income tax on past wage loss and Part 7 benefits paid and the addition of pre-judgment interest. Advances have been paid to the plaintiff in the amount of \$15,450 for a balance payable on the judgment of \$37,661.

The Parties' Positions on Costs

- [4] The defendant made three offers to settle in accordance with the Rules of Court and all three offers exceeded the jury's eventual award of damages. Accordingly, the defendant submits that the plaintiff should be awarded ordinary costs at Scale B up to the date of the first offer (September 11, 2008), the defendant should be awarded ordinary costs at Scale B from the date of the first offer to the date of the last offer (December 21, 2011), and double costs thereafter.
- [5] The plaintiff seeks to recover all of his costs and disbursements or, alternatively, costs until the date of the formal offer dated December 22, 2011 and all of his disbursements throughout.

Background

- [6] The plaintiff was injured in a motor vehicle accident on November 22, 2005. Liability was admitted by the defendant.

- [7] The plaintiff was 43 years old at the time of the accident. He had a Grade 10 education. He had been employed in various capacities in the two decades leading up to the accident. In the 18 months prior to the accident, he had worked for a siding and roofing company in a very physical job. Prior to that, he worked for almost a decade as a locksmith. He was a social, active and physical person with several athletic and recreational interests.
- [8] The plaintiff suffered various injuries as a result of the accident. Many of these resolved with time. However, he continued to have significant lower back pain and some pain in his right buttock and right thigh. In November/December 2008, he was referred to a back specialist, Dr. Lee. He had back surgery in June 2009. The back surgery alleviated, but did not resolve, his low back and right side pain.
- [9] Unfortunately, the surgery was complicated by what was described as a "dural tear and nerve root impingement" leading to "acute cauda equine syndrome". This, in turn, caused some numbness in the back of his legs. His feet were often painful and cold. He had difficulties with his balance, with controlling his bowels and with sexual function. No aspect of his evidence, or the evidence of the witnesses called on his behalf, which addressed the nature and severity of his injuries, either post-accident or post-surgery, was challenged in any meaningful way. Furthermore, the defendant accepted that the plaintiff acted reasonably in undergoing the back surgery that he did and that, if the jury concluded that the plaintiff's ongoing back problems were caused by the accident, it could also properly conclude that the adverse consequences of the surgery were caused by the defendant.
- [10] Two issues of significance arose at trial. The first issue related to causation. It was common ground between the medical experts that the plaintiff had some pre-existing degeneration of the spine at the L-4/L-5 level as well as some spondylolisthesis at that same level. The question was whether, or to what extent, the plaintiff's ongoing low back difficulties were caused or contributed to by the accident or whether they were referable to a pre-existing condition.
- [11] The second issue, one of mitigation, related to the question of what, if any, employment the plaintiff was capable of following the accident.
- [12] The Insurance Corporation of British Columbia made three offers to settle the matter:
- a) September 11, 2008: \$60,000 pursuant to Rule 37B;
 - b) March 1, 2010: \$72,346 pursuant to Rule 37B (this offer revoked the previous offer);
 - c) December 21, 2011: \$222,346 (this offer did not revoke the previous offer).
- [13] Before the jury, the plaintiff advanced the following claims:
- a) past wage loss: \$211,574.80;
 - b) future loss of income: \$427,974 (to age 70);

- c) special damages: \$6,093.60; and
- d) non-pecuniary damages and future costs of care.

[14] The jury's global award of \$70,000 was allocated to the plaintiff's claims in the following amounts:

- a) non-pecuniary damages: \$32,000;
- b) past wage loss: \$37,000;
- c) loss of future earning capacity: nil;
- d) cost of future care: nil; and
- e) special damages: \$1,000.

[15] Both counsel have analyzed the foregoing award in roughly similar terms. Counsel for the plaintiff, in his written submission, asserted the award "indicates the jury's belief that approximately one year following the accident, the plaintiff's accident injury had fully resolved and any symptoms from that point onwards were due to degeneration". Counsel for the defendant said: "It appears clear that the jury awarded income lost to the end of June 2006."

[16] A Notice of Appeal was filed on February 24, 2012.

Statutory Framework

[17] Rule 14-1(9) of the Supreme Court Civil Rules, B.C. Reg 168/2009 establishes the general rule that the costs of a proceeding must be awarded to the successful party unless the court otherwise orders. Rule 9-1, which replaced Rule 37B of the former Rules of Court, addresses the cost implications of an offer to settle and provides in ss. (4)-(6):

- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.
- (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.
- (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.

The Object of Rule 9-1 and an Award of Double Costs

- [18] In *Hartshorne v. Hartshorne*, 2011 BCCA 29, 14 B.C.L.R. (5th) 33, the court summarized the import of a number of earlier decisions and said:
- [25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" (*A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks*, 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry*, 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in *Giles* are apposite:
- [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 at 25 (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 at para. 28 (C.A.);
 - "[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 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 Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.

Application of the Factors raised by Rule 9-1(6)

[19] The defendant emphasizes the legislative object of Rule 9-1 and argues that a refusal to order double costs ignores the "deterrent function" of the Rules: *Martin v. Lavigne*, 2010 BCSC 1610 at para. 7. An award of double costs is, however, a punitive award. The appropriateness of such a punitive award, in any given case, is determined by applying and weighing the factors in Rule 9-1(6).

A) Rule 9-1(6)(a) Whether the Offer to Settle was one that Ought Reasonably to have Been Accepted

[20] It is now understood that in deciding whether an offer to settle should reasonably have been accepted, the court does not look to or consider the final result achieved in a case: *Hartshorne* at para. 27.

[21] There is no hierarchy of factors within Rule 9-1(6). Nevertheless, the question of whether a party has acted reasonably in rejecting a formal offer of settlement, almost by definition, should address the question of whether an award of double costs, an award in the nature of a penalty, is appropriate. No useful object is served by penalizing a party who has acted reasonably. Requiring parties to carefully and seriously consider an offer to settle serves a manifestly important function. Cowing litigants with meritorious claims does not.

[22] In *A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372, *aff'd* 2011 BCCA 279, a relatively early case that addressed the purpose and ambit of the former Rule 37B, Justice Goepel said:

[61] I appreciate and accept that notwithstanding the differences between Rule 37B and its predecessors, the underlying legislative policy behind Rule 37B is 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: *MacKenzie v. Brooks* (1999) BCCA 623, 130 B.C.A.C. 95; *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, 55 B.C.A.C. 191 (C.A.); *Radke v. Parry*, 2008 BCSC 1397, 64 C.P.C. (6th) 176. Parties should not however be unduly deterred from bringing a meritorious, albeit uncertain claim, because of the fear that a punishing cost order could potentially wipe out their ... damage award. In that regard I note the comments of *McLachlin J.A.*, as she then was, in *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25, 49 D.L.R. (4th) 205 (C.A.):

Costs in our system of litigation serve the purpose, not only of indemnifying the successful litigant to a greater or lesser degree, but of deterring frivolous actions or defences. Parties, in calculating the risks of proceeding with a particular action or defence, should be able to forecast with some degree of precision what penalty they face should they be unsuccessful. Moreover, there is a sound reason for keeping costs within relatively modest limits. The possibility of high costs may unduly deter a party from bringing an uncertain but meritorious claim or defence.

[23] Similarly, in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282, 5 B.C.L.R. (5th) 252, Frankel J.A., for the court, said:

[88] I appreciate there are no mandatory factors under Rule 37B(6) and that trial judges have discretion to take into account whatever factors they consider appropriate in a given case. However, the ultimate discretion as to double costs must be exercised in a just, principled, and consistent way. One of the goals of Rule 37B is to promote settlement by imposing consequences on parties who have refused to accept an offer that ought reasonably to have been accepted. While it may not invariably be the case, I consider that it would be generally antithetical to that goal to penalize an unsuccessful plaintiff with double costs for proceeding to trial in the face of an unreasonable offer. Virtually all litigation comes with a degree of risk. When faced with settlement offers, plaintiffs must carefully consider their positions. However, they should not be cowed into accepting an unreasonable offer out of fear of being penalized with double costs if they are unable to "beat" that offer. Put somewhat differently, plaintiffs should not be penalized for declining an offer that did not provide a genuine incentive to settle in the circumstances. In this case, the Credit Union and Mr. Thomas have not pointed to anything that would support a finding that the plaintiffs' decision to refuse their offer was, at the time of the refusal, an unreasonable one.

[24] In this case, the plaintiff had reports from several experts who addressed both of the central issues I identified earlier. Those reports would reasonably have caused the plaintiff to have significant confidence in the case he advanced. The plaintiff's medical evidence supported his theory of causation. The reports of a functional capacity expert and a vocational rehabilitation expert both concluded that the plaintiff could no longer do physical work. In addition, though he might be able to work as a part-time locksmith, he would require a sympathetic employer who understood his limitations.

[25] There was no reasonable justification on the basis of the expert and other evidence that was available prior to trial for the plaintiff to take an offer that represented perhaps 30% - 35% of the value of the claim he advanced.

[26] The defendant argues that the plaintiff should have been aware that his credibility was at issue and that he should have factored this consideration into his assessment of the defendant's offer to settle.

- [27] There are cases where the credibility of the party is directly relevant to a central issue. There are other instances where issues of credibility may simply cast the plaintiff in a somewhat unfavorable light. In this case the credibility of the plaintiff, properly analyzed, was not directly relevant to the key issues before the jury. In saying this I recognize that findings or impressions of credibility can indirectly sway a trier of fact and, in particular, a jury.
- [28] At trial much was made, reasonably, of the fact that the plaintiff failed to report his earlier episodes of back pain to several of the physicians who had prepared expert reports. That failure would be relevant to the issues being considered by these physicians. The reality, however, is that because the plaintiff's injury occurred some time ago, various of his experts had filed several reports. The consequences of this, in turn, was that while the plaintiff's back injuries were not identified or known to some medical experts in the earlier reports, they were in some of the later ones.
- [29] Similarly, there were some issues of credibility attached, for example, to why Mr. Wafler left his employment as a locksmith a year or two before the accident. There was, however, general consensus about what work Mr. Wafler was capable of subsequent to his accident and about what limitations he laboured under.
- [30] Thus, while the question of whether a trier of fact will accept the plaintiff's evidence is always a settlement consideration, that issue was not, or should not have been, prominent in this case. The nature and severity of the plaintiff's injuries were not really an issue. The experts generally agreed on the nature and extent of the plaintiff's degenerative back condition. What flowed from that degenerative back condition did not engage a question of credibility. There was some level of consensus on what work the plaintiff was capable of doing.
- [31] Finally, the defendant points to *Wafler v. Insurance Corporation of British Columbia*, 2008 BCSC 1387, 67 C.C.L.I. (4th) 151, in which Justice Meiklem dismissed the plaintiff's application for further disability benefits under s. 80(1) and s. 86(1) of the Regulations to the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, and says that the conclusions in that decision ought to have foreshadowed the difficulties with the plaintiff's case. The defendant also says that the plaintiff opted to "gamble" on a better result. I do not agree. While several of the issues addressed by Meiklem J. were directly relevant to the issues at trial and were determined in the defendant's favour, the plaintiff's evidence at that earlier hearing was much different and had not yet been fully developed.
- [32] In *Khunkhun v. Titus*, 2011 BCSC 1677, Justice Willcock, in addressing an application under Rule 9-1, said:
- [25] Bearing in mind all of the evidence before me now and the evidence that I heard at trial, I am of the view that it was reasonable on the part of the plaintiff to reject the settlement offer of March 30, 2011. No aspect of the claim advanced was frivolous. The plaintiff did not unnecessarily lengthen the expense or duration of the litigation. To use one test, I do not consider that reasonable counsel aware of all of the evidence in this case but unaware of the

jury award ought to have encouraged the plaintiff to accept the offer at the time it was made or up to the date of the rendering of the jury's award. I do not regard this as a case where the plaintiff should have freed up the judicial resources used to assess her claim. I am of the view that the plaintiff might have made a careful assessment of the strengths and weaknesses of her case at the commencement and throughout the course of this litigation and not accepted the settlement offer that was made to her. In summary, I find that it was entirely reasonable on the evidence for the plaintiff to prefer taking this case to the jury to accepting the offer that was made to her before trial. I adopt here what was said in *Sartori v. Gates* at para. 67.

The plaintiff had the right to test to the extent of the range of damages by trial adjudication.

- [33] In *Lumanlan v. Sadler*, 2009 BCSC 142 at para. 35, Justice Humphries succinctly said, "one should be cautious, with the advantage of hindsight, in equating having guessed wrongly with having been unreasonable in rejecting an offer".
- [34] I consider the foregoing statements and sentiments from *Khunkhun* and *Lumanlan* apposite. It is always difficult to foresee the ultimate outcome of litigation. It is a process that is inherently uncertain. Often this is particularly so when dealing with a jury: *Mazur v. Lucas*, 2011 BCSC 1685 at para. 60, 29 B.C.L.R. (5th) 179. Weighing the factors that can give rise to such uncertainty requires a measured assessment. The fact that the conclusions arising from that assessment continue to leave room for uncertainty does not mean that the decisions made are in the nature of a "gamble".
- [35] In this case the application of such a measured judgment would not, on an objective or reasonable basis, have caused competent and thoughtful counsel to have recommended that the plaintiff accept any of the defendant's three offers.

B) Rule 9-1(6)(b) The Relationship Between the Offer of Settlement and the Final Judgment/Award?

- [36] The jury awarded the plaintiff an amount which approached the first two offers of settlement the defendant made and was less than 25% of the defendant's December 21, 2011, offer. This factor militates in favor of the defendant.

C) Rule 9-1(6)(c) Relative Financial Circumstances

- [37] The defendant accepts that, notwithstanding some earlier uncertainty, it is now clear that the court may consider whether the defendant has insurance when weighing the financial circumstances of the parties: *Smith v. Tedford*, 2010 BCCA 302 at para. 19, 7 B.C.L.R. (5th) 246.
- [38] The plaintiff's financial circumstances are extremely difficult. He lives on a disability pension. At trial he gave evidence of having had to sell many of his possessions, including his vehicles and his home.

D) Rule 9-1(6)(d) Other Relevant Circumstances

- [39] Various authorities have considered such matters as the blameworthy conduct of a party or a party's conduct during the course of the trial under this consideration: Hartshorne at para. 35; Khunkhun at para. 30. There was no suggestion that such considerations pertain in the instant case.
- [40] The defendant argues that the court can consider why the claim of the party failed. Thus, a case that fails on a difficult causation issue may lead to a different exercise of discretion than one that is lost because of findings of credibility: A.E. at para. 59. In this case such considerations, for the reasons I have described, militate against the defendant.

Conclusion

- [41] There should be some consequence attached to the plaintiff's failure to accept the defendant's third offer of settlement. Having weighed the factors I have identified, I consider that an appropriate result would be to give the plaintiff his costs, including his disbursements, up to December 21, 2011. Each party is to bear their own costs and disbursements after that date. Though every case turns on its own facts and circumstances, the foregoing result aligns with the conclusions arrived at in each of Lumanlan and Khunkhun.
- [42] In addition, each party is to bear their own costs of this hearing.

"Voith J."

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