

CANADA / JUDGMENT

Wang v. British Columbia Medical Association

2014 BCSC 1073

COURT

Supreme Court of British Columbia

DECIDED

17 June 2014

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2014 BCSC 1073 Wang v. British Columbia Medical Association

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wang v. British Columbia Medical Association,

2014 BCSC 1073

Date: 20140617

Docket: S095777

Registry: Vancouver

Between:

Caroline Wang

Plaintiff

And:

British Columbia Medical Association (Canadian Medical Association - B.C. Division), Geoffrey Marsden Appleton, Brian David Brodie, William (Bill) John Riddell Cavers, Bradley Allen Fritz, Michael John Golbey, Nasirmohamed Jetha, Margaret Anne MacDiarmid, John William (Bill) Mackie, Robin David Saunders, Mark David Schonfeld, Barry John Turchen, John Michael Morris Turner, Geraldine Vance, Carole Lynn Williams

Defendants

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment on Costs

Counsel for the Plaintiff:

Stephen R. Schachter, Q.C.

Counsel for the Defendants:

Brad Cramer

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 5-6, 2014

Place and Date of Judgment:

Vancouver, B.C.

June 17, 2014

INTRODUCTION

- [1] This action proceeded to trial before me for five weeks between January 23 and February 24, 2012. Dr. Wang sought general, aggravated and punitive damages for defamation against the British Columbia Medical Association (BCMA) and the 14 individual defendants. She also sought declaratory relief against the BCMA alone for alleged breach of contract and irregular acts within the meaning of section 85 of the Society Act, RSBC 1996, c 433 ("the contract/Society Act claim").
- [2] In Reasons for Judgment delivered March 8, 2013, indexed at 2013 BCSC 394, I dismissed all of Dr. Wang's claims in defamation against the BCMA and the 14 individual defendants. On the contract/Society Act claim, I concluded the plaintiff had failed to make out a case for relief under the Society Act, and for several of the declarations she requested. I concluded, however, that she was entitled to a declaration flowing from what I had found to be a breach of contract by the BCMA consisting of procedural unfairness in the composition and mandate of a Special Committee established to review her conduct.
- [3] The plaintiff appealed my finding that a particular letter from the BCMA to its membership, dated February 2, 2008, was published on an occasion of privilege. That letter was at the core of Dr. Wang's claim in defamation, but her claim at trial also encompassed a number of subsequent letters, articles, internet postings and statements. She did not appeal the dismissal of her claims in relation to these other publications. Her appeal was dismissed in Reasons for Judgment delivered on April 30, 2014 and indexed at 2014 BCCA 162.
- [4] The defendants now apply for their costs of the proceeding in this court at Scale C, with double costs from the date of an Offer to Settle that was delivered on December 22, 2011.
- [5] The plaintiff maintains that the costs should be apportioned 70% to the defendants for the defamation claims and 30% to her for the claim on which she was successful, that the appropriate scale is Scale B, and that this is not a proper case for an award of double costs.

APPORTIONMENT

- [6] The question here is whether Dr. Wang's success in establishing a breach of contract by the BCMA that led to my granting her declaratory relief should result in an apportionment of the costs between the defamation aspect of the claim, on which the defendants were successful, and the contract/Society Act aspect, which involved only one defendant, the BCMA.
- [7] The defendants argue that this was a single proceeding, and as they were substantially successful on "the proceeding", they should be entitled to 100% of their costs, in accordance with Rule 14-1(9):
- (9) Subject to subrule (12) [which is not relevant], costs of the proceeding must be awarded to the successful party unless the court otherwise orders.
- [8] The plaintiff counters she is not seeking apportionment merely in relation to an issue, but rather in relation to an independent claim, or "matter", on which she was successful. Accordingly, she submits, this is a case in which the court should 'otherwise order'. She relies on Rule 14-1(15)(b):
- (15) The court may award costs
- (a) of a proceeding,
 - (b) that relate to some particular application, step or matter in or related to the proceeding, or
 - (c) except so far as they relate to some particular application, step or matter in or related to the proceeding
- and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.
- [9] Resolving this issue requires a review of the procedural history and context.
- [10] The entire litigation arose from a deteriorating relationship between Dr. Wang and her colleagues on the board and executive of the BCMA beginning in 2005. This culminated in complaints raised at a board meeting on February 1, 2008, of breaches by Dr. Wang of the board's Code of Conduct. This led to the letter of February 2, 2008, from the BCMA to its membership, signed by its president, in which the membership was advised, in essence, that the board would be investigating Dr. Wang under its Code of Conduct, in order to review the manner in which she carried out her duties as a member of the board and of the executive. Dr. Wang was convinced that these actions were politically motivated and taken in bad faith, but I found otherwise.
- [11] The board then established a Code of Conduct committee to carry out this investigation. The BCMA's legal counsel subsequently drafted terms of reference that, I found, established a different committee, called the Special Committee, with a mandate expanded beyond the investigation of the specific complaints that initiated the process.

- [12] Dr. Wang initiated proceedings by petition that sought to prohibit the Special Committee from proceeding with its enquiry. It was based on the same grounds later used to support the breach of contract/Society Act claim in this action.
- [13] That petition was successful. In Reasons for Judgment indexed at 2008 BCSC 1559 and delivered on November 14, 2008, Madam Justice Ballance restrained the committee from proceeding any further. By that time, it should be noted, the committee had ceased to exist in any event as all Special Committees struck during any given year expire at the following Annual Convention, held in June of each year. It was never reconstituted.
- [14] Ultimately, Ballance J.'s order was set aside by the Court of Appeal on procedural grounds on January 29, 2010: 2010 BCCA 43. Dr. Wang's petition had been based substantially on an allegation of breach of contract. The Court of Appeal considered that such a claim should have been tried in an action, not dealt with on affidavits in a petition proceeding. Accordingly, without commenting on the merits of her claims, the court dismissed Dr. Wang's petition "without prejudice to her right to bring any proceedings she may consider to be appropriate".
- [15] By that time, Dr. Wang had already commenced action against the BCMA and 14 of its directors, officers and staff for defamation. Following the decision of the Court of Appeal dismissing her petition, she commenced an additional action against the BCMA alone - the contract/Society Act claim.
- [16] By order of Mr. Justice Truscott pronounced August 26, 2010, the two actions were consolidated into the present proceeding. The Consolidated Notice of Civil Claim was issued on September 27, 2010.
- [17] Dr. Wang's current solicitors took over conduct of the consolidated proceeding in September 2011, and an intensive round of examinations for discovery ensued. In this process, Dr. Wang abandoned any claim for damages in the contract/Society Act claim, limiting the relief sought to injunctive and declaratory relief. By the time of trial, Dr. Wang had also abandoned any claim for injunctive relief.
- [18] At trial, the declarations that Dr. Wang sought were that the BCMA committed irregular acts within the meaning of section 85 of the Society Act, and breached its contract with her, by:
- (a) unlawfully and in bad faith purporting to constitute the Code of Conduct committee to investigate her;
 - (b) unlawfully requesting that she leave the meeting on February 1, 2008, and in deploring her conduct for having failed to do so;
 - (c) by appointing Dr. Williams to the committee when it was obvious that she was biased against her;

- (d) by issuing the various President's Letters and the chair's letter prior to the 2008 election in relation to the investigation of alleged violations under the Code of Conduct; and
- (e) by failing to withdraw or correct the February 2 President's Letter and subsequent statements to the same effect, following the approval by the Board of the Terms of Reference and statements by the Special Committee to the plaintiff and the statement by counsel for the BCMA and the Special Committee on the hearing of the petition.

[19] I dealt with this aspect of Dr. Wang's claim in paragraphs 352 through 376 of my Reasons for Judgment. With respect to the declarations that the plaintiff sought, I found that the BCMA had not acted unlawfully or in bad faith in relation to (a) and (b), and that (d) and (e) were not amenable to a breach of contract analysis. They were best dealt with, as they had been, in the defamation context. I also concluded that section 85 of the Society Act had no application.

[20] I did, however, find that the BCMA had breached its contract with the plaintiff through failing to provide for procedural fairness in the manner in which it established the mandate of the Special Committee, and in appointing to the committee a person whose previous comments gave rise to a reasonable apprehension of bias. This second ground was essentially that covered by declaration (c).

[21] Although the entire review process at issue had long since come to an end, I reasoned that a claim for breach of contract does not require actual present damage, and that I had jurisdiction to grant declaratory relief. I noted that the procedural fairness issues were neither theoretical nor hypothetical, and might provide some guidance for the future. Accordingly, I granted a declaration in the following terms:

THIS COURT DECLARES that the defendant British Columbia Medical Association (BCMA) breached its contract with the plaintiff by failing to provide for full procedural fairness in the composition and mandate of the Special Committee formed to review the plaintiff's conduct as a director and officer of the BCMA in place of the Code of Conduct Committee originally authorized by the Board on February 1, 2008.

[22] The plaintiff thus achieved partial success on this aspect of her claim, which was against the BCMA alone. The other 14 defendants, as well as the BCMA, achieved total success on the defamation claim.

[23] The leading cases on apportionment of costs are *British Columbia v Worthington (Canada) Inc.*, [1989] 1 WWR 1, 29 BCLR (2d) 145 (CA), and *Sutherland v Canada (Attorney General)*, 2008 BCCA 27, 77 BCLR (4th) 142. They discuss a threefold test:

- (a) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
- (b) there must be a basis on which the trial judge can identify the time attributable to the trial of the separate issues; and

(c) it must be shown that apportionment would effect a just result.

[24] In Worthington, in a trial that lasted 41 days and resulted in the claim being dismissed and the counterclaim being allowed, the trial judge concluded that 14 days of the trial were entirely devoted to two issues raised by the defendants, upon both of which they failed. He accordingly awarded costs to the plaintiffs with respect to those two issues.

[25] In upholding this exercise of discretion, the Court of Appeal, per Esson J.A., noted that the two issues in question did not necessarily arise from the plaintiff's case, but had been deliberately introduced into the litigation by the defendants with full knowledge that they would necessarily increase, to a very substantial degree, the costs and expenses of the action (para. 90). These were circumstances connected with the case which the trial judge was entitled to conclude rendered it manifestly fair and just to apportion costs.

[26] Sutherland was a claim for damages for nuisance. The trial judge had found that the plaintiff had successfully proved nuisance, and that the defendant had failed to establish its defence of statutory authority. On appeal, the Court of Appeal agreed that the plaintiff had proved nuisance, but held that the defendant had established the defence of statutory authority, which was a complete answer to the claim. The matter was referred back to the trial judge for the disposition of the issue of costs of the trial.

[27] The trial judge apportioned costs 25/39ths to the plaintiff, and 14/39ths to the defendant, on the basis that the issue of nuisance on which the plaintiff was successful had occupied 25 of the 39 days of trial time, while the issue of statutory authority, on which the defendant was successful, occupied 14 days.

[28] The Court of Appeal set this order aside. It agreed that the two issues of nuisance and statutory authority were discrete, and the judge was obviously able to identify the time attributable to the trial of those separate issues. Where the judge erred, however, was in concluding that it was manifestly just or fair to apportion costs. In fact, the court held, there was no basis for denying the defendants the costs on the issue of nuisance because the defendants were ultimately successful, had not prolonged the case unnecessarily through their conduct in relation to the issue of nuisance. They did not "over litigate" any issue. Nuisance was not in issue they had introduced, but was part of the cause of action advanced by the plaintiffs, which the defendants were obliged to defend.

[29] Neither of those cases was like this one. The equivalent to Sutherland would be if Dr. Wang sought an apportionment between the issues of defamation (on which she was successful against some of the defendants) and the defences of qualified privilege and fair comment (on which the defendants were successful wherever defamation was found). In the circumstances of this case, the defendants, as in Sutherland, could not be said to have prolonged the case unnecessarily through their conduct in relation to the issue of defamation. It was part of the cause of action advanced by Dr. Wang, which the defendants were obliged to defend. The situation considered by the court in Worthington is equally distinguishable.

- [30] The difference here is that we are not simply dealing with a discrete issue upon which an unsuccessful party was successful at trial. Fairly considered, this is not an instance of dissecting sub-issues, discouraged by the Court of Appeal in *Lewis v Lehigh Northwest Cement Ltd*, 2009 BCCA 424. We are dealing with a discretely pleaded claim upon which Dr. Wang was partially successful. But significantly, as Dr. Wang acknowledged, this discretely pleaded claim was based on the same evidence and submissions on which she based her unsuccessful claims in defamation. The two claims were inextricably interwoven except as to the relief sought. I declined to make four of the five declarations sought largely because I found them to be covering ground more appropriately considered in the defamation claim, where I had found against the plaintiff.
- [31] Nevertheless, I concluded that the process of the defamation claim could not adequately address the two areas in which I found that Dr. Wang had been deprived of procedural fairness. It was, in short, necessary for her to pursue this discrete cause of action in order to obtain relief even though it was only declaratory.
- [32] Thus, in my view, the first branch of the test is satisfied. But it is only the first branch. As *Esson J.A.* noted in *Worthington* at para. 89, it would be an error in principle to interpret the apportionment rule as requiring the court to award to the plaintiff the costs of any issue on which the defendant failed. I therefore turn to the second branch.
- [33] I am very much in doubt as to whether the plaintiff can satisfy the second branch given that it would be an exercise in futility to attempt to identify the time attributable to the trial of the separate claims. I say this notwithstanding the approach taken in *Poirier v Wal-Mart Canada Corp*, 2007 BCSC 66, 69 BCLR (4th) 106, at paras. 41-43, which, in my view, does not solve the problem here. As noted, the two claims were inextricable.
- [34] But rather than deciding the issue on the basis of this branch of the test, I prefer to proceed directly to consideration of the third branch. Whether apportionment would effect a just result may have some bearing on how one should approach the problem of attribution.
- [35] The question here is whether, in the circumstances I have described, Dr. Wang has shown that apportionment in the form of an award of costs under Rule 14-1(15)(b) relating to the matter of her breach of contract/Society Act claim would effect a just result. In *Sutherland*, the Court of Appeal addressed this issue by considering whether it would be "manifestly just or fair" to apportion costs.
- [36] In addressing this question, I have considered the following factors:
- (a) in the overall scheme of this litigation, the principal focus by a vast margin was on the defamation claims;
 - (b) the defamation claims, on which the plaintiff was wholly unsuccessful, were brought against 15 defendants;

- (c) if there was any "over litigating", it was by Dr. Wang in relation to her defamation claims against a number of the individual defendants; there was none by the defendants;
 - (d) the contract/Society Act claim, on the other hand, was brought against only one defendant;
 - (e) the injunctive and compensatory relief originally sought in the contract/Society Act claim had been abandoned as the issues had become largely moot; consequently, the relief granted was limited to a declaration; and
 - (f) although the plaintiff was successful in obtaining a declaration in her contract/Society Act claim, that success was only partial. I found against Dr. Wang in relation to most of the relief she sought in this regard - rejecting, for instance, her contention that the BCMA had acted unlawfully and in bad faith.
- [37] In these circumstances, I conclude that apportionment would not effect a just result. I can think of no principled reason to deny the defendants their full costs of the consolidated proceeding. They enjoyed more than "substantial success": see *Fotheringham v Fotheringham*, 2001 BCSC 1321, 13 CPC (5th) 302.

SCALE OF COSTS

- [38] The contest is between Scale B ("for matters of ordinary difficulty") and Scale C ("for matters of more than ordinary difficulty"). By section 2(3) of Appendix B to the Supreme Court Civil Rules:
- (3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
 - (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.
- [39] I note that the issues in this case were of importance not only to the 15 named defendants, but also to the 11,000 members of the British Columbia Medical Association. Nevertheless, the principal question is whether this proceeding was a matter of more than ordinary difficulty by reason of the involvement of difficult issues of law, fact or construction.
- [40] Relevant factors include the following (see *Movassaghi v Steels Industrial Products Ltd*, 2013 BCSC 2040 at para. 45, citing *Mort v Saanich School District No 63*, 2001 BCSC 1473; and *566935 BC Ltd v Allianz Insurance Co of Canada*, 2005 BCSC 1759 at para. 7):
- (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 expert reports; and
 - (g) the extent of the effort required in the collection and proof of facts.
- [41] Counsel for the plaintiff submits that notwithstanding the "size" of this matter, it remained one of ordinary difficulty. He points to paragraph 33 of my judgment:
- [33] The relevant events are well documented in notices, agendas, tapes, transcripts, minutes, e-mails, reports and correspondence. Predictably, however, the parties differ greatly in their respective interpretations of these events. Things would not otherwise have developed as they did.
- [42] He asserts that the documents, though numerous, were well organised, defamation is not of itself of more than ordinary difficulty, there were no expert reports, and while credibility was very much in issue, that is nothing out of the ordinary.
- [43] In the circumstances of this particular litigation, I am unable to agree. This was no ordinary case.
- [44] The Consolidated Notice of Civil Claim was 89 pages in length. There were 24 days of examination for discovery. The documents were indeed well organised, and numbered close to 2000 pages. The trial was 24 days in length, not including this costs hearing, a number of which days involved extended sitting. Closing submissions totalled over 400 pages, and my judgment was 121 pages in length. Both sides were represented by eminent senior counsel (two on each side) assisted by able junior counsel.
- [45] The plaintiff did not allege just one event of defamation, which was all the Court of Appeal had to consider in its 50-page judgment, but rather 17 separate instances of libel and one of slander. The allegations were all constructed on a foundation of overt malice and hostility that the plaintiff claimed motivated the defendants in all that they did. It is this context that required so extensive an investigation into the relationship between the plaintiff and the various defendants over the relevant years. As Madam Justice Newbury put it in the Court of Appeal:
- [10] All parties agree that context is highly important in a case of this kind, and indeed, Dr. Wang contended in her factum that the trial judge erred "in failing to conduct a contextual analysis of all relevant circumstances". This is a difficult argument to make in the wake of a judgment that is 121 pages long and that thoroughly canvasses the relationship between Dr. Wang and the BCMA between July 2005 and February 2008.

[46] These aspects required an extensive sorting out of the nuances that flavoured the parties' differing interpretations of these complex relationships and events, taking into account the evidence of the many witnesses who testified, the context of professional and association politics, assessments of credibility at every stage, and the voluminous paper record, all spread over a lengthy continuum of interaction.

[47] Taken together, it is my view that these factors took this proceeding out of the ordinary, and into the realm of more than ordinary difficulty. The absence of expert reports is of no moment to this analysis.

[48] Accordingly, I find that the appropriate scale of costs is Scale C.

THE OFFER TO SETTLE

[49] On December 22, 2011, the solicitors for the defendants delivered an Offer to Settle to Dr. Wang's solicitors. The offer was open for acceptance until 5:00 PM on December 29, 2011, but this was subsequently extended to 10:00 AM on January 5, 2012. Dr. Wang did not respond. The trial commenced on January 23, 2012.

[50] The offer was in the following terms:

December 22, 2011

BY EMAIL: Without Prejudice

Irwin Nathanson, Q.C.

Nathanson, Schachter & Thompson LLP

750 - 900 Howe Street

Vancouver, BC V6Z 2M4

Dear Mr. Nathanson:

Re: Wang v. BCMA et al; Vancouver Registry No. S095777 (the "Action")

It is no secret that the litigation between our respective clients has been costly and distracting. Ultimately, it is the BCMA members who suffer from such distraction.

The parties to the Action have substantially completed extensive Examinations for Discovery and are advised by competent counsel who can make an objective assessment of the costs and risks of a trial, the potential for liability and the likely allocation of costs in this case. Hence, I am not going to provide you with my view on these matters here.

You and Mr. Schachter have, when approached by me, made it clear that your client will not initiate any settlement discussions and that she wants her "day in court". However, I believe that it is my duty to my clients to make an attempt to resolve this dispute, regardless of how your client perceives matters. My clients have agreed to make a settlement offer to Dr. Wang on terms that will enable all parties embroiled in this litigation to put it behind them.

I am instructed to make the following lime limited settlement offer, pursuant to Rule 9-1 of the Civil Rules:

1. The Action will be dismissed by consent court order, as if there had been a trial of the Action on its merits, without cost to any party.
2. There will be a Joint Statement on the specific terms provided in the attached Schedule A. The parties will thus agree that Joint Statement will be the only public statement that the parties will make concerning the Action or its settlement.
3. Without any concession whatsoever of liability, the BCMA will make a payment of \$100,000.00 to Dr. Wang as a contribution to her expenses incurred in the Action.
4. The parties to the Action will exchange mutual, General Releases of all claims upon the dismissal of the Action.
5. This offer is open for acceptance until 5:00 p.m. on December 29, 2011 [later extended to 10:00 a.m. on January 5, 2012].

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 this proceeding.

Yours truly,

SHAPRAY CRAMER LLP

"Howard Shapray, Q.C."

[51] The proposed Joint Statement attached as Schedule A to that letter read:

Dr. Caroline Wang settles her litigation with the BCMA

The following is a joint statement issued by Dr. Caroline Wang, the British Columbia Medical Association (Canadian Medical Association - B.C. Division), Dr. Geoffrey Appleton, Dr. Brian Brodie, Dr. Bill Cavers, Dr. Bradley Fritz, Dr. Michael Golbey, Dr. Nasirmohamed Jetha, Dr. Margaret MacDiarmid, Dr. John Mackie, Dr. Robin Saunders, Dr. Mark Schonfeld, Dr. Barry Turchen, Dr. John Turner, Dr. Carole Williams ("the BCMA"):

It is often the case that strongly held opposing views on matters of principle result in misunderstandings and consternation. Dr. Wang and the BCMA have been involved in litigation since 2009 over issues that arose in 2007 and 2008.

All who are involved in that litigation realize that the inherently adversarial nature of the court's processes has a tendency to intensify the misunderstandings and upset for all participants. All of us believe that the work of the BCMA must continue on behalf of all of its members and that all controversies that detract from such important work are not in the best interests of the Association and its membership. To that end, all concerned wish to bring the litigation to an end, a result which we believe will best serve the ongoing work of the Association and better serve the interests of all of its members, matters which all of us care deeply about.

To that end, we are pleased to announce that we have resolved all of the litigation between us. This joint statement is a significant part of that resolution.

It is common ground that many of BCMA's directors and officers have held opinions that differ from those expressed by Dr. Wang on issues concerning the BCMA and its governance. Although differences of opinion between us may remain, we acknowledge that this should be both normal and healthy. Such differences, and the respectful exchange of views that results are often essential to fostering constructive dialogue, which in turn is essential to the carrying out of the BCMA's mandate and operations.

All of the parties to this statement regret that in the course of the important debates and discussions amongst them and in the conduct of the litigation, situations arose in which all felt unfairly criticized and took offence.

Dr. Wang believed that she was not treated in a fair manner and that she was unfairly criticized for pursuing what she understood to be her rights and duties as a BCMA director.

All the other parties to this statement respect Dr. Wang's rights and accept her assurance that she has always intended to act as a conscientious professional and in a bona fide manner throughout. The BCMA wish to collectively apologize for any statements made that Dr. Wang felt impugned her integrity in any way or were unfairly critical of her or her opinions.

Dr. Wang also acknowledges that the allegations that have been made have called into question, in a public forum, the motives of the defendants in their conduct of affairs in the best interests of the BCMA. Dr. Wang accepts the assurances of the other parties to this statement that they have always intended to act as conscientious professionals in a bona fide manner throughout. Dr. Wang wishes to apologize for any statements she made concerning the BCMA or her Colleagues that they felt impugned their integrity in any way or were unfairly critical of them or their views.

All of us remain committed to the important work of the BCMA on behalf of the medical community and the public. We believe that with an end to the litigation all future interactions can and should be conducted in an atmosphere of civility and respect for their divergent points of view.

[52] Offers to Settle are governed by Rule 9-1. The relevant subrules are these:

- (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.
- [53] The defendants maintain that their offer was one that Dr. Wang should have accepted and that would have given her rather more than she obtained through the trial. They seek double costs from the date of the offer. The plaintiff maintains that this was not an offer that she ought reasonably to have accepted given its terms, and that the offer would have deprived her of her partial success on the contract/Society Act claim. She points also to the relative financial circumstances of the parties.
- [54] There is no doubt that this rule confers a wide discretion, but it is not unfettered. In *Giles v Westminster Savings Credit Union*, 2010 BCCA 282, 5 BCLR (5th) 252, at para. 74, Mr. Justice Frankel described the purposes for which cost rules exist, in addition to indemnify a successful litigant, as:
- deterring frivolous actions or defences;
 - encouraging conduct that reduces the duration and expense of litigation and discouraging conduct that has the opposite effect;

- encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases;
- to have a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of litigation; and
- discouraging the continuance of doubtful cases or defences.

[55] Frankel J.A. then considered the rule relating to double costs, stating:

[88] I appreciate there are no mandatory factors under Rule 37B(6) [now Rule 9-1(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.

[56] The Court of Appeal further considered the question of double costs in *Hartshorne v Hartshorne*, 2011 BCCA 29, 14 BCLR (5th) 33:

[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" [citations omitted].

[57] Turning to the factors set out in Rule 9-1(6), the court observed:

[27] The first factor - whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted [citations omitted]. As was said in *[E. (A.) (Litigation Guardian of) v J. (D.W.)]*, 2009 BCSC 505, 91 BCLR (4th) 372], "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors as 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, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

[58] Factors that the court considered the trial judge to have properly taken into account included: that the offer was presented 12 days before the date of trial; that it was a comprehensive one that, if accepted, would have resolved the need for the 10-day trial; that it provided sufficient information to permit the offeree to understand the content of the

proposed offer; that accepting it would not have required the offeree to accept completely the offeror's reasoning in support of the offer; and that the litigation had been long and protracted, and acceptance of the offer would effectively have ended all outstanding disputes between the parties.

- [59] I turn to consider the first factor: whether the offer was one that Dr. Wang ought reasonably to have accepted.
- [60] Dr. Wang points out that the context of the offer was not a monetary claim, but much more complicated: allegations of defamation, with a claim for breach of contract. In her submission, the offer of \$100,000 must be viewed in relation to the value placed upon a person's reputation. She says that it nearly always costs a defamed plaintiff more to clear her reputation than can ever be recovered in damages and costs. Accordingly, Dr. Wang asserts, one must pay careful attention to the proffered "apology", citing *Hughes v Vander Zalm*, (28 February 2012), Vancouver S107214 (SC). The apology offered by the BCMA, she says, was qualified. What was lacking, submits the plaintiff, was (for instance) any recognition that the letter of February 2, 2008, was defamatory, and ought not to have been sent to the membership. There was no apology or expression of regret for that.
- [61] Moreover, Dr. Wang argues, the offer did not speak to her contract/Society Act claim at all. Yet she was successful in obtaining a declaration that the BCMA had failed to provide her with full procedural fairness.
- [62] While it is not permissible, in considering this factor, to take into account the award or order made at the trial, I apprehend that it is permissible in the context of this case to consider findings made that ought to have been within Dr. Wang's contemplation at the time the offer was presented.
- [63] With respect, for instance, to her complaint that the proffered Joint Statement failed to apologize for sending out the letter of February 2, 2008, it is germane to quote from the response of the Court of Appeal to Dr. Wang's submission that the letter had gone too far:
- [100] Bearing these authorities in mind, and taking a "contextual" approach to the circumstances of this case, I cannot agree that the President's letter of February 2 went beyond what was "fairly warranted" by or "reasonably germane" to the duty and interest which gave rise to the occasion of privilege. The letter was brief and to the point, and gave no details of the conduct under review. The referral of a complaint to the committee had been some time in coming, and was the obvious course available to the Board. To remain silent about it would in many ways have been nonsensical.
- [64] While I would not have expected Dr. Wang to anticipate what the Court of Appeal might have to say, I observe that both the complete context and the contents of the letter were well known to Dr. Wang at the time that the offer was made. There had been full discovery of documents and extensive examinations for discovery. The defendants' position concerning qualified privilege was clear, and Dr. Wang was advised by leading counsel. In these

circumstances, I do not think it can be said that it was reasonable for Dr. Wang to refuse the offer because it did not contain a specific apology of this nature. That she wanted such an apology is clear, but that is not the issue.

- [65] Similarly, I find no merit to Dr. Wang's argument concerning the cost of clearing one's reputation. The proposed Joint Statement did address that. It must be remembered that it was Dr. Wang who was aggressively impugning the motives of the defendants in the litigation. The Joint Statement acknowledged her belief that she had been unfairly criticized for pursuing what she understood to be her rights and duties as a BCMA director. It went on to make it clear that the defendants all accepted her assurance "that she has always intended to act as a conscientious professional and in a bona fide manner throughout".
- [66] I find that this offered a reasonable response to the question of reputation, particularly when taken together with the proffered payment of \$100,000, an amount comfortably in excess of many damage awards in successful defamation claims. In *Hughes v Vander Zalm*, for example, the jury awarded damages of \$60,000.
- [67] Moreover, the offer made the acknowledgement of conscientious professionalism and bona fides a two-way street, which was entirely appropriate in the circumstances. I note in this regard what I described in para. 86 of my Reasons as "Dr. Wang's unwavering view that those who disagreed with her were acting in bad faith to suppress points of view other than their own." That perspective may well have coloured Dr. Wang's assessment of the Offer to Settle; it was not, however, a reasonable one.
- [68] I consider that the same can be said with respect to the concerns that were the subject of Dr. Wang's contract/Society Act claim. While the joint statement did not specifically refer to that claim, any more than it specifically referred to the defamation claims, it did acknowledge and address Dr. Wang's belief that "she was not treated in a fair manner".
- [69] By the time the offer was made, the enquiry into Dr. Wang's conduct that was the foundation of the contract/Society Act claim had long since been terminated. Her claim for damages for breach of contract had been abandoned, and there was no basis any longer for a claim for injunctive relief. She was facing a five-week trial scheduled to start a month hence, against not just the BCMA, but 14 of its directors, officers and staff, some of whom had had almost nothing to do with the matters in issue. The litigation had been long, protracted and hard fought, and its outcome, from her perspective, ought at the very least to have been in considerable doubt. The offer not only would have put a significant sum of money into her pocket, but also allowed her a way to save face and avoid risk. It would have resolved all issues, it was no "nuisance offer", and it would have allowed both sides to move forward with dignity.
- [70] I find that the offer was one that Dr. Wang ought reasonably to have accepted at the time it was made.

- [71] I turn next to the second factor: the relationship between the terms of settlement offered and the final judgment of the court.
- [72] Dr. Wang argues that she achieved something through the trial that was not achievable through the proposed settlement: a declaration that she had been treated unfairly. In these circumstances, she submits, she should suffer no additional costs consequences as a result of refusing the offer.
- [73] The findings made at trial, however, as confirmed by the Court of Appeal, far from clearing Dr. Wang's reputation, considerably damaged it, and her "achievement" must be viewed in this context. While it is true that there was an acknowledgement that she had been denied full procedural fairness, it was also found that she had repeatedly breached the Code of Conduct, had misled her colleagues, had been disingenuous and unreasonable, was guilty of prevarication and exaggeration in giving her evidence, and had made a series of allegations of malice, misconduct and intimidation that were unfounded.
- [74] I am satisfied that however one might look at it, accepting the Offer to Settle would have left Dr. Wang in a much better position than did the trial judgment. She fared no better on appeal (see, for instance, 2014 BCCA 162 at para. 90). No reasonable person would consider that obtaining the one declaration I was prepared to make was worth sustaining the blow that fell from the defeat of the defamation claims -- least of all the 14 individual defendants who were dragged along for the ride.
- [75] The next factor is the relative financial circumstances of the parties. On Dr. Wang's behalf, it was submitted that as she is an individual physician, facing an association of 11,000 physicians, it follows that on a relative basis, the financial circumstances of the BCMA are deeper and healthier than hers.
- [76] An apparent relative difference, in my view, is immaterial on its own. No evidence was put before me concerning Dr. Wang's financial circumstances, or the extent to which they might be grievously impacted by double costs. In these circumstances, I conclude that the mere fact of disparity should be accorded little weight. While I can reasonably assume that the BCMA can afford the cost of litigation, shared among its 11,000 members, there is nothing before me to suggest that Dr. Wang cannot.
- [77] This brings me to the last consideration, which is "any other factor the court considers appropriate". None was suggested by either party. Nevertheless, I think it useful to return to the purposes of the costs rules as described by the Court of Appeal in the Giles and Hartshorne cases, noted above.
- [78] In this context I consider whether it would be inappropriate to award double costs where notwithstanding the overall outcome, the plaintiff did obtain relief in the form of a declaration.

- [79] In my view, this would be a relevant factor only if it could be said that her claim in that regard made it reasonable for her to refuse the offer. Viewed in the context of the proceedings as a whole, I have already concluded that it did not.
- [80] As I have noted, acceptance of the Offer to Settle would have resolved all issues between the parties and would have avoided a lengthy and expensive trial involving 15 defendants. The proposal paid that respect to Dr. Wang's reputation which was reasonable in the circumstances, and offered a face-saving resolution as well as compensation. Instead of accepting it, Dr. Wang insisted on her day in court. Her outcome at trial, as I have described, was not one that reasonable people would consider an improvement over what she could have achieved through settlement.
- [81] As I see it, an award of double costs in these circumstances furthers the purposes for which cost rules exist, as described in Hartshorne and Giles.

CONCLUSION

- [82] The defendants are awarded their costs of this proceeding at Scale C, with double costs after January 5, 2012, being the last date for acceptance of their Offer to Settle.
- [83] The defendants did not ask for Scale C or double costs in relation to this costs hearing. I therefore award the defendants their ordinary costs of this application at Scale B.

"GRAUER, J."

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