
CANADA / JUDGMENT

Warren v. Morgan

2015 BCSC 1168

COURT

Supreme Court of British Columbia

DECIDED

7 July 2015

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

2015 BCSC 1168 Warren v. Morgan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Warren v. Morgan,

2015 BCSC 1168

Date: 20150707

Docket: M083630

Registry: Vancouver

Between:

Camilla Warren

Plaintiff

And

Geraldine Morgan

Defendant

- and -

Docket: M083617

Registry: Vancouver

Between:

Camilla Warren

Plaintiff

And

Mauro Gaetano Berretta

Defendant

Before: The Honourable Madam Justice Russell

Reasons for Judgment on Costs

Counsel for the Plaintiff:

M.A. Kazimirski

Counsel for the Defendants:

K.N. Grieve

Written Submissions Filed:

April 29, May 29, June 12, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 7, 2015

- [1] The defendants seek costs in relation to a 22-day motor vehicle accident trial heard by this Court in April and May 2012. The defendant, Ms. Morgan, submits she is entitled to her costs and disbursements at scale B because the action against her was dismissed in its entirety. The defendant, Mr. Berretta, seeks his costs at scale B from the date of receipt of the defendants' first formal offer to settle in February 2012 or, alternatively, from the date of their second formal offer to settle in April 2012 pursuant to Rule 9-1(15) of the Supreme Court Civil Rules. The defendants do not seek double costs.
- [2] The plaintiff submits the court correctly determined costs in her favour at the conclusion of the trial. She submits it was reasonable to pursue an action against Ms. Morgan and the court should exercise its discretion under Rule 14-1(18) by ordering that Ms. Morgan's costs be borne by the unsuccessful party, Mr. Berretta. Finally, the plaintiff submits it was not reasonable to accept the offers to settle at the time and she will suffer significant financial hardship if this application is granted. Alternatively, the plaintiff asks that each party bear their own costs from the date of the second formal offer to the conclusion of the trial.

Background

- [3] The plaintiff was involved in two motor vehicle accidents. The first accident occurred on February 5, 2008, when Ms. Morgan rear-ended the plaintiff's vehicle (the "Morgan Action"). The second accident occurred two days later on February 7, 2008, when the plaintiff was rear-ended by a vehicle driven by Mr. Berretta (the "Berretta Action").
- [4] The plaintiff's actions against the defendants were commenced by writ of summons and statement of claim both filed on August 26, 2008. After a number of changes in plaintiff's counsel, a notice of trial was filed on September 14, 2010 setting the actions for a 10-day trial commencing November 28, 2011. At a trial management conference on October 21, 2011, Mr. Justice Ehrcke ordered the trial to be adjourned and reset for 19 days commencing April 10, 2012 after a determination that 10 days would be insufficient due to the number of plaintiff expert and lay witnesses.
- [5] The defendants jointly made a formal offer to the plaintiff to settle the two actions for the amount of \$120,000 plus taxable costs and disbursements by letter dated February 3, 2012. On February 23, 2012, defence counsel wrote to plaintiff's former counsel asking if the plaintiff was interested in attending mediation. Former plaintiff's counsel did not respond to the February 23, 2012 letter until March 28, 2012, advising that the plaintiff was interested in attempting to mediate a resolution.
- [6] Since the trial was to commence within weeks, defence counsel asked that the plaintiff provide the settlement proposal ordered by Madam Justice Hyslop at their second trial management conference on March 7, 2012 in order to assess whether mediation was a viable option for the parties. On April 3, 2012, late though it was, the plaintiff did provide a settlement brief to the defendants. The defendants characterize the damage assessment put forward by the plaintiff in her settlement brief as "similar in magnitude to that which was presented in closing argument." On April 5, 2012, the defendants jointly made a second formal offer to settle in the amount of \$200,000 plus taxable costs and disbursements.
- [7] Neither formal offer to settle was accepted by the plaintiff. Both offers specifically stated that the defendants reserved the right to bring the offers to the attention of the court for consideration in relation to costs.
- [8] It was submitted at trial that general damages should be in the range of \$275,000 with a global award of \$1,347,735 to \$2,411,199 due to future losses. Fourteen experts were relied upon by the plaintiff and two by the defendants.
- [9] In reasons for judgment dated April 26, 2013 and indexed at 2013 BCSC 708, I dismissed the Morgan Action on the issue of causation. Judgment in the Berretta Action was granted in favour of the plaintiff. The plaintiff was awarded \$50,000 in non-pecuniary damages and \$18,314.90 in special damages.

- [10] In my reasons, I ordered that special damages be reduced to account for a limited recovery period (paras. 619 - 621). I understand from the parties' written submissions on costs that they have agreed on an adjustment and, therefore, special damages are now assessed at \$5,923.43.
- [11] The plaintiff was, therefore, awarded \$55,923.43 at trial. She was also awarded costs in the action with the exception of two days' worth of trial, due to delay by former plaintiff's counsel.
- [12] Former plaintiff's counsel filed an appeal in both actions; however, the appeal record was not filed and no application to extend was brought. The appeals were dismissed as abandoned on November 14, 2014.
- [13] When attempts to follow up with plaintiff's counsel on costs and special damages were unsuccessful, on April 7, 2015 defense counsel requested permission to provide written submissions on a specific timeline.

Costs of the Morgan Action

- [14] A successful party is entitled to their costs unless otherwise ordered by the court: Rule 14-1(9).
- [15] The defendant, Ms. Morgan, submits that she is a successful party entitled to her costs because the action against her was dismissed in its entirety.
- [16] The plaintiff seeks what is often referred to as a Bullock Order under Rule 14-1(18) asking that the costs in relation to the Morgan Action be borne by the defendant, Mr. Berretta, as the unsuccessful party. Rule 14-1(18) states:

14-1(18) Costs of one defendant payable by another

If the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.

- [17] In *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at paras. 33 - 34, Madam Justice Southin explained when such orders may be appropriate:
- [33] I do not go so far, as some of the cases have suggested, as to say that such an order should be made "whenever it was reasonable for the plaintiff to have sued the successful defendant", if, by "reasonable", one is looking at the matter from the perspective of counsel for the plaintiff. One must bear in mind that the present rule as to joinder of causes of action is so broad that the causes of action alleged against the various defendants may be completely different, even though they arise out of the same transaction. ... There must be something which the unsuccessful defendant did, such as asserting the other defendant was the culprit in the case, to warrant his being made to reimburse the plaintiff for the successful defendant's

costs.

- [34] But orders under Rule 57(18) [now Rule 14-1(18)] are not restricted to cases where the unsuccessful defendant in the course of the litigation has blamed the successful defendant but may extend to acts of the unsuccessful defendant which caused the successful defendant to be brought into the litigation.
- [18] The plaintiff relies on *Bakker v. Nahanee*, 2012 BCSC 825, in which the trial judge found it was reasonable for the plaintiff to name the successful defendant and the causes of action between the two defendants were connected. I note in that case the actions of one defendant in stealing a car leased to another defendant by a third defendant caused the second and third defendants to be named in the action.
- [19] Defence counsel argues that Rule 14-1(18) contemplates parties to the same action, not parties in separate actions. In *Gill v. Lindstrom*, 2002 BCSC 1017, the court awarded a Bullock Order to the plaintiff. This decision was subsequently overturned by the Court of Appeal in *Gill v. Lindstrom*, 2004 BCCA 632. In that case, similarly involving two separate motor vehicle accidents heard at the same time, the Court of Appeal held that the successful plaintiff in one of the actions could not recover from the unsuccessful defendant in that action the costs the plaintiff was required to pay to a defendant in a separate action where the unsuccessful defendant had taken no position in the first action that could have resulted in the plaintiff's costs liability in the second action. In other words, "there was nothing in this case that the appellant did to cause the successful defendant to be brought into the litigation" (at para. 18). The Court of Appeal in *Gill* held at para. 16:
- [16] The respondent did not have to pay costs to the defendant in the second accident because of any position taken by the appellant in the first action. She had to pay costs against that defendant because she failed to prove her case against him. In these circumstances, those costs cannot be visited upon the appellant by way of a Bullock order made pursuant to Rule 57(18) [now Rule 14-1(8)].
- [20] Mr. Justice Halfyard succinctly summarized the law in *Brooks-Martin v. Martin*, 2011 BCSC 497 at para. 7, provided by the plaintiff:
- [7] In order to justify the exercise of discretion in his or her favour, a plaintiff must establish two elements, namely:
- a) that it was reasonable for the plaintiff to have sued the successful defendant together with the unsuccessful defendant; and
 - b) that there was some conduct on the part of the unsuccessful defendant (such as asserting that the successful defendant was the culprit in the case or committing some act or acts which caused the plaintiff to bring the successful defendant into the litigation) which makes it just to require the unsuccessful defendant to pay the costs of the successful defendant.

See *Grassi v. WIC Radio Ltd.* 2001 BCCA 376 at paras 32-34; *Davidson v. Tahtsa Timber Ltd.* 2010 BCCA 528 at paras 53-54.

[21] While I agree with the plaintiff that it was reasonable in the circumstances to name Ms. Morgan as a defendant, I do not agree that this is an appropriate situation for a Bullock Order. Mr. Berretta admitted liability and did not take any position in the litigation that necessitated bringing Ms. Morgan into the litigation. These are not the circumstances contemplated by Rule 14-1(18).

[22] I decline to grant a Bullock Order. The defendant, Ms. Morgan is entitled to her costs and disbursements at scale B.

Costs from the time of the settlement offers

[23] Rule 9-1(5) and (6) provide as follows:

Cost options

- (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

- (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.

[24] The dominant and overarching objective of Rule 9-1 is to promote reasonable settlements and to attach some consequences to the failure of a party to accept a reasonable settlement: *Brewster v. Li*, 2014 BCSC 463 at para. 15. Our Court of Appeal explained this further in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16 at para. 16, leave to appeal ref'd [2008] S.C.C.A. No. 454:

[16] It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.

[25] There is broad discretion in costs in relation to formal offers to settle. The court may award a party costs even though that party earlier rejected a settlement offer that would have resulted in greater recovery than the award made at trial. On the other hand, the court may penalize a party who has rejected a reasonable settlement offer by an award of single or double costs against that party: *Minhas v. Sartor*, 2014 BCSC 47 at para. 23. The court's discretion is exercised in accordance with the purposes of the Supreme Court Civil Rules and on consideration of the Rule 9-1(6) factors. I will now consider each factor.

a) Should the plaintiff have reasonably accepted the offers?

[26] The assessment of whether an offer ought reasonably to have been accepted must be based on what was known while the offer was available, not with the benefit of hindsight after the judgment of the court: *Bailey v. Jang*, 2008 BCSC 1372 at para. 24; *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.

[27] The reasonableness of an offer 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": *Hartshorne* at para. 27.

[28] The defendants' first settlement offer was provided on February 3, 2012, more than two months before trial. At that time the parties' trial briefs, which had been filed in October 2011, indicated a trial by jury was set for 10 days. The plaintiff listed 23 expert witnesses and 9 lay witnesses she intended to call, relying on 19 expert reports. The defendants plainly stated they were disputing causation and all heads of damages and their position was that if the plaintiff was injured, the injuries were very minor and any injuries actually caused by the accidents had long since resolved. The defendants intended to rely on three expert reports and planned to call those experts, along with three additional lay witnesses and the two defendants.

- [29] The second offer, which increased the offer from \$120,000 to \$200,000, was made five days before trial on April 5, 2012, but only because it took the plaintiff until two days earlier (almost a month following the date set by Hyslop J.) to provide their court-ordered settlement proposal. On March 7, 2012, the defendants had filed an updated trial brief repeating their position on the issues, adding a fourth expert report from a radiologist and listing four additional witnesses, including investigators. This trial brief also included a list of case authorities which would be relied upon for a possible mistrial application, and evidentiary concerns and issues related to the charge to the jury if the trial went ahead by jury.
- [30] The offers were open until the first day of trial. The plaintiff had ample time to consider settlement of this case and was informed of the settlement offers at a time when most of the evidence was already available to the parties.
- [31] The offers were made to settle the two actions in their entirety. There was no rationale for the offer provided in the settlement offer letters.
- [32] The settlement amounts (\$120,000 and \$200,000) cannot be considered "nominal" or "nuisance" offers. I am satisfied they were genuine offers based on the defendants' assessment of the likely outcome at trial and, most significantly, the expense they would incur if the case proceeded to trial.
- [33] The plaintiff submits that she relied on the opinions of a number of medical experts at trial that "provided support for the plaintiff's position that she had sustained damages related to chronic pain, cognitive dysfunction and psychological injury." The plethora of reports she received gave her "the impression that there was substantial evidence to support the extent of her injuries." She also asserts it was an "unexpected outcome" at the time of the offers that a number of expert opinions she intended to rely on would be deemed inadmissible at trial.
- [34] Since the "reasonableness" analysis is considered from the perspective of the person receiving the offer (*Ward v. Klaus*, 2012 BCSC 99 at para. 36), the plaintiff submits she had a sufficient basis for pursuing her claim based on the medical evidence, especially in light of the fact that liability had been admitted. The plaintiff further relies on *Wafler v. Trinh*, 2014 BCCA 95 at para. 65, in which our Court of Appeal stated:
- [65] A plaintiff, in considering an offer to settle, obviously cannot ignore the evidence against him. But if there is a reasonable degree of confidence in the evidence that supports his theory, then it seems to me he should not be unduly penalized when the trier of fact ultimately accepts evidence to the contrary.
- [35] The defendants submit that the "reasonableness" test is not a subjective one. On an objective basis, the plaintiff was aware of the defendants' objections to a substantial number of the 28 expert reports served by the plaintiff and the possibility that a number of the expert opinions would be ruled inadmissible, given their deficiencies, should have been apparent to the plaintiff or her counsel. The plaintiff was also aware of the defendants' contrary

medical opinions which stated the plaintiff had suffered a minor injury with very short-lived symptoms. Although the defendants admitted liability, they denied causation and damages.

- [36] An objective examination of the evidence the plaintiff had marshalled in advance of the trial should have led her to conclude that certain of her claims were tenuous and of questionable merit. I agree with the defendants that it is the quality, not the quantity, of the expert opinions that should be considered. The plaintiff knew, as the court later found, that many of the opinions were problematic because they relied on the accuracy of the plaintiff's self-reporting. The plaintiff and her counsel ought to have known that the credibility and reliability of her evidence would be a major deciding factor in relation to both the issues of causation and damages because of this. The findings of Madam Justice Baker in *Minhas* at para. 87 are applicable in this case:
- [87] In summary, in considering whether the offer to settle was one that ought reasonably to have been accepted, I am satisfied that Mr. Minhas and his counsel knew that Mr. Minhas's claim to have suffered a brain injury could only succeed if Mr. Minhas was found to be a credible historian and witness; that the defendant intended to robustly challenge Mr. Minhas's credibility; and that the court would be provided with objective evidence, as well as inconsistent testimony on discovery, from which it would be reasonable to conclude that Mr. Minhas was an unreliable historian and witness.
- [37] I agree with Madam Justice Kirkpatrick's statement in *Gehlen v. Rana*, 2011 BCCA 219 at para. 51 that the drafters of Rule 9-1 could not have intended that a party's failure to anticipate credibility issues would defeat the operation of a reasonable offer to settle.
- [38] Of importance are the plaintiff's claims for past income loss and loss of future earning capacity which made up a significant percentage of the global claim. The plaintiff would have known at the time of the settlement offers that there was no independent evidence on which to base these claims, beyond the opinions and speculations of the plaintiff, her husband and her friends, and should have known these claims had little chance of succeeding.
- [39] I find that in light of the weaknesses and deficiencies in the plaintiff's case, despite a large number of expert reports, the plaintiff should have reasonably accepted the settlement offer of April 5, 2012.
- b) What is the relationship between the terms of settlement offered and the final judgment of the court?
- [40] The plaintiff concedes this factor *prima facie* favours an award of costs to the defendants but asks the court to be cautious about placing too much weight on this factor, relying on *Smagh v. Bumbrah*, 2009 BCSC 623 at para. 13. I note that this caution was made by Kelleher J. regarding the unpredictability of jury decisions on damages, which is not applicable in this case. The plaintiff asserts that even the defendants did not foresee a judgment to be as low as it ultimately was, based on their settlement offer.

- [41] The first offer to settle (\$120,000) was more than double the amount of the actual award at trial (\$55,923.43); the second offer (\$200,000) was almost four times the amount of the award. In contrast, the amount sought by the plaintiff at trial (\$1,347,735 to \$2,411,199) bore no resemblance to the offers or the award.
- [42] I refuse to infer from the defendants' settlement offer amounts that they did not foresee a low judgment; there are many factors which inform the crafting of an attractive settlement offer that will allow parties to avoid the costs of a full trial.
- [43] This factor favours a cost award to the defendants.
- c) What are the relative financial circumstances of the parties?
- [44] Insurance can be a relevant consideration in an assessment of costs: *Smith v. Tedford*, 2010 BCCA 302 at para. 19. While it is not automatically a factor to be considered against the insured party, the facts of the particular case will govern whether it should be considered, and if so, what weight should be given to it: *Mazur v. Lucas*, 2011 BCSC 1685 at para. 53, *aff'd* 2014 BCCA 19.
- [45] The plaintiff submits that the defendants' insurer has the resources to fund the litigation independently. She further submits the defendants' disbursements were considerably less than the plaintiff's because the plaintiff had the burden of proof and, therefore, the plaintiff's costs will exceed the trial award.
- [46] Plaintiff's counsel asserts the plaintiff will suffer significant financial hardship if the defendants are awarded costs since she remains unemployed, has not been able to work since the accidents and continues to seek treatments for her injuries.
- [47] The defendants note that the plaintiff has not provided any evidence of her financial position to support such hardship; the only known evidence at the time of trial was that the plaintiff and her husband owned their home mortgage-free, sent their children to expensive private schools and the plaintiff's husband had a successful private accounting practice.
- [48] The defendants further submit that there is no evidence that they or their insurer used its financial strength to gain advantage, nor is there any suggestion "that the plaintiff was unable, by reason of relative financial disadvantage, to fully prosecute [her] claim": *Minhas* at para. 96. Furthermore, "[i]t is not the court's function to ensure that a plaintiff makes a net recovery from an action when it has ignored a reasonable offer. That would defeat the purpose of the Rule and does not accord with common sense": *Dempsey v. Oh*, 2011 BCSC 627 at para. 19.
- [49] While I appreciate the disappointment a plaintiff may experience when costs potentially surmount an award granted at trial, the plaintiff proceeded with her case in a manner that did not indicate any financial disadvantage and has not provided evidence of financial hardship. In the circumstances of this case, I do not find the factor of insurance should be given weight.

d) Is there any other factor the court deems relevant?

[50] The defendants submit that one relevant factor is whether or not the result in a case was one that turned, in part, on credibility as opposed to difficult questions of causation: Ward at para. 44. I agree this factor weighs in the defendants' favour because of my findings at trial on the credibility of the plaintiff related to her testimony and the self-reporting on which the experts relied. The defendants further submit that lack of candour, dishonesty or exaggeration have been considered relevant factors in assessing costs: Lakhani v. Elliott, 2010 BCSC 281 at para. 20. However, they do not point to any specific evidence to warrant such a finding.

[51] The defendants assert the damages sought by the plaintiff and the amount spent on litigation ought to be relevant considerations as well. The plaintiff incurred disbursements out of proportion to the case, which involved two very minor rear-end accidents, "presumably on the assumption that all such expense would be borne by the defence." The defendants had no choice but to proceed to trial in the face of the plaintiff's "unrealistic position on damages, and excessive spending on disbursements."

[52] While the plaintiff did maintain an unrealistic position in the case, I do not find that she was deliberately dishonest or lacking in candour. I have not considered the plaintiff's credibility in this regard in my determination of the costs awarded in this case.

Conclusion

[53] Upon consideration of the factors above, as well as the overall purpose of the rules respecting formal offers, I find that the defendants should be granted costs from the date of delivery of the second formal offer to settle, April 5, 2012. I choose this date, rather than the date of the first formal offer two months earlier, because there is no doubt that on the eve of the trial the plaintiff and her former counsel ought to have recognized the weaknesses in her case and the settlement offer of \$200,000 should reasonably have been accepted based upon that knowledge. I note that the offer included the clause that the plaintiff would be entitled to her costs and reasonable disbursements up to the date of delivery of the offer.

[54] For clarity's sake, I summarize my findings on costs in this matter:

- 1) The plaintiff is entitled to her costs at Scale B up to April 5, 2012.
- 2) The defendants are entitled to costs for the first two days of trial; however, such costs are now subsumed in the costs award arising from the offer to settle.
- 3) The defendant, Ms. Morgan, is entitled to her costs and disbursements at scale B to be paid by the plaintiff.
- 4) The defendant, Mr. Berretta, is entitled to his costs at scale B from April 5, 2012 onwards through the completion of trial.

[55] If the parties are unable to agree on the amount of the costs, there will be a reference to the registrar.

"Russell J."

The Honourable Madam Justice Russell

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/15/11/2015BCSC1168.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/warren-v-morgan-2015>

Prepared on 26 October 2026 · Esheria