

CANADA / JUDGMENT

Xiang v. Wong

2024 BCSC 512

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 512 Xiang v. Wong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xiang v. Wong,

2024 BCSC 512

Date: 20240124

Docket: M166362

Registry: Vancouver

Between:

Jing Yun Xiang

Plaintiff

And

Siu Kwan Wong

Defendant

- and -

Docket: M166364

Registry: Vancouver

Between:

Diqiu Xiang, an infant, by her litigation guardian, Wen Na Di

Plaintiff

And

Siu Kwan Wong

Defendant

And

Jing Yun Xiang

Third Party

Before: The Honourable Mr Justice Crerar

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs and Third Party in Actions No. M166362 and M166364:

E. Kwa

Counsel for the Defendant in Actions No. M166362 and M166364:

P.K. Hamilton

Place and Date of Hearing:

Vancouver

January 24, 2024

Place and Date of Judgment:

Vancouver

January 24, 2024

- [1] THE COURT: These are my reasons for judgment in the defendant's application for specific costs orders with respect to these two matters that were tried together. I make my usual reservation to edit or expand these reasons if a transcript is ordered or for any other reason.
- [2] I thank counsel for their thorough arguments that were provided in advance of this hearing. I have read those arguments and had the benefit of considering them at length before this hearing today, and I am grateful for counsel not rereading those arguments but rather providing some further gloss on those arguments.
- [3] This personal injury case concerns a father and a daughter who were involved in a collision in Burnaby in August 2014. The two actions were ordered to be tried together. I agree that joinder was appropriate, having the benefit of hearing those trials.

- [4] As set out in the trial reasons referenced as 2023 BCSC 1984, the collision occurred just down the road from the father and daughter's family apartment. The father, the daughter, and the younger son were proceeding towards a playground. The father was distracted by the younger son. The daughter darted across the crosswalk leading to the playground. The defendant, who was driving the speed limit but faster than she ought to have given the proximity of the playground, jammed on her brakes. She only lightly struck the daughter. The daughter was knocked to the ground, but immediately stood up.
- [5] The father did not witness the accident. His first sight was the confirmation that his daughter had enough physical wellbeing to stand up on her own. She had minor scrapes on her knee and ankle; her injuries largely resolved. She did not seek treatment for her injuries to any substantial degree from 2015 to the date of trial. She was largely functional in her personal life and her scholastic life, and, indeed, she excelled in school.
- [6] She sought non-pecuniary damages of between \$50,000 and \$60,000 for physical and psychological injuries. At the end of the day, she was awarded \$20,000. That was eventually reduced to \$5,000, based upon a finding of contributory negligence against both herself and her father for not taking due care:
- [29] While the daughter darted into the crosswalk, the driver could have largely avoided the accident by decelerating upon seeing the plaintiff family and the playground ahead. The father's ability to avoid the accident, by holding his daughter's hand, by taking better care to check for oncoming traffic, and by not authorizing her to cross, distinguish this case from *Panganiban*. The court ascribes fault at 25 percent of the daughter, 25 percent of the father, and 50 percent to the defendant.
- [81] The daughter's \$20,000 damages award will be proportioned as follows: the defendant \$10,000; the father \$5,000; with \$5,000 denied, representing the daughter's own contributory negligence.
- [7] For his part, the father sought \$90,000 to \$100,000 in damages for mental injury arising from the accident. The Court dismissed the father's claims in their entirety. It was not reasonably foreseeable that a person of ordinary fortitude would suffer serious psychological injury in response to the events caused by the defendant's negligence. Such damage was too remote under the principles set out in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.
- [8] At the end of the reasons, the Court made the following costs order:
- [82] The daughter has been successful, if not to the extent sought, in her action. The defendant has been successful in the father's action.

- [83] The successful parties are presumptively entitled to their costs at Scale B. If any party wishes to dislodge this presumption, that party will advise the others within 20 days of these reasons, and schedule a date with the Registry for a date as soon as reasonably practicable to argue the matter, with provision of written arguments to the other side and to the Court at least seven days before the hearing date.
- [9] The defendant took the Court up on its invitation, and she brings this present application for modified costs orders.
- [10] The defendant points to two formal offers to settle that were issued in each of the actions. On October 28, 2021, the defendant issued an offer to settle to the daughter for \$25,000. That is \$5,000 more than the damages conceptually awarded at trial and \$20,000 more than she will actually receive after the finding of contributory negligence.
- [11] On June 29, 2023, the defendant issued a formal offer to settle to the father for \$5,000. That is, of course, \$5,000 more than he received at trial.
- [12] Rule 9-1(5) of the Supreme Court Civil Rules, BC Reg 168/2009, provides a wide discretion to the court in making costs orders. With respect to a formal offer to settle, Rule 9-1(6) sets out considerations for the court in assessing whether an offer to settle ought reasonably to have been accepted and the costs consequences of not accepting that offer:

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.

[13] As set out in the leading case of *Hartshorne v. Hartshorne*, 2011 BCCA 29:

[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.

[26] Rule 37B(6) of the Rules of Court (which is now R. 9-1(6) of the Supreme Court Civil Rules and remains the same as its predecessor) lists the following factors to be considered in making an award for double costs under R. 37B(5)(b):

- (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 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.

[14] Hartshorne at para. 27 provides further guidance adding to the Rule 9-1(6) considerations of the court. These include:

- 1) the timing of the offer;
- 2) whether it had some relationship to the claim;
- 3) whether it could be easily evaluated; and
- 4) whether some rationale for the offer was provided.

[15] I will start with the offer to settle issued to the daughter. With respect to the daughter, the defendant seeks the following three orders:

- a) disbursements to the plaintiff including and up until the offer to settle;
- b) costs to the defendant at Scale B from the date of the offer to settle; and
- c) costs to the defendant from the date of the offer to settle payable by the father.

[16] The rationale provided for the third order sought is that the father was very much the driving force of this litigation--indeed, the mother had little knowledge of the litigation--and that any consideration of costs consequences ought to be borne by the father.

[17] The daughter argues that it was difficult to evaluate the formal offer to settle. In the cover letter, the defendant provided no rationale for the offer to settle in the manner that one sees: in effect, a mini argument. Further, the daughter did not yet have the defendant's medical reports in hand at the time of the formal offer to settle.

[18] The daughter cites the case of *Nemoto v. Phagura*, 2013 BCSC 370 as providing useful guidance for the assessment of damages where an offer to settle has been issued with respect to a claimed soft tissue injury, particularly one claimed by a child. In that case, the Court noted that the plaintiff had sufficient information to know that they had good grounds to be awarded some measure of damages but that given the amorphous nature of such injuries, the damages that could conceivably be awarded fell within a wide range. The daughter repeats such arguments today.

[19] The daughter also argues that because she was a minor at the time of trial, any settlement would have to be approved by the Public Guardian. In the absence of medical reports or an explanation or rationale provided by the defendant, it would have been difficult to convince the Public Guardian that the offer should have been accepted.

- [20] Notwithstanding these arguments, I largely agree with the submissions of the defendant with respect to the offer to settle issued to the daughter.
- [21] Notwithstanding the absence of the defendant's medical reports at the time of the offer, and notwithstanding the absence of a rationale in the cover letter, the plaintiff herself and her parents knew that she had only suffered minor injuries.
- [22] Indeed, the action was started only on the eve of the expiration of the two-year limitation period, and after the plaintiff had largely stopped seeking treatment for her injuries. She continued to excel at school, and she suffered only minor physical impairment.
- [23] The fact that she was not seeking any substantial treatment for those ongoing complaints speaks volumes today and ought to have spoken volumes to the daughter and, more pointedly, to her father at the time the offer was received.
- [24] Her own medical reports--both the expert medical legal reports as well as her own treatment reports--and, again, the notable absence of reports that would have been generated by further treatment, also ought to have indicated that the damages would likely be modest. The arrival of the defendant's medical reports would have confirmed the low damages award rather than serving as some form of epiphany.
- [25] Again, the daughter and her father were in the best position--over the defendant and the defendant's medical legal experts--to evaluate the severity, longevity, and financial worth of her claim.
- [26] With respect to liability, it also should have been clear to the plaintiff and her father that there was an acute possibility of a finding of significant contributory negligence.
- [27] The daughter possessed at an early stage the police report, as well as the compelling evidence of the neutral witness, Ms. Maxwell. I have no reason to believe that the impressive and persuasive nature of Ms. Maxwell's evidence at trial was unforeseeable to the daughter.
- [28] In short, not only was contributory negligence pleaded as it often is in personal injury claims, in a boiler-plate fashion, but it was or ought to have been appreciated by the daughter, by the father, and by their counsel that the daughter might receive considerably less than the \$25,000 offer. Thus, while \$25,000 may seem low in a personal injury case, it was not a nuisance offer to settle. Indeed, it was roughly 50 percent of what the plaintiff daughter herself was asking for at trial. Given the significant risk of a finding of contributory negligence--which could certainly be quantified at between 25 and 50 percent--and the likelihood of a low damages award that would be carved out by that contributory negligence, the offer ought to have been seriously considered and ought to have been accepted.

- [29] To address one final argument advanced by the daughter: while the defendant was, of course, backed up by ICBC, there was no particular evidence of misuse of this power and financial disparity. As noted in the reasons, the father enjoys a lucrative job in Redmond, Washington. The father, and consequently the daughter, were not suffering from any sort of economic duress when they received the offer. This observation, of course, also speaks to the considerations of the father's response to the offer to settle.
- [30] The first aspect of the damages award sought--disbursements to the plaintiff including and up until the offer to settle--is based on Rule 9-1(7):

Costs for settlement in cases within small claims jurisdiction

- (7) A plaintiff who accepts an offer to settle for a sum within the jurisdiction of the Provincial Court under the Small Claims Act is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.
- [31] The defendant argues that the low damages award indicates that the claim should have been brought in the Provincial Court, with a damages jurisdiction of \$25,000.
- [32] I am not satisfied that it would have been appropriate to have brought this action in the small claims court in the first instance. I decline to make the order sought by the defendant under sub (a).
- [33] As indicated earlier, it was appropriate that the father and daughter's claims be heard together. These two claims were quantified at \$50,000 to \$60,000 and \$90,000 to \$100,000 at trial. It would have been inefficient to bring these two claims separately in the small claims court. In any case, notwithstanding the relationship of the offer to settle to the amount eventually awarded at trial, it was not perverse or irresponsible for the plaintiffs to advance these claims for those amounts at trial in the first instance. Accordingly, I will allow the daughter to receive, as per my original presumptive order, ordinary costs up to and until the formal offer to settle.
- [34] I am also not going to issue the order sought in sub (c): that the father, in effect, step into the shoes of the daughter and pay costs to the defendant from the date of the offer to settle. No precedent was provided to me for this order. Again, I am satisfied that it was reasonable to bring both of these claims either viewed individually or together in this Court as opposed to the small claims court.
- [35] Accordingly, I will grant only order (b) sought: that the plaintiff daughter pay costs to the defendant at Scale B from the date of the offer to settle.
- [36] I will now turn to the offer to settle issued to the father. The defendant seeks that there be costs to the defendant at Scale B on a single-cost basis up to the offer to settle, and that there be double costs paid to the defendant from the date of the offer to settle.

- [37] The defendant makes a persuasive argument that double costs ought to be awarded. If not, the father will be, in effect, rewarded for ignoring a reasonable offer to settle that ought to have been accepted. There should be an incentive to accept and, conversely, a disincentive against proceeding to trial in the face of an offer that should be accepted.
- [38] The defendant also argues that the case was highly dependent on the father's credibility and that the reasons for judgment expressed skepticism about the honesty, integrity, and motivations of the father.
- [39] The defendant argues that the father ought to have known that his psychological injuries were minor and that he was able to function personally and professionally and that, indeed, he continued to function at a high level in his lucrative and intellectually demanding programming role.
- [40] Apart from that subjective knowledge, since November 2021, the father had in hand the medical report of Dr. Okorie. That report supported the defendant's assertion in her counsel's earlier November 2021 offer to settle:

I have instructions from my client to consent to dismissal of your client action on a without cost basis; in other words, my client will walk away from their costs incurred to date. Your client's psychological complaints, if any, were minimal and did not interfere with his ability to function. My client is also of the opinion that any minimal complaints he has arising from this matter occurred because of his failure to properly supervise his daughter.

- [41] The defendant does not directly rely upon that more informal November 2021 offer. That said, the rationale provided in the November 2021 evaluation of the case and offer to walk away from the case was largely borne out in the reasons for judgment. Indeed, the Dr. Okorie report delivered around the same time was largely accepted at trial.
- [42] That said, the Court declines to make a double-costs order based on the unusual and difficult facts before the Court and considerations that the plaintiff father and his counsel would have had to evaluate at the time the formal offer to settle was received.
- [43] As evidenced by the lengthy discussion in the reasons of the jurisprudence surrounding the evaluation and quantification of damages for psychological injuries, under Mustapha and precedents before and after that decision, that is a notoriously difficult exercise both in fact and in law. Unlike a physical injury, it is difficult to visually evaluate the effects of psychological trauma. As a matter of law, despite the guidance of Mustapha, there remains limited jurisprudence that would guide a party in evaluating its claim.
- [44] Indeed, in reaching the conclusions, the present reasons for judgment explored earlier British Columbia Court of Appeal precedents for guidance on this particularly difficult evaluation of whether it was reasonably foreseeable that the defendant's negligence would inflict a mental injury.
- [45] As the reasons noted, the result was far from intuitive:

[52] The Mustapha and Saadati passages above contain an ambiguity arising from the remoteness query: whether "a mental injury" in a person of ordinary fortitude was the reasonably foreseeable result of the defendant's negligent conduct: of particular relevance to the present case where a parent witnesses the aftermath of a light vehicular collision inflicting a minor injury on his child. While it would not be reasonably foreseeable that a person or even parent of ordinary fortitude would suffer mental injury to the degree alleged by the father, it is reasonably foreseeable that a person or parent of ordinary fortitude would suffer some kind of mental injury--"a mental injury"--in contemplating what could easily have occurred but for chance: the death of the child. Put conversely, to use the language in Mustapha at paras. 13-15, one would arguably not consider a parent who developed some form of mental injury after seeing such a minor automobile accident to display "exceptional frailty," nor such a reaction to be "unusual or extreme," nor such a result to be "far-fetched." It would flow that legal causation would be established for many if not most parents witnessing the injury of a child where such an injury was or could have been fatal.

[emphasis in original]

[46] Regardless of Mustapha, on an ordinary level, it is arguably fully foreseeable that a parent witnessing a child have a near-death experience, or even just hearing of such an experience, would suffer psychological injury. The fact that the parent receives immediate reassurance that the injuries were likely minor, on an ordinary analysis, would not necessarily avert psychological injury. Notwithstanding the principled approach set out in Mustapha, there still exists considerable uncertainty as well as the influence of policy considerations--indicated by the earlier jurisprudence--guiding whether psychological injury is reasonably foreseeable and proximate in a difficult case such as the present.

[47] Further, the father himself knew that he had indeed suffered psychological effects from the collision. Those were very apparent during trial. The father broke down on two occasions. He interrupted his cross-examination with angry and impassioned speeches about various distresses he had suffered in his life. As recognized in the reasons, the Court did not consider those emotional outbursts to be insincere:

[78] The father's trial answers did indicate that he harbours much anger and resentment, but these cannot be attributable in fact or in law to the accident. In his cross-examination answers, he was frequently angry, argumentative, and arrogant. In the closing stages of his cross-examination, he abruptly expressed a lack of confidence in the interpreter. He then launched into a lengthy diatribe about, inter alia, various frustrations he has suffered in life: the litigation and the insurer; pressures from his family in China; having to take a second master's degree upon his immigration to Canada; job-search difficulties; would-be employers expecting him to speak English; and not enjoying a higher-paying and more prestigious position than his half-million US dollar job. His daughter's well-being, and his concern about her health and the accident, were barely mentioned.

- [79] His testimony, coupled with the expert reports, confirm that he does suffer significant feelings of guilt and shame from the accident. To his credit, his pre-accident distraction arose from the responsible parental attention he paid to his toddler. The father in this case was much more responsible and attentive than many Vancouver parents one sees, with a coffee in one hand and an iPhone in the other, walking head-down while their children run randomly on streets and sidewalks. What happened to the father could happen to any parent. It is hoped that he will follow the advice of Dr Ganesan and seek professional help, going forward, so as to better enjoy his successful family and successful career.
- [48] Thus, ultimately the Court concluded that the father's psychological distress was genuine. Further, the Court concluded that psychological distress was in part connected to the effects of the collision, but not in a manner for which the defendant should bear liability. Those psychological effects flowed largely from his feelings of guilt, rather than anything that he witnessed at the trial. Again, his only visual experience of the accident, given that he was focusing on his son, was the confirmation immediately after the accident that the daughter had blessedly only suffered minor injuries.
- [49] The reference at para. 77 to the father's exaggerated self-reporting of the accident does not reflect a concern about credibility or the honesty of the father, a point on which the defendant has largely rested her argument today. Rather, the Court was more concerned with respect to the father's reliability and his ability to separate feelings of psychological distress flowing from guilt, versus psychological distress flowing from the actions of the defendant, versus other psychological issues not related to the accident.
- [50] Given this jurisprudential and psychological uncertainty, advancing a claim of between \$90,000 and \$100,000 for psychological injuries at trial was not unreasonable. Thus, the rejection of a \$5,000 offer to settle, as a small percentage of that reasonably advanced amount, was not unreasonable.
- [51] Accordingly, I find that it would be inappropriate to make an order of double costs against the father. Rather, ordinary costs will be ordered for the entire proceeding by the father to the defendant based upon the outcome at trial.

"Crerar J"

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