IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dyck v. Davies,*
2023 BCSC 997

Date: 20230612
Docket: M120721
Registry: Kelowna

Between:

Henry Dyck

Plaintiff

And

Jeffrey Davies

Defendant

Before: The Honourable Madam Justice Hardwick

Reasons for Judgment
Re Costs

Counsel for the Plaintiff:	D.G. Einfeld C. Trivett
Counsel for the Defendant:	J.T. Belding J. Walker
Date of Plaintiff's Written Submissions:	May 17, 2023
Place and Date of Judgment:	Kelowna, B.C. June 12, 2023

[1] These are my reasons for judgment on the issue of costs, following the trial of this action.

[2] My reasons for judgment following the trial in this matter were released on May 8, 2023. As the relevant facts are set out in my reasons for judgment, I will not repeat them in detail. Rather, I will very briefly summarize that:

a) The plaintiff was the operator of a vehicle that was struck by the defendant driver;

b) Liability disputed notwithstanding certain key admissions from the defendant driver;

c) The key issues in terms of the assessment of the *quantum* of damages were:

i. Determination of general damages,

ii. The claim for future income loss;

iii. The claim for past wage loss; and

iv. The claim for loss of housekeeping capacity.

d) Ultimately, after hearing the evidence tendered by the plaintiff and the submissions of counsel for both parties, my conclusions on the *quantum* of damages can be summarized as follows:

Non-pecuniary damages:	$115,000
Loss of past income-earning capacity:	$20,000
Loss of future income-earning capacity:	$0
Loss of housekeeping capacity:	$0
Cost of future care:	$800.00
Special damages:	$1,065.16

TOTAL: **$136,865.16**

[3] In my final order arising from the trial, I indicated that the plaintiff, as the substantively successful party, was entitled to his costs of this proceeding. I did, however, expressly give both the plaintiff and defence the liberty to make written submissions on the issue of costs in the event that there were issues arising from a formal offer or offers to settle made in accordance with R. 9-1 of the *Supreme Court Civil Rules*. Specifically, I gave the plaintiff 14 days from the date of my reasons for judgment, and the defendant 28 days from the date of my reasons for judgment, to provide written submissions through Supreme Court Scheduling. I further ordered that there would be no need for reply submissions on the issue of costs but did allow, in my discretion, to convene an oral hearing after receipt and review of the written submissions.

[4] The plaintiff opted to make written submissions on the issue of costs and provided those submissions within the timeline set forth in my final order following the trial. The defendant has not provided written submissions and no request has been made to extend the time provided for in my order. As such, I have concluded that the defendant does not intend to provide written submissions on the issue of costs.

The Formal Offer

[5] As part of the submissions filed on behalf of the plaintiff, I am advised that there were two formal offers to settle made.

[6] On August 12, 2022, the plaintiff presented a formal offer to the defendant to resolve this matter in the amount of $161,000 plus costs and disbursements. This offer remained open until 4 p.m. Pacific Time, on the last business day prior to the commencement of the first day of trial in this proceeding.

[7] In a further effort to settle this matter, the plaintiff presented a second formal offer to the defendant In the amount of $127,000 plus costs and disbursements on August 17, 2022. This offer revoked the August 12, 2022, offer and remained open

until 4 p.m. Pacific Time, on the last business day prior to the commencement of the first day of trial in this proceeding (the “Formal Offer to Settle”).

[8] The trial commenced on August 29, 2022.

[9] There were some issues with delayed or late financial disclosure pertaining to the plaintiff’s claim for damages for loss of future income earning capacity. I do conclude, however, that by the time the Formal Offer to Settle was made both parties were well aware of the facts of the case and the generally anticipated evidence at trial. As a result, the timeline for acceptance of the formal offer was tight, but not unreasonable in the specific circumstances of this case and the experienced counsel for both parties.

[10] Ultimately, considering the evidence and the submissions, this Court made a determination as to the *quantum* of damages as described above. The *quantum* of damages is slightly higher than the amount specified in the Formal Offer to Settle by approximately $10,000.

Brief Summary of the Law Regarding Formal Offers

[11] Rule 9-1(5)(b) of the *Supreme Court Civil Rules* sets out that in a proceeding in which an offer to settle has been made, the court may do one or more of the following: “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”.

[12] Rule 9-1(6) of the *Supreme Court Civil Rules* sets out the considerations that the court may consider:

> (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] In the 2011 decision of *Aujila v. Kaila*, 2011 BCSC 466, Mr. Justice Harris, as he then was, at para. 7, sets out the rationale for the double costs rule by quoting from the Court of Appeal decision in *Hartshorne v. Hartshorne*, 2011 BCCA 29:

> ***ii) The double costs rule and its guiding principles***
>
> [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 reasonably 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]. In this regard, Mr. Justice Frankel's comments in *Giles*, [2010 BCCA 282] 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": [citations omitted];
> >
> > "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": [citations omitted];
> >
> > "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: [citations omitted]
> >
> > [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 "discourage[ing] the continuance of doubtful cases or defences": [citations omitted].
>
> [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.
>
> [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 *A.E. v. D.W.J.*, "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.

Application of the Law Regarding Formal Offers to settle

[14] Applying the foregoing law to the circumstances of this case and specifically the Formal Offer to Settle, I have concluded that:

a) The Formal Offer to Settle was one that ought reasonably have been accepted. As noted, it was lower than the amount of damages awarded at trial. It was only lower by $10,000, but having regard to the *quantum* of damages in issue it is approximately 7 percent lower than the award at trial (which I note was quite a long trial given that virtually everything was in issue). If this had been a trial where there were millions of dollars in damages, a $10,000 difference might invoke a different exercise of the Court's discretion;

b) The only real concern is the late delivery of the Formal Offer to Settle and its short timeline for acceptance. However, in the particular circumstances of this case, I conclude that the plaintiff's case was sufficiently known by the defendant as at the date of Formal Offer to Settle such that they were in the position to consider a "short fuse" offer. I also have not received any submissions from the defendant which would suggest that there was some reason in which the defendant was unable, despite the general knowledge of the plaintiff's case, to consider and accept the plaintiff's Formal Offer to Settle within the short time frame provided in advance of trial;

c) In terms of the relative financial circumstances of the parties, liability was not admitted despite there being a key admission obtained at the

discovery of the defendant. The defence was assumed solely on behalf of the Insurance Corporation of British Columbia. In these circumstances, the guidance from the Court of Appeal in *Smith v. Tedford*, 2010 BCCA 302 and *Sauer v. Scales*, 2012 BCSC 1883 is instructive. Ultimately, having regard to these authorities and the circumstances of the case, the relative financial circumstances of the parties does not operate in the defendant's favour in considering whether to award double costs on the basis of the Formal Offer; and

d) Having regard to the decision by counsel for the defendant to not file written submissions regarding the issue of costs, there are no other factors which have been specifically identified for the Court to consider in assessing costs and there are no factors, in the circumstances of this case, which the Court has independently identified as being appropriate to consider in assessing costs.

Conclusion

[15] Having regard to the foregoing, I conclude that it is appropriate to order that:

a) The defendant shall be ordered to pay the plaintiff's costs and disbursements, as assessed pursuant to Scale B of the *Supreme Court Civil Rules*, to August 28, 2022; and

b) The defendant shall be ordered to pay the plaintiff's costs and disbursements from August 29, 2022 as double costs at Scale B pursuant to R. 9-1 of the *Supreme Court Civil Rules*.

"Hardwick J."