IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Henry v. Fontaine,*
2023 BCSC 558

Date: 20230313
Docket: M197153
Registry: Vancouver

Between:

Aaron Todd Henry

Plaintiff

And

Marcel Fontaine and Yvonne Fontaine

Defendants

Before: The Honourable Justice G.C. Weatherill

Oral Reasons for Judgment on Costs

Counsel for the Plaintiff:	R. Bisbicis
Counsel for the Defendants:	T. Lippold
Place and Date of Hearing:	Vancouver, B.C. March 13, 2023
Place and Date of Judgment:	Vancouver, B.C. March 13, 2023

[1] **THE COURT:** The plaintiff applies for double costs of the trial of this action.

[2] The plaintiff was injured in a motor vehicle accident on August 25, 2017. He commenced this action on July 2, 2019. The trial commenced on May 9, 2022, and lasted nine days.

[3] On May 4, 2022, the plaintiff delivered a formal offer to settle which stated:

> The Plaintiff makes a formal offer to settle in the above-noted proceeding. This offer is made pursuant to Rule 9-1.
>
> The Plaintiff offers to settle this action on the following terms:
>
> (1) Payment of $200,000.
>
> (2) The Plaintiff is entitled to his costs and disbursements in this action in accordance with Rule 14-1 and such sum to be assessed if the parties are unable to reach an agreement.
>
> (3) The Plaintiff will agree to execute and deliver a Full and Final Release in respect to the Defendants Marcel Fontaine and Yvonne Fontaine. The Plaintiff will also agree to the filing of a Consent Dismissal Order, if your client so desires.
>
> This offer is open for acceptance until 12:00PM, Pacific Standard Time, on Friday, May 6, 2022
>
> The Plaintiff, Aaron Todd Henry reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in this proceeding.

[4] I note parenthetically that in May of 2022, 12 o'clock p.m. Pacific Standard Time did not exist. It was Pacific Daylight Saving Time at that point.

[5] The offer was not accepted and the action proceeded to trial. The plaintiff was awarded judgment in the amount of $298,475.57, together with costs at Scale B. The breakdown of the damages award was as follows:

a) Non-pecuniary damages:	$80,000.00
b) Past loss of income-earning capacity:	$22,793.00
c) Future loss of income-earning capacity:	$185,000.00
d) Cost of future care:	$10,301.00
e) Loss of housekeeping capacity:	$0.00
f) Special damages:	$381.57

TOTAL: **$298,475.57**

[6] The parties subsequently reached an agreement on the quantum of s. 83 deductions with the result that the net judgment was $289,086.57 plus costs.

[7] The applicable rules on an application such as this are Rules 9-1(5) and (6) of the *Supreme Court Civil Rules*:

> **Cost options**
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> (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
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> (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.
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> **Considerations of court**
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> (6) In making an order under subrule (5), the court may consider the following:
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> (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;
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> (b) the relationship between the terms of settlement offered and the final judgment of the court;
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> (c) the relative financial circumstances of the parties;
>
> (d) any other factor the court considers appropriate.

[8] The policy underlining Rules 9-1(5) and (6) is to encourage early settlement of lawsuits by rewarding parties who make reasonable settlement offers that should

have been accepted and, correspondingly, penalizing parties who should have accepted reasonable settlement offers: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.

[9] The reasonableness of the settlement 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 being a nuisance offer), whether it could be easily evaluated, and whether some rationale for the offer was provided: *Hartshorne* at para. 27.

[10] The court has a broad discretion when determining the issue of costs: *Ward v. Klaus*, 2012 BCSC 99 at para. 33.

[11] The formal offer in this case was made essentially on the eve of trial. Counsel for the defendants candidly acknowledged that his clients had sufficient time before trial to consider it. However, whether the offer was one that ought reasonably to have been accepted must be assessed with reference to the circumstances existing at the time the offer was open for acceptance: *Barnes v. Lima*, 2014 BCSC 1475 at para. 9.

[12] In the reasons for judgment indexed at 2022 BCSC 930, I stated the following regarding the credibility of the plaintiff as a witness and the reliability of his evidence:

> [56] The plaintiff was an honest and credible witness, but he gave his evidence in a largely vague, imprecise, and generalized fashion. He was unable to provide specifics of the time he was unable to work due to his MVA-related injuries and offered little more than “guesstimates” in that regard. Accordingly, while I accept his evidence that he lost work-hours as a result of his MVA-related injuries, I am not satisfied that his evidence regarding average lost work days per month is reliable.

[13] In assessing the plaintiff's damages in respect of loss of earning capacity, I stated:

> [82] I am satisfied on the whole of the evidence that, despite the MVA, the plaintiff continues to be a highly skilled, hardworking and sought-after welder. I have no difficulty finding that, when working, he “runs himself hard” as he did before the MVA. I also have no difficulty finding that, but for the MVA, he would likely have worked more hours than he has—both at regular and

overtime rates. Accordingly, the question to be determined is how many hours of work he has lost.

[83] Instead of uncorroborated generalities regarding hours lost, it would have been helpful to have been provided with cogent evidence of the work the plaintiff missed—for example, in the form of a diary that could easily have been maintained. In the absence of such evidence, what would otherwise have been a relatively simple exercise for assessing the plaintiff's past wage loss has been made much more difficult.

[84] I find that the spreadsheet prepared by Ms. Kowalik accurately records the hours that the plaintiff worked for the period between the date of the MVA and October 29, 2017. The plaintiff worked a full shift on the Monday following the MVA, a half shift the following day, was off work for the next four working days, was on vacation for the following week and returned to work full-time thereafter. There is no indication in the spreadsheet that the plaintiff missed any other days of work prior to October 30, 2017, with the possible but unexplained exception of October 20, where it appears he apparently received "holiday pay".

[85] There are no records regarding the plaintiff's work schedule between October 30, 2017 and November 2018, when Newlands closed down. However, given the plaintiff's demonstrated actual work schedule—as set out in Ms. Kowalik's spreadsheet—together with a consideration of his T4 income for 2018, I am unable to accept the plaintiff's evidence that he missed between three to five days of work each month on average while working at Newlands after the MVA. If that was the case, a simple arithmetic exercise reveals that he would have had to work approximately 13 hours per day for every day he worked in 2018.

[86] I am also unable to accept as reliable the plaintiff's evidence that, on average, he has missed five to six days each month since then until trial when working as a sole proprietor or through AHS. AHS's invoices for the period January 1, 2019 to December 31, 2021 reveal that the plaintiff charged for a total of 1,552.5 hours in 2019, 1,998 hours in 2020, and 1,507.25 hours in 2021. The invoices do not disclose the number of days that were worked to generate those hours. Moreover, the plaintiff's explanation for 17 missing invoices that were identified—that they were allocated to welding jobs he had bid on but did not result in a contract—was mere speculation. Nevertheless, counsel argues that the plaintiff's demonstrated work ethic is sufficient proof that he would have worked 50 hours per week for at least 47 weeks (at total of 2,350 hours) in each of those years, and that the difference between that total and what he actually billed equates to his lost income.

[87] I reject this simplistic analysis as based on nothing more than mere speculation. It is also contrary to the evidence. The invoices show that the plaintiff regularly worked long hours over extended periods. The analysis also fails to consider significant time that was lost during 2020 due to the COVID-19 pandemic and the plaintiff's honeymoon holiday to Mexico in November 2021.

[88] I find that, despite his MVA-related injuries, the plaintiff has been able to work—albeit, with pain—at close to the pace he did prior to the MVA. This included overtime hours when he was feeling up to it. Although Ms. Ditson

> found that the plaintiff's functional limitations are limited to sustained use of his upper extremities for forward reaching, combined with sustained positioning of his head, neck and upper spine, the plaintiff did not lead any evidence as to what portion of his welding day involves such sustained positioning. Moreover, the plaintiff led no evidence as to how much longer it takes him to perform his welding tasks because of his neck pain. The uncontroverted evidence from the plaintiff himself is that he continues to have as much work available to him as he wants.
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> [89] Nevertheless, I am satisfied on the evidence as a whole that the plaintiff has demonstrated a real and substantial possibility that he has had to forego some days of work due to his MVA-related injuries. I assess that loss, on average, at one day each month of work commencing November 2017 when Newlands shut down. […]
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> […]
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> [111] Plaintiff's counsel submitted that the evidence supports a finding that, but for the MVA, the plaintiff would have worked 50 hours per week for 50 weeks per year until age 70. When the reasonableness of this assertion was questioned by the Court, he initially steadfastly maintained his position, then equivocated, then prevaricated and ultimately conceded it was devoid of common sense. He changed his position to suggest that a work schedule of 50 hours per week for 47 weeks per year until age 70 was supported by the evidence.
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> [112] It is the plaintiff's burden to demonstrate a real and substantial possibility that he would have maintained that work schedule for that length of time. Plaintiff's counsel's bald assertions that there is a real and substantial possibility the plaintiff will miss five to six working days per month until age 70 due to his MVA-related injuries not only defies common sense, but is not borne out by the available evidence as to his actual hours worked between the date of the MVA and trial.

[14] The quantum of damages to which the plaintiff was entitled for loss of earning capacity was a live issue in this action. The eventual award for loss of earning capacity, past and future, comprised almost 70 percent of the total judgment. As the foregoing excerpts make clear, the assessment of those claims was made difficult by the plaintiff's failure to provide cogent and reliable evidence of the hours of work he lost as a result of his MVA-related injuries. He provided nothing other than uncorroborated generalities. Although he admitted during his examination for discovery that he made notes of the hours he worked for the purpose of preparing his invoices, none of those notes were produced by him, despite the defendants' requests.

[15] The formal offer to settle did not inform the defendants of the amount the plaintiff was attributing to his loss of earning capacity. No rationale or documentary support was provided by the plaintiff for any portion of it.

[16] In my view, the simplistic and unreliable approach to the evidence relating to loss of earning capacity that was presented by the plaintiff was one that the defendants were reasonably entitled to test and have evaluated at trial because the plaintiff had simply not provided adequate information despite requests. The defendants' concerns were borne out at the trial.

[17] I agree with counsel for the defendants that, given the paucity of objective evidence as to the work missed by the plaintiff after the accident, a finding of reasonable and substantial possibility that he would have missed less than one day of work per month was well within the range of likely outcomes.

[18] Having considered the circumstances of this case and the submissions of counsel, I have concluded that the settlement offer was not one that the defendants ought reasonably to have accepted.

[19] I am exercising my discretion against the plaintiff. There will be no award of double costs.

[20] The plaintiff is entitled to his costs at Scale B as though the settlement offer was not made. The defendants are entitled to their costs of this application.

"G.C. Weatherill J."