IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Anderson v. Pieters,*
2017 BCSC 954

Date: 20170608
Docket: M160840
Registry: New Westminster

Between:

Teresa Anderson

Plaintiff

And

**Glen Pieters, Gold Key Sales and Lease Ltd.,
and Acrotech Cleaning Systems Inc.**

Defendants

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment on Costs

Counsel for the Plaintiff:	G. A. Smith D. K. Smith
Counsel for the Defendants:	T. Pettit
Place and Date of Hearing:	New Westminster, B.C. March 24, 2017
Place and Date of Judgment:	New Westminster, B.C. June 8, 2017

[1] A civil jury assessed the plaintiff's damages for injuries she sustained in a motor vehicle accident, and the parties now seek rulings as to costs.

[2] Following 16 days of evidence, numerous mid-trial *voir dires*, and submissions, the jury was charged and, after deliberating for approximately six hours, rendered judgment on May 17, 2016 in the amount of $294,500. The award was broken down amongst the following heads of damages:

Non-pecuniary damages:	$36,000.00
Special damages:	$5,500.00
Loss of future earning capacity:	$246,000.00
Cost of future care:	$7,000.00

[3] The plaintiff seeks double costs in respect of steps taken subsequent to the delivery of either of two settlement offers made before trial. The defendants oppose the award of double costs and seek disallowance of certain of the plaintiff's costs and disbursements, and an award of their own costs and disbursements, in respect of certain expert reports and other evidence that was ruled inadmissible.

Double Costs

[4] The Court’s discretionary power to award double costs in respect of steps taken after delivery of settlement offers is conferred by way of R. 9-1(5)(b) of the *Supreme Court Civil Rules* [*Rules*]. The Court's discretion is broad. Some considerations that may be applied in exercising that discretion are set out in R. 9-1(6):

> (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.

[5] The plaintiff made two offers to settle under R. 9-1.

[6] On April 11, 2016 – two weeks before trial – the plaintiff offered to settle for $275,000 plus costs and disbursements, after taking into account Part 7 benefits paid or payable. That offer was set out in a letter in which the plaintiff's counsel quantified the general damages at $100,000, and the potential future earnings losses – based on a 50% chance that the plaintiff would be limited to her current rate of earnings on a part-time basis – at $365,000. In addition, there were claims for special damages and the cost of future care which were not specified but were said to be “not insignificant”. The offer of $275,000 was said to represent a compromise, taking into account various contingencies.

[7] In response to that offer, on April 13 the defendants increased their settlement offer to $70,000. (To put this in perspective, the defendants had made an earlier offer, on December 10, 2015, of $60,000).

[8] The following day, April 14, 2016, the plaintiff reduced her offer to $195,000. That offer was said to take into account a number of objections the defendants had made with respect to the admissibility of the plaintiff's expert opinions, and concerns with respect to the inherent uncertainty of jury verdicts.

[9] Six days later, on April 20, 2016 – five days before the scheduled commencement of trial – the plaintiff served the defendants with a report from a forensic engineer, Gerald Sdoutz, as to the forces of impact on the plaintiff during the subject collision. On that same date, the plaintiff's counsel sent an email to the defendants' counsel withdrawing all settlement offers. The email message stated:

> We are taking this step at this time in consideration of the force of impact opinion that is based on the recently obtained photographs. As you will see the report concludes the forces involved in the collision were substantial, contrary to the evidence which we understood your client was seeking to adduce through the estimator and your client.

[10] It should be noted that no “force of impact” evidence, aside from the plaintiff's own evidence of her subjective impressions, was adduced at trial by either party.

[11] With regard to R. 9-1(6)(b), it is apparent that the plaintiff succeeded in “beating” both offers. The jury award exceeded the April 11 offer by $19,500, and exceeded the April 14 offer by $99,500. The defendants submit that not much weight should be given to this factor due to the inherent uncertainty of jury awards. While this uncertainty may be given some weight – see *Lumanlan v. Sadler*, 2009 BCSC 142 at para. 35 – I hesitate to place too much emphasis on it, as it is the defendants who took out the jury notice. It seems to me that a party should not be able to use its election of trial by jury to shield itself from the cost consequences such a choice may entail.

[12] It is certainly the case that the final award, viewed in hindsight, was well within the range of potential awards. This seems even more the case when one measures the exceedingly modest $36,000 award for pain and suffering against the future earning capacity award of $246,000; an injury severe enough to result in an earning capacity loss of that magnitude might very well have attracted non-pecuniary damages of a considerably greater amount. However, in judging the reasonableness, under R. 9-1(6)(a), of a party's failure to accept a settlement offer, it is a mistake to engage in hindsight analysis: see *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.

[13] In my view, the most significant factor in respect of the defendants’ non-acceptance of the settlement offers is that the offers were made against the backdrop of a claim that was rapidly and continually evolving, both as to the alleged nature of the plaintiff's injuries and as to the substance of the expert opinion evidence.

[14] The plaintiff, in her notice of civil claim, had alleged injuries to the cervical and lumbar spine, and left mandibular joint; concussion and post-concussion syndrome; sensitivity to bright light; headaches; and dizziness and vertigo.

[15] The 84-day deadline for the service of expert opinion reports was February 1, 2016. As of that date, the plaintiff had delivered reports from the following health practitioners:

(a) Dr. William Craig, physiatrist, dated August 18, 2014. Dr. Craig had diagnosed a moderate soft tissue injury to the neck, with a possible cervical facet joint injury; and a moderate soft tissue injury to the low back. Her neck injury was said to have a fair prognosis; the prognosis for the low back symptoms was judged to be more favourable. The plaintiff was believed to be likely a year away from her point of maximal medical recovery.

(b) Dr. Darren Sass, optometrist, dated April 20, 2015 and August 30, 2015. In the first report, Dr. Sass described a number of visual problems, three of which – accommodative dysfunction, oculomotor dysfunction, and visual perceptual dysfunction – he opined were probably related to her subject motor vehicle accident injuries. He stated that the visual problems could have been sustained as a result of the neck injury that had been diagnosed by the plaintiff's treating chiropractor, Dr. Otterstrom, “with or without associated concussion”. He further stated that these visual problems were “consistent with acquired brain injury” and were “unlikely to be long-standing”. The second report presented a similar opinion, though it accounted for further clinical records received by Dr. Sass and one further treatment session he had had with the plaintiff; it was served on February 1, 2016.

(c) Dr. Neil Longridge, otologist, dated August 19, 2015. Dr. Longridge diagnosed an injury to the plaintiff's vestibular system, resulting in visual-vestibular mismatch and motion sickness.

[16] On February 1, the defendants served the plaintiff with the reports of the following practitioners:

(a) Dr. J.S. Arthur, orthopedic surgeon, dated January 25, 2016. Dr. Arthur opined that there had been some aggravation of pre-existing neck and back

complaints, which should not be disabling. The plaintiff's complaints regarding her balance, visual issues, and headache with light sensitivity were acknowledged to be outside his area of expertise.

(b) Dr. Rehan Dost, neurologist, dated December 11, 2015. Dr. Dost found that the plaintiff's headaches satisfied the criteria for chronic headache associated with whiplash. He stated that they had not been optimally managed, and he suggested a new treatment plan. He could find no central neurological cause for the reported intermittent balance difficulty or visual issues. He opined that the plaintiff had not sustained a brain injury. He suggested EMT and ophthalmological assessments.

(c) Dr. Eytan David, otologist, dated January 20, 2016. Dr. David found there to be insufficient medical evidence of inner ear dysfunction due to the subject motor vehicle accident.

[17] Ten days after the 84-day deadline, the plaintiff's counsel served a report from the plaintiff's family physician, Dr. Leslie Sank, dated January 31, 2016. (Dr. Sank's office had not provided this report to the plaintiff's counsel in a timely manner and it was served on the defendants as soon as it was received.) Dr. Sank diagnosed myofascial strains of the cervical and lumbar spines, the former being associated with cervical facet joint degenerative changes. He adopted the diagnoses of accommodative, visual perceptive, and vestibular dysfunction that had been made by the optometrist Dr. Sass.

[18] In the weeks that followed leading up to the March 10, 2016 trial management conference, the defendants obtained three reports rebutting the opinion of Dr. Sass, from Dr. Dost, Dr. David, and a newly-retained expert, Dr. Briar Sexton, a neuro-ophthalmologist; and also a rebuttal report from Dr. Arthur responding to the report of the plaintiff's family physician Dr. Sank.

[19] On Sunday, March 6, 2016, the plaintiff served the defendants with a substantively new report from a chiropractor, Dr. Blaskovich. Dr. Blaskovich had

been retained by the plaintiff's counsel to conduct an assessment based on motion x-ray fluoroscopy of the plaintiff's cervical spine. Dr. Blaskovich purported to diagnose ligamentous injuries at the C1-2, C4-5, and C5-6 levels. He opined that the C1-2 ligament injuries would “result in upper cervical instability at the brain stem region causing headaches, chronic and recurrent neck pain, dizziness, nausea, balance problems, visual and auditory disturbances, head and ear pressure, sleeplessness, tiredness/fatigue, nervousness, irritability, and concentration problems”.

[20] This opinion of Dr. Blaskovich necessitated the defence retaining an expert in radiology, Dr. Dennis Janzen. Dr. Janzen prepared several rebuttal reports for the defendants.

[21] The trial management conference was held March 10, 2016. At that point, no medical doctor had opined that the plaintiff had sustained a brain injury.

[22] March 14, 2016 – 42 days prior to trial – was the last day under the *Rules* for the delivery of rebuttal reports.

[23] On March 14 and 18, 2016, the plaintiff served the defendants with further reports of the plaintiff’s optometrist Dr. Sass. The first of these was an update based on findings made at several progress examinations and “vision training sessions” the plaintiff had undergone since September 2015. The second of these further reports of Dr. Sass purported to be a rebuttal of the opinion of the defendants’ neurologist, Dr. Dost.

[24] On March 25, 2016, the plaintiff served the defendants with an amended report of Dr. Blaskovich. There were no changes in the substance of Dr. Blaskovich's opinion; the amendments were only as to matters of form, to bring the report into compliance with the *Rules*.

[25] The defence then began to receive rebuttal reports from its radiologist, Dr. Janzen. The first of these, dated March 26, 2016, was served on the plaintiff on April 6. On that same date the defence also served the plaintiff with a further report

of the neurologist Dr. Dost, rebutting the supplemental opinions of the optometrist Dr. Sass.

[26] Also on April 6, 2016, the plaintiff served the defendants with two supplementary reports of the otologist, Dr. Longridge. The first of these reported on the results of new testing the plaintiff had undergone on March 14, 2016. The second of these purported to be a rebuttal to the report of the defendants' otologist, Dr. David.

[27] The plaintiff's first settlement offer of $275,000 was delivered on April 11, 2016. The letter conveying that offer listed the plaintiff's injuries as follows:

1. Accommodative dysfunction (focusing control)
2. Oculomotor dysfunction (eye movements), with difficulty reading
3. Visual perceptual dysfunction (visual processing skills)
4. Heightened sensitivity to bright lights
5. Acquired brain injury
6. Cognitive difficulties including impaired concentration, limited ability to focus, impaired mathematical skills and reduced memory
7. Impaired balance – permanent
8. Soft Tissue Injury to her neck and lower back, with facet joint injury
9. Headaches and nausea
10. Anxiety
11. Disturbed sleep, with resulting physical and mental exhaustion
12. Chronic pain.

[28] On the following day, April 12, 2016 – less than two weeks prior to trial – the plaintiff served the defendants with a second report of the plaintiff's family physician, Dr. Sank, in which, relying on the opinion of the chiropractor Dr. Blaskovich, he purported to diagnose vertebrobasilar insufficiency ("VBI"), an intermittent loss of blood supply to the brain, which he believed was likely caused by the C1-2 ligament injury identified by Dr. Blaskovich. Dr. Sank opined that this was the probable cause of the plaintiff suffering dizziness, vertigo, migraines, ocular symptoms, balance difficulties, and gait instability.

[29] This second report of Dr. Sank was the first opinion delivered by the plaintiff from a medical doctor opining that the plaintiff's symptoms were associated with central nervous system dysfunction. This necessitated the defendants commissioning further rebuttal reports from Drs. Arthur, Dost, Janzen, and David. All of the work of evaluating Dr. Sank's report, deciding on a defence strategy, and instructing the defence experts had to be undertaken in a limited timeframe.

[30] In addition, on April 13, 2016, the day after it was served, defence counsel discovered that a substantial portion of Dr. Sank's second report had been plagiarized. This obviously had profound implications for evaluating the strength of the plaintiff's case.

[31] The plaintiff's reduced settlement offer in the amount of $195,000 was conveyed on April 14, 2016.

[32] On April 20, 2016 – only nine days after delivery of the first offer, and six days after delivery of the second offer – the plaintiff withdrew all settlement offers. As of that date, the defence had only just recently received rebuttal reports concerning Dr. Sank’s second report from its experts Drs. Arthur, Dost, and Janzen, and were still awaiting receipt of a further report from Dr. Janzen and a rebuttal report from Dr. David.

[33] In my reasons for the oral ruling excluding the opinion of Dr. Blaskovich, indexed at 2016 BCSC 1243, I described some of the consequences of the late service of the plaintiff's expert reports, and the prejudice that resulted therefrom. I said:

> [38] The flurry of activity that counsel have had to engage in since the service of Dr. Blaskovich’s report, and then the flurry of activity we have had to engage in, in this *voir dire*, with Dr. Janzen suddenly being made available to testify this morning and then with further opinions being generated by Dr. Blaskovich, and the court being advised of them orally through counsel's submissions, only highlights the folly of attempting to adduce evidence, particularly in the context of a jury trial, without sufficient notice, that is the 12-week period specified by the Rules of Court. Counsel have both strived mightily to adjust to the circumstances, but even if we had the luxury of time within the context of this jury trial to call further evidence by Dr. Blaskovich, I

> am not at all persuaded that we would have a sufficient degree of clarity, and that counsel would have sufficient time to overcome the prejudice that has arisen from the report only having been provided late in the day and the resulting time pressure that has [been] put on counsel to absorb the consequences of the report and to mount a response.

[34] I made similar comments in the oral ruling I gave excluding the second report of Dr. Sank, indexed at 2016 BCSC 889:

> [68] As to prejudice, I find there is manifest prejudice to the defence through [Dr. Sank's second report] having been served only two weeks prior to the start of a jury trial. Such late notice of an entirely new theory would have diverted the attention and the resources of defence counsel away from other necessary aspects of preparation for a jury trial that was already overburdened by admissibility issues. …

[35] To say that the expert evidence was in flux during the limited period in which the offers were open for acceptance would be an understatement. As I stated in my reasons on the admissibility of Dr. Blaskovich's expert opinion report, the late service of that report had set off a flurry of reply and counter-reply reports, and further supplemental reports from the plaintiff's other experts. Many of these reports – especially Dr. Blaskovich's report, and the second report of Dr. Sank served on April 12 – had very significant substantive and procedural implications.

[36] I find the defence did not have sufficient time to consider the plaintiff's reports and the rebuttal reports the defence had been able to marshal, in order to enable a proper, considered evaluation of the risks of proceeding to trial in the face of the plaintiff's offers. The offers were delivered too late in the day, were made while the expert evidence was still being disclosed, and were withdrawn after only a short period of time. In the circumstances, I cannot find that the offers ought reasonably to have been accepted.

[37] I therefore decline to make any award of double costs to the plaintiff.

Costs for Discrete Items

[38] The defence seeks to be relieved of responsibility for costs and disbursements associated with the following: (1) expert opinion reports of the

chiropractor Dr. Blaskovich, the family physician Dr. Sank, and the optometrist Dr. Sass, all of which were ruled inadmissible following *voir dire* hearings; (2) the expert report of the forensic engineer, Gerald Sdoutz, as to collision dynamics, which, as noted, was served only five days prior to trial, on April 20, 2016, and which the plaintiff did not even attempt to tender; (3) trial time consumed with rulings on opinion evidence elicited on cross-examination by plaintiff's counsel of the plaintiff's treating chiropractor Dr. Otterstrom, who had been deposed prior to trial as a defence witness; and (4) demonstrative evidence in the form of enlarged diagrams illustrating a potential medical procedure (injection of anaesthetic at spinal nerve roots), which was also ruled inadmissible.

[39] The defence further seeks an award in its favour of the costs associated with the *voir dires* that resulted in the exclusion of evidence the plaintiff sought to admit, and of the disbursements it incurred in respect of associated rebuttal expert reports.

[40] The power to make such costs orders is found in R. 14-1(14) of the *Rules*, which provides as follows:

> (14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order
>
> (a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or
>
> (b) that the party pay the costs incurred by any other party by reason of the act or omission.

[41] Alternatively, the defence seeks apportionment of the costs and disbursements under R. 14-1(15), on the basis that the plaintiff pursued a claim based on her having sustained a brain injury, the evidence of which was ruled inadmissible. Rule 14-1(15) reads as follows:

> (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.

[42] As to the disallowance of costs under R. 14-1(14), it is common ground that the governing principle is that an expense should be disallowed if it was not a proper disbursement at the time it was incurred: see *Van Daele v. Van Daele* (1983), 56 B.C.L.R. 178 (C.A.) at para. 11. As to the apportionment of costs under R. 14-1(15), in *Lee v. Jarvie*, 2013 BCCA 515 at para. 40, Groberman J.A. held that the discretion available under the new *Rules* is "at least as broad" as under the former R. 57(15), the test under that Rule having been stated by Finch C.J.B.C. in *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, to be as follows:

> (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
>
> (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
>
> (3) it must be shown that apportionment would effect a just result.

Dr. Blaskovich (Chiropractor)

[43] I do not find that the retainer of this witness was reasonable or proper when it was undertaken. Dr. Blaskovich purported to be able to draw on his experience as a chiropractor in assessing the motion x-ray results and diagnosing ligamentous instability. The deficiencies in Dr. Blaskovich's report are fully discussed in my reasons for excluding it from evidence, indexed at 2016 BCSC 1243. As I found, his use of the fluoroscopy device was not within the mainstream of scientific use, and he had no peer-reviewed studies or body of data that gave any assurance as to the validity of his conclusions. He misapplied an American Medical Association guideline that was critical to his interpretation of the x-ray results. The defence radiologist, Dr. Janzen, described his main finding as "highly speculative". The opinions expressed by Dr. Blaskovich, as to whether the ligamentous injury he had diagnosed would result in upper cervical instability at the brainstem region with associated neurological issues, were clearly beyond the scope of his expertise. Quite simply, at the time the retainer of Dr. Blaskovich was being considered, more should have

been done to ensure that he was capable of giving an opinion that met basic threshold standards of reliability.

[44] The plaintiff's disbursements in respect of the evidence of Dr. Blaskovich are disallowed. Further, the plaintiff is disallowed the associated costs of one day of trial time (one-half day on April 25, one-half day on April 26) devoted to the *voir dire* into the admissibility of Dr. Blaskovich's evidence.

Dr. Sass (Optometrist)

[45] Similar concerns apply to the reports of the optometrist Dr. Sass. My ruling as to the admissibility of his opinion evidence is indexed at 2016 BCSC 1244. I found that Dr. Sass' opinions throughout his reports were based on a finding, a diagnosis, or presumption of brain injury. To the extent he made such a finding or a diagnosis it was clearly beyond the scope of his expertise. This presumption was not supported by any medical doctor – save the family physician Dr. Sank, who simply adopted Dr. Sass' opinion. Dr. Sass' declared area of specialization in "developmental optometry" is not a field recognized by mainstream medicine. I find the expenses associated with his reports were not properly incurred.

[46] The expenses associated with Dr. Sass' reports are therefore disallowed. Approximately one-and-a-half days of trial time, on April 26 and 27, was devoted to the *voir dire* into the admissibility of Dr. Sass' opinions and the plaintiff's unsuccessful attempts to edit his reports into an acceptable form. The costs associated with that day and a half are also disallowed.

Dr. Sank (Family Physician)

[47] The second report of the family physician Dr. Sank set out a diagnosis of VBI, said to be caused by cervical instability. This diagnosis of VBI was clearly beyond the scope of Dr. Sank's expertise, as described in my reasons indexed at 2016 BCSC 889. This could have been ascertained by counsel through asking Dr. Sank a few basic questions as to his experience in diagnosing this disorder. In this respect,

the disbursement was not proper, and the expenses associated with the second report are disallowed

[48] Moreover, as I have indicated, Dr. Sank's second report was largely plagiarized from a suspect source. Furthermore, he substantially reformulated the theory advanced in that source, of there being a connection between cervical instability and VBI, changing it from a matter of postulation to a conclusion said by Dr. Sank to be "highly probable". None of this could reasonably have been known to the plaintiff's counsel initially; however, after being advised of the plagiarism by defence counsel, the plaintiff's counsel persisted in attempting to have Dr. Sank's second report admitted. This attempt was doomed to fail. Further, I must observe that it was quite likely to the plaintiff's benefit that the report was not admitted; the effect on the jury, had the extent of Dr. Sank's evident bias and dishonesty become known to them, could have been devastating to the plaintiff's case. The plaintiff is disallowed the costs associated with the one and one-half days of trial time devoted to the *voir dire* concerning Dr. Sank's second report.

Engineering Report

[49] The forensic engineering report of Gerard Sdoutz was prepared and delivered late – only five days prior to trial – and no attempt was made to have the report admitted into evidence. The cost of the report was not reasonably or properly incurred, and is disallowed.

Demonstrative Evidence

[50] I disallow the plaintiff's expenses associated with the enlarged medical illustrations, which I find were improper at the time they were incurred. As I found in excluding it, this evidence had little if any probative value and the manner of depicting the procedure was prejudicial.

Defence Claim for Costs

[51] Despite the foregoing, I conclude that in the particular circumstances of this case, it would not be just to award the defence either the costs associated with the

successful *voir dire* rulings, or the expenses incurred in obtaining the rebuttal reports. I reach this conclusion for two related reasons. First, the plaintiff's financial position is modest relative to that of the defence, which was funded by ICBC. Second, finding the plaintiff liable for those costs and disbursements would substantially detract from her damages award; as I have observed, the jury award for non-pecuniary damages was exceedingly modest, relative to the jury's assessment of the loss of future earning capacity, and in this respect the plaintiff's ability to indemnify the defence against costs that might otherwise properly be awarded has been significantly impacted. In other circumstances, fairness might dictate an award of such costs in the defendants' favour; in this case the defence will have to be content with having been found liable for only a modest damages award, relative to the findings implicit in the jury's assessment.

[52] Lastly, I make no award in the defence's favour regarding the trial time consumed by rulings on the admissibility of Dr. Otterstrom's opinions as elicited by plaintiff's counsel on cross-examination. The time spent on this issue was largely a function of Dr. Otterstrom's evidence having been taken on video deposition. This was not due to fault on the part of either side. Had Dr. Otterstrom's evidence been given *viva voce*, the plaintiff's counsel's questions in this vein could have and would have been quickly overruled. The circumstances do not warrant an award or apportionment of these costs against the plaintiff.

"A. Saunders J."