IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dhillon v. Labelle,*
2023 BCSC 32

Date: 20230109
Docket: M167246
Registry: Vancouver

Between:

Mukhdeep Dhillon

Plaintiff

And

Dylan Bard Labelle
John Doe

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment re: Costs

Counsel for the Plaintiff:	Michael D. Shirreff
Counsel for the Defendant:	Jennifer J.L. Brun, K.C.
Place and Date of Hearing:	Vancouver, B.C. November 30, 2022
Place and Date of Judgment:	Vancouver, B.C. January 9, 2023

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I. INTRODUCTION

[1] The parties seek rulings relating to costs in this matter.

[2] The plaintiff was injured in a motor vehicle accident that occurred September 17, 2014. It was a rear end collision. The defendant admitted liability.

[3] ICBC represented the defendant in relation to the plaintiff's claims. The defendant issued a notice requiring trial by jury October 6, 2017.

[4] I presided over the trial with a jury. The trial took place over 14 days, from April 29 to May 16, 2019.

[5] The plaintiff was awarded $5,100 for non-pecuniary damages, and $2,415.02 for special damages (out-of-pocket expenses).

[6] Prior to the trial, the defendant made four offers to settle within the meaning of Rule 9-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] all of which substantially exceeded the plaintiff's award.

[7] The defendant seeks an order under Rule 9-1(5)(a) depriving the plaintiff of all costs and disbursements to which she would otherwise be entitled from the date of delivery of the first of its offers to settle, December 18, 2018. The defendant seeks an order for costs and disbursements in its favour from that date.

[8] The defendant also contends that the Rule 15-1(15) – (17) fast track litigation costs rules apply, since the plaintiff recovered a monetary award of less than $100,000.

[9] The plaintiff contends that, in its discretion, the court should award her the full costs and disbursements to which she would be entitled, notwithstanding the offers to settle. She also contends that the fast track costs rules should not apply.

II. BACKGROUND

[10] At the time of the accident, the plaintiff was 59 years of age. She was a homemaker. She had two children at home. She resided together with her husband and their two children in North Vancouver. Her husband was the owner and operator of a small business.

[11] At trial, the plaintiff alleged that as a result of the accident, she suffered multiple injuries, including in particular pain in her right shoulder, her neck and upper back extending to her right arm and hand, and in both wrists. She alleged that as a result of the accident she suffered from post-traumatic insomnia, headaches, and chronic pain syndrome. She alleged that the accident caused a torn right shoulder rotator cuff injury. She alleged that her injuries were painful, partially debilitating, and permanent.

[12] The plaintiff contended that her injuries and associated pain disabled her from performing some of her usual domestic tasks, such as housework and yard work, and that she was forced to rely on cleaners and gardeners to do these tasks, as well as relying on her children and her husband.

[13] Based upon a functional assessment and cost of care assessment prepared by an occupational therapist, the plaintiff claimed for the cost of four hours of weekly housekeeping support and 15 hours of annual gardening support. Based upon an economist’s calculations, these claims totalled $137,484.

[14] The plaintiff claimed for the present value of costs of future care in the amount of $277,708, for treatment such as massage therapy, physiotherapy, medications, rehabilitation support services, and other items.

[15] She sought special damages in the amount of $4,150.46, for expenses incurred including house cleaning, physiotherapy and massage therapy, and prescription medications.

[16] The defendant's position at trial was that the accident caused no injury at all to the plaintiff, or alternatively only minor soft tissue injuries which resolved by no later than January 2016 with conservative treatment, including physiotherapy and active rehabilitation.

[17] The defendant argued that the plaintiff had an extensive pre-accident history of health concerns, including in particular an ankle fracture in 2009 that resulted in significant permanent disability and limited mobility. The ankle injury resulted in a series of four surgical interventions carried out between January 2010 and April 2013. The defence contended that the plaintiff had other pre-accident health conditions. The defence contended that the plaintiff was untruthful in testifying that she had no limiting health conditions prior to her ankle injury and that her ankle injury was not debilitating.

[18] The defence submitted that the plaintiff was not entitled to any damage award for any of her claims, or alternatively compensation reflecting minor, temporary injuries only.

[19] As set out above, the jury awarded the plaintiff minimal non-pecuniary damages and special damages. The jury rejected the plaintiff’s claims for pecuniary damages for loss of housekeeping capacity and for damages for future costs of care.

[20] The defendant made the following formal offers to settle, in accordance with Rule 9-1:

1. December 18, 2018 - $57,713.08, plus costs. A term of the offer was that the costs would be assessed in accordance with the fast track costs rules, Rule 15-1(15) to (17).
2. January 11, 2019 - $36,000, plus costs in accordance with the fast track costs rules.
3. April 16, 2019 - $57,000, plus costs in accordance with the fast track costs rules. This offer was open for acceptance until 4 p.m. on Friday, April 26,

2019 (i.e., the Friday prior to the commencement of the trial on Monday, April 29, 2019).

4. April 27, 2019 - the defence reopened its offer to settle of April 16, 2019 and made the offer open for acceptance until Monday, April 29 at 9 a.m.

[21] Each of the defendant's offers revoked the previous offer.

[22] The plaintiff made no formal offers to settle pursuant to Rule 9-1, but on April 26, 2019, she offered to settle her claims for $100,000, plus taxable costs and disbursements.

III. LEGAL PRINCIPLES

[23] In *Cottrill v. Utopia Day Spas and Salons Ltd*., 2019 BCCA 26, leave to appeal to SCC ref'd, 38488 (11 April 2019) [*Cottrill*], the court discussed costs, including the effects of Rule 9-1 offers to settle, as follows:

> [18] Pursuant to R. 14-1(9), costs in a proceeding must be awarded to the successful party unless the court otherwise orders. In cases involving a single cause of action the successful party is the plaintiff who establishes liability under that cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46. The fact that Ms. Cottrill obtained a judgment in an amount less than sought, is not, by itself, a proper reason to deprive her of costs: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328 at para. 43.
>
> [19] In this case Ms. Cottrill sued for damages for breach of her employment contract. She succeeded in her claim and unless the court otherwise orders, she is entitled to the costs of the action notwithstanding that she recovered an amount less than that sought.[…]
>
> [20] One circumstance in which the court may otherwise order is where a party fails to accept a formal offer to settle made under R. 9-1. Rule 9-1(5) sets out the options that are open to a court in circumstances in which an offer to settle has been made:
>
>> (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.

[21] In *C.P. v. RBC Royal Life Insurance*, 2015 BCCA 30 at paras. 90–92, this Court held that double costs cannot be awarded to a defendant if the plaintiff has obtained a judgement in its favour. The options therefore available on this application are to decline to award Ms. Cottrill costs in connection with steps taken in the proceeding after service of the offer, award the Company its costs in respect to steps taken in the proceeding after delivery of the offer or award Ms. Cottrill her costs as though the offer had not been made.

[22] When making an order under R. 9-1(5) the court may consider the factors set out in R. 9-1(6):

> (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.

[…]

[27] In *C.P.* at paras. 94–95, this Court summarized the principles of the offer to settle rule:

> [94] The underlying purpose of the offer to settle rule was set out in *Hartshorne*:
>
> > [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.

[95] A plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs. To do otherwise would undermine the importance of certainty and consequences in applying the Rule: *Wafler v. Trinh*, 2014

BCCA 95 at para. 81. The importance of those principles was emphasized by this Court in *A.E. Appeal* at para. 41:

> [41] This conclusion is consistent with the importance the Legislature has placed on the role of settlement offers in encouraging the determination of disputes in a cost-efficient and expeditious manner. It has placed a premium on certainty of result as a key factor which parties consider in determining whether to make or accept an offer to settle. If the parties know in advance the consequences of their decision to make or accept an offer, whether by way of reward or punishment, they are in a better position to make a reasoned decision. If they think they may be excused from the otherwise punitive effect of a costs rule in relation to an offer to settle, they will be more inclined to take their chances in refusing to accept an offer. If they know they will have to live with the consequences set forth in the Rule, they are more likely to avoid the risk.

[28] As set out above, when making an order under R. 9-1(5), the court may consider the factors set out in R. 9-1(6). We will consider those factors in turn.

i. Should the Offer Have Been Accepted

[29] Whether an offer to settle is one that ought reasonably to have been accepted is assessed not by reference to the award that was ultimately made, but under the circumstances existing when an offer was open for acceptance. In *Hartshorne v. Hartshorne,* 2011 BCCA 29 at para. 27, this Court explained:

> [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: *Bailey v. Jang*, 2008 BCSC 1372, 90 B.C.L.R. (4th) 125 at para. 24; *A.E. v. D.W.J.* at para. 55. 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.

[30] As recently noted by Justice Gomery in *Kobetitch v. Belski*, 2018 BCSC 2247 at paras. 24–25, the wording of the subrule is important. The issue is not whether the offer was reasonable but whether it was unreasonable to refuse it. He explained the distinction as follows:

> [24] In my opinion, the wording of the subrule stating this consideration is important. The consideration is not whether it would have been reasonable for the plaintiff to have accepted the offer. It is whether the plaintiff ought reasonably to have accepted the offer. The difference is this. An offer might be such that a reasonable plaintiff could choose to accept it or not. One might term it "a reasonable offer". On the other hand, to say that an offer ought reasonably to have been accepted is to say that a reasonable person should have accepted it. It was unreasonable to refuse it.
>
> [25] According to the distinction I am drawing, having regard to the wording of the subrule, the consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the plaintiff to refuse it.
>
> [Emphasis in original.]

[31] We agree with that analysis. It is also important to point out that the fact that it may be reasonable for a party to refuse an offer does not necessarily immunize that party from the consequences of a reasonable offer to settle: *Wafler v. Trinh*, 2014 BCCA 95 at paras. 79–82. For example, in the oft cited cases of *Bailey v. Jang*, 2008 BCSC 1372, and *A.E. v. D.W.J*, 2009 BCSC 505, referenced in the above quotation from *Hartshorne*, the plaintiffs were sanctioned in costs notwithstanding that the trial judges in each case found that it was not unreasonable for them to reject the offer to settle.

IV. ANALYSIS

[24] The relevant parts of Rule 9-1 are set out above in the quote from *Cottrill*, at paragraphs 20–22.

[25] For convenience, I reiterate the considerations set out in Rule 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.

[26] I will refer to each of these considerations in turn.

A. Whether the offer to settle was one that ought reasonably to have been accepted

[27] As noted in *Cottrill*, at para. 30, the issue is not whether the offer was reasonable but whether it was unreasonable for the plaintiff to refuse it. However, although it may be reasonable for a party to refuse an offer, that does not necessarily immunize that party from the consequences of a reasonable offer to settle: at para. 31.

[28] At trial, the plaintiff relied on the following expert reports and evidence:

1. Independent medical examination report and evidence of Dr. Peter Zarkadas, orthopedic surgeon, dated January 15, 2019;
2. Independent medical examination report and evidence of Dr. Joseph Wong, physiatrist, dated January 12, 2019;
3. Report of Dr. Joe Goodman, dated January 24, 2019 (plaintiff's general practitioner); and
4. Cost of future care assessment prepared by Ms. Jennifer Lane, January 31, 2019;
5. Economist's report prepared by Darren Benning, dated February 5, 2019.

[29] As noted, the defence made four offers to settle. The fact that a subsequent offer is made does not mean that a prior offer is to be ignored: *Dempsey v. Oh,* 2011 BCSC 627, at para. 14 [*Dempsey*], citing *ICBC v. Patko*, 2009 BCSC 578.

[30] In my view the plaintiff did not unreasonably refuse to accept the offers to settle of December 18, 2018, and January 11, 2019. In a claim for damages for personal injuries such as this one, the expert reports are typically all-important. As of the date of these offers, the plaintiff had not received any of the reports that she

ultimately relied upon at trial. The defence had served no expert medical reports. (In fact, the defence did not adduce any expert medical evidence at trial). The lack of expert medical and other expert evidence would have made it very difficult, if not practically impossible, for the plaintiff and her legal counsel to evaluate her claims.

[31] From this point of view, the relevant offer to settle is the third offer, made on April 16, 2019. As noted, that offer expired at 4 p.m. on Friday, April 26, 2019, but was then reiterated the next day, April 27, and was open for acceptance until 9 a.m. on the first day of trial. By then the plaintiff had full information.

[32] While acknowledging the principle that whether the plaintiff acted unreasonably in refusing the offer to settle is not to be determined in hindsight, the defendant's cost submissions include a detailed recitation of the evidence at trial. In my respectful view the defence submissions are substantially based upon a hindsight analysis. I am invited by the defence to review and consider the evidence at trial in detail. The defendant argues vigorously that the plaintiff should have been able to see all of the weaknesses in her claims. The defendant says these weaknesses ought to have been manifest to the plaintiff, as evidently reflected in the jury's award. The defendant implicitly argues that the jury's decision supports the defendant's view as to the apparent weaknesses in the plaintiff's case.

[33] However, when the plaintiff received the defence offer of April 16, 2019, she had a reasonable basis for believing that the jury would conclude that her complaints of neck, upper back, and right shoulder pain were caused by the motor vehicle accident, and that these injuries caused significant ongoing pain and disability, which was separate and distinct from her pre-existing right ankle problems.

[34] The report of Dr. Zarkadas noted that an ultrasound study of her right shoulder conducted on June 16, 2015 showed a partial thickness but quite extensive tear within the anterior fibers of the supraspinatus tendon. The report also disclosed other positive findings, such as a rent tear within the mid-tendon fibers, quite extensive bursal thickening, fluid within the subacromial/subdeltoid bursa, and acromioclavicular joint degenerative change.

[35] Dr. Zarkadas diagnosed a whiplash injury caused by the motor vehicle accident (“MVA”) and associated myofascial discomfort of both the paracervical spinal musculature and trapezial musculature bilaterally, more on the right side than the left. Based upon the ultrasound of June 16, 2015, he diagnosed partial tearing of her rotator cuff and associated subacromial/subdeltoid bursitis, consistent with right shoulder impingement, and underlying subacromial crepitus, consistent with a partial thickness tear. He opined that more likely than not the MVA of September 17, 2014, was directly responsible for the plaintiff’s neck, upper back, and right shoulder pain. Dr. Zarkadas’ prognosis in relation to her upper body problems was guarded.

[36] In sum, Dr. Zarkadas was of the opinion that the plaintiff was left with a permanent partial disability as it relates to her neck, right shoulder and upper back as a result of the MVA.

[37] The report of Dr. Zarkadas makes clear that he was fully aware of the plaintiff's pre-existing ankle problems and treatment. He opined that he expected that she may require an ankle fusion at some point.

[38] The defence contends that, at trial, Dr. Zarkadas agreed that his medical opinions were only as good as the history provided to him by the plaintiff, and that he had not received some of the plaintiff’s medical records, as well as other facts the defence contends was significant to the jury's conclusions. The defence argues that Dr. Zarkadas agreed that his report was compromised and incomplete.

[39] In her response submissions, the plaintiff takes issue with the defendant’s characterization of the evidence at trial. She contends that in re-examination Dr. Zarkadas confirmed that the most probable cause of the tear was the MVA. In further sur-reply, the defendant contends otherwise.

[40] In view of the principle that the question at issue does not depend upon a hindsight analysis, it is unnecessary for me to review the evidence at trial of Dr. Zarkadas, or the other experts, in detail.

[41] The other expert opinion evidence available to the plaintiff prior to trial also supported her case.

[42] Her general practitioner, Dr. Goodman, reviewed her medical charts going back to 2013 (thus, from prior to the accident). As he stated in his report, he also “relied on my memory of our multiple office visits since that time”. He noted there were minimal references in her pre-MVA chart to complaints about the areas injured in the accident. He opined that she suffered from soft tissue injuries to her neck, back, shoulders and arms. He noted the positive findings on radiological investigations of her right shoulder. He agreed with another doctor’s opinion that she suffered from myofascial pain syndrome, and that her prognosis was poor. He noted the significant pre-accident permanent disability and lack of mobility as a result of her ankle injury.

[43] Dr. Wong, a physiatrist, diagnosed a number of injuries caused by the MVA, including various myofascial injuries, rotator cuff tendinitis, and chronic pain syndrome. In his view, the plaintiff’s impairments resulting from the accident were permanent.

[44] Based upon the medical reports, and her own assessment, Ms. Lane, the occupational therapist, recommended various housekeeping assistance and costs for future treatment.

[45] Jury awards are notoriously difficult to predict. This is especially so since juries are not given any guidance with respect to quantum of non-pecuniary awards. However, when the offer was made, the plaintiff had a reasonable basis for believing that the jury could make an award exceeding the $57,000 amount the defendant offered in his immediate pre-trial offers.

[46] The defence relied upon surveillance video evidence at trial. The defendant argues that the video surveillance evidence adduced at trial “spoke volumes respecting the plaintiff’s functional capabilities”. In effect, the defence argues that the plaintiff ought to have concluded that the video evidence would be devastating to her

case. The video evidence was served upon plaintiff's counsel on April 18, 2019. The plaintiff states in her affidavit in relation to this application that she viewed the video footage and felt that the images was entirely consistent with her injuries and disabilities.

[47] The video showed the plaintiff engaging in various ordinary activities, such as picking up her children from school, driving to Costco, shopping, and loading purchases into her vehicle. I agree with the plaintiff that she had no reason to think that the video evidence would be devastating to her claims. The evidence made little impression upon me at trial. However, it is quite possible for the jury to have taken an entirely different view about it. There is no way to know.

[48] In summary, as I have said, I do not accept that the plaintiff unreasonably refused to accept the defendant’s offer of $57,000.

B. Relationship between the terms of settlement offered and the final judgment of the court

[49] This factor weighs heavily against the plaintiff. In my view, the fact that the jury rejected the bulk of the plaintiff’s claims entirely and made a very low, almost derisory award for non-pecuniary loss, cannot be ignored.

C. Relative financial circumstances of the parties

[50] In view of the fact that the defendant, personally, was insured, the financial circumstances of the defendant are not relevant.

[51] The plaintiff is now 66 years of age. She contends that she is a person of modest means, and that a significant award of costs against her would cause a considerable financial hardship for her family and would be financially devastating to her, personally. However her personal financial circumstances and those of her husband seem to be very much intertwined, so her reference to her personal financial circumstances is difficult to put much weight upon.

[52] I have very limited specific financial information about the plaintiff. Her financial disclosure is obviously selective. She has provided no specific information

about her net worth. The evidence indicates that the plaintiff and her husband, together, own a large, comfortable, and valuable home in Upper Lonsdale, North Vancouver. The evidence at trial indicated that the plaintiff's children attended a private school. Her evidence at trial was that she was driving the children home from school when the accident occurred.

[53] The defendant relies on the fact that the plaintiff and her husband apparently funded costly private schooling for their children, but I cannot infer anything much from the fact that the plaintiff's children attended a private school. Whether the cost was onerous for the plaintiff and her husband is not known. Some parents are prepared to make very large financial sacrifices for their children's education.

[54] The plaintiff's husband owns and operates a business, supplying window coverings. In her affidavit, she states that the Covid-19 pandemic has detrimentally affected her husband's business. However, she provides no financial details regarding the business.

[55] At trial, the plaintiff did not claim to be employed in the business. Her claims were based upon her circumstances as a homemaker. Her affidavit evidence produced for this application shows that in 2019 and 2020 she was paid $36,000 as an employee of the business. She says this is an allocation of business income done by the company's accountant. However, the plaintiff cannot have it both ways; that is, saying that she earns no income yet declaring income as an employee for tax purposes.

[56] Doing the best I can on limited evidence, I conclude that the plaintiff is a person of moderate middle-class means. I can infer that costs consequences of the orders the defendant seeks would have a significant negative effect on the plaintiff's financial position.

[57] This factor weighs somewhat in the plaintiff's favour.

D. Any other factor the court considers appropriate

[58] The defendant insisted on a jury trial. The fact that the trial was with a jury made the result very uncertain for both sides.

[59] While the defendant's offer was not generous, in my view it was on the low side of a reasonable range. As I have said, it was not unreasonable for the plaintiff to refuse it.

[60] The plaintiff's offer to settle at $100,000 represented an aggressive, optimistic outlook, given the difficulties in the plaintiff's case. The plaintiff should have recognized that proceeding to a trial with a jury was quite risky, in view of the evidence that could be expected at trial.

[61] Both parties took very aggressive positions at trial.

[62] The plaintiff's large claims for loss of homemaking capacity were in my view quite unrealistic, most especially given her previous unrelated level of disability caused by her right ankle problems and other health concerns.

[63] However, had the trial proceeded before a judge alone, in my view it is likely that the award would have been significantly higher than the amount awarded by the jury. It is possible that the award would have exceeded the offer, but I cannot be confident of this.

[64] The plaintiff took the risk of going to trial in the hopes of obtaining a result significantly better than that offered by the defence.

[65] There are cases where the court has awarded a plaintiff full costs despite achieving a result less than an offer. For example, in *Mitchell v. Fonseca*, 2020 BCSC 395 [*Mitchell*], upon which the plaintiff relies here, the court awarded the plaintiff his costs even though the jury awarded $100,000, while the defence had offered to settle for $110,000. However, the difference, as Mayer J. noted, between the offer and ultimate award was only 9%. Specifically, the jury in *Mitchell* awarded past loss of income of $89,500, but only $6,600 for non-pecuniary loss. Mayer J.

noted that this non-pecuniary award was low relative to judge-alone decisions involving comparable injuries. I infer that Mayer J. was of the view that a more reasonable assessment of non-pecuniary damages, especially with the guidance of precedents (which juries do not consider), would have resulted in an award exceeding the defendant’s offer. The court noted the complicating element of a jury trial in predicting the results.

[66] Of course, every case is unique, but in my view *Mitchell* is distinguishable, based in particular upon the minor difference between the offer and the award, and also on the views of the trial judge concerning the jury’s award.

[67] In my view, this is not a case where the defendant’s offer to settle should have no consequences. The plaintiff ought to have recognized the risks inherent in her position, especially in the case of a jury trial. A relevant consideration may include, “whether the plaintiff knew her claim was largely dependent on the court’s assessment of her credibility”, heightening the risks of trial: *Bains v. Antle*, 2019 BCCA 383 at para. 37. That factor applies here. The defendant’s offer deserved serious consideration. The plaintiff chose to proceed to trial, making large claims, with a precarious foundation.

[68] However, it was the defendant that took out the jury notice. That element of risk was introduced by the defendant, not the plaintiff. The defendant also took an aggressive position at trial in arguing that the plaintiff was uninjured and no award of any kind should be made. The jury rejected this. The defendant’s offer was low.

[69] In all of the circumstances, in my view it would be unfair to the plaintiff to have to pay the defendant's costs, which include substantial jury fees, in addition to being deprived of her own costs at the same time. As noted, the defendant’s offer was somewhat low. In all of the circumstances, a fair result is for the plaintiff to be deprived of costs following April 23, 2019 (i.e., 7 days after the April 16, 2019, offer to settle). However she should not have to pay the defendant's costs in addition.

E. Fast track costs pursuant to Rule 14-1(1)(f)

[70] Rule 15-1 is the “fast track litigation" rule. It applies, unless the court otherwise orders, if: claims are made for an amount of $100,000 or less; the trial of the action can be completed within three days; the parties consent; or the court on its own motion or on an application so orders.

[71] However, Rule 14-1(1)(f) provides that Rule 15-1(15) to (17) applies, among other things, where the relief granted is $100,000 or less, unless the court otherwise orders. Thus, the question is whether the court should exercise its discretion under Rule 14-1(1)(f) to award party and party costs under Appendix B of the *Rules* even though the judgment in this case did not exceed $100,000: *345 Builders Ltd. v. Su*, 2022 BCSC 949, at para. 16.

[72] Generally speaking, this action was not governed by Rule 15-1. No party filed a notice of fast track action. There is no evidence that examinations for discovery were limited in time as required by Rule 15-1(11), or of adherence to any of the other Rules. For example, Rule 15-1(10) states that “[a] trial of a fast track action must be heard by the court without a jury”. No one expected that the trial would be completed in three days or less. In my view, it would be anomalous to apply the fast track litigation cost rules to an action in which Rule 15-1 never applied, and only for the reason that the award, made by the jury, is less than $100,000. Rule 14-1(1)(f) places actions that should have been fast tracked, but were not, under the fast track costs schema: *Axten v. Johnson*, 2011 BCSC 1005, at para. 27. That concept is inapplicable here. As in *Dempsey*, at para. 24, this case was more complicated than that contemplated by the combination of Rules 14-1(1)(f) and 15-1. Accordingly, I order that the plaintiff's costs be assessed as ordinary costs without regard to Rule 15-1(15).

V. CONCLUSIONS, AND COSTS

[73] The plaintiff is awarded ordinary costs and disbursements for steps taken and disbursement incurred up to and including April 23, 2019. The plaintiff is deprived of

costs and disbursements incurred following that date. The defendant is not awarded costs.

[74] The plaintiff's draft bill of costs in relation to the entire action seeks 306 units pursuant to tariff Scale B, with a unit value of $110, for a total costs claim, before taxes, of $33,660. For greater certainty, the plaintiff should receive the 70 units she claims for preparation for trial, but not the 140 units claimed for attendance at trial.

[75] Success has been divided on this application. There will be no costs of this application to either party.

"Verhoeven J."