COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Han v. Park,*
2015 BCCA 324

Date: 20150713
Docket: CA41385

Between:

Moon Hee Han

Appellant
(Plaintiff)

And

Gregory Allen Park and
Sandra Michele Bazley

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated October 25, 2013 (*Han v. Park*, Vancouver Docket M993651).

Counsel for the Appellant:	W.D. Mussio
Counsel for the Respondent:	E. Segal
Place and Date of Hearing:	Vancouver, British Columbia May 26, 2015
Place and Date of Judgment:	Vancouver, British Columbia July 13, 2015

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett

Summary:

The appellant was injured in an automobile accident in 1999. Liability was admitted. In 2002 the respondents made a formal offer for $50,000 and informal offers on July 2, 2009, for $110,000 and on September 27, 2013, for $120,000. At the trial in 2013 the appellant sought approximately $2.5 million for non-pecuniary damages as well as past and future wage loss and loss of capacity. At trial the respondents admitted that appellant sustained some soft-tissue injuries from the accident. The jury awarded the appellant $51,300 in non-pecuniary damages. The trial judge awarded costs to the respondents, finding that they had "beaten" their 2002 offer when considering its net present value and holding that the appellant had been substantially unsuccessful at trial. On appeal, the appellant argues the judge erred in instructing the jury on the evidence of wage loss; in admitting the respondents' book of documents containing irrelevant and prejudicial records and documents; in leaving with the jury a transcribed portion of questions from the appellant's examination for discovery, which were put to her in cross-examination; and in awarding costs to the respondents. Held: Appeal allowed. The judge erred in admitting the respondents' book of documents en masse, which contained prejudicial records and documents, and in leaving the transcribed questions from the examination for discovery with the jury. The judge also erred in awarding costs to the respondents.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

I. BACKGROUND

[1] This is an appeal from a jury verdict assessing non-pecuniary damages in the amount of $51,300 for injuries that the appellant, Moon Hee Han, says she sustained in a car accident on May 6, 1999. The appellant advanced claims for about $2.5 million in damages. The jury rejected her claims for wage loss and loss of opportunity or capacity.

[2] The 14-day jury trial commenced October 7, 2013. The respondents admitted liability and that Ms. Han sustained some soft-tissue injuries from the accident. The appellant claimed that as a result of the car accident, in addition to soft-tissue injuries and pain, she suffered from fatigue, short-term memory problems, a brain injury, and was permanently disabled. She testified she had to take time off work following the accident. She attempted a return to her employment on a graduated basis in either the late summer or early fall of 1999 and was paid during this time, at least in part. She lost her job on December 13, 1999, and has not worked since.

[3] The appellant called as witnesses a former boyfriend and a neuropsychologist, Dr. Hendre Viljoen, who saw her three times 14 years after the accident at the request of her lawyer. He was asked to assume she lost consciousness for one or two minutes after her car was struck and had sustained a mild traumatic brain injury.

[4] Medical evidence tendered by the respondents suggested that a brain injury was improbable.

II. ISSUES

[5] Ms. Han alleges three errors by the judge in the conduct of the trial: (i) in instructing the jury on wage loss; (ii) in admitting the respondents' book of documents containing medical records and other prejudicial documents; and (iii) in admitting a transcribed portion of the appellant's examination for discovery used in her cross-examination. In addition, she alleges the judge erred in granting the respondents their costs.

A. *Jury Charge on Wage Loss*

[6] The facts are not in dispute for the most part. Ms. Han was born on August 31, 1962. She immigrated to Canada from Korea in 1998 and became a Canadian citizen in 2001. She has a Masters in Computer Science from the Philippines.

[7] The accident occurred as the then 36-year-old appellant was leaving a night course at the University of British Columbia, which she was taking to upgrade her skills. She refused medical treatment and took a bus home. She said she was shaking and had trouble sleeping that night. The next day, she went to work and told her supervisor she had been in an accident. She was given one week of vacation.

[8] She saw her family doctor. This was the first of many doctors and healthcare providers she saw over the years. Her treatments have included chiropractic and massage therapy, physiotherapy, and acupuncture. At one point, she was treated at the Thorson Pain Clinic for her ongoing symptoms. At trial, she was still receiving

chiropractic and massage therapy, physiotherapy, acupuncture and was attending a community exercise program to manage her pain symptoms. She complained of mobility issues and walked very slowly, sometimes with a cane. She described chronic fatigue.

[9] At some point, one of the healthcare providers described a brain injury, although the basis for this finding was hotly contested at trial as the appellant had not reported any head injury or loss of consciousness at the time of the accident. She said she had trouble learning and retaining new information, and suffered cognitive and short-term memory problems. She says she had problems speaking, reading, and writing. At one point, the appellant was enrolled in a brain injury program at GF Strong.

[10] Effective June 9, 1998, Ms. Han was working as a database programmer at the BC Liquor Distribution Branch. After the accident, the appellant's doctor told her to stay off work until the end of May 1999. After that, the doctor recommended a gradual return to work. The appellant testified she attempted, unsuccessfully, to return to work on June 23, 1999. Her evidence was unclear how long she remained off work or whether she gradually returned to part-time work in the summer of 1999.

[11] She was paid for some of the time she was off work following the accident and she received sick benefits. Her sick benefits were not 100% of her salary. It seems she may have been paid 75% of her salary for missed work. Her Record of Employment (ROE) seems to indicate a wage loss of 25% of her salary but even that is unclear. There is some evidence she was not paid for five days of unexplained absence from work. She was not entitled to vacation or special leave. She claims she missed promotions.

[12] The appellant's employment was terminated (effectively she was fired) December 13, 1999. Apparently this was due to difficulties in the workplace preceding the accident. She was given severance and a letter of reference.

[13] Although Ms. Han was cleared by her doctor to return to work in June 1999, she never returned. The appellant said she was not working at the time of the trial due to fatigue and memory problems. She claimed to be easily confused and disorientated. She received Employment Insurance for one year following her termination. In 2003, she was designated a “Person with Disabilities” and received provincial government money. She now receives both provincial and federal government disability income.

[14] Dr. Viljoen was asked by counsel for Ms. Han to assume for the purposes of his assessment that she had a brain injury. However, both parties agreed that as a neuropsychologist he was not qualified to diagnose such an injury. Dr. Viljoen testified that the appellant’s brain injury symptoms were unlikely to improve to the point where she could return to gainful employment. Dr. Woolfenden testified that the evidence of the appellant’s graduated return to work from June to August 1999 indicated a reasonable degree of disability related to spinal strain symptomology after the accident.

[15] The position of the appellant is that the trial judge erred in instructing the jury that there was “no evidence” of wage loss, specifically with respect to evidence of the appellant’s ability to work following the accident, with the exception of five days missed for an unexplained absence. The appellant says this instruction reflected the position of respondents’ counsel. While it is true there was no expert evidence on wage loss, the appellant argues she provided evidence that she suffered fatigue and memory loss after the accident, and as a result, sustained past wage loss, future wage loss, and loss of opportunity (such as chances for promotion). She submits it was open to the jury to assess wage loss on the basis of her evidence alone. In addition, there were letters from her employer and the ROE. Therefore, she says, the judge erred in telling the jury, as requested by the respondents, there was no evidence.

[16] The position of the respondents is that the jury charge included a full explanation on the law of wage loss and both parties’ positions on the issue. The

judge made it clear that it was up to the jury to decide whether the evidence met this standard. Viewed as a whole, the respondents say the judge did not misdirect the jury in a manner that went to the heart of the verdict. The fact that Ms. Han did not object to this aspect of the charge supports this conclusion, as does the abundance of evidence that was before the jury supporting the respondents' position that there was no wage loss.

[17] The judge instructed the jury about assessing damages as follows:

> Jury's Duty to Assess Damages
>
> You, the jury, are responsible for deciding the amount of compensation that the defendants should pay to Ms. Han for the injuries, as admitted by ICBC. Further, you are responsible for deciding the amount of compensation for Ms. Han if you decide that she was injured beyond the soft tissue injuries, and if such injuries were caused by the accident, as she claims.
>
> …
>
> The categories of damages Ms. Han is claiming in this action are all legally recognized categories of damages where a plaintiff proves them:
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> (1) non-pecuniary damages for pain, injury, physical and mental suffering, and loss of enjoyment of life;
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> (2) loss of income up to the date of trial; and
>
> (3) future loss of earning capacity from today into the future.

[18] With respect to wage loss, the judge said:

> Again, I would remind you that Ms. Han presented no evidence, including medical evidence, regarding her ability to work from 1999, save for the report of Dr. Viljoen (Exhibit 4), which is dated only six months ago in April 2013. There is, of course, the evidence of Dr. Yu, where he stated that she was able to work in late 1999 (Exhibit 9).
>
> …
>
> The Claims - Actual and Hypothetical Events
>
> Ms. Han claims that as a result of the accident she did not work full time at the Liquor Control Branch up to the date of her resignation December 13, 1999. You should consider whether there was any specific evidence to prove on a balance of probabilities what actual days or portions of days that she did not work. You will wish to consider whether there was any evidence that she was not paid her salary throughout that time. There is reference to her not being paid for possibly the five days in August 1999, when she was docked pay for not advising she would be absent (Exhibit 2, tab 10, pages 24 to 25) although there is no evidence that this was addressed in the later settlement with the Branch.

> Finally, even though her employer may have picked up that cost by paying her salary when she was not working, the law does not provide for recovery to Ms. Han save for circumstances where she herself has suffered a loss.
>
> Although Mr. Solimano referred to this claim in his address to you, I am not aware of any evidence as to what, if any, days or portions of days were missed by Ms. Han in the period leading up to December 13, 1999. Nor am I aware of any evidence of any loss incurred by Ms. Han even if she was not working for part of that time frame.
>
> With respect to the hypothetical scenario, Mr. Solimano suggested to you that the past income loss after December 1999 amounts to at least $560,000, based on the assumption that if the accident had not occurred Ms. Han would have stayed at the Liquor Control Branch at a yearly salary of $40,000 or she would have found other full-time work as a computer programmer earning $40,000.
>
> Mr. Solimano suggested to you that the inappropriate October 22nd, 1999 e-mail that led to her resignation was a result of the accident. Needless to say, Mr. Solimano is not a doctor nor is he here to give evidence. Again, I am not aware of any evidence in support of that medical opinion.

[19] Ms. Han did not lead evidence to establish the actual times she was off work following the accident until she was terminated. She provided no calculations of any income loss. The judge's instructions on wage loss were correct when she said, "Ms. Han presented no evidence, including medical evidence, regarding her ability to work from 1999, save for the report of Dr. Viljoen (Exhibit 4), which is dated only six months ago in April 2013", and "I am not aware of any evidence as to what, if any, days or portions of days were missed by Ms. Han in the period leading up to December 13, 1999. Nor am I aware of any evidence of any loss incurred by Ms. Han even if she was not working for part of that time frame."

[20] The appellant's evidence alone that she could not work due to the accident could establish a past and/or future wage loss/loss of opportunity award if the jury accepted the appellant's evidence. In my view, the judge did not leave the jury with the impression there was no evidence of wage loss or loss of opportunity. She reviewed the appellant's evidence and the evidence of the ROE and employer's letters. The judge was entitled to comment on the quality of the evidence led by the appellant in support of her claim. As her appellate counsel acknowledges, evidence of such loss was "scant". I do not agree with the appellant's assertion that the judge

"went too far in her charge, to the benefit of the Respondents, by basically directing the jury to dismiss the past and future wage loss/ loss of opportunity claim."

[21] The judge instructed the jury correctly on the burden of proof and standard of proof relating to past and future events. The judge summarized the evidence of the witnesses and told the jury it was their duty to find the facts. She cautioned the jury throughout her instructions that her recollection of the evidence may be inaccurate and they were to rely on their recollection and view of the evidence. There was a paucity of evidence reflecting any wage loss up to Ms. Han's termination and there was no evidence other than from Dr. Viljoen that the appellant could not work due to the accident.

[22] I would not accede to this ground of appeal.

B. ***Admission of Defendants' Book of Documents***

[23] The appellant submits the trial judge erred in admitting Exhibit 2, the "Defendant's Book of Documents" (the "Exhibit"), on the first day of trial. The Exhibit consisted of 322 pages and contained documents and statements that the appellant says were irrelevant and prejudicial.

[24] A catalogue of the Exhibit reveals it included: a police accident report and Ms. Han's ICBC statement; medical, wage loss, disability, and school records; and "miscellaneous" documents. The Exhibit was entered by consent. It was entered in the absence of the jury – the trier of fact. The respondents' trial counsel told the judge the documents would be used to cross-examine witnesses. There was no document agreement describing the use that could be made of the documents. The Exhibit was provided to the jury without any instructions on how they could use the documents.

[25] The medical records contained unedited clinical records from some of Ms. Han's medical doctors, records of hospitals visits, and Medical Service Plan and Pharmanet printouts listing her doctor visits and prescriptions. Some of the doctors'

notes in the clinical records had been transcribed. The accuracy of the transcription was neither admitted nor even considered at trial.

[26] The clinical records included a letter from the College of Physicians and Surgeons of British Columbia (the College) addressed to Drs. D. De Groot, R. Wan, and W. Yu concerning a complaint received from Ms. Han regarding professional services provided to her; a letter of response from Dr. D. DeGroot; Ms. Han's letter of complaint to the College; and two copies of the same letter from an ICBC Claims Representative, dated October 14, 1999, to Ms. Han's then lawyer, indicating ICBC would not pay for further treatments or prescription medications based on Dr. Yu's finding that Ms. Han could work and they would request a jury trial on issuance of a Writ.

[27] In the wage loss records, there were: a letter, dated September 25, 1998, from R. James written on behalf of Ms. Han's employer, setting out workplace expectations and anticipated disciplinary action; a letter, dated February 8, 1999, from R. James respecting expectations and monitoring of her workplace performance; a letter of reprimand by way of discipline, dated September 2, 1999, from R. James on behalf of her employer respecting unauthorized absences from work; notes of a meeting with management and the union on November 26, 1999, which Ms. Han attended but refused to participate in without a lawyer; a letter of suspension from her employer, dated November 26, 1999; a decision of the British Columbia Labour Relations Board, dated March 12, 2001, dismissing Ms. Han's complaint that the union violated its duty of fair representation, leading to her resignation; and a review and reconsideration decision of the British Columbia Labour Relations Board, dated May 14, 2001, dismissing Ms. Han's application.

[28] The miscellaneous documents consisted of a letter, dated September 23, 2002, from Ms. Han to the ICBC Fairness Commissioner, and a decision of the B.C. Human Rights Tribunal dismissing Ms. Han's allegations of discrimination on the basis of physical and mental disabilities in respect to her tenancy, contrary to the *Human Rights Code*, R.S.B.C. 1996, c. 210.

[29] The respondents argue the Exhibit was admitted by consent with no objection being raised at trial, and in such circumstances, a new trial is only required if: (a) the records and documents should not have been admitted; and (b) their admission resulted in a substantial wrong or miscarriage of justice. The respondents submit the records and documents, including the statements the appellant says were prejudicial, were relevant to key issues in dispute. In any event, the respondents say the inclusion of this evidence did not result in a miscarriage of justice.

[30] The trial judge provided the jury with mid-trial instructions about the use they could make of letters from Dr. E. Condon and Dr. Gillian Gibson, whose medical opinions did not conform to the format prescribed in the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. She did not instruct the jury on the use they could make of the other medical records until her final jury instructions. No issue is taken with her jury instructions.

[31] This Court has held that medical records should not be entered en masse: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431:

> [39] The preferable approach is obvious. Clinical records should not be admitted into evidence, by consent or otherwise, unless counsel identify the specific purpose for particular portions of the records. Furthermore, it would be preferable to introduce discrete portions of the records when they become relevant so that their admissibility can be ruled on at that time, when the jury will better appreciate the purpose of those portions in the context of the case and will have the assistance of a contemporaneous limiting instruction. In no event should a "book" of documents simply be handed up to the court and admitted as a whole.
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> [Emphasis added.]

[32] I would not restrict this comment to medical records. Further, the fact that an appellant may have consented to the admission of the records is not always the determinative factor in deciding whether documents should have been entered into evidence, and will not preclude the ordering of a new trial with costs to the appellant after prejudicial clinical records were entered into evidence: *Owimar v. Greater Vancouver Transit Authority,* 2007 BCCA 630, citing *Samuel*.

[33] In *Owimar* the court held that a new trial was required where the admission of certain psychiatric records without a proper limiting instruction resulted in an unfair trial:

> [41] In my opinion, the admission of the psychiatric records in this case rendered the trial unfair. The records were left with the jury at the second day of trial. The limiting instruction as to opinions expressed in the records was given shortly before the jury retired to consider its verdict. In the meantime, there were many statements contained in the records that portrayed the plaintiff as unstable and out of touch with reality. Those statements might easily have been accepted by the jury as further diminishing the plaintiff's credibility. Although there is no doubt that the plaintiff's credibility was a central issue in the case and he had much to do to convince the jury of his truthfulness, that issue deserved to be proved independent from psychiatric evidence that had no bearing on the physical injuries he claimed to have suffered. I would accordingly order a new trial.

[34] I agree with the appellant that like *Owimar*, the inclusion of some of the clinical records and material contained in the Exhibit had the effect of portraying the appellant as a difficult, manipulating, and stubborn individual. As appellant's counsel states, this portrayal shifted the focus of the jury to the appellant's negative character traits, rather than to the main issues of the trial.

[35] The respondents' trial counsel assured the judge all the documents in the Exhibit would be referred to in the cross-examination of Ms. Han but they were not. Some of the documents were irrelevant, some were prejudicial, and some were inflammatory. The Exhibit was marked outside the presence of the jury – the trier of fact – which is an irregularity. There was no document agreement in place, so the basis for the appellant's consent to the admission of the Exhibit is not clear. Even with consent, the trial judge is always the gatekeeper.

[36] In my view, the Exhibit should not have been admitted *en masse*. Some of the documents and records should not have been admitted at all, as their admission was highly prejudicial and resulted in a substantial wrong or miscarriage of justice.

[37] On this ground alone, it is in the interests of justice to order a new trial.

C. *Admission of Examination for Discovery Transcript*

[38] Ms. Han submits the trial judge erred in admitting transcribed portions of her examination for discovery, which were used by the respondents' trial counsel to cross-examine her. The respondents submit that this was a discretionary decision, entitled to considerable deference on appeal. The respondents argue there was no injustice since the questions and answers were put to the appellant in her cross-examination at trial and any concern that the jury would give too much weight to the evidence was mitigated by the judge's instruction that the transcripts were to be used only as an *aide memoir*.

[39] I agree with the appellant there was a significant risk that the jury would give greater weight to the transcribed portions than to the appellant's testimony since there was no transcript of her answers given in evidence in response. The judge's instruction to the jury that the transcript was an *aide memoir* did not overcome the resulting prejudice to the appellant resulting from the jury having only one side of the picture during their deliberations.

[40] This procedure was highly irregular and prejudicial to the appellant, resulting in a substantial wrong or miscarriage of justice.

[41] I would also allow the appeal on this ground.

D. *Costs*

[42] Although I have concluded that the judgment must be set aside and a new trial must be ordered, and thus the order for costs dissolves, I wish to comment on the trial judge's reasons on costs. In my view, she made several errors.

[43] Pursuant to Rule 14-1(9), the court must award "the successful party" their costs, unless it orders otherwise. The law of costs was recently discussed by this Court in *Loft v. Nat*, 2014 BCCA 108. The Court held the following principles govern whether a party is "the successful party":

> [46] … At its most basic level the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case: *Service Corporation International (Canada) Ltd. (Graham Funeral Ltd.) v. Nunes-Pottinger Funeral Services & Crematorium Ltd.*, 2012 BCSC 1588, 42 C.P.C. (7th) 416.
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> [47] In this proceeding Mr. Loft was awarded damages for injuries he had suffered in the motor vehicle accident. The respondents had denied liability until shortly before trial. Although the damage award was far less than sought, Mr. Loft was the successful party. The fact that he obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving him of costs: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328, 320 D.L.R. (4th) 637.
>
> [48] The trial judge's stated reason for awarding costs to the respondents was that the respondents had been largely successful in all areas of the claim. With respect, that decision is wrong in principle and cannot stand. I note that on the hearing of the appeal the respondents did not suggest otherwise.

[44] With respect to the court's discretion to deny costs to the successful party, the Court held:

> [49] The fact that a party has been successful at trial does not however necessarily mean that the trial judge must award costs in its favour. The rule empowers the court to otherwise order. The court may make a contrary order for many reasons. One example is misconduct in the course of the litigation: *Brown v. Lowe*, 2002 BCCA 7, 97 B.C.L.R. (3d) 246. Another is a failure to accept an offer to settle under Rule 9-1. A third arises when the court rules against the successful party on one or more issues that took a discrete amount of time at trial. … Whether a judge will order otherwise in any particular case will be dependent upon the circumstances of that individual action.

[45] As identified in *Loft*, the court may consider whether a party has made an offer to settle, pursuant to Rule 9-1(4), and may "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", pursuant to Rule 9-1(5)(a). If the plaintiff has been awarded judgment, pursuant to Rule 9-1(5)(d) the court may nevertheless require them to pay the defendant's costs if the amount awarded is less than an offer made by the defendant. In deciding whether to deprive the successful party of their costs or require that they pay the defendant's costs under Rule 9-1(5), the court is instructed by Rule 9-1(6) to have regard to 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.

[46] The appellant commenced her action in August 1999. On September 20, 2002, the respondents made a formal offer to settle for $50,000. The judge noted this was "an 'offer to settle' as defined in Rule 9-1(1)(a) of the [*Rules*], since it was delivered pursuant to Rule 37 of the former *Supreme Court Rules*, [B.C. Reg. 221/90]" and could therefore be considered pursuant to Rule 9-1(4) in the exercise of the court's discretion as to costs: at paras. 11–12. On July 2, 2009, the respondents made an informal offer to settle for $110,000, which they increased to $120,000 on September 27, 2013. The appellant was awarded $51,300 by the jury in October 2013.

[47] The trial judge found that the appellant ought to have accepted the 2002 settlement offer after May 2004 since she had not obtained medical opinion evidence that supported she was suffering from a brain injury and she had become aware of medical opinion evidence suggesting the contrary. The judge highlighted that the appellant never produced reports for the doctors she claimed had diagnosed a brain injury.

[48] With respect to the relationship between the terms of the 2002 offer and the final judgment, the judge interpreted the value of the 2002 formal offer by using the net present value of the $50,000. She interpreted the 2002 offer to be equivalent to $61,100 in 2013 dollars and accordingly concluded that the respondents had "beaten" their offer.

[49] Considering the parties' relative finances, the judge held as follows:

> [61] The defendants have characterized this litigation as Ms. Han attempting to gain a "windfall" in circumstances where she has faced little, if any, financial consequences in pressing forward with this litigation. In my

> view, there is some merit to this argument, particularly in light of the stark fact that despite 14 years of litigation, no medical evidence was ever produced to support Ms. Han's contention that she was in fact disabled over these 14 years.
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> [62] Ms. Han did, in a sense, have little, if anything, to lose in rolling the dice to see if she could secure an award based on her claims.
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> [63] I have no evidence about the actual costs and disbursements incurred by either party over the last 14 years. I do, however, appreciate that any award of costs to the defendants will substantially lessen the jury award in favour of Ms. Han. Nevertheless, I consider that Ms. Han's actions and inaction in the litigation have shown more than sufficient reason to justify the "penalty".

[50] The judge concluded, "Given that the majority of the time at trial was spent on her unsuccessful attempt to persuade the jury of her disability, one can only describe her as being substantially unsuccessful at trial": at para. 69. The judge thus awarded the respondents costs from June 2004.

[51] In the appellant's submissions, she notes that Rule 9-1(5)(d) of the *Rules* states that a judge may consider awarding the defendant costs if the judgment was "no greater than the amount of the offer to settle". She submits that, in this case, that standard was only satisfied if the settlement offer is converted into its net present value – a novel approach that is not supported by either the *Rules* or the case authorities. She further argues the judge erred in concluding that the offer to settle was not revoked by a subsequent offer to settle. She says the judge also erred in concluding that the defendants were the substantially successful party. According to *Loft*, a successful party is one who establishes liability under a cause of action and obtains a remedy. The appellant says she met that standard and was thus the successful party.

[52] The respondents argue the trial judge's conclusion on costs was discretionary and she made no clear error. They say she was in the best position to determine which party was "substantially successful". Furthermore, the subsequent offer to settle expressly stated that it did not affect the 2002 offer. Finally, her analysis of whether the appellant should have accepted the 2002 offer and when such acceptance should have taken place discloses no error.

[53] I agree with the appellant that the judge erred in adjusting the initial offer to reflect its 2013 value. This approach is not supported in law. As a result, the amount that the appellant was awarded ($51,300) exceeded the formal offer ($50,000) and the judge had no basis to award costs to the defendants pursuant to Rule 9-1(5)(d).

[54] The trial judge also erred in applying the incorrect standard to determine which party was successful. The appellant was clearly the successful party in the action, as that standard is described in *Loft*. Though the appellant was not awarded the entire amount in damages that she sought, she established liability under a cause of action – as in *Loft*, by way of the defendants' admitting liability and conceding some damages – and she obtained a remedy. The defendants did not obtain a dismissal of her case, either with respect to liability or damages.

[55] Thus the order for costs could not have been sustained in any event of the appeal.

III. CONCLUSION

[56] Based on the admission of improper and prejudicial evidence, the judgment is set aside and a new trial is ordered. The appellant is entitled to her costs of this appeal.

"The Honourable Madam Justice Stromberg-Stein"

I Agree:

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Madam Justice Bennett"