Personal Injury Trial Tactics and Tribulations

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Costs and Disbursements Entitlement after a "Mixed Result" Bodily Injury Trial; *Avoiding the Apportioning of Insult after Injury*

David Wallin

Whitelaw Twining
Vancouver BC

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David J. Wallin

Whitelaw Twining, Law Corporation
www.WTinjury.com

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"Litigant, *n.: A person about to give up his skin for the hope of retaining his bones."*

Ambrose Bierce, *Devil's Dictionary*, c 1906.

1. The Issue

The general rule is that barring any formal offers that come into play, the successful party is entitled to his or her reasonable costs and disbursements. However, "success" at trial is a relative concept and parties can often have drastically different perspectives of what in fact equates to "success at trial" when it comes to the ultimate disposition of the matter.

The purpose of this paper is to review the state of the law and identify current emerging trends in this area. Identification and discussion of the relevant themes that emerge from the legal authorities in this area will be discussed. This discussion will include a review of the applicable *Supreme Court Civil Rules* and a review of the Court's considerations when determining the parties' entitlement to reasonable costs and disbursements following what may considered to be a "mixed result" trial.

2. The Applicable Rules

As a starting point, the *Supreme Court Civil Rules* applicable to costs dispositions deserve identification and review.

Rule 9-1 is the "offers to settle" rule and governs offers to settle and their impact on the matter of costs. Rule 9-1(4) states as follows:

> (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Further, Rule 9-1(5) goes on to provide the disposition of costs options available when considering the impact of offers to settle made by the parties. Rule 9-1(5) provides the following:

> In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
>
> (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.

Rule 14-1 is the "costs rule" under the *Supreme Court Civil Rules*. Rule 14-1(9) is the usual rule that costs in a proceeding generally "follow the event". Rule 14-1(9) provides as follows:

> Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

Rule 14-1(15) provides as follows:

> 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.

Another subrule that may have a bearing on the parties' costs entitlement is Rule 14-1(7). Rule 14-1(7) provides as follows:

> If the court has made an order for costs,
>
> (a) any party may, at any time before a registrar issues a certificate under subrule (27), apply for directions to the judge or master who made the order for costs,
>
> (b) the judge or master may direct that any item of costs, including any item of disbursements, be allowed or disallowed, and
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> (c) the registrar is bound by any direction given by the judge or master.

3. The Questions

So how has the Court interpreted and applied these rules and the Court's discretion with respect to costs awards in the context of a "mixed result" trial outcome in relation to the parties' entitlement to costs and disbursements?

Does the Court really have the ability to apply a retrospective *ex post facto* analysis of the trial outcome to deprive a plaintiff from his or her costs or disbursements by "slicing and dicing" the plaintiff's claim into its discreet heads of damages and then determining the "winner" at the conclusion of such an analysis?

Or potentially even more daunting, in what circumstances will the Court be inclined to not only deprive a "successful" plaintiff of his or her costs and disbursements incurred in relation to step(s) taken but instead and award the defendant his or her costs and disbursements incurred in relation to the that party's costs and disbursements incurred in relation to steps taken?

4. The Authorities

The "usual" rule is that costs will be awarded to the successful party. The Court of Appeal has held that the person who seeks to displace the usual rule that costs go to the successful party has the burden of persuading the judge that the usual rule should be displaced.[1] The expectation should not be defeated except for some reason connected with the proceeding.[2]

Although costs are discretionary, the costs discretion must be exercised judicially. Successful parties have a reasonable expectation of being awarded their costs. Special circumstances must be established to defeat the expectation.[3] The Court of Appeal has expressly stated that although costs are discretionary, the costs discretion must be exercised judicially:

> Successful parties have a reasonable expectation of being awarded their costs. Special circumstances must be established to defeat the expectation. The expectation should not be defeated except for some reason connected with the proceeding.[4]

The "test" for the Court exercising judicial discretion in the apportionment of costs under Rule 14-1(15) can generally be set out 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; and
3. It must be shown that apportionment would effect a just result[5].

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[1] *Grassi v. WIC Radio Ltd*, 2001 89 BCLR (3d) 198 (BCCA)

[2] *Currie v. Thomas*, (1985) 19 DLR (4th) 594 at pp. 606 and 608 (BCCA)

[3] *Currie v. Thomas*, (1985) 19 DLR (4th) 594 at pp. 606 and 608 (BCCA)

[4] *ibid*

In applying the legal test to the factual circumstances in a given case, there has been considerable judicial commentary in relation to the requirements and in what circumstances will the Court consider it appropriate to "apportion" costs and/or disbursements. More to the point, there has been considerable judicial commentary in relation to in what circumstances ought the Court ***resist*** an application to apportion costs following a "mixed result" bodily injury trial.

It has been stated that applications under the apportionment subrule should not become a regular feature of litigation. The apportionment subrule has however been invoked where there have been discreet issues "occupying distinct portions of time in the life of the trial, which could be identified as having been won or lost".[6]

In this respect, it has been held in a number of cases that the apportionment rule can only be applied to particular issues that can be "clearly delineated" or which can be "neatly severable" from the rest of the proceedings.[7]

For example, in *Payne v. Lore*, the defendant argued that the plaintiff should be deprived, and the defendants be awarded their costs relating to the plaintiff's claims for future income loss and future cost of care to reflect the plaintiff's lack of success regarding those particular aspects of the plaintiff's claim. The defendants sought their costs for two-and-a-half days of trial as well as disbursements for the parties' experts relating to those issues. Further (and in the alternative), the defendants sought orders that (a) the plaintiff be denied all costs and disbursements relating to two experts, and (b) that the defendants be awarded costs for the one day of the trial taken up with the evidence of those two experts.

In response to the defendant's application, the Honourable Madam Justice Wedge stated, that Rule 14-1(15) (then Rule 57(15)), is an exception to the directive in Rule 14-1(9) (then Rule 57(9)), that costs follow the event unless the Court otherwise orders. In response to the defendant's submissions that the Plaintiff be denied her costs and that instead the defendant be entitled to his costs, the Honourable Madam Justice Wedge held as follows:

> While Ms. Payne's claims for loss of earning capacity and cost of future care were unsuccessful, the evidence of the treating practitioners and consultants was sufficiently intertwined with the other issues at trial as to render it inappropriate, in my view, to hive off portions of the evidence relevant to those heads of damage. Ms. Payne was, in my view, substantially successful in this personal injury litigation.
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> Subrule 15 of Rule 57 was designed to be an exception to the general rule and is not amenable to an application in most personal injury claims where so much of the evidence is led to address the issues generally.[8]

The principles governing the application of the apportionment subrule were well summarized by the Honourable Mr. Justice Burnyeat in *DiFranco v. Sung* (subsequently cited with approval in the 2006

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[5] *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 31

[6] *Gotaverken Energy Systems Ltd. v. Cariboo Pulp & Paper Co.*, (1995) 9 BCLR (3d) 340 at p. 343 (BCSC)

[7] *B.(R.A.R.) v. British Columbia*, 2001 14 CPC (5th) 357 (BCSC) at para. 17

[8] *Payne v. Lore*, 2010 BCSC 1313 at paras. 46-47

case of *White v. Stonestreet*[9]). These factors or "governing principles" were stated as follows:

1. Rule 57(15) [formerly R. 57(8)] is concerned with success on particular issues or parts of the proceeding, not with success in terms of the relief granted.
2. An issue within the meaning of R. 57(15) is one which is a neatly severable part of the pleadings or proceedings.
3. It is an error in principle to award every litigant costs on issues on which the opposing party has failed.
4. Proof of misconduct is not a condition precedent to making an order under the rule.
5. The court will consider conduct in determining the severity of the order, eg. whether to deprive a party of his costs or to award costs in his opponent's favour.
6. Apportionment of costs should occur in relatively few cases.

> I am satisfied that this is not one of those "relatively few cases" where there should be an apportionment of costs. I cannot conclude that the case would have taken less time or that it would have been settled if the prior medical and psychological history of the plaintiff had been made known to all of the consultants from the beginning. At the same time, it is impossible to find that the questions of future wage loss and future care costs are "neatly severable." Rather, these heads of damages are inseparable from the main question raised by the pleadings: to what extent the admitted negligence of the defendants has created long term effects for the plaintiff. While the claims may have been exaggerated, I did not and cannot now conclude that they were imaginary. It is merely the case that I could not be satisfied on a balance of probabilities that the plaintiff had shown that there was any loss of earning capacity or any need for future care costs as a result of the two accidents.[10]

More recently, in *Dinyer-Fraser v. Laurentian Bank*, the defendants also submitted that they were the overall "successful party" or, at a minimum, "success was divided" because: the plaintiff's damages claim was "many times in excess" of what she was ultimately awarded at trial. In this regard it was submitted by the defendants that the plaintiff was unsuccessful in certain aspects of her damage claim (most notably future economic loss); and that the Court had commented negatively on the plaintiff's credibility.

The defendants further submitted that because the plaintiff was "largely unsuccessful", she should bear her own costs and pay a portion of the defendants' trial costs and all of the defendants' trial disbursements (including the significant costs of expert witnesses). The defendants contended that this case justified a departure from the general rule on costs and sought the benefit of an apportionment of costs provided by the apportionment subrule. In response to these submissions the Honourable Madam Justice Ballance held as follows:

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[9] *White v. Stonestreet*, 2006 BCSC 1605

[10] *DiFranco v. Sung*, (1998) B.C.J. No. 430 (BCSC) at para. 11

> Rule 57(15) empowers the trial judge with a discretion, to be exercised judicially, to effect a just result between parties in cases which have been prolonged by issues raised unsuccessfully by a party. Whether it would be manifestly fair and just to apportion costs is fact dependent. In the leading case of *British Columbia v. Worthington (Can.) Inc.* (1988), (BCCA), [citation omitted] Esson J.A. explained the purpose of the predecessor to Rule 57(15), and pointed out that it is concerned not with the success of a party in terms of the relief claimed but with whether success has been achieved on a particular issue. The authorities decided after *Worthington* consistently recognize that it is not a legitimate approach to compare the amount of the final award to the claims or positions taken during trial as a measure of relative success on particular issues for the purposes of apportioning costs: *Pangil v. Mutual Fire Insurance* (1995), 30 C.C.L.I. (2d) 268, [1995] B.C.J. No. 531 (QL) (S.C.); *Jacobsen v. Bergman*, [1999] B.C.J. No. 2910 (QL) (S.C.) and *Kimp v. Wittenberg* (8 June 1999), Vancouver Registry, C915296 (B.C.S.C.).[11]

Another good example was in *Jacobsen v. Bergman*. In this case, the Honourable Mr. Justice Burnyeat again discussed the limited circumstances in which costs should be apportioned under the predecessor apportionment rule, wherein he said:

> Costs should be apportioned under Rule 57(15) only where separate issues can be delineated clearly: *Haida Inn Partnership v. Touche Ross & Co.*, (1991), 48 C.P.C. (2d) 61 (B.C.S.C.). Rule 57(15) was not designed to allow for a minute dissection of the success or failure of litigants on the completion of the trial but rather was envisioned that there would be discreet issues, occupying distinct portions of time in the life of a trial and involving distinct questions of law or fact, upon which an objective observer could say one or other of the parties was successful in the result.[12]

Such costs apportionment requires the Court to be able to clearly delineate "distinct portions" of occupying trial time. However, many judges have commented it "is rarely the case in personal injury actions."[13]

It is for this reason that the cases in which that apportionment has been successful tend to be in contexts other than bodily injury claims. There has however, been apportionment in several notable bodily injury cases[14], as well as cases involving construction contract disputes[15], matrimonial matters[16], and real estate transactions.[17]

As the Honourable Madam Justice Wedge stated in *Payne v. Lore*, (2010), Rule 57(15) - (the predecessor rule to R. 14-1(15)), was designed to be an ***exception*** to the general rule and is not amenable

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[11] *Dinyer-Fraser v. Laurentian Bank,* 2005 BCSC 1432 at para. 9

[12] *Jacobsen v. Bergman,* [1999] B.C.J. No. 2910 (BCSC) at para. 17

[13] *O'Ruairc v. Pelletier*, 2005 BCSC 1001 at para. 7

[14] see e.g.: *Shearsmith v. Houdek,* 2008 BCSC 1314; *Lee v. Jarvie*, 2012 BCSC 1521 and *Heppner v. Zia*, 2009 BCSC 369

[15] *Citta Construction v. Elizabeth Lane Holdings Ltd.*,(2004) BCSC 280

[16] *Fotheringham v. Fotheringham,* 2001 BCSC 1321

[17] *Cardwell v. Perthen*, 2007 BCSC 366

to an application in most personal injury claims where so much of the evidence is led to address the issues generally.[18]

The authorities are consistent in applying the principle that the apportionment of costs subrule should not become a regular feature of litigation. It has been stated that the apportionment subrule is only appropriately invoked where there have been discreet issues "occupying distinct portions" of time in the life of the trial which could be identified as having been won or lost.[19]

Even if the applicant can demonstrate that this can be done within the unique and particular facts or framework of the case, it has been stated that the Court should only exercise this discretion in the rarest of cases and where it would be manifestly unfair not to do so. The Court's discretion must be exercised judicially, to affect a just result between the parties in cases which have been unnecessarily prolonged by issues raised unsuccessfully by a party. Whether it would be manifestly fair and just to apportion costs is very case specific and fact dependant.[20]

In the 1988 case of *British Columbia v. Worthington (Canada) Inc.*, the Court of Appeal stated that the apportionment subrule is not intended to be used as a "blunt instrument" for the Court to be moved to award a party the costs of an issue which the other party has lost.[21] Instead, it has been stated that the apportionment subrule may be invoked to ensure that litigants are not rewarded for raising "red herring issues" that consume discreet portions of trial time unnecessarily. It was not intended and should not be used to perform an *ex post facto* review of the case with the "benefit of hindsight".

Trial judges have consistently held that it is generally an artificial exercise to find that the questions of future wage loss and future care costs are neatly severable from other aspects of the plaintiff's claim. Rather, those heads of damages are generally considered to be inseparable from the main question raised by the pleadings - to what extent the negligence of the defendant has created long-term effects for the plaintiff.

The authorities have also consistently recognized that it is not a legitimate or proper approach to compare the amount of the final award to the claims or positions taken during the trial (or pre-trial), as a measure of relative success on particular issues for the purpose of apportioning costs.[22]

Similarly, it has also been stated that "success is not winning an argument; it is obtaining a tangible gain"[23]. Generally speaking, a successful plaintiff is entitled to an order for costs, even where he or she did not "succeed" on every issue[24]. In this regard, it has also been stated that it is not an appropriate approach for the Court to approach the issue of costs apportionment as a "mathematical apportionment of relative success on issues before the Court."[25]

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[18] *Payne v. Lore*, 2010 BCSC 1313 at para. 47

[19] *Gotaverken Energy Systems Ltd v. Cariboo Pulp & Paper Co.*, (1995) 9 BCLR (3d) 340 at p. 343

[20] *Dinyer-Fraser v. Laurentian Bank*, 2005 BCSC 1432 at para. 9

[21] *British Columbia v. Worthington (Canada) Inc.*, (1988) 29 BCLR (2d) 145 at pp. 162-164; 167; and 169 – 170 (BCCA)

[22] *Dinyer-Fraser v. Laurentian Bank*, 2005 BCSC 1432 at para. 9

[23] *In re: Taxation of Costs In re: Locke, Lane, Nicholson and Sheppard*, (1942), 57 BCR 304 at p. 316 / para. 40 (BCCA)

[24] *Robbins v. Pacific Newspaper Group Inc.*, (2006) 54 BCLR (4th) 135 at para. 17 (BCSC)

[25] *Jacobsen v. Bergman*, as quoted in *O'Ruairc v. Pelletier*, at para. 32

Accordingly, the authorities are generally consistent in "… rejecting comparisons of the amount of the final award to the claims or positions taken by defendants as a measurement of relative success on particular issues for the purposes of apportionment of costs."[26]

For example, in *Jacobsen v. Bergman*, the Honourable Mr. Justice Burnyeat apportioned costs where he was satisfied that the issues were of "such a distinct and discrete nature" that apportionment under Rule 57(15) was indeed appropriate. However, he rejected the argument of the defendants that the costs should be apportioned further to reflect the proportionate success they achieved in relation to most of the claims advanced by the plaintiff, stating:

> What is suggested by the defendants amounts to a mathematical apportionment of success. Because damages of approximately $130,000 were claimed and a judgment of $9,210.60 was granted, the defendants submit that an 80/20 apportionment is appropriate. This submission ignores the fact that the plaintiffs were successful on the particular issue and should not be disentitled to their costs merely because their expectations exceeded the reality of the ultimate judgment.
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> *The inappropriate nature of this submission can best be illustrated by a successful plaintiff in a motor vehicle accident who claims damages of $100,000 but is ultimately granted judgment in the amount of $25,000. It cannot be said that the successful plaintiff should only be in a position to recover 25% of his or her costs merely because the hopes for a higher judgment were dashed in the judgment ultimately granted. The apportionment already ordered would ordinarily bring the question of further apportionment to an end.*[27] (emphasis added)

In a similar respect, in *Dinyer-Fraser v. Laurentian Bank*, the Honourable Madam Justice Ballance stated the following in response to the defendants' submission that the apportionment of costs was warranted in circumstances where the quantum of the plaintiff's awarded damages was considerably less than what the plaintiff claimed at trial:

> [14] The defendants' argument, indeed their primary theme, is that apportionment of costs is justified on the ground that the quantum of damages awarded was considerably less than what the plaintiff claimed is not supported by the authorities. I reject it.
>
> [15] It is not difficult to characterize damages for future income loss as part of a proceeding or a separate legal issue in the broad sense. But the question to be decided for the purposes of Rule 57(15) is whether the particular issue or part of the proceeding can be said to be discrete in the sense that it occupied an identifiable segment of trial time; time that was of some significance in the course of the trial such that it prolonged or protracted it. The answer is in the negative in this case.
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> [16] … [E]vidence, adduced through both lay and expert witnesses, was critical to the issue of liability and the assessment of damages. It would have been properly called even

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[26] *Pangli v. Mutual Fire,* as quoted in *O'Ruairc v. Pelletier,* at para. 33

[27] *Jacobsen v. Bergman,* [1999] B.C.J. No. 2910 at paras. 30-31

> if there had been no claim for future loss of income. The factual matrix of this case had unusual and complex elements and the matter of the plaintiff's future economic loss was not a discrete issue occupying a clearly distinct portion of the trial time. Rather, it was interwoven with many other key trial issues in respect of which the plaintiff was successful. Neither it nor the evidence germane to aggravated damages can be isolated from the body of the trial in any meaningful way.[28]

The Court has consistently held in the relatively rare cases where apportionment of costs has been sought at the conclusion of a bodily injury claim that success on some, but not all heads of damage or the fact that the Plaintiff did not achieve the success he or she had hoped for, does not mean that he/she was not the successful party. As was stated by the Honourable Madam Justice Wedge in *O'Ruairc v. Pelletier*:

> As noted by Meiklem J. in *Pangli v. Mutual Fire Insurance Co. of British Columbia*, [1995] B.C.J. No. 894, the authorities are reasonably consistent in "rejecting comparisons of the amount of the final award to the claims or the positions taken by defendants as a measurement of relative success on particular issues for the purposes of apportionment of costs".
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> Bearing those comments in mind, I have concluded that the plaintiff was substantially successful in the litigation. The trial in the present case involved both liability (in the Pelletier action, which was the far more serious of the two) and damages. The plaintiff succeeded in striking the jury notice and having the issues of liability and damages severed. He succeeded in establishing liability on the part of the defendant Pelletier. The plaintiff established both injury and causation, and proved some, but not all, heads of damage. The fact that he did not achieve the success he had hoped for does not mean he was not the substantially successful party.[29]

Judges deciding apportionment applications have also consistently stated that parties should not be unduly deterred from bringing a meritorious, albeit uncertain claim, because of the fear that a punishing cost order could potentially wipe out their damages award.[30] For example, in the British Columbia Court of Appeal case of *Houweling Nurseries v. Fisons,* the Honourable Madam Justice McLaughlin held as follows on behalf of a unanimous Court:

> Costs in our system of litigation serve the purpose, not only of indemnifying the successful litigant to a greater or lesser degree, but of deterring frivolous actions or defences. Parties, in calculating the risks of proceeding with a particular action or defence, should be able to forecast with some degree of precision what penalty they face should they be unsuccessful. Moreover, there is a sound reason for keeping costs within relatively modest limits. The possibility of high costs may unduly deter a party from bringing an uncertain but meritorious claim or defence.[31]

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[28] *Dinyer-Fraser v. Laurentian Bank,* (2005) BCSC 1432 at paras. 14-16

[29] *O'Ruairc v. Pelletier, ibid* at para. 34

[30] *A.E. v. D.W.J,* 2009 BCSC 505 at para. 61 and also *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1497 at para. 19

[31] *Houweling Nurseries v. Fisons*, 1998 CanLII 186 BCCA; also quoted with approval in *A.E. v. D.W.J.,* (2009) BCSC 505 at para. 61

The Court has consistently stated that considerations of cost consequences following a trial must be approached with "caution". As the Honourable Madam Justice Humphries stated in *Lumanlan v. Sadler*:

> One must be cautious with the advantage of hindsight in equating having guessed wrongly with having been unreasonable in rejecting [a formal] offer, especially when the Plaintiff receives a substantial award at trial.[32]

It is worth noting that the "substantial award at trial" contemplated by the Honourable Madam Justice Humphries in *Lumanlan v. Sadler* was approximately $81,000.

The Honourable Madam Justice Humphries also points out in *Lumanlan v. Sadler* that as every trial judge knows, an assessment of non-pecuniary damages is a difficult and somewhat subjective task[33]. Complex issues of medical causation and legal principles of *novus actus* can also be problematic and present significant challenges in assessing pre-trial prospects in such cases.

It is important to understand that the simple fact that the plaintiff obtained a judgement in an amount less than the amount sought by the plaintiff at trial is not, by itself, a proper reason for depriving a successful plaintiff of costs. In *3464920 Canada Inc. v. Strother*, the Honourable Mr. Justice Tysoe stated the following on behalf of a unanimous Court of Appeal:

> When a plaintiff sues a defendant and obtains judgment, the plaintiff is entitled to the costs of the proceeding unless the court otherwise orders Rule 57(9) of the *Supreme Court Rules*. The court will make a contrary order for numerous reasons, including unaccepted offers to settle under Rule 37B and improper or unnecessary acts (Rule 57 (14)). However, the fact that the plaintiff obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving a successful plaintiff of costs. If the plaintiff was not successful in obtaining judgment in the amount sought because the court ruled against the plaintiff on one or more issues that took a discrete amount of time at the trial, the judge may award costs in respect of those issues under Rule 57(15).[34]

In exercising the costs discretion, the Court must not exceed "the generous ambit within which reasonable disagreement is possible". The subrule does not require the Court to award a party the costs of an issue, which the other party has lost. It is reasonable for litigants to assume that orders under this subrule should be relatively rare. As the Honourable Mr. Justice Taylor succinctly stated in *Van Halteren v. Wilhem*:

> The rules here are not concerned with ultimate success in terms of the relief granted or even with wrong doing or misconduct but rather with particular issues that arose during the trial. The purpose of these rules, as noted by Mr. Justice Esson for the majority in *B.C. v. Worthington, supra*, p. 167, "to effect a just result between parties in cases which have been prolonged by issues such as those raised here by the defendants." Another less elegant description of the effect of Rule 57(15) is to avoid rewarding litigants who,

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[32] *Lumanlan v. Sadler*, (2009) BCSC 142 at para. 35

[33] *ibid*

[34] *3464920 Canada Inc. v. Strother*, (2010) 8 BCLR (5th) 53, 2010 BCCA 328, at para. 43

> although generally successful, raised "red herring issues" during the proceedings that unnecessarily consumed portions of the trial.[35]

It has also been held that the Court's "power to deprive a successful party of costs is greater than the power to award costs to a losing party".[36] It has been held that applications under this subrule should not be used as substitutes for assessments. These applications should be restricted to matters or circumstances which arose at trial and which were therefore within the purview of the trial judge.

Judicial commentary has consistently stated that the purpose of the apportionment subrule is to give trial judges a discretionary power to affect a just result between the parties, where cases have been prolonged by issues, which are lost.[37] It has also been consistently held that the decision to accept an offer is not to be done with the "benefit of hindsight".[38] "Reasonableness must be assessed without reference to the final judgment" - "there should be no hindsight analysis."[39]

However, the pursuit of intentionally inflated and exaggerated claims or claims where the plaintiff has sought to use the Court as a "vehicle for a fraudulent scheme" **must be distinguished** from complicated claims where such matters as medical causation or some other complicated factual or legal issue was seriously an issue. In this regard, the Honourable Madam Justice Ballance stated the following in *Dinyer-Fraser v. Laurentian Bank*:

> Here the plaintiff exaggerated repeatedly in order to bolster her own case. Her misconduct is deserving of judicial rebuke, but falls short of amounting to the kind of grotesque exaggeration or fraudulent-like misconduct that would justify an order that she pay the defendants' costs.[40]

In relation to the issue of success at trial relative to settlement offers exchanged prior to trial, it has been stated that the issue should be seen from the offeree's perspective. In most cases obtaining judgment for an amount that exceeds a pretrial offer is likely to outweigh all other factors.[41] "Whether an offer ought reasonably to have been accepted must be determined as at the time the offer was open for acceptance, not by reference to the judgment ultimately pronounced".[42] "The Offeror must establish that the offer ought to have reasonably been accepted."[43]

Recently, in the 2014 case of *Kovac v. Moscone*[44], the plaintiff received a general damages award of $75,000 following a 21 day judge-alone bodily injury trial. Following the trial, the defendant made an application for costs pursuant to R. 9-1, or in the alternative, an apportionment of costs, pursuant to R.

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[35] Van *Halteren v. Wilhem,* (1998) 22 CPC (4th) 319 BCSC at para. 38

[36] *Murdy v. Minahn,* 2010 BCSC 1110 at para. 18 and also *Barclay v. British Columbia (Attorney General)* 2006 BCCA 434 at para. 37

[37] *British Columbia v. Worthington (Canada) Inc.,* (1988), 29 BCLR (2d) 145 at pp. 162–164; 167; and 169-170 (BCCA)

[38] *Lumanlan v. Sadler,* (2009) BCSC 142 at paras. 34-38

[39] *E.A. v. D.W.J.,* 2009 91 BCLR (4th) 372 SC at para. 55

[40] *Dinyer-Fraser v. Laurentian Bank,* 2005 BCSC 1432 at para. 18

[41] *Gibbon v. Manchester City Counsel,* [2010] 5 Costs Law Review 828 at para. 40

[42] *Hartshorne v. Hartshorne,* 2011 BCCA 29 at para. 27

[43] *British Columbia Society for the Prevention of Cruelty to Animals v. Baker,* 2008 BCSC 947 at para. 36

[44] *Kovac v. Moscone,* 2014 BCSC 259

14-1(15). It was submitted that despite the plaintiff receiving a damages award of $75,000, that the defendant was substantially successful at trial, when measured against the plaintiff's R. 9-1 formal offer / quantum of damages submissions at trial and the Court's damages award. Liability was not at issue in the *Kovac* case, but issues of injury causation and an intervening workplace injury (with a corresponding *novus actus* argument) featured as the most prominent issue at trial and upon which considerable expert evidence was presented at trial.

With respect to the issue of "degree of success" enjoyed by the Plaintiff at the conclusion of the trial, the trial judge (the Honourable Mr. Justice Harvey) had the following to say:

> [13] Nonetheless, I agree with plaintiff's counsel that the plaintiff achieved a substantial degree of success in the proceeding and her damages were assessed in excess of the defendant's offer to settle. She succeeded on the disputed issue of whether or not she sustained thoracic outlet syndrome as a result of the collision. A significant amount of evidence from both lay and expert witnesses was called in support of and against that proposition.
>
> [14] Also, the defendant contributed to the lengthy trial by pursuing unmeritorious issues. The defendant went so far as to call [name omitted], an ICBC adjuster who handled the plaintiff's claim in its early stages, to suggest that the plaintiff had concocted her complaints of hand pain and associated numbness based upon the adjuster's discussion of her own symptoms of hand numbness at the time they met to discuss the plaintiff's claim in November 2005.
>
> [15] The plaintiff's medical records, which were at all times available to the adjuster prior to her meeting with the plaintiff, clearly indicated that the complaints of hand numbness had been made to the plaintiff's family doctor well in advance of her meeting with the adjuster.
>
> [16] Despite the fact that those records were provided to the defendant's counsel well in advance of the trial, the defence persisted with the theory of concoction at trial when it was wholly without merit.
>
> [17] I agree with the plaintiff's submission that she achieved a substantial award of damages in the proceeding in excess of that which she could have settled the claim for. I note that the plaintiff had to press this matter to trial to achieve the award she did and succeeded in establishing that her injuries were more substantial than was suggested by the defendant. In the usual course, she would be entitled to costs of the proceeding, including all of the trial days.
>
> [18] Furthermore, I reject the defendant's alternative argument that I ought to consider the defendant's offer to settle for an amount some $20,000 to $25,000 below that which was ultimately awarded.

With respect to the issue of the significance of the parties' exchange of R. 9-1 settlement offers, His Lordship stated the following:

> [21] As noted above, the [defendant's] offer fell short of the damages awarded to the plaintiff by approximately one-third.
>
> [22] The language of R.9-1(5)(d) is inconsistent with the notion that I am entitled to consider an offer which is proximate to, but less than, that which was awarded, and nevertheless invoke the rule to provide the defendant with costs of the trial.
>
> [23] Rule 9-1(6) governs the considerations as to the application of R. 9-1(5). Subsection (a) specifies that one of the considerations is "whether the offer to settle was one that ought reasonably to have accepted, either on the date that the offer to settle was delivered or served or on any later date". Subsection (b) notes that the court may consider "the relationship between the terms of settlement offered and the final judgment of the court".
>
> [24] Here, the offer is not one which ought to have reasonably been accepted. The plaintiff's recovery exceeded the offer by almost 50%. In my view, the defendant's offer to settle, falling short of the amount awarded, does not warrant departure from the usual rule that a successful plaintiff is entitled to his or her costs.

Finally, with respect to the issue of the defendant's alternative submission of the apportionment of costs, and review of the relevant judicial authorities, His Lordship held the following:

> [50] Having considered the authorities, I do not find this case to be one of the exceptional or rare instances where costs apportionment should take place. Although the claims for future economic loss were discrete issues which occupied identifiable portions of the trial, I am not of the view that apportionment would affect a just result in the circumstances.
>
> [51] Unlike in *Lee*, where the court found that the plaintiff pursued inflated and unrealistic claims, all parties agreed that the plaintiff had profound and disabling injuries. I did not find that her injuries were exaggerated; they were real and catastrophic. As noted earlier, the assessment of the plaintiff's damages were complicated by the subsequent accident at her workplace.
>
> [52] I agree with Gaul J. that the divergence over apportionment of costs in motor vehicle cases hinges on the "determination of the degree of success" achieved at trial and whether the trial was "unnecessarily prolonged by the pursuit of inflated or unrealistic claims" (at para. 38).
>
> [53] Here the plaintiff's claims were neither inflated nor unrealistic. The issue of causation was live throughout the trial.
>
> [54] Furthermore, I made no finding similar to that in *Lee* as to the plaintiff's credibility. Rather, I found her evidence and that of others who relayed her complaints in the intervening period between the motor vehicle accident and the workplace accident to be

> unreliable; therefore, the causal connection between the motor vehicle accident and some of her injuries at trial were not proven.
>
> [55] The defendant spent considerable time attacking the plaintiff's credibility as opposed to her reliability through the evidence of [the ICBC adjuster], when such an endeavor was premised upon nothing more than [the ICBC adjuster's] concern that the plaintiff was mimicking her symptoms.
>
> [56] Furthermore, the defendant was equipped with the ability, through its offer to settle, to properly protect itself from the cost consequences of the plaintiff's failure on the issue of the causal connection between her admittedly catastrophic injuries and the motor vehicle accident.
>
> [57] The conclusion that apportioning the costs would not affect a just result in the circumstances, as I have determined, does not necessarily entitle the plaintiff to the full costs of the trial. In *Bailey v. Victory* (1995), 4 B.C.L.R. (3d) 389, [1995] B.C.J. No. 526 (C.A.), the Court of Appeal found that costs apportionment would have an unfair effect. The Court held the plaintiff "lost the battle he sought to fight on the ground which he chose" which protracted the trial and he should "bear the consequences of that, but no more" (at para. 35). The Court found that in light of the fact that the plaintiff proved liability and received an award substantially in excess of what was advanced, it was fair to deny him costs for 3 days of trial.
>
> [58] In my view, the trial could have been reduced to approximately 11 days absent the plaintiff's claims for losses flowing from the workplace accident. Therefore, I find the appropriate disposition of the issue of costs is to award the plaintiff her costs but limit them to 11 days of trial as was done in *Bailey* and *Berston v. McCrea*, [1996] B.C.J. No. 134 (S.C.).
>
> [59] The plaintiff is entitled to the costs of this application.

5. Summary and Conclusion

The "usual" rule is that costs will be awarded to the successful party, and that the party that wished to challenge the usual rule will need to establish the special circumstances to defeat the expectation.

The Court has with the exception of relatively few notable exceptions refused to apportion costs and disbursements following a "mixed result" bodily injury trial. The practical and legal rationale for the Court's reluctance is well established in the authorities.

Bodily injury cases present additional challenges for apportionment, due to the often intertwining nature of the plaintiff's heads of damages and the corresponding swing in damages quantum in establishing most aspects of the plaintiff's damages claim, while falling short on others. Such a frequent lack of clearly delineated discreet issues or issue that can be "neatly severable" from the rest of the proceedings and occupying distinct portions of time in the life of the trial, can also make an apportionment of costs particularly problematic.

The key principle that has emerged from the authorities is that the apportionment of costs is limited to exceptional cases[45]. It is not a routine feature of litigation, nor have judges suggested that it should be. Rather, it is reserved for relatively rare instances.[46]

The Court has discretion pursuant to the *Supreme Court Civil Rules* to make costs awards to affect a just and fair result in all of the circumstances. The Court's discretion with respect to costs awards should be used as an effective and legitimate penalty for unreasonable litigation conduct and not a penalty for wrongly guessing the eventual outcome of a proceeding. Leeway ought to be given to parties who have mistakenly, but honestly assessed their positions."[47] Ultimately, the Court should consider the reason for costs rules, which are in part to discourage the prosecution of doubtful cases and the maintenance of doubtful defences."[48]

The overarching guiding principles in the exercise of this judicial discretion should balance the goals of not discouraging the advancement of challenging but meritorious claims, while at the same time retaining the power to admonish and visit appropriate and measured financial consequences upon litigants that approach the litigation with little or no concern for the financial impact such actions can have upon both the other litigants and the administration of justice with respect to the impact on our limited judicial resources.

By: David J. Wallin, Director

Whitelaw Twining, Law Corporation
2400 – 200 Granville Street
Vancouver, British Columbia, V6C 1S4
Internet: www.WTinjury.com
Direct Phone: (604) 891-7211
E-mail Address: DWallin@wt.ca

[45] see e.g.: *Loft v. Nat*, 2014 BCCA 108 at paras. 46-50

[46] *Dinyer-Fraser v. Laurentian Bank*, 2005 BCSC 1432 at para. 10

[47] *Fan v. Chana*, 2009 BCSC 1497 at para. 19

[48] *Bowen Contracting Ltd. v. BC Spill Recovery*, 2009 BCSC 244 at paras. 49-50 and 53