CITATION: Giordano v. Li, 2015 ONSC 3048
OSHAWA COURT FILE NO.: 68539/10
DATE: 2015-05-13

CORRECTED DATE: 2015-05-14

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Marie Giordano, Plaintiff

Cheng Li and Fang Zhi Li, Defendants

BEFORE: Mr. Justice J.B. Shaughnessy

COUNSEL: Theodore P. Charney and Andrew J. Eckart, for the Plaintiff

Todd J. McCarthy, for the Defendants

HEARD: March 6, 2015

COSTS ENDORSEMENT

[1] This proceeding was a three week trial by jury. Liability was admitted. The jury delivered a verdict assessing the damages of the plaintiff as follows:

General Damages	$ 68,625.00
Past Loss of Income	$ 76,536.00
Past Expenses for Household Cleaning	$ 1,320.00
Past Out-of-Pocket Expenses	$ 2,029.00
Future Income Loss	$ 371,076.00
Future Household Expenses	$ 39,700.00
Future Care	$ 20,052.00

[2] The jury's gross award, before deductions and inclusive of pre-judgment interest is $596,971.48. However, after making the appropriate deductions for deductibles, income replacement benefits received and factoring in pre-judgment interest, the judgment entered for the plaintiff totals $481,244.19; (the general damages were reduced by

$30,000.00 to reflect the deductible under the current insurance regime; the plaintiff received income replacement benefits prior to trial in excess of $125,000.00, thereby eliminating the award of $76,536.00 for loss of past income.)

[3] The defendants do not dispute the quantum of disbursements incurred by the plaintiff in the amount of $124,013.46. Further, the defendants do not dispute the number of hours detailed in the plaintiff's dockets subject to the submission on proportionality as detailed herein.

History of the Offers to Settle

[4] The trial was originally scheduled to proceed in the May 2014 sittings. Following a judicial pre-trial, the plaintiff delivered a Rule 49 Offer dated November 8, 2013 in the amount of $620,000.00 plus costs.

[5] On February 3, 2014**,** the defence delivered a Rule 49 Offer in the amount of $5,000.00 inclusive of interest plus costs.

[6] The parties agreed to adjourn the trial and proceed to mediation on May 9, 2014. The mediation was not successful. On May 13, 2014, the defendant served a new offer to settle of $30,000.00 inclusive of interest plus costs.

[7] The action was adjourned then to the fall November, 2014 sittings at Oshawa.

[8] On November 5, 2014, the plaintiff withdrew her previous Rule 49 Offer to Settle and replaced it with an Offer to Settle of $300,000.00 inclusive of interest plus costs.

[9] The jury was selected on November 17, 2014 and the trial commenced with the first witness on November 18, 2014.

Applicable Rules

[10] Rule 49.10(1) provides where an Offer to Settle

> (a) is made by a plaintiff at least seven days before the commencement of the hearing; and,
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the defendant,
>
> and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial costs from that date, unless the court orders otherwise.

[11] Rule 49.13 provides that

Despite rules 49.03, 49.10 and 49.11, the court in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

[12] In addition to the foregoing, I must consider the factors outlined in Rule 57.01.

Plaintiff's Position

[13] The plaintiff's position is that based on the Offer to Settle dated November 5, 2014 ($300,000 inclusive of interest plus costs) and compared to the judgment rendered by the jury, net after deductibles plus interest ($481,244.19), that the plaintiff has obtained a judgment that is as favourable as or more favourable than the Offer to Settle. Therefore applying Rule 49.10, the plaintiff ought to be awarded partial indemnity costs to November 5, 2014 and full indemnity costs thereafter.

Defendants' Position

[14] The defendants' position has to be broken down into three sub-compartments:

(1) The defendants submit that because the plaintiff has continued and will continue to receive income replacement benefits from her accident benefit insurer, Allstate, therefore, the jury's award of $371,076.00, for future income loss, must be eliminated from the consideration of whether the plaintiff has recovered a judgment that is favourable as or more favourable than the Offer to Settle of November 5, 2014. It is submitted that under s. 267.8 of the *Insurance Act*, the plaintiff is required to assign all right and entitlement to ongoing future income replacement benefits paid or payable by Allstate, as accident benefit carrier, to the defendants' insurer, State Farm Mutual Automobile Insurance Company. The entitlement will follow upon payment of the judgment inclusive of the $371,076.00 in future income loss by the defendant's insurer. The right of assignment will continue up until the sum of $371,076.00 is paid by Allstate to State Farm.

(2) Therefore, based on the argument above, the defendants state that the plaintiff's recovery after the assignment under s. 267.8 of the *Insurance Act* for the purpose of comparing the Offer to Settle, is not as favourable as or more favourable than the judgment rendered by the jury. It is submitted that the plaintiff's recovery is $131,000.00 plus interest of approximately $8,000.00, for a total of $139,000.00 plus costs. It is submitted that this amount is not as favourable as the offer to settle. Accordingly, substantial indemnity costs ought not to be awarded.

(3) Finally, the defendants submit that the costs requested by the plaintiff either on a partial indemnity basis or on a substantial indemnity basis are excessive and the rule relating to proportionality ought to apply to significantly reduce the amount claimed by the plaintiff for fees. In the factum, the defendants suggest the appropriate amount for fees on a partial indemnity scale would be $100,000.00 plus HST. In oral argument, Mr. McCarthy suggested that this court might well consider partial indemnity fees up to $150,000.00 plus HST.

Analysis

[15] The first issue to be decided is whether, as Mr. McCarthy argues, this court should eliminate the award of future income loss from the consideration of whether the judgment rendered is as favourable as or more favourable than the plaintiff's Rule 49.10 offer to settle for the purposes of an assessment of costs.

[16] It is necessary to briefly detail the general principles relating to s. 267.8 of the *Insurance Act*. The object of the provision is to prevent, in the particular circumstances, a "double recovery" by a plaintiff. The provision assumes that the plaintiff has obtained through litigation, damages covering the same loss otherwise covered by the collateral benefits.

[17] Under s. 267.8(9) of the *Insurance Act*, a plaintiff who recovers a future loss of income in a tort action while continuing to receive such a collateral benefit from his accident benefit insurer, shall hold the amount in trust. Then, as happened in the present case, the court that heard the tort action may order that the plaintiff who recovered damages in the action assign to the defendants' insurer all rights in respect of all payments to which the plaintiff who recovered damages is entitled (reference s. 267.8 (12) of the *Insurance Act.)*

[18] Accordingly, under the terms of the judgment entered in this proceeding, the plaintiff will continue to receive an income replacement loss now and into the future, subject to a number of contingencies that will be discussed herein. The defendants' insurer State Farm will pay the judgment while Allstate continues to pay or may continue to pay the plaintiff IRBs which in turn must be held in trust and be paid by the plaintiff to the defendants' insurer State Farm to the extent received up to the amount paid for future income on the judgment. In short, to ensure against double recovery, the judgment has a trust and assignment provisions under s. 267.8 of the *Insurance Act* with respect to ongoing entitlement to accident benefits from Allstate. Therefore, until the plaintiff receives $371,076.00, she forgoes entitlement from Allstate payable by way of accident benefits and specifically, income replacement benefits; incrementally, or as a lump sum.

[19] Quite often, accident benefits are settled or resolved by way of a lump sum payment before the tort action is tried. Then the battle ensues between plaintiff's counsel and defendant's insurer on another front, which I do not intend to address here.

[20] Counsel for the defendants submits that the provision of the trust and the assignment do not require the high degree of proof that the case law states applies to statutory deductions in relation to collateral benefit entitlements that are in doubt and/or which may not truly overlap with sums recovered in a tort judgment. Counsel for the plaintiff disagrees and argues that the case law establishes that deductions from a plaintiff's damage award are strictly interpreted and applied. On this point, deductions from a plaintiff's damage award to prevent "double recovery" will be made only if it is absolutely clear that the plaintiff's entitlement to such collateral benefits is certain, *and* that the plaintiff received compensation for the same benefits in the tort judgment. If

there is uncertainty as to the plaintiff's receipt of such benefits, the value of the benefits entitlement, and/or the extent (if any) to which the recovered tort damages relate to the same type of expense covered by the benefits received, matters are not "beyond dispute" in the sense required for a deduction, and no deduction should be made. (*Chrappa v. Ohm* (1998), 38 O.R. (3d) 651: *Bannon v Hagerman Estate* (1998) 38 O.R. (3d) 659; *Cowles v Balac* [2005] O.J. No 229 (S.C.J.) affirmed [2006] O.J. No. 4177 (C.A.) *Hoang v Vicentini* (2012) ONSC 6644.)

[21] Mr. Charney, counsel for the plaintiff, submits that the trust and assignment under s. 267.8(9) of the *Insurance Act* do not suggest that for the purpose of awarding costs that this court should accede to the defendants' position and deduct the sum of $371,076.00 in relation to the future loss of income and then use the balance to determine whether Rule 49.10 is applicable to award costs on a full indemnity scale to the plaintiff.

[22] I am not aware of any authority that even remotely suggests that offers to settle in relation to Rule 49 should have provisions relating to assignments of benefits. Such a requirement in my opinion, would ignore the approach advanced by the Ontario Court of Appeal in *Wilson v Cranley* 2014 ONCA 844 at para 27. Citing Rosenberg J.A. in *Elbakhiet v Palmer* 2014 ONCA 544 (para.33) in relation to Rule 49.13 a trial judge is called on "to take a more holistic approach." One of the main purposes of Rule 49, both for the plaintiff and the defendant, is to serve an Offer to Settle as an impetus to settlement. Indeed, there are sound policy reasons, in my opinion, that would suggest that Rule 49 offers should be made without unduly complicating the procedure. Imposing trust and assignment details and considerations would unduly inhibit the free flow of Rule 49 offers. Further, in the context of this motor vehicle litigation, the opposing defendants "were all sophisticated parties who were capable of assessing the value of the case, of evaluating their exposure, of setting up the necessary reserves, of planning a litigation strategy and of giving instructions to counsel." (*Rochon v MacDonald* 2014 ONSC 591 at para 18.) As in *Wilson v Cranley (supra)* and *Rider v Dydyk* 2007 ONCA 687), the Ontario Court of Appeal has directed that in determining a party's entitlement to costs, the trial judge was correct to ignore the statutory deductibles. Further, when comparing a judgment with a Rule 49 offer, the court is to consider not the judgment awarded by the jury, but the amount finally awarded by the trial judge, plus pre-judgment interest; (para. 17 in *Wilson v Cranley*). In light of these decisions of the Ontario Court of Appeal, I find no principled basis to deduct the amount of the trust/assignment amount from the judgment for the purpose of comparing the Rule 49.10 Offer to Settle.

[23] The focus of s. 267.8 of the *Insurance Act*, is "double recovery" for the plaintiff. The focus of Rule 49 and Rule 57.01 is to make an award of costs based on the judgment, comparing it to the Rule 49 offer, and applying Rule 57.01; all in the context of awarding costs in the discretion of the court, based on what is fair and reasonable in each case. The objective then is "to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding rather than an amount fixed by the actual costs incurred by the successful litigant." (*Boucher v Public Accounts Council for the Province of Ontario*, [2004] O.J. No. 2634 and now captured Rule 57.01(1)(0.b).

[24] Therefore, while I reject Mr. McCarthy's submission to deduct the future loss of income award before comparing the judgment to the Rule 49.10 offer to settle, it may be that in an appropriate case, where sufficient evidence was adduced, the future loss of income claim, arguably could have some "present value", which might be deducted from the judgment in order to compare a Rule 49 offer. In the present case, the defendants did not introduce any evidence of "present value". Accordingly, the defence argument also fails by reason of this lack of evidence. I would note however, that in the present case, even if a "present value" had been provided to the court, one then gets embroiled in a number of fluctuating factors. By way of example in this case, the plaintiff is only working part time, the medical evidence of some of the medical experts was that it is not certain whether she will succeed at even her part time employment and the plaintiff is only 33 years of age. To open this type of analysis vis-à-vis a cost hearing, appears to be unduly complicated and certainly misses the mark in terms of a "holistic approach".

[25] Therefore, I find that the judgment, without deducting the future loss of income award, is more favourable than the plaintiff's Rule 49.10 offer to settle of November 5, 2014. The verdict rendered by the jury, inclusive of pre-judgment interest, is $596,971.48, which is almost twice the Rule 49.10 Offer to Settle of $300,000 inclusive of interest. Indeed, even after the statutory deductibles, the judgment is $481,244.19, which again is substantially more than the Offer to Settle. Accordingly, I find that based on Rule 49.10, the plaintiff is entitled to costs on a partial indemnity scale up to November 5, 2014 and costs on a substantial indemnity scale from November 5, 2014.

[26] The defence acknowledges its Offers to Settle are not anywhere close to the judgment. Therefore, the defence offers provide no assistance on the issue of costs. I have considered the plaintiff's other Offers to Settle as outlined above in the context of Rule 49.13. However, these other Offers to Settle do not alter my finding that partial indemnity costs ought to be awarded up to November 5, 2014 and substantial indemnity costs thereafter.

[27] The next issue for consideration are the appropriate rates to apply for counsel fees and law clerks times. This consideration of experience, rates charged and hours spent is appropriate, but it is subject to overriding principles of reasonableness as applied to the factual matrix. (*Boucher, Moon and Coldmatic Refrigeration of Canada Ltd v Leveltek Processing LLC* (2005) 75 O.R. (3d) 638 (C.A.)). The quantum should reflect an amount the court considers to be fair and reasonable, rather than the exact measure of the actual costs to the successful litigant. (*Zesta Engineering Ltd. v Cloutier*, (2002) A.C.W.S. (3d) 341 (Ont. C.A.) at para.4.

[28] In *Rochon v MacDonald*, 2014 ONSC 591 para 23, the trial judge provides an analysis, which I agree is appropriate. He states that a trial judge should not feel bound by the cost grid in relation to senior counsel fees in a complex trial. The first reason is that there is no authority which states that a judge must be. Further, the court can also take notice of the fact that defence counsel "charge the rates they do because of their ongoing relationship with their clients, insurer's corporate policies, competition in the industry and because of the nature of defence work, which is challenging to be sure, but is not fraught with

litigation risk associated with non-recoverability of fees and disbursements if a case must be abandoned or meets with an unsuccessful outcome. Third, the principle of indemnity requires the court to take into account the fact that the less the plaintiff is able to recover in costs from the defendants, the greater will be her contribution to her own solicitor and client account." Therefore, while Mr. McCarthy states in his factum that the account to his client will be approximately $140,813.20 plus HST and disbursements throughout (the actual account is not produced), it provides limited assistance in assessing the plaintiff's costs because of the factors enumerated above.

[29] After reviewing the complexity of this case and the experience level, I find that a fair and reasonable partial indemnity rate for senior counsel, Mr. Charney is $375/hr. I find that the appropriate rate for substantial indemnity is $650/hr. I fix the rate of junior counsel, Mr. Eckart, at $225/hr. on a partial indemnity basis and at $300/hr. for substantial indemnity. The law clerks rates will be fixed at the grid rate for partial indemnity costs throughout.

[30] This brings me to the consideration of the factors under Rule 57.01(1). I begin this analysis by noting that the plaintiff recovered less than what she claimed and what she asked the jury to return as a verdict. The jury awarded an amount slightly in excess of 50% of what the plaintiff sought in general damages, and approximately 30% less than what the plaintiff claimed as a past loss of income. In relation to the future income loss, the jury awarded significantly less than the range of amounts sought by the plaintiff. On the other side of the equation, the jury awarded significantly higher amounts for damages than what defence counsel proposed to the jury. The defence suggested to the jury that the general damages were in the range of $5,000 to $15,000 and that there should be no award for past loss of income, future loss of income or future care.

[31] In considering the factors under Rule 57.01(1), I find that the plaintiff's counsel presented a well prepared, organized and efficient case. The factual and medical issues involving depression and chronic pain were intensive and complex to present to a jury. The defence position at trial was to acknowledge that the plaintiff had a chronic pain condition, but challenged causation by focussing on pre-existing medical issues, a prior motor vehicle accident, a post-accident slip and fall and a third motor vehicle accident. In addition, the defence argued that the plaintiff was malingering.

[32] The medical issues were complex. It involved evidence of psychiatrists, physiatrists, orthopaedic surgeons, occupational therapists, future care specialists, vocational alternatives, forensic accounting and quantification of damages. The jury had to be presented with present valuations of past and future loss of income and projections of future care costs.

[33] The defence takes no issue with the dockets of the plaintiff and does not dispute that the complexity of the case required a great deal of work by the plaintiff's counsel. In addition to calling 19 witnesses, there were pre-trial and mid-trial motions which counsel prepared for, including providing facta. These motions included the scope of the family doctor's testimony, the use of demonstrative aids through the trial, leave to call more than three

experts, disqualifying a defence expert (which motion did not proceed, as defence counsel withdrew from calling Dr. Bail) and a lengthy threshold motion.

[34] There were no improper, vexatious or unnecessary steps in this proceeding on the part of the plaintiff. However, there were steps taken by the defence in the trial which lengthened the trial. The defence opened to the jury following plaintiff's counsel. He told the jury that the defence would be calling a psychiatrist, Dr. Bail, who would testify that there was nothing wrong with the plaintiff and that she was malingering. Defence counsel proceeded to cross-examine the plaintiff, her mother and sister, representatives of her former employer and the plaintiff's several expert witnesses in relation to Dr. Bail's opinion. To meet the defence position, plaintiff's counsel was required in the examination-in-chief of the plaintiff's experts, (in particular through Dr. Waisman), to dismantle Dr. Bail's opinion. This evidence and cross-examinations relating to Dr. Bail's opinion did significantly lengthen the trial. When plaintiff's counsel brought a mid-trial motion to disqualify Dr. Bail as an expert witness, the defence announced that it was not calling Dr. Bail as a witness. I want to be clear that I am **not** awarding costs to punish the defence for taking the tactic it did in relation to Dr. Bail. What I am indicating is that this defence tactic lengthened the trial.

[35] This then brings my analysis to the principle of proportionality. The court should seek to balance the indemnity principle with fundamental justice. (*Davies v Clarington (Municipality)* (2009) 100 O.R. (3d) 66 at para 51-52). The "reasonable" expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable (per Rule 57.01(1) (0.b)). I agree with the proposition in *Rochon v MacDonald supra* para 8:

> The costs of litigation must not serve as a deterrent to parties defending their legitimate interests in court; on the other hand, the spectre of costs must continue to serve as an impetus to settlement.

[36] The plaintiff seeks costs for fees summarized as follows:

Partial Indemnity Costs up to November 5, 2014	$ 89,033.00
Substantial Indemnity costs from November 5, 2014	$ 305, 110.50
5% GST (fees prior to July 1, 2010)	$ 65.25
13% HST (fees after July 1, 2010)	$ 51,069.01
Total Fees	$ 445, 277.76

[37] Neither the case law nor the parties suggest that this exercise of fixing costs should be an exhaustive line by line review of the proposed charges. Therefore, applying the proportionality principle and exercising my discretion in awarding costs based upon what

is fair and reasonable, the factors set out in Rule 57.01 and the principles from the appellate courts, I fix the costs as follows:

Partial Indemnity Costs to November 5, 2014	$ 50,000
Substantial Indemnity Costs from November 5, 2014	$190,000

[38] In addition thereto, the plaintiff is awarded the appropriate GST and HST on these amounts.

[39] The plaintiff in addition is awarded disbursements in the amount of $124,013.46 inclusive of all applicable taxes.

[40] So ordered.

Justice J.B. Shaughnessy

Date: May 13, 2015
Corrected Date: May 14, 2015