

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Douglas Wray)
)
) T. Charney and A. Eckart, for the Plaintiff
Plaintiff)
)
- and -)
)
Rosemary Pereira and Gil Pereira)
)
Defendants) B. Lee and J. Nunziato, for the Defendants
)
)
)
)
) HEARD: February 8, 2019

RULING RE: COSTS
(TEXT OF ORIGINAL RULING HAS BEEN AMENDED – CHANGES APPENDED)

MCKELVEY J.:

Introduction

- [1] The plaintiff, Douglas Wray, brought this action for damages as a result of a motor vehicle accident which occurred on December 31, 2012. The action was tried before a jury. Both liability and damages were denied by the defendants in the action.
- [2] At trial, the plaintiff submitted to the jury that the general damages should be assessed in the area of \$150,000 to \$200,000, while the defendants suggested to the jury that the general damages should be assessed at \$20,000. The plaintiff also claimed past out of pocket expenses of \$7,278.52, future care costs in the sum of \$5,103.44, as well as some recurring future care costs estimated at \$3,492.14 annually. In their verdict, the jury found the defendants fully liable for the plaintiff's injuries. The jury awarded general damages in the sum of \$22,000. It awarded \$2,000 for past out of pocket expenses and zero for future care costs. Following the trial, the defendants brought a threshold motion. The defence was successful on the threshold motion. After taking into account the statutory deductible, the plaintiff's recovery at trial was \$2,000.
- [3] The plaintiff is currently 67 years old. The main injury which was alleged to have been suffered in the motor vehicle accident was an injury to his right knee. Mr. Wray testified

that he is currently unable to run or walk long distances or stand for lengthy periods of time. He has difficulty climbing stairs, squatting, and putting on his shoes and socks. He has a constant limp as a result of the pain in his right knee. He has been told that at some point in the future, he will require a knee replacement and is very afraid of this procedure.

- [4] The main issue on the issue of the plaintiff's damages was causation. There was a significant difference of opinion on this issue. The plaintiff's theory was that the motor vehicle accident triggered a pre-existing condition to become symptomatic and resulted in a downward slide in the condition of his right knee. The defence argued that the plaintiff has only suffered a muscle sprain in his knee as a result of the accident, which would have resolved within 6-8 months. The defence argued that the deterioration in the plaintiff's knee was the result of a pre-existing condition, which was unrelated to the motor vehicle accident. From the jury's verdict, it is clear that they did not attribute a significant impairment to the plaintiff's right knee as a result of the motor vehicle accident. It is apparent that in their verdict, the jury rejected the plaintiff's theory of the case and substantially adopted the defence theory.

The Parties Positions

- [5] The plaintiff asserts that he is entitled to his partial indemnity costs of the action. He claims the sum of \$232,821.75 plus HST for partial indemnity legal fees. The plaintiff also requests that the court order the defendants to pay his disbursements of \$42,949.85, inclusive of taxes.
- [6] The defence argues that it was the successful party at trial. It seeks its partial indemnity costs. In their costs brief, the defence submits, "the defendants have no desire to be punitive, and seek only \$25,000 in costs, inclusive of their disbursements from the plaintiff on a partial indemnity basis". In the alternative, the defence argues there should be no costs awarded. The defence further argues that the plaintiff should be denied any costs in the action on the basis that the amount recovered fell below the monetary jurisdiction of the Small Claims Court (Rule 57.05(1) and the Simplified Procedure Rules (Rule 76.13(2)).

Factors Relating to Costs

- [7] Rule 57.01 sets out the criteria which a court should consider in awarding costs. The particular factors which appear to be the most relevant in this case are as follows:
1. The results of the proceeding;
 2. Any offer to settle made in the action;
 3. The principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs, as well as the rates charged and the hours spent by the lawyer;
 4. The amount of costs that the unsuccessful party could reasonably expect to pay;
 5. The amount claimed and the amount recovered in the proceeding;

6. The apportionment of liability;
7. The complexity of the proceeding;
8. The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
9. Whether any step in the proceeding was improper, vexatious or unnecessary, or taken through negligence, a mistake, or excessive caution.

Who was the successful party at trial?

- [8] The defence argues that it was the successful litigant at trial and that it should be entitled to partial indemnity costs of \$25,000 or in the alternative, that there should be no order for costs. The defence argues that it was substantially successful at trial, which should entitle it to its partial indemnity costs. The defence refers to a recent cost decision in *Sharma v. Stewart*, 2017 ONSC 4333. In that case, the plaintiffs received an award which totalled only \$500. The rest of the jury's awards were reduced to zero by the deductibles. The court rejected the plaintiffs' submission that they were successful in the case because they "did not achieve anything (other than obtaining some limited compensation for travel expenses) by bringing this action". The Court refers to the fact that the plaintiffs were seeking to prove that they had been permanently injured as a result of the accident and the court noted that on this key issue, the plaintiffs were unsuccessful. In the decision, the Court also refers to a decision of Justice Myers in *Mandel v. Fakhim*, 2016 ONSC 6538, where he states, "it is certainly arguable that a plaintiff who seeks over \$1 million in damages but who wins \$3,000 has lost pure and simple".
- [9] It is significant to note, however, that in the *Sharma* decision, the defendant had made an offer that would have resulted in one plaintiff obtaining a recovery of \$30,000 plus interest and costs, and another plaintiff could have accepted an offer that would have resulted in him obtaining recovery of \$5000 plus interest and costs. As noted by the trial judge in that case, the defence offers were considered, "a key factor in assessing the costs for this case".
- [10] In the *Mandel* decision, Justice Myers does not specifically deal with a costs award and comments, "but I cannot say at this juncture what the costs outcome would be if the matter were to be argued".
- [11] In my view, the issue of success in the action should take into account the parties positions prior to trial. In this case, the defendants made no offer to settle prior to trial, not even a dismissal of the action on a without costs basis. The plaintiff made a Rule 49 offer to settle for the sum of \$75,000 plus pre-judgment interest and costs shortly before the commencement of trial. Clearly, the cost consequences under Rule 49.10 have no application since the plaintiff's offer was nowhere close to the result at trial. However, I view the plaintiff's offer as a sincere effort to try and resolve the action, whereas the defendants left the plaintiff in a situation where he either had to abandon his claim entirely and face a claim for costs, or alternatively take the case to trial. The defence argues that it was not playing "hardball" during the settlement discussions. At paragraph 41 of the cost submissions counsel states,

Further, it is untrue that the Defendants sought to play “hardball” however defined. As an officer of the Court, counsel for the Defendants unequivocally denies that this was the case. This matter was assessed in a *bona fide* manner, and the assessment was that the injuries would neither pierce the threshold nor exceed the deductible given that the Plaintiff continued to be physically active in a way that would put stress on his knee, including golfing 3 times a week. There was no wider policy or strategy involved. The Defendants’ assessment has been borne out by the jury verdict. [Emphasis in original]

- [12] While I do not take issue with the right of the defendants to try this case, I have concluded that there was in fact a “hardball” approach taken by the defence in this case. The defence left the plaintiff with no option to withdraw from the litigation gracefully. In deciding not to make any offer, the defence was setting a clear demarcation line or a “line in the sand” which can be used to identify success or failure in the action. In my view, the defence should have realized that even a small award would be considered a success for the plaintiff in these circumstances. I conclude that while the recovery in this case was extremely modest, the plaintiff achieved some success in the action which would justify an award of partial indemnity costs. This also takes into account that in addition to the issue of damages, the defence also was unsuccessful on the liability issues. The jury found the defendants 100% liable for the accident.

The hourly rates charged by the plaintiff’s counsel

- [13] The claim for costs submitted by the plaintiff is based on an hourly rate for senior plaintiff’s counsel of \$850 an hour and a rate of \$400 per hour for junior counsel. I agree with the defence that these hourly rates are excessive in the context of a case where the amount in dispute was in the area of \$225,000. As noted in the Ontario Court of Appeal decision in *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC*, [2005] O.J. No. 160, the overriding principle of reasonableness requires a court to stand back from the fee produced by the raw calculation of hours spent times hourly rate and to assess the reasonableness of the counsel fee from the perspective of the reasonable expectations of the losing party. The issue is not what a counsel is entitled to charge his or her own client, but rather what amount is reasonable to impose upon the loser.
- [14] In the present case, it does not appear that the hourly rates requested were in fact paid by the plaintiff. I agree with the defence position that the proposed billing rates are completely notional because the plaintiff would likely never have agreed to proceed with a trial in which he would be required to pay his counsel \$850 an hour when he was only claiming relief in the area of \$225,000 and was willing to settle for \$75,000 plus interest and costs.
- [15] I am not proposing to set an hourly rate for either senior counsel or his junior in this case. It is a factor I have taken into consideration, but the critical question becomes what this Court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than the actual cost to the successful litigant. See para. 24 of *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (ON CA).

The amount claimed and the amount recovered in the proceeding

[16] Proportionality is a critical issue to consider where the plaintiff's recovery is limited to \$2000.

[17] In the Ontario Court of Appeal decision in *Elbakhiet v. Palmer*, [2014] O.J. No. 3302, the court overruled the trial judge in a case where the respondents sought damages of approximately 1.9 million dollars and where the jury award came in at just under \$145,000. The trial judge awarded costs of \$580,000. In overturning the trial judge's decision, the Ontario Court of Appeal stated,

The trial judge made an error in principle in failing to give any consideration to the offers to settle and her award is wholly disproportionate to the amounts recovered. The trial judge's decision to simply award the costs sought by the respondents failed to give any consideration to what amount would be fair and reasonable.

[18] In the *Elbakhiet* case, the Court of Appeal reduced the costs to be paid by the appellant's to \$100,000, which took into consideration an offer to settle that was virtually the same as the judgment.

[19] In the present case, the plaintiff refers to a costs decision of Justice Hackland in *Corbett v. Odorico*, 2016 ONSC 2961. In that case, the plaintiffs made an offer, which if accepted, would have paid the plaintiff \$7. The jury returned a verdict for \$141,500 following a six week trial. The partial indemnity fee claimed by the plaintiff was \$159,249. In awarding those partial indemnity fees to the plaintiff, Justice Hackland commented,

They made an offer, which if accepted, would have paid the plaintiff \$7. This presented the plaintiff with the proposition that, on the eve of trial, she should walk away from her case with no compensation, or proceed through trial. In my view, to impose a rule arbitrarily limiting the amount of costs to some proportion of the recovery when there has been no offer of settlement, or only a nominal offer as in this case, would undermine the purpose of Rule 49, which is to encourage settlement by attaching costs consequences for failure to make or accept reasonable offers. It would also encourage the type of "hard ball" approach to settlement employed in this case.

[20] Justice Hackland also referred to a recent decision of Justice McCarthy in *Aaccurate v. Tarasco*, 2015 ONSC 5980, where Justice McCarthy comments that declining to make realistic award of costs in modest cases would send a message to litigants that it is not worth one's while to pursue legitimate claims in court because one cannot possibly make it cost effective to do so. Justice McCarthy concludes that this would constitute a denial of justice in the most fundamental sense and would encourage those resisting legitimate but modest claims to take unreasonable positions, the logic being that any exposure to costs would be limited because of the size of the claim, regardless of time and expense necessary to extract a judgment.

- [21] In my view, however, the principle of proportionality must have a serious impact on the award of costs in this case. This is not a situation where a plaintiff asserted a modest claim, and was substantially successful despite a defendant's refusal to make a realistic offer. The case before me represents a situation where the plaintiff made a substantial claim that was rejected by the jury and resulted in what can only be described as a token award. The defence, therefore, has been successful in defeating substantially all of the plaintiff's claims. Therefore, in my view, the principles outlined in the *Elbakhiet* decision are directly applicable.
- [22] This same principle was adopted by Justice Mullins in *Moyer v. Vanderwere*, [2016] O.J. No. 6090. In that case, the plaintiff recovered a damage award of \$500 after an 11 day jury trial. Partial indemnity costs were sought by the plaintiff of \$71,397.27. Justice Mullins ordered costs fixed at \$9000, together with HST.

Should costs be denied to the plaintiff because the jury's award was less than the monetary jurisdiction of the Small Claims Court and the Rules of Simplified Procedure?

- [23] The defendants argue that the plaintiff should be denied his costs on the basis that his award is less than the Small Claims monetary jurisdiction of \$25,000 and is also less than the Simplified Procedure Rules which apply to claims less than \$100,000.
- [24] In my view, however, it was reasonable for the plaintiff to bring his action in Superior Court under the regular rules. In this case, the major issue was causation. If causation had been established, then a reasonable award would have been well in excess of the \$100,000 limit under the simplified procedure rules. While the plaintiff was not ultimately successful in establishing causation, the case in my view had merit and the plaintiff's decision to take the case to trial was reasonable. The plaintiff's position was supported by both an independent expert and his own treating orthopedic surgeon. For these reasons, I reject the defence position that the plaintiff should be disentitled to an award of costs because the ultimate verdict of the jury was less than the Small Claims Court and simplified rules limits.

The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding and whether any step in the proceeding was improper, vexatious or unnecessary, or taken through negligence, mistake, or excessive caution

- [25] The trial in this action was hard fought and there were numerous objections and motions argued during the course of the trial. While success on the motions and objections was divided, there were some issues advanced by the defendants which had no merit and which lengthened the trial from its estimated length of two weeks. The trial date was initially set at the pre-trial by Justice Shaughnessy. The pre-trial was held on April 24, 2018. The trial was scheduled to be heard at the spring sittings, which commenced on May 14, 2018. The defendants initially objected to the case being put on the trial list at the pre-trial before Justice Shaughnessy. The defendants subsequently brought a motion before Justice Edwards to adjourn the trial. The defendants request for an adjournment was denied. The defendants again attended again before Justice Edwards with a further request for an adjournment, which also was denied. The request for an adjournment was once again brought up at the commencement of trial. Approximately half a day was spent dealing with the plaintiff's request for an adjournment. In light of the three previous requests to adjourn

the trial, which had all been denied, I have concluded that the further motion for an adjournment of the trial was excessive and unnecessary.

- [26] Another issue which took approximately a day of trial time, was dealing with the defence request to introduce surveillance evidence. The defence attempted to introduce surveillance evidence both for a substantive purpose and for purposes of impeachment. However, in my written reasons dated August 1, 2018, I concluded that there had been clear violations by the defence of their obligations to produce the video surveillance at a much earlier stage of the litigation. As a result of the defence conduct, there was the potential for significant prejudice to the plaintiff for failing to comply fully with their disclosure and production obligations. I ruled that the surveillance evidence could not be used for substantive purposes by the defence.
- [27] Further time was spent during the trial with the defence attempting to introduce the surveillance evidence for purposes of impeachment. However, I concluded that there was no basis for the introduction of this evidence based on the evidence of the plaintiff.
- [28] The court was also required to accommodate the attendance of the defence expert, Dr. Finkelstein, who was only available to attend during the third week of the trial. I agree with the plaintiff's submissions that they made every attempt to streamline the trial. They did not call a care cost expert or actuary. They made concessions where possible in order to shorten the length of the trial. For example, they agreed not to pursue a ruling on the admissibility of a wedding video, which had been proposed to go in as an exhibit. They re-organized witnesses as required to keep the trial moving. The conduct of the defence, however, had the effect of lengthening the trial by several days. It also increased the plaintiff's disbursements for professional witnesses who were kept waiting before being able to give their evidence. All of these factors favour a more generous assessment of costs in favour of the plaintiff.

Conclusion

- [29] As noted in the *Boucher* case, *supra.*, the objective in assessing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in a particular proceeding. In the present case, the plaintiff's recovery is so small that the plaintiff's proposed cost outline does not provide a reasonable basis for an award of costs. However, the defendants approach to a resolution of this case made it almost impossible to avoid a trial and their conduct at trial did increase by several days, the length of the trial. Taking into account all of the factors discussed above, I have concluded that a reasonable amount of partial indemnity costs in this case is \$40,000 inclusive of HST and disbursements. This figure also takes into account that the defence was successful on the threshold motion. I therefore order that the defendants pay to the plaintiff his party-and-party costs fixed at \$40,000 inclusive of HST and disbursements.



Justice M. McKelvey

Amendments

- 1. Paragraph [5] has been amended from its original text:** The plaintiff asserts that it is entitled to its partial indemnity costs of the action. It claims the sum of \$232,821.75 plus HST for partial indemnity legal fees. The plaintiff also requests that the court order the defendants to pay his disbursements of \$42,949.85, inclusive of taxes.

To new Paragraph [5]: The plaintiff asserts that **he** is entitled to **his** partial indemnity costs of the action. **He** claims the sum of \$232,821.75 plus HST for partial indemnity legal fees. The plaintiff also requests that the court order the defendants to pay his disbursements of \$42,949.85, inclusive of taxes.

- 2. The following excerpt of Paragraph [11] has been amended from its original text: ...**
In this case, the plaintiff made no offer to settle prior to trial, not even a dismissal of the action on a without costs basis. The plaintiff made a Rule 49 offer to settle for the sum of \$75,000 plus pre-judgment interest and costs shortly before the commencement of trial. Clearly, the cost consequences under Rule 49.10 have no application since the plaintiff's offer was nowhere close to the result at trial. However, I view the plaintiff's offer as a sincere effort to try and resolve the action, whereas the defendant left the plaintiff in a situation where he either had to abandon his claim entirely and face a claim for costs, or alternatively take the case to trial. ...

To new excerpt of Paragraph [11]: ... In this case, the **defendants** made no offer to settle prior to trial, not even a dismissal of the action on a without costs basis. The plaintiff made a Rule 49 offer to settle for the sum of \$75,000 plus pre-judgment interest and costs shortly before the commencement of trial. Clearly, the cost consequences under Rule 49.10 have no application since the plaintiff's offer was nowhere close to the result at trial. However, I view the plaintiff's offer as a sincere effort to try and resolve the action, whereas the **defendants** left the plaintiff in a situation where he either had to abandon his claim entirely and face a claim for costs, or alternatively take the case to trial. ...

- 3. The following excerpt of Paragraph [25] has been amended from its original text: ...**
The plaintiff initially objected to the case being put on the trial list at the pre-trial before Justice Shaughnessy. He subsequently brought a motion before Justice Edwards to adjourn the trial. His request for an adjournment was denied. He attended again before Justice Edwards with a further request for an adjournment, which also was denied. ...

To new excerpt of Paragraph [25]: ... The **defendants** initially objected to the case being put on the trial list at the pre-trial before Justice Shaughnessy. **The defendants** subsequently brought a motion before Justice Edwards to adjourn the trial. **The defendants** request for an adjournment was denied. The **defendants** attended again before Justice Edwards with a further request for an adjournment, which also was denied. ...

CITATION: Wray v. Pereira, 2019 ONSC 3354

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Douglas Wray

Plaintiff

– and –

Rosemary Pereira and Gil Pereira

Defendants

RULING RE: COSTS

Justice M. McKelvey

Released: May 31, 2019