

Case Name:

Boyuk v. Loblaws Supermarkets Ltd.

Between

Ann Boyuk and Peggy Ann Boyuk, Plaintiffs, and
Loblaws Supermarkets Limited, Defendant

[2007] O.J. No. 732

Court File No. 03-CV-259915CM3

Ontario Superior Court of Justice
P.M. Perell J.

February 28, 2007.

(13 paras)

Civil procedure — Assessment or fixing of costs — Considerations — Defendant awarded partial indemnity costs fixed at \$30,000 — The plaintiff's action for damages resulting from a slip and fall in the defendant's store was dismissed — An unsuccessful claim by the plaintiff's daughter was statutory and derivative, and did not warrant a costs award — A modest adjustment to the rates billed by the defendant's lawyers was appropriate

Statutes, Regulations and Rules Cited:

Family Law Act, R.S.O. 1990, c. F.3, s. 61

Counsel:

Theodore P. Charney and H. Jack Parsekhian for the Plaintiffs.

Wayne Morris for the Defendant

COSTS ENDORSEMENT

¶ 1 **P.M. PERELL J.:**— This is a slip and fall personal injury claim. The main plaintiff is Ann Boyuk, who fell at a Loblaws store. The other plaintiff is her daughter, Peggy Ann Boyuk, who was just recently added to the action to assert a claim under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3.

¶ 2 Although the quantum of costs is challenged, the plaintiffs acknowledge that there should be a costs award on a partial indemnity basis against the plaintiff Ann Boyuk, but they submit that no costs award should be made against the co-plaintiff Peggy Ann Boyuk.

¶ 3 I agree that in the circumstances of this case, it is appropriate to make a costs award only against the elder Boyuk. Her daughter's claim was a statutory and derivative one, and the daughter's participation to assert this derivative claim, although unsuccessful, should not expose her to a costs award.

¶ 4 I agree with the submission of plaintiffs' counsel that if unsuccessful *Family Law Act* claimants were automatically exposed to costs, it would discourage family members from making these claims, although the legislation clearly intended that such claims are available to them. Apart from the lack of success, which really depends upon the failure of her mother's claim, there is nothing to justify a costs award against Peggy Ann Boyuk, and I decline to make one.

¶ 5 This leaves then the matter of the quantum of costs to be paid by the unsuccessful Ann Boyuk, the main plaintiff.

¶ 6 The material filed by the defendant indicates that as between lawyer and client, it will be or has been charged \$45,411.00 for fees including the counsel fee for the trial and \$2,587.99 for disbursements and GST for a total charge of \$47,998.99.

¶ 7 In making these charges, it appears that the defendant's senior counsel is charging at the rate of \$280/hour, which he also claims as his partial indemnity rate. Similarly, the junior lawyers and law clerks involved in this matter do not differentiate between their actual rates and their partial indemnity rates, which are \$140/hour and \$100/hour respectively.

¶ 8 Loblaws' claim for costs, is not, however, \$47,998.99; rather, it is seeking \$35,000.00 all inclusive of fees, disbursements, and GST.

¶ 9 In the plaintiffs' costs submissions, they state that the hourly rates by counsel for the defendant are the rates which were billed to Loblaws and hence if costs were awarded on these rates, Loblaws would receive full indemnity. This submission ignores the fact that Loblaws' lawyers have reduced their total lawyer and client charges by around 27%. It may also be noted that the rates being charged by Loblaws' lawyers are relatively modest.

¶ 10 The plaintiffs submit that with an adjustment to the rates for Loblaws' lawyers and to the hours of work performed by the junior lawyers that the appropriate partial indemnity costs would be \$20,724.00 for fees, \$1,969.12 for disbursements, plus GST, (which I reckon to be \$1361.59) for a total award of \$24,054.71.

¶ 11 I am persuaded that some modest adjustment should be made to the calculation of the defendant's partial indemnity costs to account for the factors identified by the plaintiffs.

¶ 12 I conclude that the appropriate award in all the circumstances is \$30,000.00 all inclusive of fees, disbursements, and GST.

¶ 13 An order should issue accordingly.

P.M. PERELL J.

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