

CITATION: McLeish v Daines and Penney, 2017 ONSC 3117
COURT FILE NO.: 14-61793
DATE: 2017/05/19

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Krystal McLeish, Plaintiff

AND

Erin Daines and Paul Penney, Defendants

BEFORE: Mr. Justice Robert J. Smith

COUNSEL: Alan J. Clausi, Counsel for the Plaintiff

Kevin P. Nearing, Counsel for Defendants

HEARD: In writing

DECISION ON COSTS

[1] The Plaintiff claims fees on a partial indemnity basis of \$155,354.10 plus HST, plus disbursements of \$100,260.41 inclusive of HST for a 15-day civil jury trial. The Plaintiff recovered \$65,000.00 in non-pecuniary damages and \$175,000 for future pecuniary damages for a total of \$240,000.00 but was found 30% contributarily negligent. This reduced her recovery to \$168,000.00 plus costs and interest less the deductible.

[2] The Defendant submits that it was partially successful on liability as the Plaintiff was found 30% responsible and was partly successful on her claim for loss of future income which was assessed at \$175,000.00 when the Plaintiff sought \$850,000.00.

[3] The Defendant further submits that the Plaintiff spent an excessive amount of time preparing for discoveries, mediation and for trial and had two senior counsel at trial rather than a senior counsel assisted by a junior counsel.

[4] The Defendant also objects to paying the travel disbursements for out of town counsel, which results in a reduction of \$6,138.

[5] The Defendant finally objects to paying the disbursements for witnesses that were not called to testify at trial, including Dr. Fedak-Tarmopolsky for \$5,243.70, Dr. Lewis for \$4,350, Dr. Tester for \$270, and two supplementary reports prepared by ADS, for a total reduction of \$14,723.70.

[6] The Defendant also seeks to exclude the disbursements for Dr. Friedlander and Dr. Holland as they allege their evidence was of marginal value. I do not agree with this submission as they were permitted to testify in different areas.

[7] The Defendant submits that \$120,000.00 for fees and \$55,000.00 for disbursements, inclusive of HST, is a reasonable amount to be awarded to the Plaintiff for her costs.

Factors

[8] The factors to be considered when fixing costs are set out in Rule 57 of the *Rules of Civil Procedure* and include in addition to success, the amount claimed and recovered, the complexity and importance of the matter and the principle of proportionality, the conduct of any party which unduly lengthened the proceeding, whether any step was improper, vexatious or unnecessary, or taken through negligence mistake or excessive caution, a party's denial or refusal to admit anything, any offer to settle, the principle of indemnity, scale of costs, hourly rate claimed in relation to the partial indemnity rate set out in the Information to the Profession effective July 1, 2005, the time spent, and the amount that a losing party would reasonably expect to pay.

Success

[9] The Defendant submits that it was partially successful on liability as the Plaintiff was found 30% responsible and was partly successful on the loss of future income which was assessed at \$175,000.00 when the Plaintiff has sought \$850,000.00.

[10] The Plaintiff recovered \$168,000.00 plus costs and interest after her share of responsibility was deducted. She was successful although she recovered less than she sought at trial.

Amount Claimed and Recovered

[11] The Plaintiff sought \$850,000.00 in loss of future income and recovered only \$175,000.00. The Plaintiff was not fully successful on the amount she recovered.

Complexity and Importance

[12] The issues were reasonably complex as they involved assessing contributory negligence when turning left on a yellow or red light. In addition the case involved chronic pain and the loss of future income. The case was a typical motor vehicle accident jury trial and was important to the parties involved.

Offers to Settle

[13] The Plaintiff did not exceed any offers to settle but did come very close as she offered to settle for \$170,000.00 plus costs and P.J.I, but only recovered \$168,000.00 plus costs and P.J.I. In *Elbakhiat v Palmer*, 2014 ONCA 544, the Court of Appeal held that there was no “near miss”

doctrine but did consider the effect of the Defendant's offer to settle under *Rule 49.13 of Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[14] The Defendant offered to settle for \$5,000.00 and then increased this amount to \$35,000.00 plus costs and interest nineteen days before the trial. The Defendant's offers were not close to the amount recovered.

[15] As the Plaintiff did not exceed her offer to settle after trial and the conduct of the Defendant was not egregious or reprehensible, costs will be assessed on a partial indemnity scale.

Hourly Rates and Time Spent

[16] The Defendant submits that an excessive amount of time was spent in preparation for trial. The Plaintiff was required to spend more time in preparation for this case than the Defendants. Mr. Clausi was the senior lawyer that had carriage of the action for 26 months prior to trial and had conducted all aspects of the case until shortly before trial. As such, it was reasonable that he participate in the trial involving many expert witnesses that he had retained. However, I will reduce the amount of costs awarded for using two senior counsel at trial rather than a senior counsel and a junior counsel.

Experts not called at Trial

[17] Dr. Fedak-Tamopolsky, a licensed physiatrist, prepared an expert report and an addendum for which the Plaintiff has paid \$5,220 and \$704.78 for her reports. Several months before trial, she advised the Plaintiff that she was retiring and would not be available to testify at

trial, after the notice of trial was served on her. I agree with the Plaintiff that these expenses are unfortunate but the Plaintiff acted reasonably in retaining her as a properly qualified expert and her unavailability to testify at trial was not the Plaintiff's fault.

[18] I agree with the Defendant that disbursements incurred for Dr. Lewis, Dr. Tester, Dr. Woolbeck, Candis Dodd, Catherin Merritt and Christine Gload who did not testify at trial will not be allowed. I will deduct the sum of \$5,499.77 from the disbursements claimed for these experts and witnesses who were not called at trial.

Out of Town Counsel Travel Expenses

[19] The Defendants object to payment for the travel and lodging expenses for counsel from the Oshawa area to attend the Trial in Ottawa when the plaintiff had already retained counsel from Ottawa. The Plaintiff was living in Barrie for some time prior to trial and had the right to counsel of her choice. If she is unable to claim for Mr. Mair's travel and lodging expense then she would be penalized financially for retaining Mr. Mair to conduct the trial because he did not live in the Ottawa area. If she had been unsuccessful at trial, then she would have had to pay the reasonable costs for the out of town counsel to attend. Mr. Mair was an experienced counsel who along with defence counsel cooperated and ran a very efficient trial. His involvement in this trial was reasonable but in the circumstances where the plaintiff had already retained counsel from Ottawa, I will allow one half of Mr. Mair's travel and lodging expenses as a disbursement.

Expectations of Unsuccessful Party

[20] I find that the amount claimed for costs, is in the range of what the unsuccessful Defendant would reasonably expect to pay, based on the number of experts involved in a chronic pain three week jury trial.

Disposition

[21] Having considered the relevant factors and for the above reasons, the Defendants are ordered to pay costs on a partial indemnity basis of \$145,000.00 plus HST, plus disbursements of \$85,000.000 inclusive of HST.

R. Smith J.

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SUPERIOR COURT OF JUSTICE

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BEFORE: Mr. Justice Robert J. Smith

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Kevin P. Nearing, Counsel for Defendants

HEARD: November 24, 2016 (Ottawa)

DECISION ON COSTS

R. Smith J.

Released: 2017/05/19