

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Walla Amouri, Plaintiff

AND:

Catherine Hansen and **Edwin Hansen**, Defendants

BEFORE: Master Kaufman

COUNSEL: Alan J. Clausi, Counsel for the Plaintiff

Alex Robineau, Counsel for the Defendants

HEARD: In writing

REASONS FOR DECISION

[1] On March 23, 2021, this matter came before me by way of a pre-trial conference. The parties advised that they had resolved the action but could not agree on costs. I agreed to adjudicate the issue of costs and set a timetable for the delivery of costs outlines and submissions. The parties delivered their materials in accordance with my endorsement. These are my reasons on the issue of costs.

The litigation

[2] The action arose out of a motor vehicle accident which occurred on April 13, 2017. The plaintiff commenced this action 8 months later. She claimed \$350,000 in general damages and an unspecified amount in special damages.

[3] The action proceeded in an ordinary and usual manner. The defendants defended the action and denied that the plaintiff's injuries met the threshold under section 267.5 of the *Insurance Act*.

[4] The parties conducted discoveries in May 2018 and held a mediation in November 2018. The defendants scheduled two medical assessments (physiatrist and psychiatry) and their reports supported their position that the plaintiff's impairments did not meet the threshold. The plaintiff set the action down in June 2019 and a five-week trial was scheduled to commence in October 2022.

[5] The parties' minutes of settlement provide that the defendants shall pay the plaintiff \$9,000 for past loss of income and past loss of housekeeping capacity, in full and final satisfaction of the plaintiff's entire claim for damages in relation to the issues in dispute. The parties also agreed that the defendants would pay the plaintiff's legal costs on a partial indemnity

basis and her disbursements in accordance with my reasons, subject to any applicable right of appeal.

Issues

- [6] The parties agree as to the applicable principles respecting costs orders. Costs are in the discretion of the Court¹ and normally follow the event. The Court's discretion must be based on the specific facts and circumstances of the case and the factors set-out in Rule 57.01(1).² Costs awards must be fair and reasonable and the parties' expectation concerning the amount of a costs award is a relevant factor to be considered.³
- [7] The plaintiff claims legal fees in the amount of \$41,179.70 and disbursements of \$28,922.86. The defendants contend that any costs award should be limited to a maximum of \$9,000 plus HST and \$3,278.31 plus HST for disbursements. The defendants say that they have incurred fees of \$12,491.13, also on a partial indemnity basis, and that the plaintiff's costs are excessive and disproportional. The parties raise the following issues: First, should the plaintiff's entitlement to costs be reduced on account of proportionality? Second, should the costs award include amounts that relate to the plaintiff pursuit of Statutory Accident Benefits (SABs)? Third, did the defendants' insurers breach their statutory duty to "attempt to settle the claim as expeditiously as possible"? Finally, what is a fair and reasonable costs award in the circumstances?

Issue 1 – Effect of proportionality and terms of settlement on costs award

- [8] The defendants argue that the costs sought are grossly disproportionate to the settlement amount and are excessive when viewed in the context of this case. The plaintiff, for her part, says that as the successful party, the defendants should pay her costs, disbursements and applicable taxes.
- [9] Rule 57.01(a) requires the Court to consider the amount claimed and the amount recovered in the proceeding, and Rule 1.04(1.1) requires the Court to make orders that are proportionate to the importance and complexity of the issues and to the amount involved in the proceeding. While the plaintiff concedes that costs awards must be proportional, she argues that an undue focus on proportionality ignores the principles of indemnity and access to justice.
- [10] On the issue of proportionality, I agree with the plaintiff. This Court has often awarded costs in amounts that have exceeded damages by several orders of magnitude.⁴ For instance, in *Cobb v. Long Estate*, the Court of Appeal held that the plaintiff's costs could not have been expected to exceed \$200,000 where the result achieved was \$22,136.⁵

¹ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131, and *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194., R. 57.01.

² *Andersen v. St. Jude Medical Inc.*, 2006 CanLII 85158, (Ont. Div. Ct.).

³ *Boucher v. Public Accountants' Council for the Province of Ontario*, 2004 CanLII 14579 (Ont. C.A.).

⁴ See *Dennie v. Hamilton*, 2008 CanLII 5964 (Ont. Sup. Ct.); *Persiampieri v. Hobbs*, 2018 ONSC 368 (Ont. Sup. Ct.); *Duncan v. Taylor*, 2017 ONSC 7445 (Ont. Sup. Ct.).

⁵ *Cobb v. Long Estate*, 2017 ONCA 717, at para 159.

- [11] On the facts of this case, however, I agree with the defendants that the plaintiff's costs should be somewhat reduced to account for the fact that the plaintiff was not successful on the issue of general damages.
- [12] The plaintiff argues that it did not matter to her how the \$9,000 settlement was broken down. She argues that the settlement's real value is \$109,031.51 before the applicable deductible and statutory benefits are deducted. I am unable to accept this submission. It is clear from the parties' minutes of settlement that the plaintiff did not receive any compensation for general damages. Characterizing the settlement as general damages would have been of benefit to the plaintiff, as the award would have been exempt from taxation. The defendants maintained throughout this proceeding that the plaintiff's injuries did not meet the threshold. The only conclusion to be drawn from the minutes of settlement is that the plaintiff recognized that her claim for general damages was weak, and she agreed to forego any entitlement under this head of damages.
- [13] Had the parties achieved the same result following a trial, the defendants would have been justified in arguing that the success was divided.⁶ As stated in Orkin on the Law of Costs, "where there are a number of issues on some of which the plaintiff is successful and on others defendant is successful, the costs may be apportioned [...]."⁷ There are several recognized ways of apportioning costs. The plaintiff may be awarded the general costs of the action and the defendant the costs referable to the specific issue on which it succeeded, and the costs may be set-off against each other.⁸ The record before me does not permit to make this kind of assessment.
- [14] Another method of apportioning costs is to discount the plaintiff's costs by an appropriate percentage. In *Dennie v. Hamilton*,⁹ for example, the plaintiff sought general damages of \$350,000 and \$200,000 for loss of housekeeping capacity. The jury awarded only \$40,000 (\$20,000 under each head) and nothing for income loss. Justice Whalen held that the amount recovered did not amount to a victory for the plaintiff and that the costs sought could not be justified given the result achieved. There, the plaintiff's costs were reduced by approximately 30%. I adopt a similar approach here and the plaintiff's costs will be discounted to reflect the fact that the settlement achieved was a modest one that provided no compensation for general damages.

Issue 2 – Should the defendants be liable for the legal fees incurred in recovering SABs?

- [15] In *Cadieux v. Cloutier*, the Court of Appeal recognized that in some cases, it may be appropriate to award the plaintiff some or all of the costs actually incurred un recovering

⁶ This would not be the case if the plaintiff had made a compliant Rule 49 offer and obtained a better result at trial: See *Battiston v. Microsoft Canada Inc.* 2021 ONSC 1341 at para 10 (Ont. Sup Ct.). Rule 49, however, is not engaged in this matter.

⁷ Orkin on the Law of Costs, Second edition, Canada Law Book, Section 211.3.

⁸ *Ibid.*

⁹ 2008 CanLII 5964, at paras 45 and 48 (Ont. Sup. Ct.).

SABs which have reduced the amount of the tort award.¹⁰ The Court added that legal fees and disbursements incurred in the pursuit of SABs can be considered incidental to a proceeding where the SABs have reduced the damages payable by the tortfeasor.

[16] The plaintiff argues that the payments she received from the accident benefits insurer assisted her recovery, covered some of her treatment costs and ultimately allowed her to make a strong offer to settle the claim. I am not persuaded that this is the kind of benefit to the defendant the Court of Appeal had in mind. If the bar were set so low, defendants would always be liable for the fees incurred in pursuing SABs.

[17] I agree with the defendants that the \$9,000 settlement did not relate to general damages and accordingly, they received no benefit from the plaintiff's settlement of the accident benefits. The plaintiff was not entitled to income replacement benefits, which means that the defendants did not receive a benefit under that head of damages.

[18] Accordingly, the plaintiff's legal fees incurred to secure SABs are not allowable.

Issue 3 – Did the defendants' insurers breach their statutory duty to attempt to settle the claim as expeditiously as possible?

[19] Sections 258.5(1) and (5) of the *Insurance Act*¹¹ impose a positive obligation on an insurer defending a motor vehicle action to attempt to settle the claim as expeditiously as possible, and an insurer's failure to do so shall be considered in awarding costs. These provisions provide as follows:

258.5 (1) An insurer that is defending an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile behalf of an insured or that receives a notice under clause 258.3(1)(b) from an insured shall attempt to settle the claim as expeditiously as possible.

[...]

Failure to comply

(5) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, an insurer's failure to comply with this section shall be considered by the court in awarding costs.

[20] These statutory duties have been described as "very vague" and do not require a defendant to capitalize, fold its tent and give in to the plaintiff.¹² Here, the defendants held to their position that the plaintiff was not entitled to general damages and offered to settle the past income loss and past loss of housekeeping capacity. The plaintiff only served her income

¹⁰ 2018 ONCA 903, at para 123.

¹¹ R.S.O. 1990 c. I.8.

¹² *Russett v. Bujold*, 2004 CarswellOnt 2386, at para 65 (Ont. Sup. Ct.).

tax returns and financial records in September 2019 and 2020 which allowed the defendants to make their first offer to settle the action on November 18, 2020.

[21] I am not persuaded that the defendants acted contrary to their statutory obligations in this case.

Issue 4 – What is a fair and reasonable costs award?

[22] As set out above, the plaintiff recovered a modest settlement which did not compensate her for her physical injuries. In these circumstances, it would not be fair or reasonable for the defendants to award the plaintiff her full partial indemnity costs for all steps in this proceeding. However, many of the steps would have been carried out regardless of the settlement's outcome and the plaintiff should be compensated for having incurred these costs.

i. Legal Fees

[23] The plaintiff claims \$5,589 for legal fees related to her initial consultation with counsel, his retainer, initial meetings, requests for employment files, medical files, accident benefit documents and the like. These fees are reasonable and would have been incurred regardless of the success or failure of her general damages claim. They are allowed in full.

[24] The plaintiff claims \$2,076 for legal fees as they relate to her pleadings. I also consider these fees to be reasonable and allow them in full.

[25] The plaintiff claims \$534 for legal fees as they relate to the collection of documents and the preparation of her affidavit of documents. I deem them to be reasonable and allow them in full.

[26] The plaintiff claims \$3,254 and \$5,988 in relation to the examinations for discovery and discovery. I will discount them by 30% to account for the fact that a significant portion of the time would have been consumed on her general damages claim.

[27] The plaintiff claims \$9,508.90 on pursuing SABs. As indicated above, the settlement provided a benefit to the plaintiff but did not provide one to the defendants in the context of this action. These fees are disallowed in their entirety.

[28] The plaintiff claims \$2,736 on legal fees relating to her own and the defendants' expert reports. I will discount these fees by 50% as the expert reports dealt with the issue of her physical impairments and general damages.

[29] The plaintiff claims \$735 and \$764 for legal fees incurred in relation to Court attendances and the preparation of offers to settle. I allow these fees in full as these are necessary steps in any court action and these costs would have been incurred regardless of the settlement outcome.

[30] The plaintiff claims \$3,690 for the preparation of the Trial Record and the Pre-trial. These costs relate to mandatory steps, are fair and reasonable, and are allowed in full.

[31] Finally, the plaintiff claims \$1,575 for the preparation of the bill of costs and costs submissions. I consider that amount to be fair and reasonable, the quality of the submissions to be very high (as were the defendants') and allow this claim in full.

ii. Disbursements

[32] The plaintiff claims \$20,355 in disbursements requiring HST and \$5,921.11 in disbursements not requiring HST, and \$2,646.22 for HST, for a total of \$28,922.86. Of this amount, \$4,001.35 relates to obtaining police and clinical records, court filing fees, process server fees, court reporter fees, photocopies and postage and courier fees. I allow these disbursements in their entirety as fair and reasonable.

[33] The plaintiff claims \$22,275.28 for the cost of obtaining 5 expert reports. I accept the defendants' contention that the plaintiff obtained these reports to build her claim for general damages and for costs of care, which are claims that did not form part of the settlement between the parties. In the circumstances, I will discount the costs of these reports by 50%.

[34] The plaintiff's legal fees are hereby fixed in the amount of \$25,764 (\$22,800 + HST) and the plaintiff's disbursements at \$16,465.05, for a total of \$42,229.05.



Master Kaufman

Date: June 21, 2021

Amended July 5, 2021