CITATION: Valentine v. Rodriguez-Elizalde, 2016 ONSC 6395
COURT FILE NO.: CV-12-463220
DATE: 20161018

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: AMANDA VALENTINE, Plaintiff

AND:

SEBASTIAN RODRIGUEZ-ELIZALDE, Defendant

BEFORE: Mr. Justice Stephen Firestone

COUNSEL: *Z. Tsimerman* and *K. Podbielski*, for the Plaintiff

J. Bowcock and *A. Fox*, for the Defendant

HEARD: In Writing

COSTS ENDORSEMENT

[1] The trial of this motor vehicle action proceeded before me with a jury. The defendant admitted liability for the collision. The trial commenced on February 1, 2016 and the jury delivered its verdict on February 12, 2016. The jury awarded the plaintiff $30,000 for general damages, $14,022.83 for past loss of income, $50,000 for loss of competitive advantage, $0 for past housekeeping, and $1,200 for future housekeeping.

[2] In my collateral benefit, threshold, and deductible decision dated June 2, 2016, I determined the collateral benefits to be deducted from the jury's award and addressed the application of the threshold and statutory deductible as follows.

[3] In accordance with s. 267.8(7) of the *Insurance Act*, R.S.O. 1990, c. I.8 ("the Act"), the jury's non-pecuniary damage award of $30,000 is not subject to a collateral benefit deduction. After application of the statutory deductible, the net general damage award is $0.

[4] The jury's award of $14,022.83 for past loss of income is reduced to $4,684.17 after applying the 70% of gross calculation under s. 267.5(1) 2.ii of the Act as well as the collateral benefit deductions under s. 267.8(1) of the Act.

[5] The parties agree that no collateral benefit deduction is to be applied to the award of $50,000 for loss of competitive advantage.

[6] The jury awarded $0 for past housekeeping and $1,200 for future housekeeping. After deduction of collateral benefits under s. 267.8(6) of the Act, this amount is reduced to $0.

[7] Written cost submissions were requested and received. The plaintiff seeks costs of this action on a partial indemnity basis of $19,972.75 inclusive of HST to her Offer to Settle ("Offer") dated June 16, 2014, substantial indemnity costs thereafter of $198,687.90 inclusive of HST, and disbursements of $49,340.87. In the alternative, the plaintiff seeks costs on a partial indemnity basis of $39,352.25 inclusive of HST to her Offer made December 11, 2015, substantial indemnity costs thereafter of $169,618.65 inclusive of HST, and assessable disbursements of $49,340.87.

Procedural History and Rule 49 Offers

[8] The plaintiff's Statement of Claim ("Claim") was issued September 11, 2012. The statement of defense and jury notice were filed on or about October 10, 2012. Examinations for discovery of all parties took place on June 3, 2013. The plaintiff set the action down for trial on June 6, 2014.

[9] On November 15, 2013, the defendant served its first Rule 49 Offer: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The offer was that the defendant would consent to a dismissal of the action on a without costs basis. That offer remained open for 45 days and was not accepted by the plaintiff.

[10] On May 13, 2014, the parties participated in mandatory mediation. At mediation, the defendant renewed its offer of a dismissal of the action without costs. This offer was not accepted by the plaintiff.

[11] On June 16, 2014, the plaintiff delivered its first offer. The terms of that offer were that the defendant pay to the plaintiff: $15,000 for special damages; $1,000 net of the statutory deductible for general damages; plus, appropriate prejudgment interest, costs, and disbursements. That offer, unless withdrawn, remained open until five minutes after the commencement of trial. That offer was not accepted by the defendant.

[12] On December 3, 2013, the first pre-trial conference ("pre-trial") under Rule 50.02 took place. The action did not settle.

[13] Following this pre-trial, on December 11, 2015, the plaintiff withdrew its first offer and served a second offer which was to remain open until five minutes after the commencement of trial, at which time it would be automatically withdrawn.

[14] The terms of the plaintiff's second offer were that the defendant pay to the plaintiff: $5,000 for special damages; $0 net of the statutory deductible for general damages; plus, appropriate pre-judgment interest, costs, and disbursements. This offer was not accepted by the defendant.

[15] The defendant made a second offer dated December 15, 2015. The terms of this offer were that the plaintiff had until 5:00 p.m. on January 20, 2016 to consent to dismissal of the action with costs payable by the plaintiff to the defendant in the amount of $10,000 plus HST. If this offer was not accepted by the due date then, as of 5:01 p.m. on January 20, 2016, the terms

of the offer changed. The plaintiff was then to consent to a dismissal of the action with costs payable to the defendant in the amount of $20,000 plus HST and assessable disbursements. This offer was not accepted by the plaintiff.

[16] A second pre-trial took place on January 21, 2016. The parties did not settle.

Positions of the Parties

(a) The Plaintiff

[17] The plaintiff submits that two material facts are determinative of costs in this case. First, at trial she obtained a verdict over and above both her Rule 49 offers. Second, the defendant, through its insurer Aviva Canada, made no attempt to resolve this action by way of a monetary offer. As a result, the plaintiff was forced into a ten-day jury trial.

[18] The plaintiff submits that, in accordance with Rule 57.01(1), the court may consider "the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding." She submits that the defendant never made any reasonable attempt to resolve this case, even after the plaintiff made her offer to settle the case for $5,000. The plaintiff submits that the defendant's entire "hard-nosed" approach in making their offers lengthened the proceeding and forced the plaintiff into a trial.

[19] The plaintiff also relies on Rule 49.10(1), which provides that where a plaintiff obtains a judgment as favorable as, or more favorable than, the terms of an offer to settle, "the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise." The plaintiff submits that her net recovery at trial was 3.42 times more than her first offer and 10.94 times more than her second offer.

[20] Finally, given the insurer's conduct, the plaintiff seeks a remedial costs penalty under s. 258.5(5) of the Act based on the insurer's failure to settle the claim as expeditiously as possible. The plaintiff submits that the insurer made no attempt to resolve the action, failed to negotiate in good faith at virtually every step of the proceeding, and maintained its "hard-nosed approach" from the onset of the litigation. The plaintiff refers directly to s. 258.5(1) and by reference to s. 258.6(1) of the Act.

[21] Sections 258.5(1) and (5) of the Act state as follows:

> **DUTY OF INSURER RE SETTLEMENT OF CLAIM**
>
> 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.

[22] Sections 258.6(1) and (2) of the Act states as follows:

MEDIATION

258.6(1) A person making a claim for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile and an insurer that is defending an action in respect of the claim on behalf of an insured or that receives a notice under clause 258.3(1) (b) in respect of the claim shall, on the request of either of them, participate in a mediation of the claim in accordance with the procedures prescribed by the regulations.

Failure to comply

(2) In an action in respect of the claim, a person's failure to comply with this section shall be considered by the court in awarding costs.

(b) The Defendant

[23] The Defendant refers to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that "the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid." This is supplemented by the provisions of Rule 57.01(1), which sets forth the factors the court may consider when exercising its discretion to award costs pursuant to s. 131, and by the principle of proportionality set out in Rule 1.04(1.1).

[24] In applying the factors under Rule 57.01(1), the defendant submits that costs should be awarded on a partial indemnity basis unless justice can only be done by complete or substantial indemnification. As a general rule, justice will only require substantial indemnification where there has been "reprehensible, scandalous or outrageous" conduct. In this case, the defendant submits there has been no such conduct on its part which would justify an award of substantial indemnity costs. If the court were to exercise its discretion in awarding costs in this case, the defendant submits they should be awarded on a partial indemnity basis only.

[25] The defendant submits that the plaintiff's cost demand is not proportional to the jury award. He submits that the costs being sought are excessive as compared to the defendant's partial indemnity costs and are beyond that which would be expected by the defendant after a two-week trial. This is especially so given the divided success achieved by the parties.

[26] The defendant highlights that there were seven heads of damages claimed in this action. The jury questions related to past and future health care expenses were struck following the

defendant's motion at trial. In addition, the jury awarded $0 for past housekeeping and $1,200 for future housekeeping expenses, which was reduced to $0 following the collateral benefit deductions. Further, the defendant was successful in the threshold determination. The defendant submits that the plaintiff's refusal to settle the issue of general damages prolonged the trial and resulted in increased costs.

[27] The defendant argues that a review of the plaintiff's cost outline shows duplication of time which ought to be reduced. The defendant's costs on a partial indemnity basis to the date of the verdict inclusive of HST and disbursements were $57,917.77. Those costs on a substantial indemnity basis were $80,966.55. These sums are substantially lower than the plaintiff's.

[28] The disbursements sought by the plaintiff of $49,340.87 inclusive of HST are nearly equivalent to the judgment in this action. The court should take a close look at those disbursements.

[29] The defendant submits that the cost of the plaintiff's adverse cost insurance is not an assessable disbursement. The defendant also argues that the amount owed by the plaintiff for failing to attend the defense medical is not an assessable disbursement. The defendant also takes issue with the amounts charged for photocopies, parking, mileage, and an expert report which was not filed at trial and for which the author was not called.

[30] The defendant further submits that no remedial penalty is justified. The defendant references the wording of s. 258.6 of the Act and the requirement the parties participate in mediation at the request of either of them. He submits that the insurer did attend and participate at mediation as required by and in compliance with the Act.

[31] The defendant argues that s. 258.6 of the Act does not mandate that a certain sum of money be offered at mediation, as suggested by the plaintiff. The defendant offered a dismissal of the action without costs, which was reflective of its assessment of the claim. There was therefore meaningful participation in the mediation.

[32] The defendant submits that the plaintiff is equating the payment of money with an attempt to settle the matter. The plaintiff is arguing, in essence, that money must be paid to a plaintiff in every case for there to be an attempt to settle the matter irrespective of the merits of the claim.

[33] On January 28, 2016, the managing partner of the plaintiff's law firm offered to settle the general damages claim for $0 and proceed to trial on the special damages claim only. Counsel for the defendant received instructions to accept that offer, however it was withdrawn by plaintiff's counsel on the basis that the plaintiff was not prepared to withdraw her claims for past and future health care expenses, which are subject to the threshold.

[34] The defendant submits that each party should bear their own costs or, in the alternative, costs ought to be awarded on a partial indemnity basis, and fixed with regard to the divided success of the parties and the principle of proportionality.

(c) Plaintiff's Reply

[35] The plaintiff submits that the defendant's emphasis on proportionality would serve to undercompensate her for costs legitimately incurred.

[36] In addition, she submits that the *prima facie* cost consequences under Rule 49.10 are intended to encourage parties to make reasonable offers to settle. The plaintiff made a Rule 49 offer of $0 for general damages, net of the statutory deductible, and $5,000 for special damages. Based on the jury's verdict, the plaintiff was wholly successful at trial and costs should not be divided.

[37] The plaintiff seeks costs legitimately incurred. The plaintiff completed her case in five days. The length of trial would have been the same, she submits, even if the issue of general damages was settled prior to trial, given the evidence the plaintiff had to introduce in order to prove her pecuniary loss claim.

[38] The defendant understood the risks and costs of trial, yet maintained his position regarding both special and general damages. The fact that disbursements are near the judgment amount is irrelevant as the disbursements were all legitimately incurred and necessary.

[39] The plaintiff argues that the defendant made no genuine attempt to resolve this matter short of trial. The defendant is in breach of both s. 258.5(1) and, by reference, s. 258.6(1) of the Act. The defendant should pay a remedial penalty to the plaintiffs because the insurer never really attempted to resolve the matter. They did not negotiate in good faith and maintained a hard-nosed position from the onset of the litigation.

Analysis

The Applicable legal principles

[40] Section 131(1) of the *Courts of Justice Act* provides as follows:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent costs shall be paid.

[41] Rule 57.01 of the *Rules of Civil Procedure* identifies the factors a court may consider when exercising its discretion to award costs:

> (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> > (0.a) 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 that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.

[42] Rule 49.10 limits the court's discretion regarding the fixing of costs in certain circumstances when there has been a qualifying offer to settle. These automatic cost consequences are designed to encourage the parties to take realistic positions and encourage settlement. This Rule provides that:

(1) Where an offer to settle,

(a) is made by a plaintiff at least seven days before the commencement of the hearing;

> (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 indemnity costs from that date, unless the court orders otherwise.
>
> (2) Where an offer to settle,
>
> (a) is made by a defendant at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the plaintiff,
>
> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

[43] Rule 49.13 provides as follows:

> 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* [emphasis added].

[44] In *Agius v. Home Depot Holdings Inc.*, 2011 ONSC 5272, the court set forth the general principles to be applied in fixing costs, at paras. 10-12:

> Cumming J. in *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601 at para. 5 described the "normative approach" to an application for costs:
>
> > Costs are in the discretion of the Court: s. 131, *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 57.01 of the Rules of Civil Procedure. In Ontario, the normative approach is first, that costs follow the event, premised upon a two-way, or loser pay, costs approach; second, that costs are awarded on a partial indemnity basis; and third, that costs are payable forthwith, i.e. within 30 days. Discretion can, of course, be exercised in exceptional circumstances to depart from any one or more of these norms.

Fixing of costs is not merely a mechanical exercise in reviewing the receiving party's Cost Outline. In *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557, the Divisional Court set out several principles to be considered in making an award of costs:

> 1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher* [*Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291], *Moon* [*Moon v. Sher* (2004), 246 D.L.R. (4th) 440], and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (C.A.).
>
> 2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont. C.A.), at para. 4.
>
> 3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
>
> 4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), at p. 249.
>
> 5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

The Court of Appeal has identified the overriding principle to be that the amount of costs awarded be reasonable in the circumstances. In *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 Epstein J.A. stated at paras. 51-52:

> As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher*, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful

> party to pay in the particular proceeding at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."

Application of Rule 49.10

[45] Where there have been qualifying written offers to settle, the mandatory cost consequences under Rule 49.10(1) and (2) apply unless otherwise ordered by the court.

[46] In this case, the plaintiff's first offer dated June 16, 2014 was withdrawn prior to the commencement of trial and is therefore not Rule 49.10 compliant. The plaintiff's second offer dated December 11, 2015, however, was not withdrawn prior to trial and is therefore compliant with Rule 49.10.

[47] The plaintiff, by way of her second offer, attempted to settle this claim for the reduced amount of $5,000 plus prejudgment interest, costs, and disbursements. The defendant refused to accept this offer and rather chose to maintain their position and proceed to trial.

[48] In accordance with my collateral benefit, threshold, and deductible decision dated June 2, 2016, the plaintiff obtained judgment in the sum of $54,684.17 plus interest. The plaintiff was the successful party in this action. The plaintiff obtained judgment more favourable than the terms of her offer to settle. She is therefore entitled, pursuant to Rule 49.10(1), to partial indemnity costs to the date of her offer of December 11, 2015 and substantial indemnity costs from that date.

[49] There is no valid basis to exercise my discretion and depart from the mandatory cost consequences under Rule 49.10. The defendant, through his insurer, played hardball. This is evident from the timing and contents of the various offers to settle made. The defendant was entitled to make the offers reflective of and based on their assessment of the case with full knowledge that, if the plaintiff was successful at trial, he could be obligated to pay substantial indemnity costs in accordance with Rule 49.10.

[50] Based on the offers made and the judgment obtained, I find that the defendant is to pay the plaintiff partial indemnity costs up to the plaintiff's offer of December 11, 2015, and substantial indemnity costs thereafter. To use the words of the Court of Appeal in *Ross v. Bacchus*, 2015 ONCA 347, 126 O.R. (3d) 255, at para. 51, discussed further below, "[w]hen an insurer rejects a plaintiff's offer and proceeds to trial, the insurer risks both a higher damage award at trial and the imposition of substantial indemnity costs after the date of the rejected offer. Both risks came to pass this case."

Did the Insurer breach sections 258.5(1) and 258.6(1) of the *Insurance Act*?

[51] Sections 258.5(1) and 258.6(1) of the Act are unique to the motor vehicle tort compensation system in Ontario. These two provisions clearly have a legislative purpose, namely

to encourage and promote settlement of these claims. These sections contain provisions which provide that a failure to comply with them shall be considered by the court in awarding costs.

(a) Section 258.5 - Duty of Insurer Re Settlement of Claim

[52] Section 258.5(1) of the Act imposes a positive obligation on an insurer defending a motor vehicle tort action to "attempt to settle the claim as expeditiously as possible."

[53] The meaning of the phrase "shall attempt to settle the claim as expeditiously as possible" was dealt with by the court in *Russett v*. *Bujold*, 2004 CarswellOnt 2386 (Ont. S.C.). Referencing the Ontario Court of Appeal decision in *McCombie v*. *Cadotte* (2001), 53 O.R. (3d) 704, Power J. states, at para. 65:

> This statutory duty, it will be noted, is very vague. The duty is to "attempt to settle the claim as expeditiously as possible". Damages in a bodily injury or death claim are never certain and, almost never, or indeed never do two people calculate them in such a fashion as to arrive at the exact same result. The word "settle" suggests compromise. However, it does not mean that one of the parties to the dispute, in this case the Insurer, must totally capitalize, fold its tent, and give into the claimant. There can be little doubt that an Insurer who acts dishonestly; takes advantage of an uninformed claimant; or that misrepresents information and advice from its own employees or other advisors would, in such circumstances, be acting contrary to its duty to settle the claim expeditiously. The statutory duty is not simply to settle, but to "attempt to settle the claim as expeditiously as possible". In my opinion, the duty is also violated when an Insurer, without reasonable cause, delays a settlement. The duty relates to a time factor i.e. "expeditiously". (See *McCombie v*. *Cadotte*, [2001] O.J. No.1286 (Ont. C.A.))

[54] In *Ross v*. *Bacchus*, the Court of Appeal provides further clarification. At paras. 45, 46, 48, and 51, the court states:

> The costs sanctions in ss. 258.5(5) and 258.6(2) are clearly intended to penalize insurers for non-compliance with their statutory obligations in the specific case and to encourage those same insurers to comply with those obligations in future cases. The amounts awarded should be sufficient not only to sanction the particular breach, but to give insurers a strong financial incentive comply with their obligations in the future.
>
> The costs sanctions in ss. 258.5 and 258.6 can only serve their intended purposes if the facts justify the imposition of those sanctions. An insurer's statement on the eve of trial that is not prepared to settle a claim cannot be equated with insurer's failure to "attempt to settle the claim as expeditiously as possible." Nor can an insurer who actually participates in a mediation be declared to have failed to participate simply because the insurer indicated prior to the mediation that it was not prepared to settle the claim. A clear statement of the insurer's position going

> into the mediation, even a strong statement, does not preclude meaningful participation in a mediation…
>
> There is also no evidence that the insurer did not participate in the mediation in a meaningful way. The trial judge assumed that because the insurer's counsel advised that his client was "not interested" in settling the case, the insurer's subsequent participation in the mediation was "a sham." The assumption was unwarranted. A firm position strongly put going into mediation does not preclude meaningful participation in the mediation. In any event, the insurer had made a settlement offer which was not revoked before trial…
>
> Insurers, like any other defendant, are entitled to take cases to trial. When an insurer rejects a plaintiff's offer and proceeds to trial, the insurer risks both a higher damage award at trial and the imposition of substantial indemnity costs after the date of the rejected offer. Both risks came to pass in this case. The insurer paid a significant financial penalty for its decision to proceed to trial. The cost provisions in ss. 258.5 and 258.6 do not address those risks, but instead address the failure to meet the specific obligations identified in those provisions. The trial judge's assumptions about the insurer's motivation for rejecting the respondent's offer and proceeding to trial had no relevance to the determination of whether augmented costs should be awarded under the *Insurance Act* provisions.

[55] Based on the procedural history and factual matrix in this case, I do not find that the insurer breached s. 258.5(1) of the Act. The defendant did serve an initial offer early in the litigation, the terms of which were a dismissal of the action without costs. That offer was renewed on a time-limited basis at mediation. The insurer from the outset maintained its "hardball" position. The defendant did attempt to settle the case, albeit on terms that were not acceptable to the plaintiff. I agree with the statement of Tzimas J. in *Dimopoulos v. Mustafa*, 2016 ONSC 4119, at para. 30, that: "an insurer's statement that it is not prepared to settle a claim cannot necessarily be equated with an insurer's failure to 'attempt to settle the claim as expeditiously as possible.'"

[56] As in *Ross v. Bacchus*, the defendant in this case rejected the plaintiff's last offer and the plaintiff then obtained a higher damages award at trial.

(b) Section 258.6(1) - Mediation

[57] I find that the defendant is not in breach of s. 258.6(1) of the Act.

[58] The facts of this case are different and not analogous to those in in *Keam v. Caddey*, 2010 ONCA 565, 103 O.R. (3d) 626. In that case, the defendant insurer refused to attend mediation at all. Here, the defendant insurer did attend mediation with their adjuster. Mediation memorandums were exchanged and opening statements were made. It therefore cannot be said that the insurer failed to "participate in a mediation" in breach of s. 258.6(1) of the Act.

[59] Section 258.6(1) of the *Insurance Act* does not mandate that a certain sum of monetary compensation be offered at mediation in order for there to be compliance with the Act. The section does require that the defendant attend at mediation and enter into meaningful discussions regarding the damages position being taken in the litigation.

[60] The fact that I have found that there has not been a breach of ss. 258.5(1) and 258.6(1) of the Act does not detract from the fact that the plaintiff is entitled to solicitor client costs in accordance with Rule 49.10.

Quantum of Costs

[61] Section 131 of the *Courts of Justice Act* provides me with broad discretion in determining the amount of costs to be paid.

[62] The overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 16.

[63] In addition to the factors under Rule 57.01, Rule 49.13 directs that, in exercising my discretion in determining the quantum of costs, I may take into account any offer to settle made in writing, the date the offer was made, and the terms of the offer.

[64] On December 15, 2015, shortly before trial, the defendant served its second Rule 49 escalating offer. The terms of that offer required the plaintiff to pay to the defendant the amounts of $10,000 or $20,000 respectively. Given the position of the parties up to that time, surely the defendant's insurer would have known that b**y** making such an offer, a trial and its associated costs was now a certainty. The terms of that offer had the effect of bringing the parties further away rather than closer to settlement. This, in addition to the other factors to be considered under Rule 57.01, is an important consideration.

[65] In fixing the costs in accordance with the principles outlined above, I do not intend to engage in a purely mathematical exercise of reviewing the time spent outlined in the parties' bill of costs. My task is to fix the amount based on the principles referred to above rather than conduct an exact mathematical calculation of the actual costs of the plaintiff.

[66] While proportionality is a relevant factor, I agree with the plaintiff's submission that the plaintiff should not be undercompensated for costs which were legitimately incurred: see *Gardiner v. MacDonald*, 2016 ONSC 2770, at para. 19; *Accurate v. Trasco*, 2015 ONSC 5980, 51 C.L.R. (4th) 314, at para. 16; and *Interborough Electric Inc*. v. *724351 Ontario Ltd*., 2016 ONSC 1115, at para. 57.

[67] While counsel's hourly rate is an appropriate consideration, it is subject to the overriding principle of reasonableness as applied to the factual matrix of this particular case, as set out above. I have reviewed the plaintiff's Bill of Costs and time dockets. There is some duplication of effort and excessive hours spent.

[68] I fix the plaintiff's partial indemnity costs in the amount of $26,000 inclusive of HST and her substantial indemnity costs in the amount of $115,000 inclusive of HST.

[69] The plaintiff requests disbursements in the sum of $49,340.87 inclusive of HST.

[70] I agree with the defendant that the cost of adverse cost insurance, or after-the-event insurance ("ATE"), is not an assessable disbursement. Such insurance is not necessary for the plaintiff to advance or develop the various heads of damages claimed in this action.

[71] I agree with the reasoning of Milanetti J. in *Markovic v. Richards*, 2015 ONSC 6983, at para. 7, where she states that "[w]hile it is clearly the plaintiff's prerogative to obtain ATE insurance, I do not accept that such premium should be reimbursed by the defendants as a compensable disbursement." See also *Foster v. Durkin*, 2016 ONSC 684.

[72] The $800 non-attendance fee paid by plaintiff's counsel to the defendant solicitors for the plaintiff's non-attendance at a defense medical is not an assessable disbursement. The sum of $10,333 for photocopies and facsimiles is excessive. Particulars were not given regarding the amount of $12,882 paid for expert assessments from Access Reports.

[73] I order that the defendant pay to the plaintiff disbursements in the sum of $31,000 inclusive of HST.

[74] The total costs are fixed at $172,000 inclusive of fees, disbursements, and HST. This sum is payable by the defendant to the plaintiff within 30 days.

[75] I conclude this endorsement by making an important observation. In assessing both the risk and potential costs of proceeding to trial in a motor vehicle accident claim under the current third party compensation system, it is important for defendants and their insurers to be cognizant of the following point. The statutory exception, or threshold, contained in the Act, as well as the corresponding sections of O. Reg. 461/96, as amended by O. Reg. 381/03, which seek to define the threshold, have no application to the determination of a plaintiff's entitlement to, and assessment of, income-related pecuniary loss claims. The threshold wording is not and should not be held out as a barrier to settlement of such economic claims.

[76] Section 4.2 of O. Reg. 461/96 makes reference to various employment and accommodation requirements. The employment and accommodation-related requirements contained in the regulation apply only to the determination of the threshold in relation to claims for non-economic loss and healthcare expenses. A plaintiff is not required to prove or meet these specified requirements as a precondition to the recovery of income-related pecuniary loss claims.

Firestone J.

Date: October 18, 2016