CITATION: Jamieson v. Kapashesit, 2019 ONSC 2831
COURT FILE NO.: C-2969-13
DATE: 2019-05-06
CORRECTED DECISION DATE: 2019-05-07

2019 ONSC 2831 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
	)	
Tina Jamieson and Michael Jamieson	)	John Michael Bray, for the Plaintiffs.
Plaintiffs	)	
– and –	)	
	)	
Rosanne Jocelyn Kapashesit, Lester Small, Kyle Abitong, T. Bell Transport Inc. and CIT Financial Ltd. / Services Financiers CIT Ltee.	)	Rosanne Jocelyn Kapashesit, Unrepresented, Lester Small, Unrepresented and Brian Monteiro and Michelle Farb, for the Defendants Kyle Abitong and T. Bell Transport Inc. and CIT Financial Ltd / Services Financiers CIT Ltee.
Defendants	)	
	)	
	)	**HEARD:** May 2, 2019

CORRECTED DECISION ON COSTS

Corrected Decision: Style of Cause corrected on first page and back page

R.D. GORDON J.

Overview

[1] The trial of this action took place from November 13 to December 6, 2018 in Sudbury. It was a personal injury action arising from a motor vehicle accident and was tried before a jury.

[2] The jury determined that the Abitong defendants were 5% liable for the accident and assessed the main plaintiff's general damages at $10,000. The plaintiff had suggested something in the range of $100,000 to $125,000. The jury awarded nothing on account of past or future loss of income. The plaintiff had sought several hundred thousand dollars. No *Family Law Act* damages were awarded.

[3] After application of the statutory deductible, the plaintiffs were entitled to no recovery. The Abitong defendants now seek costs.

The Defendants' Section 49 Offer

[4] On August 29, 2017 the defendants made a formal offer to settle the action essentially by dismissal without costs. This offer was open until September 5, 2017 whereupon it would continue but with the defendants being paid their costs and disbursements on a partial indemnity scale. The offer remained open until the outset of trial.

General Principles With Respect to Costs

[5] In addition to considering the effect of the offer made by the defendants, r. 57 sets out several factors for consideration in the exercise of my discretion to award costs under section 131 of the *Courts of Justice Act*.

[6] I have taken into account the factors enumerated under r. 57, including the time spent, the result achieved, and the complexity of the matters, as well as the application of the principle of proportionality: r. 1.04(1). In addition, I have considered the principles set forth by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.) and *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.), specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant.

Analysis

[7] The plaintiffs urged me to order no costs. Essentially, they asked that I sanction the defendants for taking a rigid approach to this action and to the insurer's general litigation principle of refusing to pay even nuisance value for a claim it believes to be without merit.

[8] The plaintiffs point out that a contribution of payment towards the plaintiffs' damages was recommended by at least three pre-trial judges, that the plaintiffs made an all-inclusive offer of $40,000 to resolve the case eight weeks prior to trial, and that the plaintiffs would, in all likelihood, have accepted any reasonable counter offer had one been made.

[9] I was referred to the case of *Persampieri v. Hobbs,* 2018 ONSC 368 (CanLII) in which the court made the following comments:

> [103] Insurers can, of course, pursue whatever strategy options they deem fit, but especially where such strategies have wide ranging and adverse implications involving widespread denial of access to justice, the use of such strategies should not be encouraged by the giving of costs breaks on foreseeable costs consequences.
>
> [104] The insurer here rejected a Plaintiff's offer that would have made it possible for it to pay minimal damages.

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> [105] I have already alluded to the submission of Counsel for the Plaintiff that the insurer here made the decision early in this litigation not to pay any tort damages and that once made, that decision was unalterable [apparently regardless of any information received and/or of any advice given to the insurer by defence counsel later in the litigation, including advice given after further production, mediation and discovery.]
>
> [106] Adoption of such an unalterable decision making process would render meaningless and make a mockery of the pretrial resolution process, aimed as it is, at encouraging and effecting settlement to avoid unnecessary trials.
>
> [107] To sanction such a process would be to undermine those policy objectives.
>
> [108] Total unwillingness to reassess/discuss settlement based on full information and advice should not be sanctioned or encouraged in any way, [including by sheltering insurers from the foreseeable costs consequences of such a decision, should it fail to yield a result favourable to an insurer in a particular case].

[10] In the context of that case, I could not agree more. However, in that case the defendant was not seeking costs. It was seeking to limit the costs payable to the plaintiff by referencing the very modest award from the jury. It was essentially a proportionality argument – that the plaintiffs should not receive a substantial costs award when their recovery amounted to just over $20,000. In that case the plaintiffs had offered to settle for $10,000 plus partial indemnity costs in advance of trial. As the court found, the party seeking to invoke the proportionality principle and minimize its costs exposure was a sophisticated insurer that made a tactical decision to reject a formal offer to settle understanding the risk in costs that it was taking by so doing.

[11] That case is not this case.

[12] In this case, although the plaintiffs made a very modest offer to resolve the litigation, they did not best that offer at trial. It turns out the defendants were correct in their assessment of the plaintiffs' claim.

[13] In *Persampieri* the plaintiff insisted that she had an entitlement to some measure of damages. The defendants insisted she did not. The case was tried and the plaintiff was successful.

[14] In this case, the plaintiff insisted that she had an entitlement to some measure of damages. The defendants insisted she did not. The case was tried and the defendants were successful.

[15] Just as the defendants in *Persampieri,* who insisted on paying no damages, were ordered to pay costs when the jury determined that they should pay something, so too should plaintiffs

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who insist they be paid something be ordered to pay costs when the jury determines they should be paid nothing.

[16] In both cases the parties were represented by counsel, would have received competent advice, and would have been aware of the potential costs consequences of conducting the trial. It is difficult to conceptualize why the plaintiff would recover costs in *Persampieri* and the defendants would not recover costs in this case.

[17] I am satisfied the defendants are entitled to their costs on a partial indemnity basis.

[18] The plaintiffs made several well-founded objections to the amount claimed, some of which are acknowledged by the defendants. For example, the defendants agreed that they should not be granted costs for preparation and attendance at the second scheduled trail of this matter which was mistried due to late service of surveillance evidence. Similarly, a scheduled trial of this matter in 2016 was adjourned at the request of the defendants and it is agreed that costs related to preparation for that trial are inappropriate. It is also appropriate that the discovery costs be reduced to reflect that discovery was conducted jointly in this action and a separate action arising out of the same accident.

[19] The plaintiffs made several other objections to the amounts claimed that the defendants disagreed with.

[20] To begin with, the plaintiffs argued that the conduct of defence counsel caused the trial to last longer than it should have. I agree. Following the completion of the examination-in-chief of the Plaintiff it was necessary to conduct a voir dire on the admissibility of surveillance evidence. The required defence witnesses were not available for the better part of two days. In addition, when the defendant was presenting its case, there was close to two full days of trial time lost because of unavailability of witnesses. I agree that had defence witnesses been readily available the trial time would have been reduced by about four days.

[21] Secondly, the plaintiffs argued that the time claimed for trial preparation and attendance was excessive. In particular, they argued that this was not a complex trial requiring two lawyers and over 1000 hours of time. I tend to agree. Although both liability and damages were at issue, the liability issue was reasonably narrow and the damages were restricted to claims of general damages, along with past and future income loss. This is not what I would call a complex case. However, it is important to note that the plaintiffs were advancing a claim of several hundred thousand dollars. Had they been entirely successful, the defendants stood to lose a million dollars or more. It was not necessarily unreasonable for them to have directed significant resources to this claim.

[22] Thirdly, the plaintiffs argued that the disbursements claim was excessive at $153,000. I agree, particularly in light of plaintiffs' counsel information that their disbursements were in the range of $70,000. Without parsing every single disbursement, I note that the surveillance costs and expert costs seemed particularly high in all of the circumstances. In addition, the defendants improperly included their costs payment to the plaintiffs from the aborted trial as a disbursement.

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[23] Fourthly, the plaintiffs argued that the defendants should not be entitled to the usual partial indemnity rates because they used in-house counsel who, one might reasonably infer, are not paid those rates. They point to *790668 Ontario Inc. v. D'Andrea Management Inc.,* [2015] O.J. No. 4018 (Ont. C.A.) in support of this proposition. In that case the court was considering an appeal from, among other things, costs ordered by a motions judge who acknowledged that the defence was being provided by LawPro at an hourly rate roughly two thirds of other lawyers practising in the same field with comparable experience and expertise. She awarded partial indemnity costs in the full amount of the actual rates charged by counsel. The Court of Appeal held that it was an error in principle for the motion judge to award partial indemnity costs in the full amount of the actual costs paid and that there was no reason, on the facts in the record, to depart from the ordinary rule of thumb that partial indemnity costs should be about one-third less than substantial indemnity costs. Although it is not clear from the reasons of the Court of Appeal, it would appear that LawPro had hired outside counsel at reduced rates to represent the successful defendants.

[24] This case before me is somewhat different in that the insurer used its own in-house lawyers to represent the defendants. The almost identical issue has been dealt with by the Ontario Court of Appeal in *Ontario v. Rothmans Inc.,* 2013 ONCA 353:

> [129] Although the hourly rates sought by counsel for Ontario were approximately one-half of those being claimed by the appellants for counsel with comparable years of experience, the appellants contend that the province's hourly rates were "unjustified, excessive and beyond the reasonable expectation of the parties." They further submitted that the province is only entitled to partial indemnity for the costs incurred and that it was therefore required to supply proof of its actual costs for lawyer's time – in effect, the salaries of Crown counsel – in order to establish a basis for the motion judge to determine a correct partial indemnity rate for the province.
>
> [130] We do not agree.
>
> …
>
> [134] There is no issue that actual rates charged may be a relevant consideration in determining costs: see *Stellarbridge Management Inc. v. Magna International (Canada) Inc.* (2004), 71 O.R. (3d) 263 (Ont. C.A.) at paras. 94-99. However, hourly rates and the notion of indemnification, while clearly important, are not the only relevant considerations: see *1465778 Ontario Inc. c. 1122077 Ontario Ltd.*(2006), 82 O.R. (3d) 757 (Ont. C.A.); and *Chiefs of Ontario v. R.,* [2007] O.J. No. 4068 (Ont. S.C.J.), paras 12-14 and 17. The court's authority under rule 57.01(1) remains discretionary, and it is significant that under rule 57.01(1)(0.a), information regarding "rates charged and hours spent" is called for in applying the principle of indemnity only "where applicable". Rates and hours spent are not

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> particularly "applicable" in situations where counsel are salaried employees of the employer litigant. In those circumstances, the salaried lawyer does not generally send a bill to his or her employer for services rendered, with or without hourly rates.
>
> [135] Section 131(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, and s. 36 of the *Solicitors Act*, R.S.O., c. S. 15 both affirm the Crown's right to recover its partial indemnity costs in proceedings in which it has been successful, even though it is represented by salaried counsel. They provide:
>
> **Courts of Justice Act**
>
> 131(2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown…
>
> **Solicitors Act**
>
> 36.Costs awarded to a party in a proceeding shall not be disallowed or reduced on assessment merely because they relate to a solicitor or counsel who is a salaried employee of the party.
>
> [136] As Ontario acknowledges, these provisions do not deprive the court of its discretion in fixing costs. However, the courts in many jurisdictions have adopted the principle that, where a successful party is represented by a salaried lawyer, the proper method of fixing costs is to deal with them as though they were the costs of an independent outside counsel. The theory behind this approach is that it will roughly and fairly approximate the actual amount of expenses incurred…
>
> [137] The motion judge followed this approach. She was entitled to do so.
>
> [138] In the end, the motion judge simply followed the test signalled by Armstrong J.A. in *Boucher v. Public Accountants Council (Ontario)* 92004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 26: "the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, *rather than an amount fixed by the actual costs incurred by the successful litigant"* (emphasis added).

[25] The hourly rate claimed in this instance is not likely to render the matter profitable for the defendants. In addition to the salaries of counsel there are membership and insurance fees, overhead and equipment, support staff and benefits. In my view, it is not inappropriate in the

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circumstances of this case to assess costs as though independent outside counsel had been retained.

[26] To the credit of the Abitong defendants, they acknowledge that the fees and disbursements claimed are somewhat greater than might be fair or reasonable in this case and have reduced their partial indemnity request from $382,449.95 to $200,000 all inclusive. They say this is a reasonable amount given all of the factors set out in Rule 57.

[27] The plaintiffs have suggested that fees should be based on 215 hours of time, and disbursements limited to two thirds of the $70,000 expended by them. At the hourly rates submitted by the Abitong defendants this would amount to fees of $29,000 and disbursements of roughly $47,000, for a total of $76,000. I note that the plaintiffs did not submit a bill of costs and there is no real means by which I can compare the times spent by counsel on this case. I doubt very much that the plaintiffs would have advanced such a modest claim for costs had they been successful before the jury.

[28] On consideration of all the factors set out in r. 57, I am of the view that an appropriate award of costs to the Abitong defendants in this matter is $175,000, all inclusive, and it is so ordered.

The Honourable Mr. Justice R.D. Gordon

Released: May 06, 2019
Corrected Decision Released: May 7, 2019

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Defendants

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R.D. Gordon, J.

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