CITIATION: McCurdy et al., v. Maille et al., 2024 ONSC 1222
COURT FILE NO.: CV-16-00001478-0000
DATE: 20240227

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Randy Dale McCurdy, Sandra Jean McCurdy, Barry McCurdy, and Jackson McCurdy, Mya McCurdy, and Olivia McCurdy, by their Litigation Guardian, Sandra Jean McCurdy, Plaintiffs

AND

Charles Maille, The Corporation of the United Counties of Stormont, Dundas and Glengarry and 809298 Ontario Inc., Defendants

BEFORE: Justice Spencer Nicholson

COUNSEL: V. Edgar and A. Duggan for the Plaintiffs

B. Sunohara and A. Colarossi for the Defendants, Charles Maille and 809298 Ontario Inc.

HEARD: In Writing

COSTS ENDORSEMENT

NICHOLSON J.:

[1] After a twelve-day trial, a jury awarded the plaintiffs the sum of $2,170,188 in damages. After applying the statutory deductibles and deducting credits for collateral benefits received by the plaintiffs before trial, the net award, including pre-judgment interest, was $1,749,690.54.

[2] By Reasons dated December 5, 2023, I held that the defendants were entitled to an assignment of the plaintiff's future disability benefits and to deduct those benefits already received from the jury's award in respect of past loss of income.

[3] The parties were unable to agree on costs of the action.

[4] Each side served relevant offers to settle.

[5] On October 18, 2022, the plaintiffs offered to settle the action for the sum of $1,200,000 plus costs for all claims, including pre-judgment interest. The plaintiffs' offer is silent with respect to future disability benefits and accordingly, I find that had the defendants accepted that offer, they would not have been entitled to an assignment.

[6] The defendants served an offer of $625,000 on February 22, 2022, which was inclusive of costs and interest. That offer, if accepted, would permit the plaintiffs to retain the future disability benefits.

[7] The plaintiffs claim entitlement to costs on a partial indemnity basis up until the date of their offer to settle and substantial indemnity costs thereafter, pursuant to rule 49.10 of the *Rules of Civil Procedure.* Their Bill of Costs sets out full fees of $315,356 to the date of their offer to settle and $334,974.50 thereafter. This totals $650,330.50. The plaintiffs also claim disbursements of $57,472.07.

[8] Factoring in rule 49.10, the plaintiffs argue that their costs should be fixed at $506,458.48 plus HST and disbursements of $57,472.07.

[9] Plaintiffs' counsel have included their time entries for the period from March 30, 2016 through to the conclusion of making costs submissions. However, those time entries include no description of what work was actually done during each entry. Accordingly, they are of limited assistance. Invoices in respect of the disbursements are also produced.

[10] The defendants concede that the judgment was higher than the plaintiffs' offer to settle and that the plaintiffs are entitled to their costs of the action on a partial indemnity basis to the date of their offer to settle and substantial indemnity costs thereafter.

[11] However, the defendants argue that the plaintiffs are seeking excessive costs or costs that are unrecoverable in the tort action. They argue that:

(a) the costs associated with pursuing statutory accident benefits and collateral benefits are not recoverable in this tort action;
(b) the costs associated with interlocutory motions should have been dealt with by the motions judge and are not recoverable at the conclusion of the action;
(c) the costs associated with a *Workplace Safety and Insurance Appeals Tribunal* (*WSIAT*) hearing to determine whether or not this action was barred are not recoverable in this action;
(d) the defendants were the successful party on the collateral benefits motion; and
(e) certain disbursements are not recoverable.

[12] Anticipating that the defendants would assert that the plaintiffs' costs were excessive, I instructed the defendants to submit their own Bill of Costs. The defendants state that their costs were $185,547.13 on a full indemnity basis after removing items that they argue are not recoverable.

[13] The defendants argue that the plaintiffs' costs should be fixed at $275,000, inclusive of HST, plus $54,000 in disbursements.

Legal Principles:

[14] The costs of and incidental to a proceeding are in the discretion of the court pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[15] The factors to be considered by the court are enumerated in rule 57.01 of the *Rules*. The following factors play a role in the exercise of my discretion in this case:

- the principle of indemnity, considering the hourly rate of the lawyers and the time expended;
- the amount of costs that the unsuccessful party would reasonably expect to pay;
- the amount claimed and the amount recovered in this action;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of any party that tended to shorten or lengthen the proceedings.

[16] Absent reprehensible, scandalous or outrageous conduct on the part of a litigant, the usual scale of costs is on a partial indemnity basis as opposed to a substantial indemnity basis (see: *Davis v. Clarington (Municipality) et al*., 2009 ONCA 722). However, rule 49.10 imposes adverse costs consequences on the defendants where the plaintiffs obtain a judgment more favourable than the plaintiffs' offer. Rule 49 cost consequences are designed to foster settlement of civil actions. As noted, the defendants concede that the plaintiffs "beat" their offer to settle and are entitled to the higher scale of costs from the date of that offer onward.

[17] As described in *Boucher v. Public Accountants Council (Ontario)* (2004), 2004 CarswellOnt 2521, [2004] O.J. No. 2634, the fixing of costs is not simply a mechanical exercise and does not begin and end with a calculation of hours times rates. Overall, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding.

Application of the Rule 57 Factors:

[18] I will deal with each of the relevant rule 57 factors briefly.

[19] Ms. Edgar has 33 years of experience and I find her hourly rates to be reasonable for a plaintiffs' personal injury lawyer with her experience in this jurisdiction. Furthermore, the rates claimed for the associates and clerks are also reasonable. The defendants' lawyers' hourly rates are lower as the insurance industry tightly regulates hourly rates. Accordingly, that comparison does not assist the court.

[20] In terms of hours expended, I accept that some aspects of the file have been "over-lawyered". However, I do not intend to, nor am I required to, deal with the dockets in a line-by-line fashion. Much of the time relates to collateral benefits or the *WSIAT* hearing, which I will address below. I also accept that plaintiffs' counsel often has to expend more time than defence counsel "managing" their clients. The nature of Mr. McCurdy's

significant injuries did justify considerable client management. Nonetheless, I do not accept at face value that all of the docketed time in this file is properly payable by the defendants and there will be an overall reduction to account for "over-lawyering". That term, in this case, is not meant to be a criticism.

[21] I note that both parties had two lawyers present for the entirety of the trial, a senior counsel and junior counsel. In the context of this case, the involvement of two counsel for each side at trial was entirely appropriate. Certainly, the junior counsel for the plaintiff participated actively in the examination of witnesses and making legal arguments. I am confident that junior counsel for the defendants played an important role in the defense of the action as well.

[22] The amount claimed and recovered in the proceeding was significant in terms of personal injury jury actions. This was a large award such that a generous costs award would not be disproportionate to the amount at stake, or the excellent results achieved by plaintiffs' counsel.

[23] The defendants argue that this was not a complex case. For example, liability was admitted by the defendants. However, I disagree to some extent. In terms of a personal injury action, this case was reasonably complicated. Mr. McCurdy presented with an extensive array of injuries, including a significant traumatic brain injury, the recovery from which was hotly contested. Each party had to lead evidence with respect to the extent of Mr. McCurdy's injuries and the extent of his recovery from those injuries. Each party led evidence with respect to the prospects for his return to employment. The complexity of this case was, overall, in the moderate range in terms of personal injury cases.

[24] In terms of importance, it is clear from its award that the jury was of the view that Mr. McCurdy's employability was significantly, if not entirely, diminished by this motor vehicle accident. The financial security of the McCurdy family was obviously imperilled. The stakes in this litigation were extremely high for the plaintiffs.

[25] Both sides took reasonable steps to shorten the trial. I note that there was a brief recess early in the proceedings to allow the defendants to re-examine Mr. McCurdy for discovery. The parties accomplished that with minimal interruption to the jury proceedings, for which all counsel should be commended. The plaintiffs did not pursue future healthcare expenses, presumably on the basis that the settlement of his accident benefits file reasonably compensated him for those losses. The defendants did agree to admit liability. I thought that the trial was handled efficiently by all involved.

[26] I am asked by the defendants to consider that the plaintiffs, in my opinion, did not properly approach the issue of collateral benefits during the trial, by presenting the past and future income loss claims to the jury on a "net" basis. While I agree that their approach was flawed, there was not a substantial increase to court time in attempting to repair that issue. Accordingly, I would not reduce the plaintiffs' entitlement to costs on that basis.

[27] I turn now to address the specific concerns raised by the defendants.

Costs Associated with SABS:

[28] In *Cadieux v. Cloutier*, 2018 ONCA 903 (and in Supplementary Reasons cited at 2019 ONCA 241), the Ontario Court of Appeal stated the following at para. 130:

> [130] We agree with the observations of D. Wilson J. in *Hoang* and in *Ryan v. Rayner*, at para. 8, that the tort defendant should not be required to pay the costs of the plaintiffs' pursuit of SABS as a general principle or as a matter of course. The issue, as she observed, is fact-driven and depends on the particular circumstances of the case.

[29] The Court of Appeal, at para. 132, then stated:

> [132] A trial judge considering whether to award such costs, and if so, the amount of the award, will have regard to all the circumstances, including (a) the fees and disbursements actually billed to the plaintiff in pursuit of the SABs; (b) relevant factors in rule 57.01, including whether the litigation of the SABs claim involved particular risk or effort; (c) the proportionality of the legal costs and expenses incurred by the plaintiff to the benefit of the SABs reduction to the defendant; (d) whether the SABs were resolved by way of settlement or by arbitration; (e) any costs paid as a result of the settlement or arbitration; (f) whether all or any portion of the costs were incurred as a result of unusual or labour-intensive steps that should not reasonably be visited upon the tort defendant; (g) whether or not plaintiff's counsel was acting on a contingent fee basis and, if so, the terms of the arrangement; and (h) the overall fairness of the allocation of the costs of pursuing SABs as between the plaintiff and the SABs insurer and as between the plaintiff and the tort insurer.

[30] In *Hoang v Vicentini* 2014 ONSC 5893, cited with approval in *Cadieux*, Wilson J. stated as follows:

> "The Regulations provide a comprehensive scheme for the recovery of benefits associated with motor vehicle accidents, and there are provisions for the payment of costs…. The pursuit of SABs and whether to settle or proceed to the next level is in the discretion of counsel and the injured party…. Tort defendants are not involved in the SABS process and have no ability to control it. It would be unfair as a general proposition, in my view, to lay the costs of the accident benefits pursuit at the feet of the tort defendants. There may be times when a tort defendant derives a clear benefit from the accident benefits matters by way of a deduction of the amounts from damages, and in those circumstances a judge fixing costs in a tort action may consider it appropriate that the tort defendant pay the costs incurred by the plaintiff in securing the benefits. At other times, however, there may be "compelling circumstances," as described in *Moodie v. Greenaway Estate*, [1977] O.J. No. 6525 (Ont. Ct. J., Gen. Div.), at para. 4, where it would be inappropriate to visit the costs of dealing with other insurers on a Defendant in a tort claim. There is no hard and fast rule…. As I stated in *Ananthamoorthy*, at

> para. 21, "the solicitor for the Plaintiff is bound to pursue his client's entitlement to various benefits . . ." There are limitations on that activity. The statutory scheme which exists for securing accident benefits provides for the payment of costs. In many if not the majority of cases where there is a tort action going forward, the pursuit of accident benefits is quite separate from the tort action, including separate disbursements and expert reports. It is appropriate in these circumstances that the solicitor for the Plaintiff accepts the costs as awarded at FSCO. In other cases, depending on the facts, it may be appropriate for some of the time expended in pursing statutory benefits to be included in the fees sought in the tort action. I do not agree that a Plaintiff can take whatever steps he or she wishes to recover accident benefits and then demand and expect payment from the tortfeasors in a different proceeding."

[31] Problematically, I have no information about the quantum of the accident benefits settlement. The plaintiff received minimal income replacement benefits and because future care costs were not pursued at trial, the amount of his accident benefits settlement was not relevant and therefore, not disclosed. I have no evidence about how much of the settlement was allocated to legal fees or what the plaintiffs were actually charged. Plaintiffs' counsel did not disclose any of this information during their written submissions.

[32] I also have no information about whether the plaintiffs were required to engage in LAT proceedings, for example, although my suspicion is that they were not.

[33] I have no hesitation, however, in concluding that the defendants did derive substantial benefit in the plaintiffs' pursuit of, and resolution of, their statutory accident benefits. The entire future care costs claim was not pursued due to the quantum of that settlement. The judgment against the defendants would have been greater, likely by some considerable measure, absent that settlement in light of the plaintiff's injuries. However, as noted in *Cadieux*, in the supplementary reasons, at para. 13, this observation would apply in almost any motor vehicle accident case.

[34] I conclude that the defendants should not be visited with all of the legal costs that were incurred with respect to pursuing the plaintiffs' statutory accident benefits claims. However, given that the defendants did benefit from the settlement, it is appropriate that they contribute some of those costs.

[35] Due to the lack of descriptions in the time entries provided by plaintiffs' counsel, I am left only to speculate what time entries pertain to accident benefits and what might relate to tort matters. The defendants suggest that the time dockets demonstrate that Ms. Edgar expended approximately 75 hours (at $700 per hour) on accident benefits related matters and that her senior clerk expended 135 hours (at $150 per hour). This would be approximately $72,750 on a full indemnity basis, or approximately $43,650 on a partial indemnity basis.

[36] I am reducing the amount of costs by $25,000, on a partial indemnity basis, to acknowledge that the defendants ought not to be required to pay costs on the entirety of the work done on the accident benefits file but did derive substantial benefit from the settlement.

Costs Associated with Interlocutory Motions:

[37] The motion in question was to amend the Statement of Claim to add the municipality as a defendant. By the time of trial, the municipality was no longer involved in the case. To my knowledge, the municipality did not contribute to the amount of damages that the defendants are required to pay.

[38] The motion proceeded unopposed.

[39] I agree that the costs of the motion should have been dealt with at the time that the order arising from the motion was obtained. I am deducting $5,500 representing the partial indemnity fees associated with that motion.

Costs Associated with the Workplace Safety and Insurance Appeals Tribunal (WSIAT) Hearing:

[40] Although it did not come up during the trial, I now gather that there was a *WSIAT* hearing to determine whether this action was barred by operation of s. 28 of the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sched. A ("*WSIA*"). That section provides that a worker employed by a "Schedule 1" employer is not entitled to commence an action against a Schedule 1 employer or another worker employed by a Schedule 1 employer in respect of a personal injury by accident occurring in the course of employment.

[41] Obviously, the *WSIAT* held that the action could proceed.

[42] The defendants rely upon *Olesiuk v. Hilltop Water Service*, 2016 ONSC 4548. In that case, the defendants sought their costs of a *WSIAT* hearing that resulted in the dismissal of the plaintiff's personal injury action.

[43] I note that in *Olesiuk*, Sweeny J. referred to and relied upon *Boyd v. Cooper*, 2011 ONSC 1869, [2011] O.J. No. 1893, where O'Connell J. refused to order costs incurred with respect to a *WSIAT* hearing. O'Connell J. noted that the *WSIAT* has no authority to award costs against another party under the *WSIA*. After setting out the *WSIAT* Practice Direction and reviewing the relevant statutory provisions, O'Connell J. held:

> There is no valid reason to end run the clear rule of the *WSIA*. The *WSIAT* engaged its jurisdiction. It resulted in a cessation of the action. [para. 44]

[44] In *Boyd*, no costs were allowed with respect to the *WSIAT* hearing, which were the only costs claimed by the insurer in that case. In that case, the action had also been dismissed.

[45] Sweeny J. also referred to *Cantlon v. Timmins (City)*, 2006 CanLII 39081 (ON SC) in which the plaintiffs' action had been allowed to continue following a *WSIAT* hearing, and the plaintiffs were denied the *WSIAT* costs in the personal injury action. Sweeny J. described that to hold otherwise would amount to an end-run around the *WSIA* legislation that provides that the tribunal has no authority to award costs.

[46] *Olesiuk* was considered by Mew J. in *Marrocco v. Heft*, 2018 ONSC 3438, where he stated, at para. 40 that the costs of a *WSIAT* hearing were not recoverable in the action.

[47] The plaintiffs attempt to distinguish *Olesiuk* on the basis that the action in that case was not permitted to proceed. However, in *Cantlon*, D.S. Ferguson J. had disallowed *WSIAT* hearing costs despite the plaintiff's success at the hearing. The plaintiffs adduced no cases favourable to their position.

[48] I am disallowing the costs of the *WSIAT* hearing on the basis of the authorities noted above. Again determining with precision the amount of costs expended in those hearings is difficult based solely on the plaintiffs' time entries. I know from the submissions that the hearing occurred in 2021 and involved multiple days. I also presume that Ms. Edgar appeared on that hearing. The defendants argue that Ms. Edgar expended 80 hours with respect to the *WSIAT* hearing and her clerk 30 hours. I am deducting partial indemnity fees of $35,000 in relation to those proceedings, including preparation time.

The Collateral Benefits Motion:

[49] In my view, this was an important motion in the context of these proceedings. The plaintiff had received $258,000 in long term disability benefits up to the date of trial. The present value of the long-term disability benefits was in the several hundreds of thousands.

[50] I note that the deductibility of the long term disability benefits was raised for the first time after trial. In fact, during the trial, the plaintiffs had approached the issue of income loss as if it was a foregone conclusion that the benefits were deductible. Nevertheless, I do think that the plaintiffs were perfectly entitled to litigate the issue post-trial and I do not consider the late raising of the issue in awarding costs.

[51] However, the plaintiffs, unsuccessful on the motion, should not be awarded costs of the motion. Rather, the defendant should be entitled to some costs.

[52] It is clear from the plaintiffs' Bill of Costs that they have not included in the approximately $650,000 sought the fees incurred on the collateral benefits motion.

[53] I fix the defendants' fees of that motion in the amount of $5000 on a partial indemnity basis.

Miscellaneous Disbursements:

[54] I agree that disbursements in relation to meals are not payable by the unsuccessful party (see: *Noori v. Liu*, 2021 ONSC 3445 and *Lehmann v. Lehmann Estate*, 2018 ONSC 4683).

[55] I also accept the defendants' argument that items such as courier charges and copying should be considered part of a law firm's overhead expenses.

[56] The defendants, fairly, acknowledge that the law is unsettled with respect to whether the costs of adverse costs insurance is a recoverable disbursement from the defendants. There are cases that hold both ways. It is my view that adverse costs insurance is not a necessary expense in pursuing a claim for damages and would disallow the disbursement here. In particular, the defendants admitted liability such that *some* award of damages was a certainty. I choose to follow cases such as *Valentine v. Rodriguez-Elizalde*, 2016 ONSC 6395, per Firestone J..

[57] With respect to the report of Peter Hathaway Consulting, the defendants describe it as relating to the *WSIAT* hearing. The plaintiffs use that descriptor in their disbursement list too. However, in their costs submissions, the plaintiffs characterize it as covering interviews of several witnesses. I accept that this report ought to be included in the disbursements claimed by the plaintiffs.

[58] I fix the amount of assessable disbursements at $55,000, inclusive of HST.

Disposition on Costs:

[59] I return now to the overall goal in making costs awards—to fix costs that are fair and reasonable for the unsuccessful party to pay.

[60] In personal injury actions, true success is often dictated by the offers to settle that were made by each party. There is no question that this was a successful trial for the plaintiffs. The judgment exceeded their offer to settle by a considerable amount and the defence offer to settle pales in comparison to the jury verdict. The inescapable conclusion, although obviously with the benefit of hindsight, is that the plaintiffs took reasonable steps to avoid trial and the defendants did not.

[61] In assessing a fair and reasonable figure for costs, the court cannot ignore that basic fact. This 12-day trial would not have occurred but for the stance of the defendants.

[62] The overall amount of costs has to be proportionate to the amount of the judgment. The plaintiffs were awarded over $2 million by the jury, although the amount was subsequently reduced by collateral benefits and the application of statutory deductibles.

[63] I award partial indemnity costs up to the date of the plaintiffs' offer to settle in the amount of $105,000.

[64] I have arrived at that figure by reducing the full fees claimed to account for "over-lawyering", then applied a partial indemnity rate of 60% (see the analysis of J. Wilson J. in *Moore v. Getahun*, 2014 ONSC 3931 at paras. 17-21). I have then subtracted the fees attributable to the *WSIAT* hearing, the amount attributable to statutory accident benefits and the motion to amend the statement of claim.

[65] From the date of the offer to settle through to the end of trial, the plaintiffs are entitled to their substantial indemnity costs, which I fix in the amount of $270,000.

[66] I have arrived at that figure by reducing the full fees on account of "over-lawyering" and applied a substantial indemnity rate.

[67] Accordingly, the plaintiffs are entitled to their costs of this proceeding in the amount of $375,000 plus HST of $48,750. The plaintiffs are also entitled to their disbursements of $55,000, inclusive of HST. The grand total is $478,750.00 all-inclusive.

[68] From this amount, the defendants are entitled to deduct $5,000 in relation to the collateral benefits motion.

[69] The net amount of costs is therefore $473,750.00, all-inclusive, payable by the defendants to the plaintiffs within 30 days of this decision.

[70] The approach I have taken, in my view, results in a fair and reasonable, proportionate amount of costs given the excellent results achieved at trial and the offer to settle made by the plaintiffs. Furthermore, defendants in personal injury motor vehicle accident cases that demand a trial in the face of what turns out to be a reasonable offer to settle by the plaintiffs, should contemplate an award in this magnitude.

Justice Spencer Nicholson

Date: February 27, 2024