CITATION: Barry v Anantharajah, 2024 ONSC 1267
COURT FILE NO.: CV-19-2521-00
DATE: 2024 02 29

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Jacqueline Barry (By way of her litigation guardian, Devon Francis) Plaintiff	Jamie Fox, for the Plaintiff
- and -	
Punithavathi Anantharajah Respondent	Sarah Reisler, for the Defendants
	HEARD: In writing

REASONS ON COSTS

MANDHANE J.

[1] This matter was commenced by way of Statement of Claim dated October 3, 2016, wherein the Plaintiff claimed over $1,000,000 in damages. The Defendant opposed the claim.

[2] The parties attended mediation in 2018, a pre-trial conference in 2022, and an “exit pre-trial” in 2024. I have no doubt that the judges presiding over the pre-trial conferences encouraged both parties to present a monetary settlement prior to trial.

[3] The Plaintiff made an offer on December 18, 2023. She asked that that Defendant pay her $500,000 in damages, plus costs and disbursements. The Defendant responded the same day and counter-offered that the action be dismissed without costs. The Defendant never made a monetary offer before or during the trial.

[4] The parties appeared before me for a three-week jury trial that began on January 15, 2024. The Plaintiff was represented by two senior counsel and one junior counsel, while the Defendant was represented by one senior and one junior counsel for her insurance company, Aviva Trial Lawyers.

[5] The Plaintiff says that she was successful at trial and asks me to award her partial indemnity costs in the amount of $290,297 (inclusive of HST) and $114,512 (inclusive of HST) in disbursements. She asks for a total of $404,809. The Plaintiff concedes that she did not meet her offer at trial such that she is not entitled to substantial indemnity costs pursuant to Rule 49.10.

[6] The Defence submits that no costs should be awarded to either party. The Defence says that neither party was truly successful at trial because the Defendant

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will pay the Plaintiff who will in turn have to pay various assignees. The Defendant says that, given the small amount awarded by the jury, the trial should have been commenced in small claims court such that I have the jurisdiction to decline to award any costs pursuant to Rule 57.05(1).

[7] Having considered all the relevant factors, I would award the Plaintiff $300,000 inclusive of costs, disbursements, and HST.

OVERVIEW

[8] At trial, the Plaintiff asked the jury to award damages caused by a motor vehicle accident in which the Defendant struck the Plaintiff. The Defendant was making a left turn while the Plaintiff was walking across the street within the crosswalk. Both liability and damages were in issue. The Plaintiff sought general damages, as well as damages for past and future income loss, future housekeeping and home maintenance, and future health care expenses.

[9] At trial, the Plaintiff took the stand and testified that because of the accident she has been in near constant pain, is depressed and anxious, is paranoid about being pedestrian and passenger in a car, is untrusting, has memory and cognitive issues, has become unable to take care of herself, and has lost social connections. She testified that she is unable to work, is reliant on social assistance, and has been precariously housed. She states that she terminated a pregnancy after the accident because she did not feel capable of caring for a child because of her pain and mental health issues. The Plaintiff also called evidence from two

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family members, her family doctor, her treating psychiatrist, her treating social worker, a peer support worker, an expert physiatrist, an expert psychiatrist, a lifecare planner, and an actuary. The witnesses testified that the Plaintiff suffered psychiatric issues as a result of the accident, and that she suffered damages as a result.

[10] In his closing address, Plaintiff's counsel argued that she was a credible witness because her evidence was corroborated by her family members and her treating doctors. On causation, she argued that she was a classic "thin skull" Plaintiff and relied on her expert psychiatrist's opinion that her current condition was caused by the accident. The Plaintiff's position in front of the jury was that they should award her $100,000 to 150,000 in general damages, and somewhere in the range of $500,000 to $1,000,000 in special damages.

[11] The Defendant vigorously defended all aspects of the claim. After an extensive cross-examination of the Plaintiff, the Defendant forcefully argued that the jury should reject her evidence as not being credible or reliable because of her memory problems, her refusal to participate in all aspects of the assessment processes, her results on malingering screening tests, her past instances of dishonesty, and the differences between her reported symptoms and her observed capabilities.

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[12] The Defendant also took the stand and called evidence from an expert orthopedic surgeon and an expert psychiatrist. While Defendant's counsel conceded liability after her client took the stand, she argued that the Plaintiff was contributorily negligent in the nature of 25%. She argued that the jury should accept the Plaintiff's own evidence that she did look left before crossing the street to find that she did not exercise due care. She also argued that the jury should infer—despite a total absence of evidence—that the Plaintiff was distracted and on her phone at the time of the accident.

[13] On the issue of causation, the Defendant argued that there was no credible evidence to suggest that the Plaintiff's ongoing problems were because of the accident. She relied on the evidence from her expert orthopedic surgeon who said that the minor soft tissue injuries from the accident would have resolved within 12 weeks, and the evidence of her expert psychiatrist who opined that any psychological issues were resolved by August 2017. The Defendant's position was that the Plaintiff should receive $20,000 to 30,000 in general damages and no award for special damages.

[14] At the conclusion of the trial, the jury awarded the Plaintiff $21,166 in general damages, and $26,000 in special damages for past income loss. The jury also found the Plaintiff contributorily negligent by 15%. After accounting for the jury's finding of contributory negligence and the statutory deductible for general

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damages of $46,053.20, the parties agree that the Plaintiff will receive $16,160.50 in damages.

[15] In an endorsement dated February 7, 2024, consistent with the jury's monetary award for general damages, I found that the Plaintiff had failed to establish that she sustained a permanent, serious impairment of an important physical, mental, or psychological function because of the accident, pursuant to s. 267.5 of the *Insurance Act*, R.S.O. 1990, c. I.8.

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ANALYSIS

[16] I have a broad discretion when it comes to awarding costs: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131(1). I must consider the factors set out in Rule 57.01(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg 194, including: the result, offers to settle, the principle of indemnity, the amount that the unsuccessful party could reasonably expect to pay, the complexity and importance of the matter, the conduct of any party during the litigation, any unnecessary steps, and any other relevant matter.

Success at trial

[17] I agree with the Plaintiff that she was more successful than the Defendant at trial. The Defendant asked the jury to award the Plaintiff nothing for past income loss, while the jury ended up awarding some damages under this head. I also reject the Defence's argument that the damages for past income loss should be reduced to $0 for the purposes of my costs analysis. The Plaintiff has assignments for both

the Ontario Disability Support Program and Ontario Works such that s. 267.8(1) of the *Insurance Act* does not apply before me. The Defendant does not point to any case law to support her position that I should "reduce" the Plaintiff's damage award to zero for the purpose of deciding costs. I refuse to do so.

[18] That said, the case certainly was not a slam dunk for the Plaintiff. On the issue of general damages, while the jury made an award, this is of no practical effect because of the statutory deductible. The jury also refused to award any amount for special damages, and the defence had some success at trial in terms of the contributory negligence issue. Given their damage award, I find that the jury must have accepted the Defendant's theory of the case which was that the Plaintiff was a "crumbing skull" whose pre-existing issues were temporarily exacerbated by the accident but that these issues had long since resolved. They must have found that the Plaintiff's current condition was caused by her pre-existing mental problems, as well as incidents that happened after the accident.

[19] I agree however that success must be determined relative to the parties' positions prior to trial: *Wray v Pereira,* 2019 ONSC 3354 (CanLII), para. 11. Where a defendant insurer plays "hardball" by offering zero prior to trial rather than even a modest sum, it leaves the plaintiff in a bind: Either she has to abandon her claim entirely and face a claim for costs, or take the case to trial at great cost. As stated by the McKelvey J. in *Wray*, at para 12: "In deciding not to make any offer, the defence was setting a clear demarcation line or a 'line in the sand' which can be

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used to identify success or failure in an action." Having set a line in the sand, the Defendant must accept that she lost on her own measure.

[20] Finally, I reject the Defendant's argument that I should exercise my discretion to decline to award costs by operation of Rule 57.05(1). The Defendant says that, given the amount of the jury award, this matter should have been commenced in small claims court. However, even the cases that the Defendant cites in support of her position state that another relevant factor that I must consider under Rule 57.05(1) is whether the Defendant themselves made a relevant offer to settle: *Hilson v. Evans,* 2020 ONSC 2129, at para. 42. In light of the Defendant's "hard ball" approach, I refuse to exercise my discretion under Rule 57.05(1).

Indemnity and reasonable expectations

[21] The Plaintiff's claim for costs far exceeds the damage award at trial. That said, I find the Bill of Costs to be generally reasonable in light of the issues at trial. Half of the legal fees were incurred at trial and not before. That said, I find that the decision to assign two senior counsel to the file was excessive. As such, I would decrease the costs award by $40,000 on account of duplication. The disbursements were reasonable and included fees to obtain documents, for process serving, for discovery transcripts, for capacity assessments, and for expert reports.

[22] I also find that the Defendant would have been well-aware of the actual costs of this litigation early on in the process. Certainly, coming up to the trial, the

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Defendant would have known that the matter had been ongoing for years, that the Plaintiff had been represented throughout, that counsel had attended discoveries, conferences and prepared voluminous materials, and that experts had been retained and paid. Moreover, the Defendant's own Bill of Costs reflects fees on a partial indemnity basis and disbursements totalling about $300,000.

[23] I have no doubt that had the Defendant made a reasonable offer to settle, this trial (and the associated costs) could have been avoided. To that extent, despite the Plaintiff's modest recovery at trial, I find that proportionality is not determinative of my ultimate decision on quantum because it was the Defendant's unreasonable decision not to make any pre-trial offers that effectively necessitated the matter going to trial. Significantly decreasing the Plaintiff's claim for costs in such circumstances risks rewarding Defendants who engage in such bully tactics: *Persampieri v Hobbs*, 2018 ONSC 368, at paras 93-108 (where Aviva was also the defending insurer); *Corbett v. Odorico,* 2016 ONSC 2961, at paras. 19-20.

[24] On the other hand, this case is closer to the situation in *Wray* than *Corbett.* In *Wray,* the Court found that proportionality was still an important factor despite the defendant's refusal to make a pre-trial offer on the basis that:

> This is not a situation where a plaintiff asserted a modest claim, and was substantially successful despite a defendant's refusal to make a realistic offer. The case before me represents a situation where the plaintiff made a

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substantial claim that was rejected by the jury and resulted in what can only be described as a token award. The defence, therefore, has been successful in defeating substantially all of the plaintiff's claims.

In *Wray,* the plaintiff sought costs of over $250,000 while the court ended up awarding him a total of $40,000.

Conduct of the parties

[25] Plaintiff's counsel was well-prepared for trial and did his best to streamline the issues and witnesses. That said, he did not do a good job of ensuring that his witnesses were ready when called, such that at least one day of court time was wasted. The Plaintiff also brought an unsuccessful motion to strike the jury question on contributory negligence.

[26] Defendant's counsel was also prepared for trial and acted with professionalism and courtesy throughout. That said, I am troubled by the Defendant's refusal to admit any degree of liability prior to trial given the factual context in which the accident took place. The Defendant brought two unsuccessful motions: a pre-trial strike the claim for special damages, and a mid-trial motion to strike certain jury questions.

[27] Again, I must note here that the Defendant's decision not to make a monetary offer prior to trial was unreasonable. At trial, the defence expert psychiatrist admitted that the accident caused or contributed the Plaintiff's

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psychological injuries from the date of the accident until December 2017. The Defendant also knew that the Plaintiff was on her way to work at the time of the accident, such that it should have been foreseeable that the jury would award some amount for past income loss. In short, the Defendant's decision not to make an offer makes no sense in light of the evidence at trial and which the jury clearly accepted. The Defence would have been aware of this evidence well before the trial. We will simply never know if that trial could have been avoided had the Defence made even a modest offer early on in the litigation.

[28] In my view, the strategy of offering plaintiffs nothing and forcing the matter to a jury trial is highly wasteful of court and public resources. This matter occupied a full three weeks of court time. It also drew on the time of eight jury members (six jurors and two alternate jurors) who could not work during their service. The cost to the public is clearly not something that factored into the Defendant's calculations when deciding how to conduct this litigation. I find that this was unreasonable.

Complexity and importance

[29] The case raised complex factual issues in relation to causation of the Plaintiff's psychological injuries in light her of pre- and post-accident history. The credibility of the Plaintiff was also a key issue at trial. Both the Plaintiff and Defendant attended examination for discovery, the Plaintiff produced voluminous medical and employment records which were also subpoenaed to court, both

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parties took the stand, and both parties called extensive medical and health-related evidence.

[30] The issues were of significance to both the Plaintiff and the Defendant. The Plaintiff's evidence was that she developed serious mental health disabilities because of the accident. I accept that this litigation engaged important social, psychological, and financial interests for her.

[31] The issues were also clearly significant to the Defendant. The Defence position going into trial was that the Plaintiff had no case because she could not prove causation. In my view, the defence's aggressive litigation strategy reflected a knee-jerk reaction that was premised at least in part on underlying stereotypes about the credibility and reliability of Plaintiffs with mental health disabilities and reflected an outdated view that mental health injuries are less worthy of compensation that physical injuries. That is the only way to rationalize the Defendant's decision to offer the Plaintiff nothing when its own psychiatrist admitted that she was damaged by the accident.

[32] The complexity of the issues is best illustrated by the fact that the jury deliberated for over six hours before returning a verdict.

Quantum of Costs

[33] Given that the Defendant's clear tactic was to force the matter to trial in the hopes that the Plaintiff would either withdraw or settle her claim for no monetary

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compensation, it is fair and reasonable that the Defendant bear the costs of this aggressive litigation strategy. That said, I would reduce the quantum of costs by $100,000 on the basis of proportionality and the higher legal fees necessitated by the Plaintiff's decision to retain two senior lawyers.

[34] On the whole, I would order that the Defendant pay the Plaintiff a total of $300,000 inclusive of costs, disbursements, and HST.

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Mandhane J.

Released: February 29, 2024

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(By way of her litigation guardian,
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Plaintiff

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