CITATION: Pye v. Di Trapani et. el., 2024 ONSC 2265
COURT FILE NO.: CV-16-58529
DATE: 2024-09-06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
William "Bill" Pye	)	M. Smitiuch, Esq., S. Snider, Esq. and P. LeDonne for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
Carmela Di Trapani and Vincenzo Di Trapani	)	D. Wong, Esq. and S. Ullal for the Defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** March 8, 2024

REASONS FOR JUDGMENT

SKARICA, J: (Orally)

[1] This is a matter of William Bill Pye and Carmella Di Trapani and Vincenzo Di Trapani. These are my reasons for costs and judgment interests ruling.

OVERVIEW

[2] A Hamilton jury on October 12th, 2023, awarded the plaintiff an award of over one million dollars in damages for serious injuries suffered by the plaintiff from the motor vehicle

accident collision that occurred on July 2nd, 2016. The jury award exceeded both the plaintiff's and the defendant's offer to settle. The plaintiff seeks an order for costs and prejudgment interest, which I will refer to as PJI on occasion, and post-judgment interest.

ISSUES

[3] (1) What is the appropriate costs amount to be awarded to the winning litigant, the plaintiff?

[4] (2) What is an appropriate amount of PJI?

[5] (3) What is an appropriate amount of post-judgment interest?

FACTS

[6] I believe a chronology of events best outlines the relevant facts which are as follows.

THE ACCIDENT

[7] (1) July 2nd, 2016, the plaintiff, William Bill Pye, suffered serious injuries when Ms. Di Trapani drove her vehicle into an intersection when it was not safe to do so. Mr. Pye was operating a motorcycle and was unable to avoid colliding with the defendant's motor vehicle and suffered very serious physical injuries.

OFFERS TO SETTLE AND TRIAL PROCEEDINGS

[8] (2) August 16, 2019, a failed mediation takes place. The plaintiff at that time had a lawyer named Brad Duby. May 6th, 2020, Notice of Change of a Lawyer was delivered. The plaintiff's new lawyer is Smitiuch Law Firm.

[9] (3) May 14th, 2020, the defendant makes a first Rule 49 Offer to Settle as follows:

> $150,000.00 for general damages, for pain and suffering; $30,000.00 for all income claims past and future; $30,000.00 for future care costs; and $15,000.00 for housekeeping. That's a total of $225,000.00, plus there was an offer to pay

plaintiff's costs and disbursements on a partial indemnity basis. That offer, obviously, was not accepted.

[10] (4) June 21, 2021, a pretrial conference was heard before Justice Sheard. No offers were made. The matter was eventually adjourned to the jury list of September 13th, 2021 and then to the jury -- and then to the jury list of September 19th, 2022.

[11] (5) July 5th, 2022, the defendant makes a second Rule 49 Offer to Settle. The defendant offers $350,000.00 inclusive of pre-judgment interest for all damages plus costs on a partial indemnity scale.

[12] (6) September 19th, 2022, the trial is adjourned to February 13th, 2023. The plaintiff requests an adjournment which the defendant consents to. The plaintiff had another trial booked at that time for a 90 year old client.

[13] (7) February 2nd, 2023, the plaintiff makes a Rule 49 offer to settle for $799,000.00 for all claims, and interest, plus costs and accessible disbursements.

[14] (8) February 13th, 2023, the trial is adjourned a second time at the request of the plaintiff counsel as one of the plaintiff's experts was not available due to medical issues. That was a future care expert. And the defendant's counsel did not oppose the adjournment and the trial was adjourned to September 2023 sittings. That is September 11th, 2023.

[15] (9) August 30th, 2023, the defendant makes a third Offer to Settle, offering $500,000.00 inclusive of prejudgment interest for all damages, an offer to pay $150,000.00 for costs and disbursements on a partial indemnity scale.

[16] (10) September 18th, 2023, the trial proceeds and takes, approximately, 4 weeks.

[17] (11) October 12th, 2023, the jury awards the plaintiff an award exceeding one million dollars, as follows (and this is detailed at paragraph 55 of the defendant's submissions):

STATEMENT OF CLAIM

[18] The plaintiff sought two million dollars and was awarded by the jury $1,072,440.42. In general damages the plaintiff sought $450,000.00. The defendant asked for $200,000.00. The jury granted $350,000.00.

PAST LOSS OF INCOME

[19] The plaintiff asked for $66,000.00 which was agreed to by the defendant and the jury awarded that amount, $66,000.00.

FUTURE LOSS OF INCOME

[20] The plaintiff asked for zero to $252,000.00 leaving it to the jury. The jury decided zero dollars which was the defendant's position.

PAST ATTENDANT CARE

[21] The plaintiff took no real -- did not provide a real number. The defendant asked for zero dollars. The jury provided zero dollars.

FUTURE COST OF CARE – MEDICAL EXPENSES

[22] The plaintiff asked for $1,139,000.00. No number was suggested by the defence. $525,000.00 was awarded by the jury.

FUTURE HOUSEKEEPING AND HOME MAINTENANCE EXPENSES

[23] The plaintiff asked for $125,00.00. Again, the defendant did not suggest a number. The jury awarded a $105,000.00.

[24] Special damages out-of-pocket expenses were agreed to by both counsel and the jury awarded the amount suggested, $26,490.42. As well as outlined at paragraph 56 of the defendant's submissions, the plaintiff's claim also included a claim for home renovations at a cost of $438,000.00. Following a motion at the outset of trial, the defence was successful in having the claim for home renovations removed.

[25] Mr. Pye's award exceeds all the Offers to Settle and he's entitled to a costs award as the successful litigant. Mr. Pye asked for (and as outlined at paragraph one of the plaintiff's costs submissions,):

> "Mr. Pye asked that he be awarded partial indemnity cost for work performed up to and including February 1, 2023 and substantial indemnity costs on route from that date in accordance with the plaintiff's bill of costs, which is filed at Tab 2 of the plaintiff's submissions. This is on the basis of his Rule 49, Offer to Settle in the amount of $799,000.00 for damages and interest plus costs and disbursements made on February 2nd, 2023 which is more than doubled by the damages award made at trial."

[26] It was actually more than double the defendant's offer, but in any event, the real issue here for me to decide is what is an appropriate amount for costs for the successful plaintiff?

THE LAW REGARDING COSTS

[27] The principles of costs awards. Justice Turnbull in *Teglas v. City of Brantford et al*, 2021 ONSC 997 succinctly summarizes the relevant principles at paragraphs 4-6 of that judgment:

> PARAGRAPH 4
>
> Section 131(1) of the *Courts of Justice Act* provides that the cost of and incidental to a proceeding are in the discretion of the Court and the Court can decide by who and to what extent the costs should be paid. As with any discretion it should be exercised fairly and reasonably.
>
> PARAGRAPH 5
>
> Rule 57.01(1) sets out the general principles which may be applied by the Court in exercising its discretion under section 131(1) of the *Courts of Justice Act*. The preamble to the Rule invites the Court to consider the results of the proceeding and any written offer to settle, as well as the following factors:
>
> > (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 this 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: the conduct of any party that tended to shorten or length unnecessarily the duration of the proceeding;

(e) whether any step in the proceeding was;

(i) improper, vexatious, or unnecessary, or

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

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

(b) whether it is appropriate to award any costs or more, than one set of costs where a party commenced separate proceedings for claims that should have been made in one proceeding in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer and,

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

PARAGRAPH 6

The costs rules are designed to advance several purposes in the administration of justice. One is to indemnify successful litigants. That purpose is evident and leads to the second purpose; namely, to facilitate access to justice. Costs rules are also designed to discourage frivolous claims and defences. I find that this was not a frivolous claim despite the fact that the defence position of absolute denial of liability was sustained. The overall objective is to fix an amount that is fair and reasonable, bearing in mind the broad range of factors articulated in Rule 57.01(1). The Ontario Court of Appeal has held the failure of a judge assessing costs to consider the "overriding principle of reasonableness" can result in a denial of access to justice.

[28] Regarding offers to settle Rule 49.10 sets out the consequences of a failure to accept the plaintiff's offer:

49.10 (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 the 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.

[29] It is obvious that the plaintiff received a judgment that is more favourable than his offer to settle and accordingly pursuant to Rule 49 he is entitled to partial indemnity costs to the date of the offer to settle, February 1, 2023, and substantial indemnity costs from that date onwards unless the Court orders otherwise. In considering the phrase "unless the Court orders otherwise", I take into account the following considerations:

> (1) in reviewing a claim for costs, the Court need not undertake a line-by-line analysis of hours claimed or second guess amounts claimed unless it is clearly excessive or overreaching. A trial judge must consider what is reasonable in the circumstances and after taking into account all the relevant factors, should award costs in a more global fashion. See *TMS Lighting v. KGS Transport*, 2014 ONSC 7148 at paragraph 15, *R. v. Fazio and Cusumano*, reported at 2005 CANLII 33782 ONSC at paragraph 8; and *Ramcharran v. State Farm Mutual Automobile Insurance Company* reported at 2023 ONSC 3698 at paragraph 50.
>
> (2) Relative expenditures by adversaries on opposite sides of a motion is a relevant consideration where there is an allegation of excess in a particular matter but that is not conclusive. See *TMS Lighting* at paragraph 57.
>
> (3) Substantial and partial indemnity rights are, approximately, 90 per cent and 60 per cent, respectively, of a full amount billed. See *Rolling Meadows v. 2560262 Ontario Inc.* reported at 2018 ONSC 6455 at paragraph 15.

(4) There's no requirement to apply out of date grid rates rather than the 55 to 60 per cent of a reasonable actual rate. See *Bain v. UBS Securities Canada Inc.*, 2018 ONCA 190 at paragraph 32.

(5) A plaintiff is entitled to incur legal expenses commensurate with the amount in issue. See *Tri-Associates Insurance Agency Limited v Douglas*, [1986] OJ No. 557 at page 1.

(6) The principle of proportionality, indemnity, and access to justice may allow a costs award to exceed the damage settlement if that costs amount is reasonable on the totality of the circumstances. See *Block v. Brown, et al* at 2022 ONSC 3199 at paragraph 90.

(7) In the present case the defendant did not make an offer that was a "near miss". I am not to impose a rule arbitrarily limiting the amount of costs to some proportion of the recovery where there has been a nominal offer. Rule 49 is designed to encourage settlement by attaching costs consequences for failure to make or to accept reasonable offers. See *Corbett v. Odorico*, 2016 ONSC 2961 at paragraph 19.

(8) Costs premium can be awarded to successful plaintiffs where the evidence involves a detailed understanding of complex scientific material. See *Maria Berendsen et al v. Her Majesty the Queen in Right of Ontario*, 2008 CanLII 35263 at paragraph 24 and *Teglas* at paragraph 8.

(9) Proportionality has become an ever increasingly important factor in assessing costs. Costs awards should reflect more what the Court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant. See *Bombardier Inc. v. AS Estonian Air*, 2013 ONSC 4209, and *Ramcharran* at paragraph 50.

(10) A Court can assess and reduce a costs award to the successful litigant where adjournments required the opposite party to redo work necessary to prepare for trial. See *Teglas* at paragraphs 18 to 19.

(11) A Court can disallow disbursements which are either unnecessary or excessive. See *Ramcharran v. State Farm Mutual Automobile Insurance Company* at paragraph 52, *Noori v. Liu*, 2021 ONSC 3445 at paragraph 55, and *McCurdy et al v. Maille et al.*, 2024 ONSC 1222 at paragraph 55.

(12) It is accepted principle that a plaintiff requires more time to present a case than the defendant. See *Ramcharran* at paragraph 48.

THE LEGAL PRINCIPLES OF PREJUDGEMENT INTEREST

[30] In *Maria Berendsen et al v. The Queen*, Justice Seppi held at paragraph 1 that a Court has the discretion pursuant to section 131 of the *Courts of Justice Act*, (CJA), to allow prejudgment interest for periods other than that prescribed in section 128 and at a higher or lower rate, having regard to factors listed in section 130(2) of the CJA.

[31] In *Debora v. Debora*, [2006] OJ No. 4826, ONCA the Court of Appeal held at paragraph 93 as follows;

> The wording of section 130 is very broad and in addition to enabling the trial judge to consider the circumstances of the case, specifically, allows the trial judge to take into account Mr. Debora's conduct in lengthening unnecessarily the duration of the proceeding by his persistent refusal to make full disclosure of his income and assets. As Cronk J.A. notes in *Somers v. Fournier*... Armak concerns an older version of the prejudgment interest provision, and section 130(2)(f) grants the trial judge the jurisdiction to consider a litigant's conduct during the proceedings when determining whether to exercise her discretion to vary the rate of prejudgment interest.

[32] Section 128(1) and (2) and section 130(1) and (2) of the *Courts of Justice Act* indicate as follows:

PREJUDGMENT INTEREST

128 (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate calculated from the date of the cause of action arose to the date of the order.

EXCEPTION FOR NON-PECUNIARY LOSS ON PERSONAL INJURY

(2) Despite subsection 1, the rate of interest on damages for non-pecuniary lost in an action for personal injury shall be the rate determined by the rules of Court made under clause 66 (2) (w).

DISCRETION OF THE COURT

130 (1) The Court may, where it considers it just to do so, in respect of the whole or any part of the amount, on which interest is payable under section 128 or 129

(a) disallow interest under either section;

(b) allow interest at a rate higher or lower than that provided in either section;

(c) allow interest for a period other than that provided in either section.

IDEM

(2) For the purpose of subsection one, the Court shall take into account,

(a) changes in market interest rates;

(b) the circumstances of the case;

(c) the fact that an advance payment was made;

(d) the circumstances of medical disclosure by the plaintiff;

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

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

(g) any other relevant consideration.

[33] In *Somers v. Fournier*, 214 DLR (4th), 611, (2002 ONCA) Cronk J.A. held as follows at paragraph 23 - 24;

> PARAGRAPH 23
>
> Modern theories of pre-judgement interest related to compensatory, rather than punitive, goals. Awards of pre-judgment interest are designed to recognize the impact of inflation and to provide relief to a successful litigant against the declining value of money between the date of entitlement to damages and the time when damages were awarded.
>
> PARAGRAPH 24
>
> The Court refers to Graham v. Rourke where this is stated at paragraph 24 of the Court of Appeal decision:
>
> > Pre-judgment interest cannot, however, become a means of punishing or rewarding a party to the proceedings. Rather prejudgment interest must be viewed as part of the compensatory package provided to the person wronged.

[34] In *Cobb v. Long Estate*, 2015 ONSC 6799 Justice Belch held as follows at paragraph 24:

> This motor vehicle collision occurred seven years ago and the plaintiff has been without compensation from the defendant tort insurer for this entire period of time. There has been no interim payment from the defendant. I exercise my discretion and order prejudgment interest to be paid at the rate of three per cent. I have taken into account the factors set out in section 130(2) of the *Courts of Justice Act*. I have considered the overall circumstances of the case. Pre-judgment interest is to compensate for the loss of use of money. And it is not to be used as a means of punishing or rewarding a party. Having been the trial judge during the civil jury

> trial which lasted in excess of four weeks, I'm of the view that I'm in a position to take into account and balance the various factors set out in the section. I am satisfied that the rate of three per cent is entirely just and reasonable after taking all the considerations into account.

[35] That decision was rendered November 13th, 2015.

REGARDING PRE-JUDGMENT INTEREST

[36] The Court of Appeal affirmed the *Cobb's* decision. See *Cobb v. Long Estate*, 2017 ONCA 717. The Court of Appeal explained how prejudgment interest works in motor vehicle cases at paragraph 68 through to 73.

> PARAGRAPH 68
>
> To understand the effect of s. 258.3(8.1) to accident cases to which it applies, one must read it in the context of the statutory regime for prejudgment interest. One begins with section 128(1) of the *Courts of Justice Act*, which creates an entitlement to prejudgment interest and refers to default rate.

[37] The Court refers to that section which I've already read.

> PARAGRAPH 69
>
> For the purpose of section 128, section 127.1 defines "prejudgment interest rate" as "the bank rate at the end of the first day of last month of the quarter proceeding the quarter in which the proceeding was commenced". However, section 128(2) creates an exception from this default rate of prejudgment interest for damages for non-pecuniary loss arising from personal injuries.

[38] Then again, I've read 128(2) already previously.

> PARAGRAPH 70
>
> The relevant rule of Court to which section 128(2) refers to is Rule 53.10 of the *Rules of Civil Procedure*, which provides:
>
> > 53.10 The prejudgment interest rate on damages for non- pecuniary losses in an action for personal injury is five per cent per year.

PARAGRAPH 71

Therefore, section 128 of the *Courts of Justice Act* contemplates two default rates of prejudgment interest. One for damages for non-pecuniary loss and personal injury actions, and one called "the prejudgment interest rate", for all other money awards for which section 128 makes prejudgment interest available. The plaintiffs commenced their action on December 8th, 2009 so the applicable prejudgment interest rate is section 128(1) is .5 per cent.

PARAGRAPH 72

I have referred to the regime of prejudgment interest rates in section 128(1) and (2) as one of "default" rates because section 130 of the *Courts of Justice Act* gives the Court discretion to reduce or increase the prescribed rate of interest or to disallow interest otherwise payable under section 128.

[39] The Court then outlines section 130 of the *Courts of Justice Act* which I have already read.

PARAGRAPH 73

Therefore, paragraph 73, the Court concludes:

Therefore the effect of section 258.3(8.1) of the *Insurance Act* is that, in an action for damages arising out of a motor vehicle accident the prejudgment interest rate on nonpecuniary damages will now be the rate provided for in section 127 and 128(1) of the *Courts of Justice Act*, subject to the overriding discretion of the Court in section 130 of the same statute to increase or reduce the rate, the changed interest period, or to allow interest altogether.

APPLICATION OF LAW TO FACTS OF THIS CASE

[40] Complexity Rule 57.01(1) subsection (c) indicates that complexity of the proceedings is a relevant factor in assessing the cost award. In my opinion the issue of liability was relatively simple in this case. However, the damage assessments and medical evidence given by the medical experts involved complex issues. There were issues regarding the impact of pre-existing injuries, especially with regard to the plaintiff's serious right shoulder injury. There was conflicting expert evidence regarding voiding and erectile dysfunction. There were extensive medical reports and diagnosis that needed to be described and explained. Both parties called as witnesses a number of medical experts to deal with these complex issues.

ADJOURNMENTS

[41] The defendant points out that this trial was adjourned twice at the behest of the plaintiff, which adjournments were acceded to by the defendant. The first adjournment occurred during the September 2022 sittings wherein the parties attended trial readiness court and plaintiff's counsel advised that he had another trial with a 90-year-old plaintiff. The defendants consented to an adjournment to the February 2023 sittings. The plaintiff's counsel contacted the defence's -- defendant's counsel on the Friday evening before the second trial date, that is before the Monday second trial date to advise that their future care expert, Ms. Deena Rogozinsky was not available for trial due to medical issues. It was agreed that a new expert would now have to be retained and a new report would have to be served.

[42] All counsel attended the first day of the trial sittings where an adjournment was granted for the second time and the matter was adjourned further. I find that these adjournment requests by the plaintiff were entirely reasonable and a second adjournment was entirely out of the control of both parties. Unlike *Teglas*, there is no specific evidence that any extra costs were incurred by the defendant. No, details were provided that any work was done that had to be done again. There was no evidence regarding duplication of effort attributable to the two adjournments. No details were provided as to the costs expense regarding work done that had to be reviewed or reanalyzed due to the adjournment. See *Teglas* at paragraphs 18

through 19. Accordingly, there will be no deductions from the plaintiff's cost award due to these two adjournments.

ADDITIONAL COUNSEL AT TRIAL PRIOR COUNSEL

[43] Michael Smitiuch was the lead counsel at trial with, approximately, 25 years of experience. Mr. Smitiuch was assisted by Shawn Snider, year of call 2019 and Philip LeDonne year of call 2022. The defendant contends that the $550.00 hourly rate of these two counsel is too high. Mr. Smitiuch indicates that Mr. LeDonne has computer and tech skills that were essential to the proper and efficient conduct of the trial. Mr. LeDonne marshalled the witnesses and examined the witnesses. The same could be said of Mr. Snider. It is clear that all three counsel worked efficiently as a highly skilled team during/throughout the trial. The result was that that the trial was conducted efficiently with no down time, a rare event. There was a constant flow of witnesses and in my, approximately, 45 years -- 40 years of litigation I've never seen a long trial run more smoothly.

[44] Credit must be given to the defendant counsel as well. Accordingly, given the results of extreme efficiency conducted by the plaintiff's team of lawyers, I find that the cost claims are reasonable in the circumstances, pursuant to the indemnity principle outlined in Rule 57.01(1) (o.a).

[45] Regarding prior counsel, Brad Duby, 2001 call, now deceased. Mr. Duby retained the plaintiff's experts and he conducted the mediation in August 2019. Mr. Duby's bill of, approximately, $31,594.80 plus prejudgment interest, I find to be reasonable. And the plaintiff is directed to pay Mr. Duby's bill to his estate as I understand Mr. Duby's account has yet to be paid.

DISBURSEMENTS

[46] The defendant submits at paragraphs 79 and 80 of his submissions that it contests a number of disbursements claimed by the plaintiff. The plaintiff concedes that its line 19 entry, in its index of disbursement regarding the ARCG invoice, it should be deducted. That invoice

indicates a balance due for a total of $2,750.00. Accordingly, $2,750.00 will be deducted from the plaintiff costs awarded.

[47] I find that the remaining disbursements to be reasonable and necessary to conduct the plaintiff's litigation. The disbursements incurred by the plaintiff contributed to advance his case and were necessary to assist the jury's understanding regarding the nature and extent of the plaintiff's numerous injuries and damage claims and to contradict the defendant's claims to the contrary. There was no issue raised regarding duplication of experts or evidence at trial. Counsel for both parties released some witnesses to make the trial more efficient. I agree that Mr. Pye's disbursements are reasonable and fair and appropriate given the quantum of damages sought and awarded. See *Hamfler v. Mink,* 2011 CanLII 86201 (ON SC) paragraph 13.

[48] Briefly some of the defendant's objections to disbursements are simply nitpicking. For example, the trial photo boards were extremely helpful in outlining the exact nature of the plaintiff's injuries. I don't agree that photocopying and postage expenses are necessarily part of a law firm's overhead expenses. The police take a contrary view in requiring compensation for such items in Wagg Applications. Further, given the complicated nature of issues involving injuries, it is entirely reasonable to order copies of the trial transcript regarding crucial points of evidence. I agree with Justice Edwards' comments at paragraphs 11 and 12 in *Hamfler v. Mink* regarding these type of expenses. Respectfully, I disagree with comments to the contrary in *McCurdy et al v. Maille et al,* 2024 ONSC at paragraph 55 and *Noori v. Liu,* 2021 ONSC 3445 at paragraph 55.

[49] I note that in Liu $7,671.70 was claimed for transcripts. The amount claimed by the plaintiff in this proceeding is a far more reasonable $1,819.70. Accordingly, in the result, the plaintiff is awarded its disbursement's claim of $168,071.45 minus $2,750.00 for a total award of $165,321.45 for its disbursements.

PROPORTIONALITY

[50] The costs award claimed is almost equal to the damage award. Is that reasonable, appropriate, and fair, in these circumstances? See *McCurdy and Maille*, 2024 ONSC 1222 at paragraph 17 and *Block v. Brown* at paragraphs 83 and 87. The defendant relies on *Ramcharran* at paragraphs 41 through to 55 where the damaged award was, approximately, $417,000.00. The plaintiff sought $394,629.15 in costs. The costs award was dramatically reduced to, approximately, $179,000.00, inclusive of costs, HST, and disbursements.

[51] In *McCurdy et al. v. Maille et al.*, 2024 ONSC 1222, the plaintiff received a net award of, approximately, $1.75 million inclusive of prejudgment interest. See paragraph one. The plaintiff claimed costs of $650,330.50 plus disbursements of $57,472.07. See paragraphs seven and eight of that case.

[52] The Court awarded costs of $375,000.00 plus HST of $48,750.00 plus disbursements of $55,000.00 for a grand total of $478,750.00 all inclusive. See paragraph 67.

[53] The plaintiff relies on *Barry v. Anantharajah*, 2024 ONSC 1267 (CanLII), wherein the plaintiff, after a three week jury trial was awarded $16,160.50 in damage. See paragraph 14 of that case. It was held that the plaintiff was more successful than the defendant at trial. See paragraph 17. The plaintiff asked for costs of, approximately, $400,000.00 but was awarded $300,000.00 inclusive of costs, disbursements, and HST. See paragraphs 33 and 34.

[54] I believe that the law is accurately set out in *Block v. Brown et al*, 2022 ONSC 3199 where Justice Shaw indicates as follows:

> PARAGRAPH 79
>
> The issue of proportionality is at the heart of this dispute regarding costs. The defendant's assert that the fees sought by the plaintiff are disproportionate to the amount recovered, (which according to paragraph two was $25,000.00). As I've already noted the plaintiff is seeking costs of over four times the amount of that settlement.

PARAGRAPH 80

Proportionality is clearly a factor although it's not the sole factor to consider when assessing costs. In *Bonaiuto v. Pilot Insurance Company* the plaintiff recovered $5,000.00 after a jury trial for theft and damage of her car. At paragraph seven, Harvison Young, J. found that while costs must be fair and reasonable, the mere fact that costs exceeded the damages does not render an award inappropriate. She awarded the plaintiff costs of $75,932.00 which is 15 times the amount of the recovery at trial. In that case the defendant's unsuccessful theory was that the plaintiff committed fraud.

PARAGRAPH 81

I agree with the comments of McCarthy, J. at paragraph 15 in *Accurate General Contracting Limited v. Tarasco*, 2015 ONSC 5980, that proportionality should not be "routinely invoked to save litigants from the real costs of the proceedings in circumstances where those litigants have put forward an unmeritorious defence to a legitimate claim or have caused proceedings to become unduly prolonged or complicated". This decision has been adopted or approved in several other costs decisions.

PARAGRAPH 82

I note in these reasons I have made no finding that the defendants advanced an unmeritorious defence or unduly protracted or complicated the matter other than the late acknowledgement that liability was not an issue.

PARAGRAPH 83

While proportionality is a factor to consider, an award of costs must ultimately be one that is fair and reasonable, having regard to all the circumstances.

PARAGRAPH 86

In a recent decision, *Gilbank v. Cooper and English*, Trimble, J. awarded costs of $45,000.00 to the plaintiff following a nine day trial in which he awarded the plaintiff $54,365.00 less $4,500.00 that went to the defendants for their claim. Justice Trimble set out in detail the legal principles to consider when assessing costs. He noted at paragraph 19, that when considering the principle of proportionality, the overarching consideration is determining whether the costs incurred were justified in all the circumstances. Furthermore, a costs award may be appropriate even if it exceeds a damages award.

PARAGRAPH 87

At paragraph 20, Trimble, J. noted that an undue focus on proportionality ignores the principles of indemnity and access to justice. Ultimately, an award of costs must be fair and appropriate.

PARAGRAPH 88

My role as a judge is not to sit as an assessment officer assessing costs. I will not engage in a line-by-line assessment of the Bill of Costs submitted. Rather I will look at the matter in its entirety and determine what is a reasonable amount to the unsuccessful party to pay. I've also considered the principles of proportionality but not to the exclusion of the principles of indemnity and access to justice. When I consider the totality of the factors set out herein, costs should be fixed on a partial indemnity basis in the amount of $50,000.00 plus HST of $6,500.00 and disbursements of $36,623.00 plus HST of $3,657.45 for a total of $96,780.93. Those costs shall be paid by the defendants to the plaintiff forthwith.

PARAGRAPH 90

While this cost award exceeds the damage settlement, it is an appropriate amount given the totality of the circumstances.

CONCLUSION

[55] Accordingly, I find that a potential costs award that more or less equals the damages award can be awarded provided it's fair, reasonable and appropriate in all the circumstances.

PRINCIPLES OF INDEMNITY, RULE 57.01(1) AND ACCESS TO JUSTICE

[56] The defendant claims that since it had partial successes at trial relating to future loss of income, past attendant care, contributory negligence and home renovations, that there should be an additional reduction in costs due to the result of, as they put it, as the defendant put it, "split success", see paragraphs 56 through 66 of the defendant's submission.

[57] In short, the defendant says it should get credit for winning some minor skirmishes before dramatically losing the war. And I note that the jury award was, approximately, double the last offer to settle made by the defendant; the jury awarded, approximately, double that amount. The defendant submission is directly contrary to the Rule 49.10 directive requiring the losing party to pay partial indemnity costs up to the date of the plaintiff's offer to settle and substantial indemnity, thereafter, if the judgment is more favourable than the terms of the offer to settle as is the case in this litigation.

[58] Regarding Mr. Smitiuch's billing for a $925.00 full indemnity counsel fee in particular, and the plaintiff's total costs in general, Rule 57.01(1)(i) allows me to consider any other matter relevant to the greater question of costs. At tab four of the defendant's submission, Mr. Wong in his Bill of Costs notes that his call to the bar was 1999. Pretty close to Mr. Smitiuch's call. He charges -- that is Mr. Wong, charges $350.00 per hour. Frankly, given Mr. Wong's experience and talent level, I consider that $350.00 amount to be woefully inadequate given much larger fees I have seen billed by less experienced counsel for many years now.

[59] Rule 57.01(1) allows for consideration to be given to experience of counsel. In my opinion, effectiveness of counsel is far more important than mere experience. For some reason this does not appear to be discussed in any great detail in the cases provided to me. Usually, for

example, references to counsel's effectiveness are briefly summarized in cases such as "it was hard fought". That phrase was used in *Sanson v. Paterson* and *Sanson v. Security National Insurance*, 2022 ONSC, unreported, where -- there are two files with long numbers, I don't need to repeat them, but that comment "the matter was hard fought", was -- appears at paragraph 13 and I note the plaintiff's counsel was Mr. Smitiuch in that case.

[60] In my opinion, advocacy is an art form. In order to be a true artist in advocacy, what is required is a total commitment in both effort and passion towards the trial proceedings being conducted. To effectively and convincingly conduct a trial, whether criminal or civil, long hours of dedicated effort are demanded of accomplished counsel. This is no nine to five job. Intelligence, experience and a dogged work ethic are essential tools of the effective and, ultimately, the very few great advocates. In my opinion true greatness is achieved when a court room spectator sees the artform in action and comments, "it looks easy, I could do it". You could say that watching Mr. Smitiuch's performance.

[61] Given the commitment and skills demanded of a truly accomplished and great -- in rare cases of a great advocate, ... a commanding performance conducted by an artist in advocacy is a rare and precious item. In my 12 years of presiding over hundreds, maybe even close to a thousand proceedings on the bench, I have seen truly excellent advocacy on only a very few occasions. Mr. Smitiuch's conduct in this trial qualifies as one of those very rare jewels of advocacy that it is a wonderful treat to behold. Mr. Smitiuch's cross examinations were concise and penetrating. His submissions were succinct and persuasive. His presentation of Mr. Pye's case was brilliant, especially so, as Mr. Pye presented as a miserable old man, as accurately described by his ex-girlfriend, Sue Duncan.

[62] A lost art rediscovered by Mr. Smitiuch and displayed on more than one occasion, is the ability and instinct to know when to forcefully press a point, bold as a lion and when to retreat in a losing fight in order to gain credibility and higher ground on the next battle to come. There are no dead horses flogged by Mr. Smitiuch in litigation. Being a top litigator is a very lonely experience. I'm not saying I'm a top litigator but I know what it's like. It entails long hours in the office, when everyone else has gone home. Maintaining normal

family relationships is virtually impossible given the time and focus required to excel at the top of the profession. Many interpersonal sacrifices are a significant cost, that is demanded of all dedicated litigators.

[63] In my opinion, Mr. Smitiuch is an advocate who is as excellent as any I've encountered in the 40 years of trial litigation I've conducted, both as a judge and as a lawyer. It is no coincidence that the jury awarded miserable, unlikeable, old Mr. Pye an award well in excess of the settlement offers.

[64] In order to retain excellent counsel, such as this in a serious case, most litigants would gladly pay $925.00 an hour in order to guarantee outstanding superior representation, especially since we are talking Canadian dollars.

CONCLUSION AS TO COSTS

[65] For all the reasons outlined, I find that the plaintiff's costs claims are reasonable, fair, and appropriate in all the circumstances of this case. Accordingly, there will be an order for costs as follows;

> Partial indemnity costs from the commencement of this action up to an including February 1st, 2023, directed to Smitiuch Injury Law in the amount of $218,925.00. HST on total costs out of partial indemnity rate directed to Smitiuch Injury Law in the amount of $28,460.25.
>
> (c) substantial indemnity cost from and after February 2nd, 2023, directed to Smitiuch Injury Law in the amount of $516,060.00.
>
> (d) HST on total cost at a substantial indemnity rate, directed to Smitiuch Injury Law in the amount of $67,087.80.
>
> (e) disbursement in the amount of $168,071.45 minus $2,750.00 inclusive of tax directed to Smitiuch Injury Law. Total disbursements inclusive of tax are fixed at $165,321.45.

[66] Total costs inclusive of costs, tax, and disbursements, therefore, are fixed at $998,604.50 minus $2,750.00 equaling total cost tax disbursements fixed at $995,854.50 directed to Smitiuch Injury Law.

PREJUDGMENT INTEREST

[67] As reviewed earlier the Court has an overriding discretion pursuant to section 130 of the *Courts of Justice Act* to increase or reduce the rate of prejudgment interest, to change the interest period or disallow interest altogether notwithstanding the provisions of section 127 and 128(1) of the *Courts of Justice Act*. See *R. v. Maria Berendsen* at paragraph 1 and *Cobb v. Long Estate* at paragraph 73. And that's the Court of Appeal decision.

[68] The defendant submits at paragraphs 84 to 86 of its submissions that the prejudgment interest for general damages claimed is governed by section 128(1) of the *CJA*, that's the *Courts of Justice Act* and submits the prejudgment interest should be 0.8 per cent per year from July 2nd, 2016 and should be suspended from September 20, 2022 due to the adjournment request brought by the plaintiff.

[69] The plaintiff submits that I should exercise my discretion under section 130 of the *CJA* and that's the *Courts of Justice Act* and increase the prejudgment interest rate to five per cent. I agree that from 2016 to September/October 2023, both interest rates and inflation increased dramatically. In 2016 the inflation rate was 1.43 per cent. In 2022 inflation reached 6.8 per cent. As outlined in Exhibit 1, Canada Interest Rate chart from 2014 to 2022, interest rates were relatively flat and well under two per cent or even one per cent for some time. However, in 2022, interest rates moved rapidly upward and reached five per cent in 2023.

[70] Section 130(2) of the *Courts of Justice Act* allows me to consider a variety of factors including changes in market interest rates. During the time period of this litigation, interest fluctuated between just under one per cent to five per cent. I note that in *Cobb v. Long Estate*, this is the Superior Court decision at paragraph 24, the Court ordered on November

13th, 2015 prejudgment interest rate at a rate of three per cent, stating that three per cent was entirely just and reasonable after taking section 130(2) factors into account. In late 2015, according to Exhibit 1, Canada Interest Rate chart, market interest rates were around one per cent but the Court ordered three per cent. The *Cobb* decision was appealed to the Court of Appeal and the Court of Appeal maintained the prejudgment interest rate at three per cent. See paragraphs 76, 77, and 130 of the Court of Appeal judgment.

[71] Given the factors outlined in section 130(2) of the *Courts of Justice Act* and the fluctuating market interest rates as detailed in Exhibit 1, Canada Interest Rate, and the increases in the inflation rate as set out by the plaintiff in its submissions, I find a fair and reasonable prejudgment interest rate to be three per cent. As outlined in Tab 2 of the plaintiff's submission the period to be considered is July 2nd, 2016 to October 12th, 2023 for general and special damages and July 2nd, 2016 to September 18th, 2023 for past loss of income.

[72] Counsel are agreed that at three per cent prejudgment rate an award of prejudgment interest should be fixed at a total of $84,933.00, which consists of $72,618.00 for general damages, prejudgment interest; $6,819.00 past loss of income, prejudgment interest of $5,496.00 prejudgment interest for special damages, for an overall total of $84,933.00 for prejudgment interest.

POST JUDGMENT INTEREST

[73] Post judgement interest is calculated at seven per cent from October 12th, 2023, until February 13th, 2024, when the judgment was paid by the defendant for a total of $23,770.00 for post judgment interest.

[74] Accordingly, the final order as to cost and interest is as follows; the defendant, accordingly, is ordered to pay forthwith, the following amounts to Smitiuch Injury Law;

(1) Costs fixed at $995,854.50.

(2) Prejudgment interest fixed at $84,933.00.

(3) Post judgment interest fixed at $23,770.00

[75] The overall total, therefore, to be paid is $1,104,557.50.

[76] Now, I've made the endorsement accordingly and attached paragraph 24 of the plaintiff's submissions which outlines the details of the partial and substantial indemnity costs. So, I'll put that into the record, Madam Registrar and I've made copies for both counsel.

[77] Thank you very much counsel.

_____

Skarica J.

Released: September 6, 2024

CITATION: Pye v. Di Trapani et. al., 2024 ONSC 2265
COURT FILE NO.: CV-16-58529
DATE: 2024-09-06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

William “Bill” Pye

Plaintiff

- and –

Carmela Di Trapani and Vincenzo Di Trapani

Defendants

REASONS FOR JUDGMENT (ORALLY)

Skarica, J

Released: September 6, 2024