COURT FILE NO.: CV-18-00611590-0000
DATE: 20250919

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Diana Harripersaud and Sahoodra Petamber	)	*Hugh R. Scher*, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
	)	
Royal Bank of Canada Life Insurance Company	)	*Colleen E. Arsenault* and *Brandon Orct*, for the Defendant
	)	
Defendant	)	
	)	
	)	**Heard at Toronto:** September 2, 2025

J.K. Penman J.

REASONS FOR JUDGEMENT

Overview

[1] The underlying action in this case is a long-term disability ("LTD") claim. The defendant, Royal Bank of Canada Life Insurance Company ("RBC Life"), terminated the plaintiff, Diana Harripersaud's LTD claim in 2017. Harripersaud and her mother, Sahoodra Petamber, sued RBC for LTD benefits and for extra contractual damages. Ms. Petamber also pursued a claim under the *Family Law Act*, R.S.O. 1990, c. F.3.

[2] The parties settled the plaintiff's claims prior to the trial. The only remaining issue is assessing the plaintiff's costs and disbursements.

[3] The plaintiff, Diana Harripersaud, initially applied for LTD benefits in September 2012. Ultimately, RBC Life found that the plaintiff was entitled to disability benefits under the policy from September 2012 to December 2017.

[4] The plaintiff's LTD benefits under the policy were terminated in December 2017.

[5] The action was commenced on December 24, 2018, with the plaintiff seeking various forms of relief and damages. RBC Life delivered a Statement of Defence on October 2, 2019. Examinations for discovery were completed in November 2020. Private mediation took place on April 29, 2020, which did not resolve the dispute.

[6] The plaintiff set down the action for trial on November 23, 2020.

[7] On July 5, 2021, counsel for the plaintiff wrote to counsel for RBC Life, offering to settle the action for a reinstatement of benefits plus costs, noting that costs currently totalled $70,000 on a partial indemnity basis. The plaintiff's counsel also indicated that "the offer of reinstatement, arrears and costs as agreed or assessed is made pursuant to Rule 49 and shall remain open unless otherwise withdrawn until 30 minutes after the start of trial."

[8] Three years later, on July 9, 2024, RBC Life's counsel wrote to counsel for the plaintiff, accepting the July 5, 2021, Rule 49 Offer to Settle. The settlement provided for the reinstatement of the plaintiff's benefits on a retroactive and go forward basis, totalling approximately $186,000 together with monthly benefit payments on a go forward basis of $2,019 per month. In total, this was a value of over $300,000. In the same letter, RBC Life requested the plaintiff's bill of costs and an updated list of assessable disbursements.

[9] Between 2015 and 2022, the plaintiff took out several loans from third party lenders at interest rates between 21% and 29%. The principal amounts totalled just over $100,000. The accrued interest on the loans to the date of the offer to settle totalled $275,094.29.

[10] The plaintiff now seeks costs of $225,278.75, disbursements of $39,229.26, and HST in the amount of $29,286.24. This is based on costs on a partial indemnity basis up to the date of the settlement offer (July 5, 2021), and substantial indemnity costs for the period between the date the offer was made and the date it was accepted by the defendant (July 9, 2024). The plaintiff argues this is supported by RBC Life's untimely acceptance of the Rule 49 offer and by the fact that the offer represents full recovery on the primary allegation in her claim – that is, the unjust termination of her total disability benefits.

[11] The plaintiff also seeks to recover $275,094.29 in loan interest accrued on the third-party loans. The plaintiff argues that because of the delay in the acceptance of the 2021 offer, the plaintiff was forced to take out loans at high interest rates to support her participation in the litigation, and to meet her basic living needs and expenses.

[12] RBC Life submits that the applicable scale of costs should be on a partial indemnity basis throughout. RBC Life also submits that interest accrued on the loans are not properly recoverable as a disbursement, nor are they properly characterized as "litigation" loans.

[13] The issues for me to decide are as follows:

i) What is the appropriate cost award?

ii) Is the loan interest recoverable as a disbursement?

[14] For the reasons that follow, costs will be ordered in the amount of $246,279.26 inclusive of HST and disbursements. I am not persuaded that the loan interest is properly recoverable as a disbursement, and that application is dismissed.

Legal Principles

[15] Fixing costs is a discretionary decision under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. In exercising my discretion, I may consider the result in the

proceeding, any offer to settle or to contribute made in writing, and the factors listed in rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[16] The purpose of awarding costs is:

- to indemnify successful litigants for the costs of litigation, although not necessarily completely;
- to facilitate access to justice, including access for impecunious litigants;
- to discourage frivolous claims and defences;
- to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings; and
- to encourage settlements: *Harley v. Harley*, 2023 ONSC 4611, at para. 22; and *Bender v. Dulovic*, 2023 ONSC 4753 at para. 23.

[17] Rule 57.01(1)(i) provides that the court may also consider "any other matter relevant to the question of costs."

[18] In exercising my discretion to fix costs, I must consider what is a fair and reasonable amount for the unsuccessful party to pay and balance the compensation with the goal of fostering access to justice: *Boucher et al. v. Public Accountants Council for the Province of Ontario et al.*, 71 O.R. (3d) 391 (C.A.), at paras. 26 and 37.

[19] Additionally, Rule 49.10 provides that:

> 1) Where an offer to settle,
>
> (a) is made by a plaintiff at least seven days before the commencement of the hearing of the proceeding;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing of the proceeding; and

> (c) is not accepted by the defendant, and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

[20] Rule 49.13 expressly states that "[d]espite rules 49.03, 49.10 and 49.11, the court in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer."

[21] The intent of r. 49 is to encourage negotiations and settlements prior to trial by imposing cost consequences where reasonable offers to settle are not accepted in a timely fashion, thus triggering increased litigation and litigation costs, including disbursements that could have otherwise been negated: *Thomas v. Bell Helmets Inc.*, 126 O.A.C. 353, at p. 368.

[22] However, the Court of Appeal for Ontario, in *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. 3(d) 66, at para. 40 (*"Davies (ONCA)"*), held that:

> The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made.

[23] Rule 49.13 calls for a holistic approach to the determination of costs having regard to factors including any offers to settle – regardless of whether they meet the requirements of r. 49 – where appropriate, to ensure justice between the parties. See *König v. Hobza*, 2015 ONCA 885, 129 O.R. 3(d) 57, at para. 35; and *Lawson v. Viersen*, 2012 ONCA 25, 108 O.R. 3(d) 771, at para. 46.

[24] Costs should be proportional to the issues in the action and the amount awarded. Proportionality, however, should not override other considerations, and determining what is proportional should not be a purely retrospective inquiry based on the award. It should not be used to undercompensate a litigant for costs legitimately incurred.

[25] An undue focus on proportionality ignores principles of indemnity and access to justice: *Gardiner v. MacDonald*, 2016 ONSC 2770, at para. 65. The trial judge must make an award that is fair and appropriate, overall.

[26] When assessing costs, the overarching principles are fairness, reasonableness, and proportionality: see *Davies (ONCA)*, at para. 51.

Analysis

Issue 1: What is the Appropriate Cost Award?

[27] A Rule 49 offer was made and ultimately accepted before trial. Because there was not technical compliance with r. 49, the mandatory cost implications under r. 49.10 do not apply. In addition, neither the offer nor the terms of the settlement set out the scale of costs to be assessed. In these circumstances, the request for costs must be assessed with regard to r. 49.13 and the factors listed in r. 57.01.

[28] I have taken into consideration the following factors in my assessment of costs in this case. First, the plaintiff secured the primary relief in her claim.

[29] Second, in my view, this case was of modest complexity. I accept that there was a lengthy history to the proceeding, a generous amount of documentary disclosure and multiple days of discovery. The issue at the core of the case, however, was relatively straightforward – that is, was the plaintiff able to meet the definition under the policy or not.

[30] Third, there is no doubt that the plaintiff's entitlement to benefits on a retroactive and future basis were of significant importance to the plaintiff. I also appreciate that this

is allied with the importance of the loan interest as a recoverable disbursement, which I will address below.

[31] Fourth, I am satisfied that the time spent, and rates charged were reasonable in the circumstances with the following comments. Mr. Scher, the senior counsel on the file, has over 30 years' experience and according to the retainer agreement and July 2024 invoice, billed at a rate of $600/hour. The bill of costs, however, is calculated at a rate of $700/hour. Mr. Scher acknowledges that the retainer agreement reflects a $600/hour rate but submits that the file was billed at $700/hour for almost the entirety of the claim, and that his current rate is $750/hour. I am not prepared to "second guess" Mr. Scher's assertion of his rate and time spent: see *Sumner v. Sullivan*, 2014 ONSC 2940, at para. 22. I find that the rate of $700/hour is a reasonable one, given his seniority.

[32] However, the amount claimed for various associates, in my view, demonstrates overlapping or duplicative efforts. For example, an associate attended RBC Life's examination for discovery, and two associates attended the mediation. Four lawyers worked on the preparation of the pre-trial conference memorandum. It is not clear why four lawyers were required for this task. RBC Life should not be responsible for duplication of work, other lawyers getting "up to speed" on the file, and/or multiple lawyers attending events through the course of the litigation to assist or observe Mr. Scher.

[33] And finally, a significant factor in this analysis is the timing of the acceptance of the offer. But for the late acceptance of the plaintiff's offer in July 2024, the plaintiff would not have had to participate in protracted proceedings involving discovery, and undertakings. I also acknowledge that the plaintiff may well not have incurred most of the loans and accrued interest on them.

[34] RBC Life submits the timing of the acceptance of the offer was reasonable in the circumstances. They point to challenges in obtaining necessary information for RBC Life to assess the claim, including medical assessments, the plaintiff's bank records to understand the extent of her gambling problems, and in particular, her settlement with her employer. RBC Life also submits that a significant barrier to settlement was the

disagreement between the parties on whether the loan and loan interest were properly recovered as special or aggravated damages.

[35] None of these factors had changed at the time the offer was accepted. The decision to accept the offer was focused on the risks inherent with taking matters to trial.

[36] I am of the view that it is fair and appropriate in these circumstances to give some costs consideration to the time it took the defendant to accept the offer. The offer was accepted in July 2024, three years after it was made.

[37] RBC Life has not otherwise disclosed their bill of costs, and I have taken that fact into consideration in my overall assessment of the reasonableness of the plaintiff's costs: *Banman v. Ontario*, 2023 ONSC 7187, at para. 21.

[38] Overall, I have balanced the defendant's delayed acceptance of the offer with the duplication of work and unnecessary expense by the plaintiff's counsel. For these reasons, I fix the costs of the action at $185,000, plus HST in the amount of $24,050, for a total of $209,050.

[39] I also order that RBC Life pay disbursements in the amount of $37,229.26. RBC Life took issue with a disbursement in the amount of $6,497.50 attributed to J. Childs because he became an employee of the plaintiff's counsel's firm in 2020. I have not been provided with any evidence to suggest that this amounts to a duplication of work.

[40] In sum, costs will be ordered in the total amount of $246,279.26 inclusive of HST and disbursements.

Issue 2: Is the Loan Interest Recoverable as a Disbursement?

[41] For the following reasons, I am not prepared to find that the loan interest is a recoverable disbursement.

[42] Courts in Ontario have not found litigation loan interest as a properly recoverable disbursement for a variety of reasons. In *Warsh v. Warsh*, 2013 ONSC 1886, Lauwers J.,

as he then was, observed that allowing interest on litigation loans to be a recoverable cost would create a "perverse incentive" on litigants, encouraging them to borrow to finance lawsuits: at paras. 28-29.

[43] In *Giuliani v. Region of Halton*, 2011 ONSC 5119, the court found that the interest amounts were unreasonable given the punitive interest rate involved. The court also found that it would bring the administration of justice into disrepute and "encourage predatory lenders whose business it is to extract unconscionable amounts of interest from vulnerable individuals": at para. 57.

[44] In *Poile v. Collins*, 2015 ONSC 916, the court declined to exercise its discretion to allow interest from a loan to be a recoverable disbursement: at para. 27. The court found that concerns about access to justice cannot form the basis upon which interest loans are recoverable as disbursements. Encouraging parties to inquire if the other side can afford litigation "is a far too nebulous and loosely defined basis to approach the matter of costs": at para. 26.

[45] The plaintiff relies heavily on *LeBlanc v. Doucet and the New Brunswick Power Corporation*, 2012 NBCA 88, 394 N.B.R. (2d) 228. In that case, the court held that interest on a loan taken out to pay litigation expenses was recoverable as a disbursement under New Brunswick's version of Rule 57.01 and Tariff "D" of New Brunswick's *Rules of Court*, N.B. Reg 82-73: at para. 40. *LeBlanc*, however, was decided on a factual finding concerning the plaintiff's financial circumstances. More importantly, the approach in *LeBlanc* has been rejected by Ontario courts in cases such as *Collins* and *Davies v. The Corporation of the Municipality of Clarington*, 2019 ONSC 2292, aff'd 2023 ONCA 376 (*"Davies (ONSC)"*).

[46] In *Collins*, the court declined to follow *LeBlanc* because it was limited to the particular facts of that case, and the interpretation of a tariff item that is materially different from any tariff item found in Ontario: at paras. 19-27.

[47] The court outlined that to successfully claim interest on a litigation loan as a disbursement, the plaintiff must (a) disclose the loan details; (b) consider other funding

methods; (c) demonstrate the need for the loan; and (d) disclose the loan documents in Schedule “B” of their Affidavit of Documents: see also *Rezai et al v. Kumar et al*, 2024 ONSC 4497, at para. 27.

[48] The court in *Davies (ONSC)* rejected the plaintiff’s claim that litigation loan interest was a recoverable disbursement because there was no evidence that the proceeds of the litigation loans advanced to the plaintiff had been used to fund disbursements as they were being incurred: at para. 75. The court also found that the defendants did not have knowledge of the existence of the loan nor its purpose: at paras. 22 and 51.

[49] The court also observed:

> [I]f the court is to consider whether interest on a litigation loan is a properly recoverable disbursement, the court must be provided with the necessary tools that would allow the court to consider whether, in fact, the principle amount of the loan was incurred, and actually used for the purpose of funding disbursements: at para. 74.

[50] The plaintiff did not initially disclose the details of the loans in the Affidavit of Documents or the Supplementary Affidavit of Documents. When RBC Life became aware of the existence of the loans and the issue surrounding the accrued interest, it believed the litigation loans were being sought as extra contractual or special damages. However, after the settlement, the plaintiff pivoted and sought to recover the accrued loan interest as a disbursement. I am satisfied, however, that the defendant was aware of the full details of the loans and interest by January 2024, some months before it accepted the offer to settle.

[51] My primary concern is that there is an insufficient evidentiary record to find that the amounts received were necessary and ultimately used to fund the litigation. I appreciate the plaintiff’s assertion that the loans were taken out to “maintain [her] day to day living, medical and rehab expenses, and those of [her] family.” The difficulty is the lack of evidence identifying how and to what extent the loans were reasonably necessary to conduct the litigation itself or related costs. At least one of the loans was obtained prior

to the commencement of the litigation, thereby undermining the suggestion that the loans were necessary for the conduct of the litigation.

[52] I understand the plaintiff's position that the loans were required, in part, to assist with medication expenses that had to be prepaid before any reimbursement could be received. However, the plaintiff, in her examination for discovery, advised that she had a gambling problem and admitted that she had on occasion asked RBC Life to release her LTD benefits early so that she had money for gambling. I accept the possibility that some of the loan funds were used for gambling.

[53] There is limited evidence before the court as to whether the plaintiff ever made any payments for legal disbursements or legal fees related to this action, along with full particulars of when, how much, where the funds came from and what the payments were for. Of the two invoices produced as evidence, one for $37,272.98 was paid out of the settlement funds received from RBC Life for these disbursements.

[54] While it is not determinative, there is limited evidence before me that the plaintiff considered other funding. The only evidence she provided was an assertion that because she had previously declared bankruptcy in 2021, she would not have qualified for a traditional loan with lower or more favourable interest rates. The plaintiff attested that she sought a traditional loan from a bank, many times, but had no records of this. She testified that she could not get a loan because she did not have a job and her mom was a senior. In *Rezai* the court found that whether a party has other methods of funding as opposed to litigation loans is a relevant consideration: at paras. 28-29.

[55] I am also not persuaded on the evidence before me that the loans were necessary for the plaintiff to advance her claims in court or provide access to justice. The plaintiff would have had legal representation up to and throughout the trial of this action and would not otherwise have been prevented from pursuing her legal rights without obtaining and using the loans to fund the litigation.

[56] While I am sympathetic to the plaintiff's situation, I am not satisfied on the evidentiary record before me that the loan interest is a properly recoverable

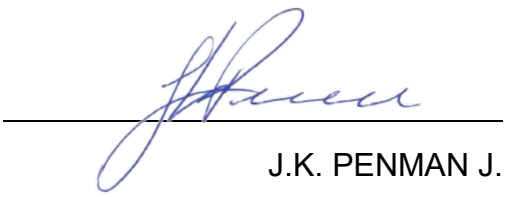
disbursement. I have concerns that the recovery of interest on litigation loans engages significant public policy concerns and should be assessed cautiously with a full evidentiary record. Finally, permitting the recovery of interest from litigation loans would have the effect of reversing s. 128(4) of the *Courts of Justice Act* for practical purposes by making a form of pre-judgment interest payable on costs: *Warsh*, at para. 29.

Disposition

[57] The defendant is ordered to pay costs to the plaintiff in the amount of $246,279.26 inclusive of HST and disbursements within 60 days of this order. I am not persuaded that the loan interest is properly recoverable as a disbursement, and that claim is dismissed.

Costs

[58] I would encourage the parties to try to settle costs of the motion. If they cannot, the plaintiff may serve and file written cost submissions within 20 days of the release of these Reasons for Judgment, followed by the defendant's written cost submissions within a further 15 days. The costs submissions shall not exceed three pages in length, excluding the bill of costs.



J.K. PENMAN J.

Date: September 19, 2025

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SUPERIOR COURT OF JUSTICE

BETWEEN:

Diana Harripersaud and Sahoodra Petamber

Plaintiffs

– and –

Royal Bank of Canada Life Insurance Company

Defendant

REASONS FOR JUDGMENT

J.K. PENMAN J.

Released: September 19, 2025