CITATION: Loye v. Bowers, 2020 ONSC 456
COURT FILE NO.: 681-17
DATE: 2020-01-23

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Carlos Loye, Plaintiff

AND:

George William Bowers, Litigation Administrator for the Estate of Laurie Bowers, Deceased, Defendant

BEFORE: Turnbull, J.

COUNSEL: Georgiana Masgras and Kevan Wylie, Counsel for the Plaintiff

Jillian Van Allen, Counsel for Georgina Masgras

Elisabeth van Rensburg, Counsel for the Defendant

HEARD: January 20, 2020

RULING ON COSTS

[1] The parties have finished a personal injury civil jury trial which arose from a motor vehicle accident of December 26, 2015. The trial was fought over liability, causation and damages and continued over 21 days. The plaintiff succeeded in having the jury find the defendant responsible for the accident but only awarded the plaintiff $10,000 for his general damages for pain and suffering and dismissed his claim for loss of residual earning capacity/loss of competitive advantage.

[2] The parties did exchange Offers to Settle prior to trial pursuant to Rule 49 of the *Rules of Practice*. The defendant first made a Rule 49 Offer in May 2019 to consent to a dismissal of the action without costs. On August 8th, 2019 the defendant gave written notice that his Offer to Settle would be withdrawn effective August 20th. On that date, the defendant did withdraw

his offer to settle dated May 1, 2019 and took the position that he would be seeking his costs of the action on a substantial indemnity basis. On October 3, 2019, the Plaintiff made a Rule 49 Offer to Settle upon payment by the defendant of $50,000 plus pre-judgment interest, costs, disbursements, and HST to be agreed upon or assessed. I find that neither party made an offer to settle which triggered the costs consequences envisaged by Rule 49.

[3] The defendant was substantially successful in this action. As Ms. Van Rensburg stated in her submissions, on the issue of liability the plaintiff won the battle, but in the end, the defendant won the war.

[4] I find that there is no reason to deviate from the general rule that costs should follow the event. Despite the fact that the defendant was not successful on the issue of liability, which took a good portion of the time at trial, the defendant is entitled to have his costs throughout on a partial indemnity basis.

Review of Rule 57.01 Factors:

[5] In assessing costs, the court is required to consider the general factors listed in Rule 57.01. The preamble to the Rule invites the court to consider any written offer(s) to settle. In rendering this ruling, I will review the factors listed in Rule 57.01 which I feel are applicable to the case at bar.

[6] Rule 57.01 (0.a) The principle of indemnity. Ms. Van Rensburg was called to the bar in 2015. Ms. Panno is a 2009 call. Ms. Van Rensburg claims an hourly partial indemnity rate of $175 per hour and Ms. Panno claims $250 per hour. I find that these rates are reasonable and within the reasonable range that the plaintiff and his lawyers could have expected.

[7] Rule 57.01 (0.b). The amount of costs that an unsuccessful party could reasonably expect to pay. Both parties were represented by two counsel throughout the trial. The defendant's Bill of Costs reflects that expensive fact but there was no criticism of that use of two lawyers in the written or oral submissions of the plaintiff. The plaintiff has also not volunteered a

copy of his solicitor/client bill to the court to provide that information to support any suggestion that the defendant's bill of costs is excessive.

[8] Rule 57.01 (a). The plaintiff claimed $1,000,000 in damages plus interest and costs. During her closing arguments, counsel for the plaintiff urged the jury to award him between $125,000 and $150,000 in general damages. Counsel for the defendant urged the jury to award the plaintiff nothing and in the event that they felt that some damages were compensable, to award him a minimal amount such as $10,000. That is what they did. Because the damages did not exceed the statutory "threshold", the plaintiff recovered nothing. I might add that while the jury was deliberating, I rendered reasons finding that the plaintiff's claim should be dismissed as he had not proven that his injury had met the statutory level of impairment due to the accident to permit him to bring the action.

[9] Rule 57.01(c). The proceeding was not exceedingly complex. While there were several pre-trial and mid-trial motions argued, the issues were relatively straight-forward and generally, it was not complicated or difficult to identify and present the evidence and law.

[10] Rule 57.01(d). The issues were very important to the plaintiff. He and his family are immigrants to Canada. His shoulder restrictions, which I found (and evidently the jury also) were largely unrelated to the accident and the product of pre-existing severe osteoarthritis diagnosed years before the accident. He is married and is the father of several school aged children. His wife works nights to help the family put food on the table. At the time of trial, he drove Uber and after expenses, his income was evidently marginal. The named defendant is just that: a defendant in name. The party directing this defence is the defendant's insurance company, TD Insurance. The plaintiff made an offer to settle the case for $50,000 plus costs, disbursements and HST. The defendant made a business decision to play hardball and pay nothing. That is its right under our legal system. As Ms. Van Rensburg indicated in her submissions, her principals do not want to set a precedent of settling non-meritorious actions and hence they took this

matter to trial. The decision of the jury largely vindicates their decision. They were ultimately proved right in law. They won the war. However, it is most likely to be a pyrrhic victory, bearing in mind they seek $263,499.95 in costs from the plaintiff. Perhaps that explains their position in this assessment of costs that they seek an order that the Plaintiff' lawyer personally pay their costs. That motion is dismissed for reasons articulated below.

[11] Rule 57.01(e). The conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding. As stated, there were several pre-trial motions brought by the defendant. Frankly, I would have expected all of them to have been agreed between counsel prior to trial. They included motion records for such perfunctory matters as an order excluding witnesses, an order permitting the defendant's counsel to read in portions of the examination for discovery of the late Laurie Bowers, and an order that the plaintiff produce diagnostic images (which had been undertaken at examinations for discovery). The defendant also brought an unsuccessful motion, which necessitated a voir dire, for an order that the essential facts of the plaintiff's guilty plea to entering an intersection on a red light contrary to the Highway Traffic Act was determinative of liability. It is rather trite law that such a plea is a rebuttable presumption and I would have expected counsel to have worked that out prior to trial.

[12] The defendant was also forced to bring three other motions during the course of the trial which included:

A. a motion to limit the scope of the expert evidence of the plaintiff's medical expert Dr. West.

B. A motion preventing the plaintiff's accident reconstruction expert Mr. Jennings from using a demonstrative aid during his evidence.

C. A motion permitting Dr. Marks (the defence medical expert) to use a demonstrative aid during his testimony.

All these motions were resolved on consent but they should never had had to be drafted, served and presented to the court. Counsel had the obligation to get these issues resolved and present the proposed consent to the court for its stamp of approval.

[13] After the plaintiff closed his case, the defendant brought a motion to strike jury questions related to income loss, loss of earning capacity and/or loss of competitive advantage, and future housekeeping costs. I ruled that the plaintiff was, due to the lack of an evidentiary foundation, not able to argue that he had suffered a short- term loss of income to the date of trial, that he was entitled to damages for the costs of future care and future housekeeping expenses. At the suggestion of the court, the plaintiff brought a motion for leave to re-open his case so that his income tax returns could be filed as exhibits. The defendant resisted this motion. The plaintiff succeeded but I ruled that the defendant would be entitled to his costs of that motion in any event of the cause.

[14] I have considered all the factors listed under Rule 57.01 and feel the ones I have referred to above are the most pertinent in my decision.

Claim that the Plaintiff's Lawyers Pay the Defendant's Costs under Rule 57.07

[15] The defendant seeks an order that the plaintiff's lawyers personally pay the defendant's costs of this action. In a nutshell, the defendant alleges that counsel for the plaintiff was not properly prepared for this trial, failed to agree to issues which delayed trial proceedings, forced the defendant to bring numerous motions, did not have witnesses ready to testify when the court was ready for them and failed to lead the appropriate evidence to support the claims which they wanted to argue to the jury. The file of Traffic Defenders, the para-legal firm which represented the plaintiff when he entered his guilty plea to going through a red light, was not produced by the plaintiff until the opening day of trial.

[16] In my view, the plaintiff's case was not perfectly presented. However, both counsel for the plaintiff worked exceedingly hard during the trial, and were

candid and courteous with the court in their submissions. Their conduct ultimately did not prejudice the plaintiff's case which was clearly going to be a difficult one from the outset.

[17] Counsel for many plaintiffs are required from time to time to present difficult cases to the court to allow their client to be heard. In this case, I must say that initially on the issue of liability, I thought the plaintiff had a difficult hill to climb. Despite that, counsel for the plaintiff succeeded in convincing the jury that the defendant was responsible for the accident. I am also cognizant of the fact that when representing a client of limited means, counsel for the plaintiff are often required to fund the cost of future care reports, future loss of income reports, and other reports from various experts to prove future compensatory losses. Sometimes, a business decision has to be made not to order such reports and to incur the personal financial and professional responsibility for payment of such expensive reports. An insurance company does not face quite the same financial limitations in most cases. It is difficult for the court to criticize counsel in such circumstances because all the factors influencing how a case is presented are not known by a presiding judge.

[18] Ms. Van Allan appeared as counsel to the lawyers for the plaintiffs. In her written submissions to the court, she cited *Mitchinson v Marshall,* 2018 ONSC 5632 at para 21

> The threshold of making an order to award costs against a lawyer personally is a high one, to be exercised in exceptional circumstances. Examples include cases that involve abuse of process, frivolous proceedings, misconduct, dishonesty or action taken for ulterior motives where the effect is to seriously undermine the authority of the courts or seriously interfere with the administration of justice. Virtually, all the cases involving an order to pay costs personally, whether under the Rules of Civil Procedure or otherwise, are based on a marked and unacceptable departure from the standard of reasonable conduct expected of a lawyer in the judicial system. Mistakes,

negligence or errors in judgment are not typically sufficient to justify the costs award.

[19] As stated above, I adopt that reasoning in dismissing the argument that counsel for the plaintiff personally pay the defendant's costs.

Insurance Policy Covering Opponent's Legal Costs and Disbursements and Assured's Own Disbursements

[20] There is another issue of concern which partially founded the defendant's claim with respect to costs. During the course of the litigation, the plaintiff purchased third party costs insurance protection with JusticeRisk Solutions in the amount of $100,000. The named insured is the plaintiff Carlo Loye and the Law Firm is the Masgras Professional Corporation.

[21] I was presented with a copy of the policy during the oral submissions on costs. Through oversight on my part, the policy was not entered as an exhibit and I am directing that a copy of it be entered retroactively in the record as exhibit one on Costs Submissions. I have so marked my copy and signed it accordingly

[22] The effective date of the policy was December 26, 2015. After the jury returned its verdict and as we were setting dates for submissions on costs, I was advised that this policy, of which the defendant had been advised, had been suspended effective November 6, 2019. Counsel for the defendant was immediately advised by the plaintiff's lawyers of its suspension on or about November 7, 2019, just five days before the anticipated commencement of trial.

[23] I directed that a representative of the insurer attend before me at this time to provide information related to the suspension of the policy. Ms. Van Allen objected on the basis that solicitor/client privilege may be compromised. I directed that the representative be sworn as a witness with restricted questioning to be permitted with respect to the reasons for the termination without violating any solicitor/client privilege.

[24] Mr. Nicholas Robson was sworn as a witness. He is the Vice President and General Counsel to JusticeRisk Solutions. He confirmed that the subject policy was issued September 28, 2016 but the policy start date was December 26, 2015. He stated that the policy was suspended on November 7, 2019 in accordance with its written terms. Ms. Van Rensburg had him identify section 4A1 of the policy as the grounds for the suspension. That provision requires the insured to "always provide us and your lawyer with information relating to your legal proceeding that is true and complete to the best of your knowledge and belief".

[25] Mr. Robson indicated that JusticeRisk Solutions became aware of the information relied upon to suspend the policy on November 6, 2019 as a result of communication from the plaintiff's counsel. In Mr. Robson's view, plaintiff's counsel did what she was required to do and what he would have expected her to do. He agreed that the information related to the conduct of the insured and violated the spirit of the policy.

[26] The purpose of my request for Mr. Robson to attend was the timing of the suspension of the policy just before the commencement of trial. I felt that it was important to the issue of payment of costs that the court know that the suspension of the policy was not due to a unilateral act of the plaintiff or his lawyers to influence the defendant's insurer to agree to pay some compensation to the plaintiff because his third party costs coverage was no longer in effect as a possible source for the defendant to recoup some of its costs in the event of a successful outcome at trial. That clearly was not the case in this instance.

[27] I do note that under the terms of the policy, the term "suspend" is defined. It provides that "if your policy is suspended for any reason, cover will cease from the date of suspension onwards, however all cover will remain for the period up to the date of suspension.". In other words, the plaintiff may very well have contractual rights to indemnity to and including November 6, 2019, which in due course may permit the defendant's insurer to at least recover some of the costs awarded under this decision.

Review of the Defendant's Bill of Costs:

[28] In the defendant's Bill of Costs, the claims for pre-trial attendances are appropriate subject to the following comments and adjustments:

a. Caitlin Turner, called in 2011, appears to have been the senior lawyer on the case for the defendant at its outset. She was initially involved and appears to have conducted the examinations for discovery and reported on it. Ms. Van Rensburg became involved early on and docketed 36.7 hours up to the conclusion of the examinations for discovery. I have no doubt that there is some overlap of time between her work and that of Ms. Turner as Ms. Van Rensburg gained familiarity with the facts. Therefore, I reduce the hours claimed by Ms. Van Rensburg by 14 hours or $2,450 (14x $175) to reflect that overlap as she became familiar with the file.

b. I find the amounts claimed for attendances at Trial Scheduling Court, preparation for and attendance at mediation on March 11, 2019, preparation for and attendance at the judicial pre-trial May 21, 2019 and attendance at Trial Readiness Court to be appropriate.

[29] The claims for hours spent in trial preparation are excessive. They total 440 hours which is the equivalent of a lawyer working 40 hours per week for eleven weeks. There is no doubt that preparation is essential to successfully present a case for trial but overpreparation should not be required to be paid by the unsuccessful party. In my view, half of that time is more appropriate. Hence, I will allow 220 hours of preparation time for counsel. I note that for some reason, the defendant had eleven different counsel working on this file to prepare it for trial. With so many people working on the file, I can come to no other conclusion than there is considerable overlapping of time as each lawyer becomes familiar with the file, the issues and the next steps needed to be taken. Hence the amount claimed for trial preparation shall be reduced from $89,001.50 to $45,000.00.

[30] Ms. Van Rensburg and Ms. Panno have claimed 168 hours each for attendance at trial for 21 days. Ms. Van Rensburg explained that their days were actually longer than that but she allowed 8 hours per day as an average. I find those to be very reasonable estimations of their time for trial attendance and the preparation which is necessary before and after each day of trial. Both counsel were well prepared and had to respond to a number of issues which arose during the trial by undertaking work overnight to be ready to proceed on the next court day. I allow their fees as claimed at $71,400 for attendance at trial on a partial indemnity basis.

[31] I further allow Ms. Van Rensburg her time claimed for preparation of the Bill of Costs and preparing and serving and filing her helpful costs submissions. I further allow her time for attendance at the hearing for costs submissions, preparation and travel time which I fix at 8 hours or $1400 (8x$175).

[32] Thus, for time spent on this trial by various counsel for the defendant, I allow costs for legal fees on a partial indemnity basis in the amount of $134,995.00 plus HST of $17,549.50.

Disbursements:

[33] The defendants claim $60,047.40 for disbursements. I will review some of them which cause me concern.

Dr. Marks

[34] Dr. Marks was called as a defence expert witness in the area of orthopedic surgery. Dr. Mark's wrote a reply medical report which was 82 pages in length, compared to the plaintiff's expert report of 18 pages. In fairness to Dr. Marks, he had to review in detail the lengthy pre-accident and post-accident medical history of the plaintiff in rendering his opinion. He charged $11,300 for the written report which is somewhat on the high side but not unreasonably so. His evidence was clear and persuasive and in my

view, it was important in assisting the jury to render its verdict, which was favourable to the defendant.

[35] Counsel for the plaintiff objects to the fact that in addition to the fee for his written report, the defendant also claims $24,182 as a witness fee for Dr. Marks' preparation and appearance to testify during one day of this trial. He provided counsel with his docketed hours of preparation which amounted to 14.25 hours at $800 per hour. He further charged $10,000 for his appearance to testify for a full day.

[36] It appears that he had 9 teleconference calls with counsel between November 4, 2019 and November 12, 2019 which was supposed to be the day that the trial started. In fact, it did not start until a week later due to a number of pre-trial motions brought by the defendant.

[37] I find the time and fees charged by Dr. Marks to be totally excessive. His hourly rate of $800 is jaw dropping. I find that he should have been able to be prepared to give his evidence in three hours of consultation with counsel and personal review of his report. I will allow the defendant $3,000 for preparation of Dr. Marks to testify. I allow the sum of $5,000 for his attendance at trial and giving his testimony. Thus, I allow preparation and attendance fees for Dr. Marks of $8,000 plus HST of $1,040.00 for a total of $9,040.00, reduced from the amount claimed of $24,182.00.

Hotel Accommodation and Meals for Counsel:

[38] In the defendant's Bill of Cost, there are significant claims made for the cost of meals, accommodation and car rentals for each counsel. They are as follow:

Ms. Van Rensburg: Hotel accommodation and parking $5,687.65

Car Rental and Gas: $800.80

Meal Expenses: $1201.25.

Ms. Panno: Hotel accommodation and meals: $6,000.

Meal Expenses: $1200.00

Mileage: $371.52.

[39] The total claimed by both of the defendant's trial counsel for hotel accommodations and meals is $14,088.90.

[40] Section 30 of the Tariff gives the court discretion to allow accommodation and travelling expenses incurred by a party. I must say that I find the hotel expenses claimed to be excessive. Personally, I stayed at the Radisson Hotel in Kitchener on a number of occasions during this trial at a government rate of $115 per night plus taxes (which included breakfast). The total bill each night was approximately $138.00. It is a clean, safe hotel located within a ten-minute drive from the court house.

[41] I have no idea from the information given to me of the rate charged for the room at the hotel where they were staying. I am aware that I checked the cost of another hotel in Waterloo and it would have cost $229 per night and hence I did not stay there.

[42] I feel that it is incumbent on counsel to search out and find the most reasonably priced appropriate hotel in the region of a courthouse if it is expected that their client would be asking the adverse party to pay their expenses. I have no evidence in that regard.

[43] I have no information with respect to the number of nights each counsel stayed at a hotel, which hotel they stayed at, the cost per night, whether they sought and obtained a reduced "business" rate. I have no idea of the costs incurred for each meal nor whether alcohol was included in the bills.

[44] I also take into account the fact that counsel are employed by TD Insurance as "in house counsel". This accident occurred in London but was tried in

Kitchener. While TD is entitled to counsel of its choice, it seems to me to be unreasonable to require the plaintiff to have to pay the hotel and meal costs of two counsel from out of town. I must ask myself why a lawyer from the Kitchener/Waterloo region could not have been retained to act as co-counsel to help limit the costs incurred in this matter and which now are demanded from the plaintiff.

[45] I therefore allow the defendant's claim for hotel accommodations in the amount of $6,000. I allow the sum of $1200.00 for meals.

[46] I further disallow the claim for $1160.00 related to a consultation with 30 Forensic Engineering, as no report or witness was called by the defendant from that firm.

[47] In all other respects, I accept the amounts claimed for disbursements as being appropriate and assessable.

Conclusion:

[48] The defendant shall have judgment against the plaintiff for his partial indemnity costs, disbursements and HST tax as follows:

a. Total Fees: $134,995.00

b. HST $ 17,549.50

c. Disbursements: $ 36,754.18

Total: $189,298.68

Turnbull J.

Turnbull, J.

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Elisabeth van Rensburg, Counel for the Defendant

RULING ON COSTS

Turnbull J.

Released: January 23, 2020