



BEARDWINTER LLP

# Defender

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## ***Barry v Anantharajah*, 2025 ONCA 603: An Unjustified Settlement Approach May Cost Your Client More Than You Think**



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### **Overview**

Courts will analyze a handful of factors in determining how to exercise their discretion when it comes to calculating the appropriate costs award. These factors include the party's respective success at trial, the complexity of the issues, the costs incurred to advance the litigation, and the presence of any settlement offers.

The case of *Barry v. Anantharajah*, 2025 ONCA 603 ("**Barry**") is the most recent case documenting the impact of settlement offers on determinations of costs awards. Despite a total damages award of \$16,160.50, counsel was awarded \$300,000.00 in costs. *Barry* offers key insights into how courts utilize settlement offers in determining the proportionality and validity of costs awards and presents defence counsel with new considerations when forming settlement strategy.

### **The Trial Decision**

The respondent was injured in a motor vehicle accident and claimed \$1,000,000.00 in damages. Prior to trial, the appellant, through their insurer Aviva, offered to dismiss the claim with no costs. The respondent counter offered with \$500,000.00. In response, the appellant reiterated her offer of a dismissal without costs. In the alternative, the appellant offered to admit liability in exchange for the respondent limiting her claim to the appellant's policy limits of \$1 million.

At trial, the respondent was awarded \$24,166.00 in general damages and \$26,000.00 in special damages for past income loss. The respondent's total damages totaled \$16,160.50, after a finding of contributory negligence and subtracting the relevant statutory deductible. In terms of costs, the respondent was awarded \$300,000.00 by the trial judge (\$164,148.33 in fees, \$21,339.29 for HST, and \$114,512.38 for disbursements).

In calculating the respondent's costs award, the trial judge emphasized that success must be determined relative to the parties' positions prior to trial. Where a defendant insurer plays "hardball" by offering nothing prior to trial rather than even a modest sum, the defence is setting a clear demarcation line or a 'line in the sand,' which can be used to identify success or failure in an action.

The trial judge opined that the lack of any offers from the appellant was unreasonable given their own expert's findings regarding liability, and the respondent's psychological injuries. It was foreseeable that a jury would make an adverse finding against the respondent in terms of damages.

The trial judge further opined that the respondent's bill of costs was reasonable, as most disbursements and fees were incurred at trial. The appellant would have been aware of these costs being incurred early in the litigation. The lack of any offers from the respondent necessitated the matter going to trial.

On the basis of proportionality, the trial judge decreased the respondent's costs request by \$100,000.00 due to the respondent's high legal fees. The trial judge emphasized that significantly decreasing the respondent's claim for costs in such circumstances risks rewarding defendants who engage in bully tactics.

## The Appeal

Justice Pepall of the Ontario Court of Appeal dismissed the Appellant's appeal of the costs order. Justice Pepall bifurcated their reasoning into a discussion of the respondent's success at trial and the proportionality of the costs award to the overall damages award.

Justice Pepall first discussed the differential approach to trial judges in granting cost awards and noted that a court will set aside a costs award only if the trial judge has made an error in principle or if the award "is plainly wrong." Justice Pepall cautioned that an error in principle is not fatal so long as there is an independent basis on which to uphold the costs order.

Justice Pepall found no error in the trial judge's determination of the costs award. Justice Pepall affirmed that if the outcome of the trial vindicates the refusal to offer, then denying costs to that party, if successful, would be an error in principle. In this case, the respondent's success resulted in the appellant's settlement position not being reasonable. As such, if a party opts for a "hardball" approach to settlement, that party assumes the risks associated with such a posture.

Even if the trial judge committed an error in principle, independent bases validated her decision. Justice Pepall agreed that such bases included the respondent's success at trial, the appellant's refusal to admit any degree of liability prior to trial, and that the case raised issues on outdated stereotypes relating to mental health injuries.

Finally, on proportionality, Justice Pepall affirmed that while the costs order substantially exceeded the recovery, the costs order was proportionate to the importance and complexity of the issues, and to the amount involved in the litigation. Proportionality is akin to reasonableness and fairness, and in this case the trial judge adequately considered proportionality. Justice Pepall recognized that the trial judge reduced the respondent's costs claim by \$100,000.00, the appellant was found 85% liable for the damages, and the appellant made no offer. As such, the costs award was not overturned.

## Section 285.5 of the *Insurance Act*

The respondent cited section 285.5 of the *Insurance Act* to substantiate their position to uphold the costs award. Subsection (1) states that an insurer shall attempt to settle the claim as expeditiously as possible and subsection (5) states that an insurer's failure to comply shall be considered by the court in awarding costs. Justice Pepall opined that the legislation does not require the insurer



by law to make such an offer, but that a party should appreciate that it does take a risk on costs in adopting such a stance.

## Takeaways

*Barry* offers key considerations for defence counsel. While a defendant is not required to make any settlement offers, if that is the posture adopted, the defendant must live with the consequences if its decision does not prove to have been a reasonable one. As such, having thought-out and reasonable settlement offers may aid counsel in the calculation or determination of any adverse costs award.

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