CITATION: Lakew v. Munro, 2014 ONSC 7316
COURT FILE NO.: CV-12-464474
DATE: 20141219

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: YODIT LAKEW, Plaintiff

AND:

GLEN GEORGE MUNRO, Defendant

BEFORE: Mr. Justice Stephen Firestone

COUNSEL: *Jono Schneider*, for the Plaintiff

William J. Jesseau, for the Defendant

HEARD: In Writing

COSTS ENDORSEMENT

[1] The trial of this motor vehicle action proceeded before me with the jury. The trial commenced on June 9, 2014, and the jury delivered its verdict on June 24, 2014. Liability for the accident was admitted. The jury found that the motor vehicle collision of March 28, 2008, did not cause any injuries to the plaintiff.

[2] In accordance with the jury's verdict the action was dismissed and the record was endorsed accordingly. The defendant's threshold motion, which had been argued while the jury was deliberating, was withdrawn by the defendant following the return of the jury's verdict. Written cost submissions were requested. Those submissions and the authorities referred to have been received and reviewed.

Position of the Defendant

[3] The defendant seeks its costs of this action given that he was entirely successful at trial. The amount claimed in his bill of costs on a substantial indemnity basis is $140,024.61 and $110,371.72 on a partial indemnity basis. The defendant submits that the lawyer experience and corresponding hourly rates proposed are entirely reasonable.

[4] In relying on section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and rule 57.01(1)(0.a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg.194 ("the Rules") the defendant argues that in exercising its discretion, the principle of indemnity should be considered. The general rule, he submits, is that the successful party is entitled to its partial indemnity costs, subject to the discretion of the trial judge under s. 131 of the *Courts of Justice Act* having regard to the factors enumerated in Rule 57 and the related jurisprudence.

[5] It is not the role of the court, he argues, to second guess the time spent by counsel unless it is manifestly unreasonable, i.e. the total time spent is clearly excessive and the matter has been overly lawyered.

[6] In considering the amount claimed and the amount recovered under rule 57.01(1)(a) the defendant highlights that the plaintiff in her statement of claim ("claim") requested a total of $950,000 in damages plus pre-judgment interest and costs. This comprised $200,000 in general damages; $50,000 in special damages; $500,000 in damages for loss of income and earning capacity; $100,000 in damages for housekeeping and home maintenance; and $100,000 in damages for past and future medical, rehabilitation, and attendant care expenses. The claim was not amended at any time before delivery of the jury's verdict. The plaintiff did not recover any damages.

[7] In addressing the complexity of the proceeding and the importance of the issues under rules 57.01(1)(c) and (d) the defendant argues that this action involved inherently complex issues of causation requiring various experts to explain the defendant's theory that the accident did not cause any injury to the plaintiff.

[8] The defendant asks the court, under rules 57.01(1)(e) and (f) to consider whether the conduct of the plaintiff tended to shorten or lengthen unnecessarily the duration of the proceeding and whether any step in the proceeding was improper, vexatious, or unnecessary.

[9] In this regard the defendant highlights that despite the defendant's admission of liability, the plaintiff insisted on conducting a discovery of the defendant. This was, he argues, an unnecessary step which increased the cost of defending the action.

[10] In addition, following the plaintiff's examination for discovery, the defendant served a request to admit on the plaintiff addressing the issues of general damages, loss of income, and loss of competitive advantage. The plaintiff refused to admit various facts regarding these heads of damages which were subsequently found to be true by the jury.

[11] The defendant advises that on December 2, 2010, he served an offer to settle under Rule 49 comprising $30,000 for all non-pecuniary damages, claims, and pre-judgment interest which was open for acceptance until one minute after the commencement of trial. The plaintiff on April 30, 2014, served an offer to settle for $45,000 for all claims, plus prejudgment interest and costs.

[12] The jury awarded less than the defendant's Rule 49 offer and as a result he submits he is entitled to substantial indemnity costs from December 2, 2010, onward.

Position of the Plaintiff

[13] The plaintiff argues that the defendant offered nothing at all during the course of this litigation, leaving her with little choice other than to walk away from the case and be forced to pay disbursements for an action for which the defendant agrees she was completely innocent. The plaintiff states she is an impecunious mother of four.

[14] Given the position taken by the defendant, the plaintiff's only recourse was to pursue a trial. She states that the defendant's insurer is a sophisticated company with ample resources to play hardball. As a result the plaintiff requests that the defendant's claim for costs and disbursements be denied and that her disbursements and a portion of her costs be paid by the defendant.

[15] The plaintiff argues that the court has discretion under s. 131 of the *Courts of Justice Act* to depart from the normal approach that the loser pays the winner in appropriate circumstances. She relies on the principles enumerated under Rule 57 as well as the terms of the offers to settle made by the parties.

[16] The defendant, the plaintiff argues, has maintained all along that he would not offer anything toward resolution. Regarding the defendant's offer to settle dated December 2, 2010, its terms were that the defendant would pay $30,000 for all non-pecuniary damages, claims, and prejudgment interest, the said sum being subject to a $30,000 deductible pursuant to s. 265.5 of the *Insurance Act*, R.S.O. 1990, c. I.8. Nothing was offered for the plaintiff's costs or disbursements.

[17] The plaintiff submits that she has maintained all along that she was open to resolution without the need for a trial and required her proper disbursements to be paid. She served an offer to settle dated April 29, 2014, for $45,000 for all claims inclusive of interest plus costs and disbursements.

[18] Regarding the application of Rule 49, the plaintiff argues that the Rule contemplates punishing a plaintiff who has a valid claim but rejects a more favourable offer. Those were not the circumstances in this case. Rule 49 does not apply where the plaintiff's action is dismissed and the defendant beats its offer to settle.

[19] The plaintiff further argues that apart from the application of Rule 49, 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. In this case there is no allegation, the plaintiff submits, of reprehensible or egregious conduct on the part of the plaintiff.

[20] Regarding the application of Rule 57, the plaintiff argues that the general principle under rule 57.01(1)(0.b) is that the amount of costs the unsuccessful party could reasonably expect to pay is a consideration for the court in exercising its discretion in determining costs. The plaintiff as an unsuspecting member of the public is simply "shocked" at the amount of costs now being claimed by the defendant. The plaintiff only became aware at trial that it was the defendant's intention to call rather than read in and file the report of Dr. Soric. As well the operator of the third vehicle involved in the collision was called. She was not on the defendant's pre-trial witness list.

[21] Regarding the consideration of the amount claimed and recovered under rule 57.01(1)(a), the plaintiff at trial only claimed amounts for general damages and loss of income. She did not assert a claim for special damages; housekeeping and home maintenance; attendant care expenses; caregiver benefits; past medical rehabilitation; or future rehabilitation at trial. The

plaintiff suggested in closing that if proposed amounts were viewed as excessive, the jury is to consider a lesser amount. The plaintiff highlights that the defendant's proposed costs award is approximately the same as the plaintiff's requested claims had she been completely successful at trial.

[22] Regarding the complexity of the proceeding under rule 57.01(1)(c), the plaintiff submits that this case did not, as the defendant argues, involve complex injuries, law, or circumstances. As well the defendant did not need an expert physiatrist to opine on causation regarding the plaintiff's left knee and low back complaints given that the plaintiff's own orthopedic surgeon did not conclude that the left knee injury was caused by the collision.

[23] Under rules 57.01(1)(e) and (f) consideration is given to the conduct of a party and steps taken. The plaintiff submits that discovery of the defendant was a necessary step given that counsel refused to undertake not to call the defendant at trial, refused or neglected to provide a signed affidavit of documents, refused or neglected to provide his property damage file, refused or neglected to provide particulars of pictures of the defendant's car, and refused to provide particulars of surveillance in the defendant's possession. At trial the defendant was called and testified regarding matters addressed at his discovery.

[24] The plaintiff submits that during the trial the defendant agreed to participate in a mid-trial conference yet at the conference advised nothing would be paid for claims, costs, or disbursements. This was no different than his prior position. As a result, both counsel and court time and resources were wasted.

[25] Because Dr. Soric was called to give oral evidence instead of reading in and filing her report, as previously agreed and ordered at the pre-trial, additional preparation and court time was incurred. As well, the defendant initially advised it required a *voir dire* to determine the scope of the opinion evidence Dr. Ogilvie-Harris could proffer. This motion was abandoned, adding to further delay and cost because the doctor's trial attendance had to be re-scheduled.

[26] Regarding the defendant's request to admit, the plaintiff submits that none of the statements in it were addressed by the jury due to the nature of the jury questions answered and the fact that the defendant withdrew its threshold motion.

[27] The plaintiff served their own request to admit addressing the issues of liability and damages. The defendant failed to respond to it in a timely fashion, resulting in deemed admissions. The plaintiff expended considerable time preparing for a trial of issues that were deemed admitted which were subsequently withdrawn.

[28] Under rule 57.01(1)(i) the plaintiff argues that in determining costs the court should consider the fact that the plaintiff has been determined by the City of Toronto to be so impecunious that she requires subsidized housing and subsidized childcare. She works part-time earning just above the minimum wage. She is a single mother with four small children.

[29] The plaintiff also argues that the defendant did not attempt to settle the claim as expeditiously as possible and did not participate in mediation when requested, as mandated under s. 258.6(1) of the *Insurance Act*, *supra*.

[30] The plaintiff further submits that on the eve of trial the defendant served particulars of a surveillance report that was in his possession at the time of discovery in 2012 but not disclosed.

[31] The plaintiff takes issue with the defendant's costs outline, arguing that there are charges involving an overlap of tasks, participation in a "sham" mediation, excessive hours, as well as improper charges for disbursements. The plaintiff therefore submits that the defendant's motion for costs and disbursements should be dismissed. In addition she requests her costs as follows:

> (a) Costs on a partial indemnity basis of $28,145 plus HST between February 6, 2014, and June 6, 2014, for costs in pursuing the trial in the face of deemed admissions;
>
> (b) A fee portion of the plaintiff's costs in the sum of $60,000 plus HST or alternatively an augmented costs award to the plaintiff in the sum of $60,000 as a sanction for the insurer's noncompliance with their statutory duty to attempt to settle and mediate when requested;
>
> (c) The plaintiff's costs prior to being served with the statement of defense in the sum of $5,197.50 plus HST on a partial indemnity basis; and
>
> (d) Payment of the plaintiff's disbursements in the sum of $51,042.75, which includes the cost of mediation.

Defendant's Reply

[32] The defendant argues that his Rule 49 offer was the same as the judgment obtained and should be given considerable weight.

[33] Plaintiff's counsel was fully aware that the defendant would vigorously defend the action. The threshold provisions contained in the *Insurance Act* provide a full statutory defense to general damage claims arising out of motor vehicle accidents. The defendant was fully within his rights to vigorously defend the action in accordance with those provisions and with his assessment of the claims for pecuniary damages.

[34] The defendant submits that the plaintiff's assertion that she is "shocked" at the defendant's costs outline is simply untenable given that after adding the fees from November 10, 2010, to February 6, 2014, and the fees associated with the two-week jury trial, the plaintiff's fees and disbursements would be well in excess of $120,000 and in line with the costs sought by the defendant.

[35] Contrary to the plaintiff's position, the defendant states that this case did involve inherently complex issues of causation because the defendant alleged that the motor vehicle accident did not cause any injuries to the plaintiff.

[36] Dr. Soric's *viva voce* evidence was necessary in order to assist the jury with the distinction between chronic pain syndrome and chronic pain. Further, such evidence was necessary regarding the issue of causation because the plaintiff had told Dr. Soric that she had struck her knee in the collision, yet admitted that was not true at discovery and trial.

[37] Regarding the issue of impecuniosity, the plaintiff asserts that she should not be subject to a cost award because her net worth is less than zero. However, there is nothing to suggest that the plaintiff is personally responsible for the payment of disbursements in the sum of $51,042, which will likely be borne solely by the plaintiff's solicitors.

[38] This is not an exceptional situation, the defendant argues, where no costs should be awarded to the successful defendant. In this case the jury found that the plaintiff was not injured as a result of the collision. The defendant submits that hardship or impecuniosity is not a factor enumerated in Rule 57.01. The successful defendant should not be denied costs simply due to the plaintiff's financial circumstances.

[39] If costs are denied to every successful defendant faced with an impecunious plaintiff, there would be no deterrent for such plaintiffs to pursue claims that are later found by the trier of fact to have no merit.

[40] The defendant denies the assertion that he hid surveillance. All surveillance was disclosed to the plaintiff prior to the commencement of trial pursuant to the rules. In addition no surveillance was used at trial.

[41] The plaintiff requests her fees to the date the deemed admissions arose pursuant to a request to admit and the withdrawal of those admissions on June 6, 2014. The plaintiff's request to admit addressed issues of threshold and pecuniary damages. It was not an attempt to narrow issues. As a result, the plaintiff was attempting to secure an indirect verdict on the issues to be tried by the jury.

[42] The defendant responded to the plaintiff's request to admit on March 4, 2014. The plaintiff therefore knew as of that date that the defendant did not admit the truth of the facts contained in the plaintiff's request to admit. As a result there was no reliance by the plaintiff on the deemed admissions between March 4, 2014, and June 6, 2014, if at all.

[43] The defendant argues that the plaintiff should not be permitted to now separate the costs of the pursuit of accident benefits from the tort claim in an effort to recover some level of costs that may not otherwise be available to her as the unsuccessful party in this tort action.

[44] Regarding the duty to mitigate, the defendant points out that he did attend mediation and did make an offer to settle. This is not a situation where the defendant did not attend mediation at all. As a result, the defendant submits it is not accurate to say that the defendant did not "meaningfully participate" in the mediation or that the mediation was a "sham."

[45] The fact that the plaintiff was advised by way of correspondence that "no settlement will be offered at the mediation…" does not equate to unwillingness on the part of the defendant to

bring the action to conclusion as expeditiously as possible at mediation. Rather, the word "settlement" referred to the fact that no monetary compensation for damages would be offered.

[46] The defendant attended the mediation in good faith with an adjuster from the insurer with full authority to settle the dispute. Both parties signed the agreement to mediate. Opening statements were made and the defendant's position was made clear to the plaintiff and her counsel. At that time the defendant offered dismissal of the action without costs. This was reflective of his assessment of the plaintiff's claim.

[47] The plaintiff is equating meaningful participation in mediation with the payment of money to the plaintiff. The argument being advanced by the plaintiff that money must be paid by an insurer at every mediation in order to satisfy the requirements of s. 258.6(1) of the *Insurance Act*, the defendant submits, is simply not correct.

Analysis

[48] Section 131(1) of the *Courts of Justice Act* provides as follows:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent costs shall be paid.

[49] Rule 57.01 of the *Rules of Civil Procedure* identifies the factors a court may consider when exercising its discretion to award costs:

> (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
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> > (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;
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> > (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
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> > (a) the amount claimed and the amount recovered in the proceeding;
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> > (b) the apportionment of liability;
> >
> > (c) the complexity of the proceeding;
> >
> > (d) the importance of the issues;

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

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

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

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

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

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

[50] Rule 49.10 limits the court's discretion on costs in certain circumstances when there has been a qualifying offer to settle:

(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 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.

(2) Where an offer to settle,

(a) is made by a defendant 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 plaintiff,
>
> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

[51] Rule 49.13 provides as follows:

> Despite 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.

[52] In *Agius v. Home Depot Holdings Inc.*, 2011 ONSC 5272, the court set forth the general principles to be applied in fixing costs, at paras. 10-12:

> Cumming J. in *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601 at para. 5, described the "normative approach" to an application for costs:
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> > Costs are in the discretion of the Court: s. 131, *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 57.01 of the Rules of Civil Procedure. In Ontario, the normative approach is first, that costs follow the event, premised upon a two-way, or loser pay, costs approach; second, that costs are awarded on a partial indemnity basis; and third, that costs are payable forthwith, i.e. within 30 days. Discretion can, of course, be exercised in exceptional circumstances to depart from any one or more of these norms.
>
> Fixing of costs is not merely a mechanical exercise in reviewing the receiving party's Cost Outline. In *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557, the Divisional Court set out several principles to be considered in making an award of costs:
>
> > 1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher* [*Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291], *Moon* [*Moon v. Sher* (2004), 246 D.L.R. (4th) 440], and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (C.A.).
> >
> > 2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of

> reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont. C.A.), at para. 4.
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> 3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
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> 4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), at p. 249.
>
> 5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

The Court of Appeal has identified the overriding principle to be that the amount of costs awarded be reasonable in the circumstances. In *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 Epstein J.A. stated at paras. 51-52:

> As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher*, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."

The application of rule 49.10

[53] It is important that I address the applicability of rule 49.10 to the situation in which a plaintiff is awarded no recovery by the jury.

[54] The offers made in this case were valid rule 49 offers, in the sense that they were in writing and were made at least seven days before trial. However, rule 49.10(1) (titled "Plaintiff's Offer") and rule 49.10(2) ("Defendant's Offer") stipulate that they take effect when "the plaintiff obtains a judgment." Therefore, the specific cost consequences under rule 49.10 have no application when the plaintiff's claim is dismissed in its entirety with no award of damages, as it

was here: *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 38 ("as the plaintiff's claim had failed, rule 49.10 had no application"). The Court of Appeal explained the rationale for rule 49.10's limited scope in *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243 (C.A.), at p. 245:

> At first glance it seems an anomaly that the plaintiff should be awarded solicitor-and-client costs following the date of an offer, while the defendant only receives party-and-party costs. The answer is found in appreciating that this rule assumes that the plaintiff has recovered a judgment of some value. Without the rule, that plaintiff would normally recover party-and-party costs. The rule gives that plaintiff a bonus for an offer lower than the recovery by elevating costs to the solicitor-and-client level following the offer. The bonus to a defendant who makes an offer higher than the recovery is that the defendant pays no costs following the offer and, in addition, recovers party-and-party costs for that period of time. That rationale does not fit a case where the plaintiff is totally unsuccessful because, without the rule, the defendant is normally entitled to party-and-party costs. The words in the rule "and the plaintiff obtains a judgment as favourable" make it clear that the rule has no application where the plaintiff fails to recover any judgment. [Emphasis added.]

[55] Accordingly, rule 49.10 does not automatically entitle the defendant to costs.

The application of rule 57.01

[56] In addition to the result achieved and offers to settle, I may consider the factors enumerated in rule 57.01(1) when exercising my discretion under s. 131 of the *Courts of Justice Act*.

[57] Costs are in the absolute discretion of the court. A successful litigant has no right to costs, but only a reasonable expectation of costs. The plaintiff's position is that the defendant should be denied his costs and should pay the plaintiff's costs because of the way in which he conducted the litigation.

[58] In *Yelda v. Vu*, 2013 ONSC 5903 (leave to appeal denied, 2014 ONCA 353) at para. 11, Arrell J. confirmed the long-standing principle that a successful party is entitled to costs except for good reason. He states as follows:

> The principle that costs follow the event should only be departed from for very good reasons such as misconduct of the party, miscarriage in procedure, or oppressive or vexatious conduct of proceedings.

[59] Regarding the amount claimed and the amount recovered in the proceeding, notwithstanding the heads of damages and amounts originally claimed, the defendant was well aware that at trial the plaintiff would only be claiming amounts for general damages and loss of income. Nothing was claimed at trial for housekeeping and home maintenance, attendant care

expenses, caregiver benefits, or past or future medical rehabilitation. The plaintiff recovered nil dollars as a result of the jury's finding that the accident did not cause any injuries.

[60] This action did not, as the defendant suggests, involve inherently complex issues. Liability for the accident was admitted. While the evidence regarding causation was necessary, the issues involved were straightforward and of moderate complexity. I do agree that Dr. Soric's *viva voce* evidence was of assistance to the jury in understanding the issues.

[61] The plaintiff's insistence on examining the defendant notwithstanding the defendant's admission of liability was entirely reasonable and appropriate. The plaintiff is entitled to obtain the defendant's evidence regarding the damage to the vehicles as well as his observations of the plaintiff following the collision as it relates to the issue of the plaintiff's damages. In this case the defendant was called by defence counsel at trial and evidence on these very issues was led.

[62] In my view after considering this matter in its entirety, it cannot be said that there has been "any step in the proceeding" by the defendant that was "improper, vexatious or unnecessary" sufficient to depart from the general principle that a successful party is entitled to their costs.

[63] The defendant and his counsel took a consistent position throughout the litigation whereby they maintained at all times that they would not offer anything toward resolution other than what is in effect a dismissal of the action without costs. I disagree that the plaintiff's only recourse was to pursue a trial. There were choices. The plaintiff was well aware that the defendant would not be changing the position he had consistently maintained all along. The requests to admit did not change this.

[64] It was open to the plaintiff to either agree to a dismissal of the action without costs or proceed through trial with full knowledge that if it did not go well she could potentially be responsible for payment of not only her solicitor's costs and disbursements, but also the defendant's costs, depending on the result obtained at trial.

[65] While it was agreed and ordered that Dr. Soric's report would be read in and filed, the basis of that order was that there was some question regarding whether Dr. Soric would be available to testify. At trial I ruled that because Dr. Soric was available she could now give *viva voce* evidence in the normal course. In my view there was no prejudice to the plaintiff in proceeding in this fashion given that the plaintiff now had the right of cross examination as well as reply, if necessary.

[66] With respect, on the facts of this case, while it is clear the defendant was playing "hardball," I do not find that the defendant was in breach of s. 258.6(1) of the *Insurance Act*, *supra*. That section states as follows:

> A person making a claim for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile and an insurer that is defending an action in respect of the claim on behalf of an insured or that receives a notice under clause 258.3(1)(b) in respect of the claim shall, on the

> request of either of them, participate in a mediation of the claim in accordance with the procedures prescribed by the regulations. [Emphasis added.]

[67] The situation in this case is not analogous to the one in *Keam v. Caddey*, 2010 ONCA 565, 103 O.R. (3d) 626. In that case the defendant (insurer) refused to attend the mediation at all. Clearly if you do not attend you cannot participate.

[68] Here, the defendant (by his counsel) executed the mediation agreement, attended with full authority to settle, made an opening statement (consistent with the position maintained all along) and offered to settle the action by way of a dismissal not with, but rather without costs.

[69] In my view it cannot be said that the defendant failed to participate or meaningfully participate in the mediation on the basis that nothing other than a dismissal without costs was offered, which is in effect the offer contained in the defendant's offer to settle dated December 2, 2010. The defendant was entitled to maintain that position and would be ultimately bound by the same cost principles applicable to the plaintiff depending on the result at trial.

[70] Section 258.6(1) of the *Insurance Act* does not mandate that a certain sum of monetary compensation be offered at mediation in order to comply with the section. The section does require that the defendant attend at mediation and enter into meaningful discussions regarding the basis of their position on liability and damages. On the evidence before me, with respect it cannot be said that the mediation was a "sham," as the plaintiff contends.

[71] Under Rule 57.01(1)(i) I may consider "any other matter relevant to the question of costs." I agree with the plaintiff that her financial position is a factor which may be considered in determining costs. The plaintiff is receiving subsidized housing and child care. I do not accept the plaintiff's contention that she is an unsuspecting member of the public who would not have known of the potential negative cost consequences of a two week trial if she lost. This is especially so given that she was represented by experienced counsel.

Quantum of Costs

[72] Based on the evidence in this case and the application of the Rules and applicable caselaw there is not sufficient basis to depart from the principle that the successful defendant is entitled to its costs. However there is certainly no conduct on the part of the plaintiff which would justify that such costs be paid on an elevated level. The plaintiff is not, based on the result obtained and on consideration of the applicable principles, entitled to payment of her costs.

[73] Section 131 of the *Courts of Justice Act* affords discretion to determine the amount of costs to be paid.

[74] The overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 16.

[75] In *Haufler v. Hotel Riu Palace Cabo San Lucas*, 2014 ONSC 2686 at para. 11, Quigley J. confirmed the principle that courts increasingly recognize that an hourly costs approach to determining costs awards as against the losing party is a problematic element of litigation. See also *Brady v. Lamb*, 14 C.C.L.I. (4th) 285, 2004 CanLII 27491 (Ont. S.C.) at para. 29.

[76] This concern was aptly expressed in *Independent Multi-Funds Inc. v. Bank of Nova Scotia*, 2004 CanLII 18796 at para. 23:

> As between a lawyer and a client, this approach may be acceptable; certainly it is now almost universal, but the client, unlike the opposite party, has the option of seeking a less expensive lawyer. Combined with our system of requiring the loser to pay costs to the winner, measured by what the winner has spent, this approach is proving an enormous obstacle to access to justice in our courts. What middle class person would dream of financing an action, however meritorious, against an opponent capable of spending the sums illustrated by the Bill of Costs of the Bank, when the penalty for losing is financial disaster? It is time for this ruinous system to be revisited. Many jurisdictions do without costs altogether. Perhaps Ontario should join them. As a start, we could stop measuring costs by what the winner has spent, and move to a predictable fixed fee system.

[77] In accordance with the principles outlined above, I do not intend to engage in a purely mathematical exercise of reviewing the time dockets provided. My role is to fix a reasonable amount to be paid by the unsuccessful party rather than conduct an exact mathematical calculation of the actual costs of the successful litigant.

[78] While the rate charged per hour is an appropriate consideration, it is subject to the overriding principle of reasonableness as applied to the factual matrix of this particular case, set out above.

[79] This was a straightforward case of moderate complexity. Liability was admitted. I have reviewed the defendant's cost outline. The defendant was entitled to have two counsel present at trial. However, a review of the costs outline indicates that there is some duplication of effort and excessive hours.

[80] The defendant has requested fees on a partial indemnity basis in the sum of $64,980.65 inclusive of HST. In applying the applicable legal principles to the facts of this case I award fees on a partial indemnity basis in the all-inclusive sum of $39,950.

[81] The defendant claims disbursements in the sum of $45,391.07 inclusive of HST. The defendant is not entitled to the sum of $60 for a trial room key, $6,513 paid to a Jack Stewart or $630 for an audio visual rental given that surveillance was not put before the jury.

[82] Pursuant to O. Reg. 461/96, s. 3(6) the defendant's insurer shall pay all reasonable fees and expenses of the mediator in motor vehicle cases in which the provisions of the *Insurance Act* and regulations apply. Here the plaintiff paid half the cost of the mediation in the sum of $2,922.71. This amount is to be deducted from the defendant's bill of costs.

[83] I therefore award the all-inclusive sum of $35,265.36 for disbursements.

[84] Costs are fixed in the sum of $75,215.36 inclusive of fees, disbursements, and HST payable by the plaintiff to the defendant. The plaintiff is given six months from the date of this order to pay these costs.

Firestone J.

Date: December 19, 2014