CITATION: Persampieri v. Hobbs, 2018 ONSC 368
COURT FILE NO.: CV-11-423627
DATE: 20180122

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Maria Persampieri, Plaintiff

AND:

George Hobbs, Dover Industries Ltd. and Roberto Persampieri, Defendants

BEFORE: Justice Sanderson

COUNSEL: *George Bekiaris*, for the Plaintiff

Siobhan L. McClelland, for the Defendants George Hobbs and Dover Industries Ltd.

HEARD: In Writing

COSTS ENDORSEMENT

Introduction and Background

[1] This endorsement relates to costs of an action for injuries received by the 84 year old Plaintiff while a passenger in a motor vehicle that was hit from behind by the Defendant vehicle on February 11, 2009.

[2] For costs, the Plaintiff claims total fees and disbursements, inclusive of HST of $268,070.29, including fees and disbursements on a partial indemnity scale to May 15, 2017, the date of the Plaintiff's successful Rule 49 offer, and fees and disbursements on a substantial indemnity scale thereafter.

History of the Litigation

[3] In her Statement of Claim, the Plaintiff initially claimed $1,000,000.

[4] Shortly after the Statement of Defence was served, counsel for the Defendants advised counsel for the Plaintiff that the Defendants' insurer, Aviva Canada, "the insurer or Aviva" was not prepared to pay any tort damages and that it would not be making any offer to the Plaintiff in the tort action.

[5] Counsel for the Plaintiff submitted as follows: "The original counsel of the Defendants advised Plaintiff's counsel as soon as she had served and filed the Statement of Defence, that her client (the insurer for the Defendant Aviva Canada) had an internal system of assessing motor vehicle accident claims and that its assessment concluded that it would not be willing to offer even $1.00…She further advised that once this internal decision had been made, nothing could

be done to alter it. Throughout...the action, the defendants were represented by a number of...solicitors. Every one...conveyed the message...that only two options were available... to accept $0.00 for a dismissal of the action on a without costs basis or to proceed to trial..."

[6] In his costs submissions, Counsel for the Plaintiff advised this Court that the Defendant Aviva never wavered from that position at any time prior to the rendering of the jury's verdict.

[7] Prior to the trial, counsel for the Defendants made it clear that unless the Plaintiff agreed to a dismissal of her action, she would face vigorous opposition from the Defendants at a trial and that, among other arguments, they would be submitting that the Plaintiff's injuries would not meet the statutory threshold test under s. 267.5(5) of *the Insurance Act*.

[8] On September 17, 2013 the Defendants served their first Offer to Settle- in exchange for a dismissal of the Plaintiff's action and any cross claim, they would not to pursue costs against the Plaintiff.

[9] At the mandatory mediation held on January 13, 2015, the Defendants, including Hobbs and Dover Industries agreed to admit liability. In return, the Plaintiff agreed to limit her claim against them to their remaining policy limits after disbursement of amounts the Defendants had already agreed to pay to the Plaintiff's son, another passenger in the same vehicle on February 11, 2009, to settle his companion action.

[10] The Defendants served a Rule 49 Offer to Settle on November 25, 2016 - to consent to an order dismissing the action without costs. That Offer remained open until the commencement of trial.

[11] The pretrial took place in February 2017.

[12] By March 21, 2017 the Plaintiff had served a Rule 49 Offer to Settle her action for damages of $20,000 plus partial indemnity fees plus disbursements. The Offer further provided that no prejudgment interest would be payable.

[13] On May 15, 2017 about two weeks before the commencement of the trial, that Offer was withdrawn, in effect, when Counsel for the Plaintiff served a further Rule 49 Offer to accept damages of $10,000, without pre judgment interest, "for all general and special damages combined net of the applicable statutory deductible plus partial indemnity costs."

[14] Counsel for the Plaintiff submitted that, given the position taken by the Defendants on the Plaintiff's credibility, the threshold and other matters, including on preexisting disabilities, the Defendants understood when they rejected the Plaintiff's May 15, 2017 Rule 49 Offer, that if the Plaintiff elected to proceed to a trial, it would be lengthy and expensive.

[15] Given the legal positions the Defendants were taking, the parties all understood that to possibly succeed at trial, Plaintiff's counsel would need to call sufficient medical and other evidence to convince a jury that her injuries had been caused by the accident, that they were real, to prove the quantum of her damages and to satisfy this Court that the threshold had been met.

[16] The Plaintiff chose to proceed to trial.

[17] Counsel for the Plaintiff submitted that although she had adverse costs protection in place that would have potentially funded up to $50,000 of her own disbursements and costs awarded against her, she risked personal exposure to costs beyond that amount.

[18] Her counsel submitted that that risk caused her significant stress, because at 84, she would "not have been able to recover from a negative result at trial."

[19] The trial before a jury proceeded before me from May 29 to June 15, 2017.

[20] Throughout, the Defendants mounted a vigorous defence.

[21] At the outset, their counsel brought a summary judgment motion on a limitations issue.

[22] Counsel for the Plaintiff was successful in obtaining an order dismissing that motion.

[23] During the trial of the substantive issues, counsel for the Plaintiff predictably, and in my view reasonably, called extensive lay, medical and future cost of care evidence.

[24] After the jury charge, I heard and dismissed the Defendants' threshold motion.

[25] Members of the jury rendered their verdict on June 15, 2017.

[26] They awarded the Plaintiff $40,000 for general damages, $25,000 for housekeeping and home maintenance, $2,000 for attendant care, and $500 for medical and rehabilitation expenses.

[27] After the verdict, I agreed to receive written submissions on the deductions to be made from the jury award as well as on costs.

[28] Counsel for the Plaintiff provided written submissions on those issues during the summer and in October of 2017.

[29] Counsel for the Defendants provided written submissions during November of 2017.

Ruling on Deductions to be made to the Jury Award

[30] In the interim between the submissions of counsel, in September of 2017, the Ontario Court of Appeal clarified the approach to be followed in calculating the net quantum of awards in *Cobb v Long Estate,* [2017] OJ No. 4830 and in *Elkhodr v Lackie* 2017 ONCA 716.

[31] As a result, counsel for the parties were able to agree that after application of statutory deductibles and deductions for accident benefits, the net Jury award is $20,414.83, calculated as follows:

> $2,614.83 for general damages (net of the deductible),
>
> $15,800 for housekeeping and home maintenance damages (net of housekeeping benefits received)
>
> $0 for caregiving,

$2,000 for attendant care damages,

$0 for out of pocket expenses,

$0 for medical and rehabilitation benefits (net of medical rehabilitation benefits.)

Ruling on Costs

[32] What remains is for this Court to fix the Costs.

Principles and Rules to be Applied in Fixing Costs

[33] While the parties generally agree that this Court can and should exercise its discretion here under Section 131(1) of the *Courts of Justice Act* in light of the specific facts and circumstances, and that, in so doing , the quantum of the Costs awarded should be fair and reasonable, [rather than an exact measure of the actual costs of the successful litigant, *Zesta Engineering Ltd v Cloutier* (2002), 119 ACWS (3d) 341 at para 4,] and that this Court should consider the factors set out in Rule 57 and the case law, they differ as to how this Court should apply those factors in all the circumstances of this case.

The Scale of Costs

[34] Counsel for the Defendants conceded that even after the adjustments to the jury award set out above have been made, the net jury award the Plaintiff obtained at trial was more favourable to the Plaintiff than her May 15, 2017 Offer to Settle. In colloquial terms, the Plaintiff beat her May 15, 2017 Offer.

[35] Counsel for the Plaintiff submitted that as a result, this Court should apply the usual cost consequences set out in Rule 49.01(1).

[36] After May 15, 2017 [the date of the Plaintiff's successful Rule 49 Offer to Settle for $10,000 damages plus costs was made], the Defendants understood that if they did not accept it and if the net jury award was higher, unless the Court ordered otherwise, pursuant to Rule 49.1.0(1), the usual costs order would be that the Plaintiff would receive partial indemnity costs to May 15, 2017 and substantial indemnity costs thereafter.

[37] Counsel for the Plaintiff submitted: "Notwithstanding the Defendants' and Aviva Canada's uncompromising refusal to engage in good faith settlement talks, she was always willing to discuss resolution. The Plaintiff made two extremely reasonable Rule 49 Offers in an attempt to resolve this action and avoid an unnecessary trial. The jury awarded the Plaintiff a damages amount that exceeded both of her Rule 49 offers. Furthermore, the jury award was more than double the amount of the Plaintiff's Rule 49 Offer."

[38] He also submitted that while the Defendants were entitled to adopt the litigation strategy they did, and to "play hardball", they appreciated the obvious risks of so doing. They must now bear the foreseeable costs consequences thereof.

[39] The Defendants knew that they could avoid the obvious risk of paying substantial indemnity costs of a lengthy and expensive trial by accepting the Plaintiff's offer of $10,000 plus costs.

[40] The Defendants understood, given their position on the Plaintiff's credibility, the threshold and other matters, including that the accident had not caused many of her ongoing disabilities, that if the Plaintiff beat her own Rule 49 Offer to Settle, the Court would likely order them to pay the substantial indemnity costs of a lengthy and expensive trial.

Ruling on the Scale of Costs

[41] I accept the Plaintiff's submissions on the appropriate scale of costs here.

[42] I see no reason in all the circumstances here to depart from the usual cost consequences under Rule 49.01(1).

[43] I specifically decline to "order otherwise."

[44] The Plaintiff is entitled to her costs on the partial indemnity scale to May 15, 2017, the date of the plaintiff's Rule 49 offer, and to her costs on the substantial indemnity scale thereafter.

Fixing of Costs-Analysis and Quantification

[45] In addition to Rule 49, in fixing these costs, I have also given much consideration to the submissions of counsel on reasonableness and proportionality, as well as the other factors set out in Rule 57.

[46] Counsel for the Defendants submitted that despite the usual cost consequences under Rule 49.01(1), the quantum of costs she is seeking here, as set out in her Bill of Costs, is unreasonable.

[47] The partial and substantial indemnity costs awarded here should be proportional to the net award.

[48] The costs she is seeking are all out of proportion to the amount recovered and for that reason should be reduced.

[49] Counsel for the Plaintiffs submitted that the Plaintiff should receive all reasonable costs of the trial necessitated by the litigation position taken by the Defendants.

[50] For this Court to let proportionality be the overriding, or even the predominant factor, would be grossly unfair to the Plaintiff and would be to reward the uncompromising, and, (in the light of the jury verdict) unreasonable behaviour of the insurer.

[51] In making the submission that the costs award should be proportional to the amount awarded, Counsel for the Defendants relied on *Burhoe v Mohammed,* [2012] OJ No. 3160 CA and *Dennie v Hamilton* (2008), 89 OR (3d) 542, *Elbakhiet v Palmer* (2004), 121 OR (3d) *616,*

Patene Building Supplies LTD v Niagara Home Builders, [2010] OJ 535, *Moyer v Vanderwere,* [2016] OJ 6090.

[52] In *Burthoe,* the Ontario Court of Appeal considered a costs award of $196,000 after a jury award of $65,000 was reduced by a $15,000 deductible. The Court of Appeal reduced the costs award to $166,695.

[53] I note that case did not involve a successful Plaintiff's Rule 49 Offer to Settle. In that case, the costs consequences under Rule 49.01(1) were never under consideration.

[54] *In Dennie,* the Court allowed costs of $196,255.12 on a partial indemnity scale after a jury had awarded damages of $40,000.

[55] Again, in *Dennie*, the costs consequences of Rule 49.01(1) were not under consideration.

[56] In *Elbakiet*, the Ontario Court of Appeal held that a costs award of $580,000 was not reasonable where there had been an offer to settle that, although not technically Rule 49 compliant should have been given considerable weight by the trial judge and where a jury had awarded damages of $144,013.17. On those facts, the Court of Appeal reduced the costs award to $100,000.

[57] None of the authorities cited by Counsel for the Defendant and listed in paragraph 51 above dealt squarely with the application of the proportionality factor as it applies to costs awards, where Rule 49.01(1) has been applied after a Plaintiff has beaten her own Rule 49 Offer to Settle.

[58] In *Cobb, supra,* the trial judge, on what he calculated was a net judgment of $34000 awarded costs on a partial indemnity scale to the Plaintiff of $409,098.48. The Ontario Court of Appeal, on the basis of calculations it made using different deductibles than the trial judge had used, calculated the net award at $22,136.60.

[59] The Defendants had offered to settle for $40,000 plus prejudgment interest and costs.

[60] After taking into account the statutory deductibles, the Court of Appeal concluded that the **Defendant** had made a successful Rule 49.10(2) offer.

[61] The Court of Appeal noted that ordinarily, the Plaintiffs would be entitled to partial indemnity costs only to the date of the defendants offer and the Defendant would have its costs on a partial indemnity basis thereafter.

[62] However, as the Defendant had advised that Court that it would be content with an order that each party bear its own costs, the Court of Appeal so ordered.

[63] In *Cobb,* the Court noted at paragraph 157: "Although the case took some 19 days to try, any costs award must reflect the reality that the final judgment after this Court's correction of the legal errors was for only $22,136.30."

[64] It noted that the amount of the jury verdict remaining after all relevant deductions was the relevant one for costs assessment purposes.

[65] The Court wrote at paragraph 159: "On any proportional basis, the plaintiff's costs, even taking the defence offer out of the equation for the moment, could not have been expected to exceed approximately $200,000, given the results achieved."

[66] In saying that on a net judgment of $22,136.30 a costs award on a partial indemnity scale should not have exceeded $200,000, the Court of Appeal appeared to have been providing guidance to the effect that a costs award on a partial indemnity scale should not exceed 9.035 times the amount of the net Judgment.

[67] In *Corbett v Odorico* 2016 ONSC 2961, after a six week trial, the jury awarded $141,500 before deduction of statutory deductions and collateral benefits. The net award was $108,500.

[68] Neither party beat its own offer to settle.

[69] The Plaintiff claimed $159,249.90 in fees on a partial indemnity basis and $242,521.50 in fees on a substantial indemnity basis.

[70] Hackland J rejected the submission of counsel for the Defendant on proportionality.

[71] He held that to over emphasize proportionality could result in under compensation of the Plaintiffs .It would be an injustice to the Plaintiffs to deprive them of otherwise appropriate and reasonable costs because of a modest recovery at trial in the face of a $7.00 settlement offer from the Defendant.

[72] Hackland J awarded the Plaintiffs costs as follows: fees of $159,249.90, HST of $20,702.48 and disbursements of $89,347.

[73] He noted at paragraph 19 that the offer "presented the plaintiff with the proposition that, on the eve of trial, she should walk away from her case with no compensation, or proceed through trial."

[74] He commented that to impose a rule arbitrarily limiting the amount of costs to some proportion of the recovery, where there has been no offer of settlement, or only a nominal offer [as there was in *Corbett]* would undermine the purpose of Rule 49, which is to encourage settlement by attaching costs consequences for failure to make or accept reasonable offers. It would also encourage the type of "hard ball" approach to settlement that the Defendant had taken.

[75] He held that the amount of partial indemnity fees sought by the Plaintiff of $159,249, [if not higher], was readily foreseeable to a defendant that chose to make no genuine Rule 49 offer, thereby compelling the plaintiffs to take their claim through trial.

[76] The applicability of the proportionality doctrine has also been considered in a number of cases where Plaintiffs have made successful Rule 49 offers and the usual costs consequences have been applied under Rule 49.01(1).

[77] In *A and A Steelseal Waterproofing Inc v Kalovski* 2010 ONSC 2652 (Can LII) Daley J awarded costs to a Plaintiff of $41,661.47 under Rule 49.01(1) where the Plaintiff had beat its Offer to Settle.

[78] In that case, judgment had been granted in the amount of $10,000.

[79] Daley J expressed the view at paragraph 21 that while costs must be reasonable, the mere fact that costs exceeded damages would not render a costs award inappropriate.

[80] He noted that counsel for the Defendant knew that a costs award of the magnitude he was being asked to make was a risk of defending the claim in the manner that it did.

[81] He agreed with Lane J in *163972 Canada Inc v Isacco,* [1997] OJ No 838 that to reduce the plaintiff's otherwise reasonable costs because of proportionality concerns would encourage the kind of intransigence displayed by the defendants in that case.

[82] In *Aaccurate v Tarasco* 2015 ONSC 5980, McCarthy J expressed the view that an over emphasis on proportionality could serve to under compensate a plaintiff for costs legitimately incurred.

[83] He also commented that a pattern of such outcomes would result in an unintended but nonetheless real denial of access to justice; it would send a message to plaintiffs that it is not worthwhile to pursue legitimate claims in court because one cannot possibly make it cost effective to do so. This would be a denial of justice in the most fundamental sense. It would tend to encourage those resisting legitimate but modest claims to take unreasonable positions.

[84] In *Valentine v Rodriguez-Elizalde,* [2016] OJ 5353, even after a jury award of $95,222.83 had been reduced to a net award of $54,684.17 plus interest [by reason of benefits received and a successful threshold argument] the Plaintiff had beaten her own Rule 49 Offer to Settle of $5,000 for special damages, $0 for general damages plus prejudgment interest, costs and disbursements.

[85] Firestone J applied Rule 49.01(1) in the usual way, fixed the Plaintiff's partial indemnity fees at $26,000 inclusive of HST, and, her substantial indemnity fees at $115000 inclusive of HST and disbursements of $31,000 inclusive of HST.

[86] Firestone J noted that based on the jury's verdict the Plaintiff had been successful at trial.

[87] He observed that the Defendant had understood the risks of having to pay substantial indemnity costs of the trial, yet had maintained its position.

[88] Firestone J wrote at para 49 "...The defendant through his insurer played hardball. This was evident from the timing and contents of the various offers to settle made. The defendant was entitled to make the offers reflective of and based on their assessment of the case with full knowledge that if the plaintiff was successful at trial he could be obligated to pay substantial indemnity costs in accordance with Rule 49.10."

[89] Firestone J wrote at para 50:... para 51 "To use the words of the Court of Appeal in *Ross v Bacchus* 2015 ONCA 347,...at para 51 "When an insurer rejects a plaintiffs offer and proceeds

to trial, the insurer risks both a higher damage award at trial and the imposition of substantial indemnity costs after the date of the rejected offer. Both risks came to pass in this case."

[90] Firestone J accepted the submission of counsel for the Plaintiff that if the court were to apply proportionality as the Defendant was seeking, that would serve to under-compensate the Plaintiff for costs legitimately incurred.

[91] He wrote at para 66: "...I agree with the Plaintiff's submissions that the Plaintiff should not be undercompensated for costs which were legitimately incurred see *Gardiner v MacDonald* 2016 ONSC 2770 at para 18; *Accurate v Trasco* 2015 ONSC 5980 and *Interborough Electric Inc* v *724Ruling351 Ontario Ltd* 2016 ONSC 1115 at para 57."

[92] He held that that the fact that disbursements were near to the judgment amount was irrelevant, because they had all been legitimately incurred, and had been necessary to prove the claim.

Ruling On Reasonableness and Proportionality

[93] In my view, it is important to recognize that the legislature [or its delegate], by imposing stiffer costs consequences on Defendants where Plaintiffs have beat their own Offers to Settle than it has imposed on Plaintiffs where Defendants have beat their own Offers to Settle has signaled an intention to give greater costs protections to Plaintiffs than to Defendants.

[94] A strict application of the proportionality principle in awarding costs to a Plaintiff who has obtained an order under Rule 49.01(1) for costs on a substantial indemnity basis, would be to deprive that plaintiff of that greater protection.

[95] Like Firestone J, in *Valentine,* and the other Courts to which I have earlier alluded in this endorsement, I am of the view that to unduly shave Plaintiff's costs, especially substantial indemnity costs ordered under Rule 49.01(1), based solely or primarily on an undue emphasis on the application of the proportionality factor (reasonableness of costs ordered relative to the amount awarded) would be unfair, especially in all of the circumstances here.

[96] The proportionality principle is generally invoked to foster access to justice.

[97] However a strict application of the proportionality principle here could work against the achievement of that goal and could have the opposite effect.

[98] Here, the party invoking the proportionality principle and thereby seeking to minimize the effects of a usual order for costs under Rule 49.01(1) is a sophisticated insurer that made a tactical decision to reject a Plaintiff's formal Rule 49 Offer to Settle understanding the risk in costs that it was taking by so doing.

[99] Because it had framed its defence in the manner that it had, it knew that the resolution of the issues at a trial would involve the hearing of lengthy and costly evidence, including extensive medical evidence.

[100] Sanctioning insurers' litigation strategies involving:

(1) discouraging Plaintiffs from pursuing legitimate but modest claims by refusing to make any meaningful offer to pay damages and forcing those Plaintiffs to trial in circumstances where, because of defences the insurers have asserted, they cannot possibly be successful unless they call expensive medical and other evidence;

(2) then, raising the spectre of very serious adverse cost consequences of such trials;

(3) then, even after Plaintiffs have chosen to take the serious adverse costs risks of such trials, and even after they have been successful at trial and have received costs awards under Rule 49.01(1) on a substantial indemnity scale;

(4) attempting to unduly minimize the quantum of otherwise usual amounts of costs including substantial indemnity costs on the basis of proportionality,

would be, in my view, to sanction under compensation of Plaintiffs for costs legitimately incurred to make many lawsuits uneconomic and could generally discourage Plaintiffs with modest claims, even if valid from pursuing them.

[101] If pursuing such an approach or strategy were to have the effect of generally discouraging Plaintiffs from bringing and pursuing modest sized claims, [even in cases such as here where liability has been admitted] the benefits to insurers could be significant and wide ranging.

[102] If insurers were incentivized to pursue such a strategy and to generally resist settlement of such cases, in order to generally discourage such Plaintiffs from pursuing such actions, that could seriously jeopardize overall access to justice.

[103] Insurers can, of course, pursue whatever strategy options they deem fit, but especially where such strategies may have wide ranging and adverse implications involving widespread denial of access to justice, the use such strategies should not be encouraged by the giving of cost breaks on foreseeable costs consequences .

[104] The insurer here rejected a Plaintiff's offer that would have made it possible for it to pay minimal damages.

[105] I have already alluded to the submission of Counsel for the Plaintiff that the insurer here made the decision early in this litigation not to pay any tort damages and that once made, that decision was unalterable [apparently regardless of any information received and/or of any advice given to the insurer by defence counsel later in the litigation, including advice given after further production, mediation and discovery.]

[106] Adoption of such an unalterable decision making process would render meaningless and make a mockery of the pretrial resolution process, aimed as it is, at encouraging and effecting settlement to avoid unnecessary trials.

[107] To sanction such a process would be to undermine those policy objectives.

[108] Total unwillingness to reassess/discuss settlement based on full information and advice should not be sanctioned or encouraged in any way, [including by sheltering insurers from the foreseeable costs consequences of such a decision, should it fail to yield a result favourable to an insurer in a particular case].

Fixing the Plaintiff's Partial Indemnity Fees to the Date of the Offer May 15, 2017

[109] On a partial indemnity basis, Counsel for the Plaintiff, Mr Bekiaris, who was called to the bar in 2007, seeks $300 per hour for his time.

[110] On a partial indemnity basis, up to the date of the successful Rule 49 offer, the Plaintiff claims partial indemnity fees of $61,440, for the time of Mr Bekiaris and a law clerk as follows: $1,800 for 6 hours, pre pleadings, $1,200 for 4 hours, for pleadings, $900 for 3 hours, for preliminary motions, $4,500 for 15 hours plus 20 hours of law clerk time, $1,600 for the Affidavit of Documents, $6,750 for 22.5 hours plus $1,360 for 14 hours of law clerk time for discoveries, 26.5 hours $7,950 plus 6 hours $480 for law clerk time post discovery review of discovery evidence, mediation 27 hours $8100 plus $160 for 2 hours law clerk time, pretrial 18.5 hours $5,550 plus 3.5 hours of law clerk time.

[111] Counsel for the Defendants submitted that the Plaintiff's claim for partial indemnity costs before May 15, 2017 [when the Rule 49 Offer was made] is excessive.

[112] She submitted that this Court should conclude that the overall time spent was excessive in light of the not particularly complex subject matter and of the Defendants' admission of liability.

[113] Counsel for the Defendant submitted, for example, that the 27 hours claimed for the mediation was excessive, as was the 22.5 hours plus 14 law clerk hours claimed for a pre-trial that lasted about 2 hours.

[114] While this Court is not required to analyze every docket, I have generally reviewed the number of hour and rates claimed, having regard to the factors under Rule 57 and the caselaw.

[115] The amount awarded for fees on a partial indemnity scale must be reasonable.

[116] The plaintiff should be compensated for necessary and reasonable costs on a partial indemnity basis.

[117] I have noted that liability was admitted at the mediation on January 13, 2015.

[118] I have noted that while extensive *viva voce* evidence was needed to meet the issues raised by the Defence, the issues to be addressed were not otherwise unusually complex.

[119] I have accepted the submission of counsel for the Defendant, that the 27 hours of time spent for 1 day mediation and 22.5 hours for the pretrial were excessive.

[120] I am of the view that $40,500 plus HST of $5,265 is reasonable for fees on a partial indemnity scale to the date of the successful Rule 49 Offer to Settle.

Partial Indemnity Disbursements

[121] Counsel for the Plaintiff seeks $16,764.48 plus HST for disbursements incurred before May 2017 when her Offer to Settle was made.

[122] Counsel for the Plaintiff submitted that disbursements awarded will be based on what a Court deems as reasonable *Voka Steel Inc v Edgecon Construction et al,* [2011] ONSC 3231(CanLII) at paragraph 30.

[123] In *Valentine,* Firestone J wrote that the fact that disbursements were near to the judgment amount was irrelevant, because they had all been legitimately incurred and had been necessary to prove the claim.

[124] On the Bill of Costs here there are a number of items that I am not prepared to allow, including taxi fare for the Plaintiff and parking and travel fees.

[125] Given that the Defendants prepared the Joint Briefs, I am of the view that the photocopying expenses are excessive. The courier expenses claimed are not allowable.

[126] I allow partial indemnity disbursements of $15,000 plus HST of $1,950.

[127] Total partial indemnity fees, disbursements and HST are $62,715.

Substantial Indemnity Costs

[128] Counsel for the Plaintiff submitted that where the legislature has provided for costs to be awarded on substantial indemnity scale, those costs are intended to provide almost complete indemnification for all costs (fees and disbursements) reasonably incurred in the course of prosecuting or defending the action or proceeding.

[129] He cited *Apotex v. Egis Pharmaceuticals,* [1991] Can LII 2729 at page 5. Where the award specifies the solicitor and client scale, the judge's function is to achieve full indemnity for the party for his solicitor's bill except for "extra" charges beyond the reasonable scope of the litigation and the preparation and presentation of the client's case.

[130] Newbould J noted in *Stetson Oil v Stifel Nicolous Canada Inc* 2013 ONSC 5213, that a fair and reasonable assessment of partial indemnity costs would be 60% of actual costs and substantial indemnity would be 90% of actual costs.

Ruling on Substantial Indemnity Costs

[131] Substantial indemnity costs are usually about 1.5 times partial indemnity costs.

[132] I have noted that in *Cobb,* the Ontario Court of Appeal indicated that where the net award was $20,414.83 one would not expect partial indemnity costs payable by a defendant to a plaintiff to exceed $200,000. In effect, I interpret the Court of Appeal to be directing that partial indemnity costs payable to a plaintiff should not exceed 9.035 times the net award ($200,000 ÷ $20,414.83 = 9.035).

[133] If substantial indemnity costs are to be affected at all by the doctrine of proportionality, the guidance provided in *Cobb* would indicate a notional upper limit for substantial indemnity costs of 9.035 x 1.5= or 13.5525 times the net amount awarded.

[134] 13.5525 times $20,414.83, the net amount awarded here, would be $276,671.98.

[135] If all the costs in this case had been ordered on a substantial indemnity basis that would indicate a notional upper limit of $276,671.98.

[136] The order I have made under Rule 49.01(1) here of course is for costs on a partial indemnity scale to May 15, 2017 and substantial indemnity scale thereafter.

Substantial Indemnity Fees

[137] Mr Bekiaris on behalf of the Plaintiff is seeking substantial indemnity fees of $159,700 including $29,000 for trial preparation including fees for 73 Hours of his own time, [at $400 per hour], plus 44.5 hours for Ms Qin, an associate lawyer called to the bar in 2013, [at $300 per hour] = $13,350, plus 12 hours for Mr Brar, called to the bar in 2016 [at $200 per hour] = $2,400, for a total of $44,750 for trial preparation.

[138] For the trial, Mr Bekiaris seeks fees of $58,800 for 145 hours of his own time, $31,650 for 105.5 hours of Ms Qin's time plus $18,800 for 94 hours of Mr Brar's time = $109,950 for the trial

[139] Post-trial, Mr Bekiaris seeks fees of $5,000 for 12.5 hours of his own time.

[140] I have accepted the submission of Counsel for the Defendants that even on a Substantial Indemnity basis, substantial indemnity costs allowed must be reasonable substantial indemnity costs.

[141] The Defendants should not be required to pay for over lawyering by the Plaintiff.

[142] I am of the view that during trial preparation it was reasonable to have 3 lawyers preparing for trial so long as each lawyer's work and number of hours reflected his or her level of experience, was reasonable given the task undertaken, and was not duplicative.

[143] I fix trial preparation fees at $42,000.

[144] For the trial, Counsel for the Plaintiff has claimed for 145 hours of Mr Bekiaris' time, 105.5 hours of Ms Qin's time and 94 hours of Mr Brar's time.

[145] Counsel for the Defendants has submitted that it was not reasonable for the Plaintiff to have had three gowned lawyers at the trial.

[146] At trial, the Defendants had a lawyer and an articling student.

[147] In my view, even on a substantial indemnity basis, it was not reasonable for the Plaintiffs to have had 3 lawyers present for most of the trial.

[148] Counsel for the Defendants submitted the hourly rates mentioned in the Bill of Costs were excessive.

[149] She submitted that her hourly rate [she is a 2004 call] was $265 and that of the articling student who attended the trial with her was $145.

[150] I fix substantial indemnity fees of the trial at $87,500

[151] Post-trial I fix substantial indemnity fees of $4,500.

[152] I fix total substantial indemnity fees of $134,000 plus HST.

Substantial Indemnity Disbursements

[153] For substantial indemnity disbursements, counsel for the Plaintiff claims $22,131.74 plus HST.

[154] Again, as Firestone J made clear in *Valentine*, substantial indemnity disbursements must be reasonable.

[155] I do not allow parking, travel expense or taxi fares. In my view, the Defendants should not be required to pay all of the photocopying charge claimed.

[156] I allow substantial indemnity disbursements of $20,250 plus HST of $2,632.50.

[157] Total substantial indemnity fees and disbursements are $154,250 plus HST of $20,052.50 = $174,302.50.

[158] The total of partial and substantial indemnity costs is $62,715 plus $174,302.50 = $237,017.50.

The Jurisdictional Issue

[159] Counsel for the Defendants submitted that since the net award was less than $25,000, and as the Plaintiff's action was commenced and continued under the ordinary procedure, the Plaintiff should in effect be penalized in costs for failing to bring her action in the Small Claims Court or under the Simplified Procedure.

[160] I do not accept that submission.

[161] When this lawsuit was commenced and until after the completion of the trial, the law on the deductibility of benefits was unclear, making unclear the net amounts Plaintiffs could expect to recover in tort litigation.

[162] More importantly given the issues in this case and the evidence needed to meet the defences mounted by the Defendants, and given their challenge of the credibility of the Plaintiff, use of the Small Claims Court Procedure or the procedures under the Simplified Rules would not have been practicable.

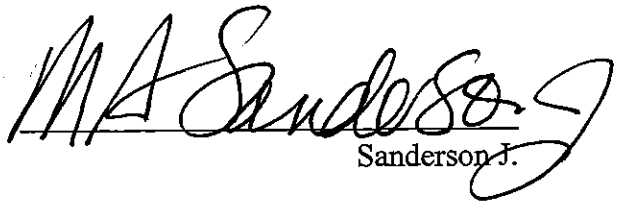
[163] The resolution of the issues here required a full trial with viva voce evidence in chief and cross examination.

[164] Like Mew J in *Tossonian v Cynphany Diamonds* 2015 ONSC 766 where a plaintiff received $13,520 in a wrongful dismissal action, and where Mew J ordered the defendant to pay the Plaintiff $86,450.98 to the Plaintiff in costs, I am of the view that it was not unreasonable for the Plaintiff here to commence her action in the Superior Court.

Disposition - Total Costs Order

[165] The total is $237,017.50, an amount I interpret to be within the guidelines set by the Ontario Court of Appeal in *Cobb*.

[166] In all the circumstances here, I order the Defendants to pay costs of $237,017.50 to the Plaintiff.



Sanderson J.

Date: January 22, 2018