

CITATION: Basandra v. Sforza, 2015 ONSC 5059
COURT FILE NO.: 09-CV-369827
DATE: 20150811

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Subash Basandra, Plaintiff

AND: Guisppe Sforza, Defendant

BEFORE: Justice Matheson

COUNSEL: *Gary Mazin*, for the Plaintiff

K. Bruce B. Chambers, for the Defendant

HEARD: August 10, 2015

COSTS ENDORSEMENT

[1] This endorsement addresses costs arising from an approximately three-week jury trial. The plaintiff was seriously injured in a motor vehicle accident in 2007. He was driving north on Don Mills Road in Toronto, and the defendant was driving south on Don Mills Road. As found by the jury, the defendant did not appropriately observe weather and road conditions. He lost control of his car, which crossed the center line into oncoming traffic.

[2] The collision that followed caused the plaintiff a left hip fracture/dislocation with multiple breaks for which he had surgery, a left knee fracture with multiple breaks for which he had surgery and a right knee contusion with fracture, among other injuries. In hospital, after surgery, the plaintiff developed deep vein thrombosis and pulmonary embolism, but he survived. After a lengthy period in hospital and despite significant rehabilitation efforts, the plaintiff was seriously and permanently impaired. The threshold was not contested. The plaintiff suffered permanent serious impairment of an important physical, mental or psychological function, as found by me at the conclusion of the trial.

[3] By verdict reached on February 26, 2015, the jury found that the defendant was negligent and awarded the plaintiff damages. After deductions for collateral benefits, the plaintiff was awarded \$182,000 in damages, on which substantial amounts are also owing to the plaintiff for prejudgment interest.

[4] Since the plaintiff prevailed at trial, the defendant concedes that the plaintiff is entitled to his partial indemnity costs. However, the quantum is the subject of significant dispute.

[5] The plaintiff seeks either substantial indemnity costs of approximately \$547,000 or partial indemnity costs of approximately \$417,000. These amounts include approximately \$124,000 of disbursements, as well as costs of prior counsel. HST is only included with respect to the costs of prior counsel.

[6] The defendant submits that costs should be fixed at \$100,000 for fees, \$50,000 for disbursements, and applicable tax.

[7] The general principles applicable to costs are not disputed. Costs are discretionary. Rule 57.01 of the *Rules of Civil Procedure* sets out factors I may consider in exercising my discretion, in addition to the result of the proceeding and any written offers to settle. Overall, the objective is to fix an amount that is fair and reasonable, having regard for, among other things, the expectations of the parties concerning the quantum of costs: *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634, 71 O.R. (3d) 291 (C.A.) at paras. 26, 38.

[8] The plaintiff has submitted one offer to settle. Plaintiff's counsel concedes that the plaintiff did not beat that offer at trial, but submits that it was reasonable in all the circumstances. It does not justify substantial indemnity costs.

[9] The plaintiff also seeks substantial indemnity costs based on various of the factors under Rule 57.01. I agree that those factors are relevant to my cost determination, and they are referred to below, but I do not conclude that they justify costs on a substantial indemnity basis.

[10] I have considered all of the submissions in the exercise of my discretion, as well as the detailed information regarding the plaintiff's costs submitted in his costs outline. Without limiting the scope of my consideration, the following are the main relevant factors in my view:

- (i) this was a very important claim for the plaintiff, who was seriously and permanently impaired as result of the accident;
- (ii) although for the most part the trial was conducted cooperatively and efficiently, the defendant did persist in some areas that elongated the trial, based on evidence that was, to say the least, insufficient, especially with respect to contributory negligence;
- (iii) although it is not unusual for the plaintiff to have the most to accomplish in the evidence, it was especially onerous in this case given the very complex medical evidence and resulting need for numerous expert witnesses;
- (iv) the defendant did not call competing expert testimony with respect to most of the plaintiff's expert witnesses but also did not concede anything that would avoid the need for those experts to testify or significantly narrow the scope of their testimony;

- (v) as a result, a direct comparison between the cost of the parties is not as relevant as it might otherwise be, however, I note that the defendant's costs were much lower at approximately \$70,000;
- (vi) the hourly rates claimed, on a partial indemnity basis, are quite high and have a significant impact on the overall cost claim;
- (vii) some of the hours claimed are high and some of the disbursements are less appropriate on a partial indemnity basis; and,
- (viii) the overall cost claim is quite high in comparison to the actual recovery.

[11] In the exercise of my discretion, the defendant shall pay the plaintiff costs on a partial indemnity basis in the amount of \$160,000 for counsel fees, \$115,000 for disbursements, and shall pay any applicable HST.

Justice Matheson

Date: August 11, 2015