CITATION: Britten v. EWIO, 2017 ONSC 4707
COURT FILE NO.: C-958-14
DATE: 2017-08-02

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Teresa Elizabeth Britten	)	
Plaintiff	)	Gary Mazin and Iman Ahsan, Counsel for the Plaintiff
– and –	)	
The Corporation of the City of Kitchener, EIWO Canadian Management Ltd., TM Lawn and Snow Services Inc., Louis Litwiller operating as Check Management, Kevin Ward operating as Check Management and CFN Frederick Inc.	)	Brian A. Foster and Anne Davenport, Counsel for the Defendant
Defendants	)	

COSTS

THE HONOURABLE JUSTICE JAMES W. SLOAN

[1] This matter was heard by a jury in Kitchener over a three-week period.

[2] By the start of trial only the defendants EIWO and CFN remained in the action

[3] After deliberation, the jury awarded the plaintiff a total of $241,740. In addition to this amount the parties had previously agreed that if the plaintiff was successful, the defendants would pay the OHIP subrogated account in the amount of $24,962.51. In addition, the appropriate amount of interest would be added to the above amounts.

[4] The jury award was made up of generals – $150,000, past income loss – $6,400, future income loss – $38,100, medications/assistive devices – $25,240, surgical services – option – $17,000 and pain management program – option – $5,000 for a total of $241,740.

Defendant's Position

[5] The defendants submit that they made an offer on January 3, 2017 in the amount of $100,000 hoping to initiate settlement discussions but no response to the offer was forthcoming.

[6] On April 17, the day before the pretrial conference hearing, the plaintiff served an offer to settle for $1,010,000, plus the OHIP claim, plus costs, interest and disbursements to be agreed upon or assessed.

[7] The defendants submit that at the pretrial they advised that their initial offer of $100,000 was served in an effort to initiate settlement discussions but their effort was unsuccessful.

[8] It was the plaintiff's position at pretrial that she had made her offer the day before and was not willing to negotiate further from her offer of just over $1,000,000 plus costs.

[9] Based on the plaintiff's negotiating stance, the defendants made a further offer to settle at the pretrial for $250,000, on an all-inclusive basis.

[10] This offer was rejected by the plaintiff, without any further counter offer being made.

[11] Having been unsuccessful to narrow the gap at the pretrial on April 26, 2017, the defendants served a formal offer to settle for $375,000, inclusive of interest with OHIP, plus costs to be assessed or agreed-upon. This offer remained open for acceptance by the plaintiff until one minute after the commencement of trial.

[12] On the same date, the defendants served a separate/alternate offer to settle on the issue of liability in an effort to shorten the trial. The offer was that the plaintiff would accept being 25% contributorily negligent and the trial would proceed on the issue of damages.

[13] The defendants' offers were clear that they were separate and distinct and that if the plaintiff accepted the $375,000 offer there would be no deduction for her being contributorily negligent.

[14] On May 1, 2017, the plaintiff served an offer to settle for $850,000, plus costs to be assessed or agreed. In addition, the plaintiff served a separate and distinct offer to settle on the issue of liability on the basis that the plaintiff would admit 10.1% contributory negligence.

[15] On May 8th the defendants formally withdrew their offer to settle the issue of liability dated April 26, 2017, leaving in place the $375,000 offer.

[16] On May 10th the plaintiff served an offer to settle for $600,000, plus costs as agreed or assessed and, on the same date, the plaintiff served a separate and distinct offer to settle the issue of liability on the basis that the plaintiff would admit 20.1% contributory negligence.

[17] Finally on May 12, 2017, the plaintiff served a further offer to settle in the amount of $475,000, plus costs to be agreed upon or assessed.

[18] The defendants submit that, in Ontario, costs normally follow the event and that the court's discretion is guided by Rule 57.01 of the *Rules of Civil Procedure* and s.131 of the *Courts of Justice Act*.

[19] They further submit that their offer was more than $100,000 better than the jury award, and had it been accepted, the parties would have avoided a fifteen day trial.

[20] In addition, they submit that the fact that the jury did not award any damages for professional services, pain management services, housekeeping and home

maintenance services, heavier packing and unpacking or extraordinary rent and disability specific home modifications/renovations, should be taken into account since such claims significantly increased costs for the defendants to defend the action.

[21] In addition, the plaintiff called nine experts and five lay witnesses while the defendant called two experts, and in addition, relied on approximately one hour of surveillance video.

[22] They further submit that both sides were well aware that a fifteen day trial is expensive.

[23] The plaintiff's last offer before trial of $475,000 was almost double what the plaintiff recovered at trial.

[24] In addition, at trial the plaintiff sought between $795,000 and $890,000 for all of her damages.

[25] With respect to the complexity of the proceeding and the importance of the issue, the defendants submit that the complexity of the proceeding was substantially increased by the plaintiff's nine experts.

[26] In addition the plaintiff's limited work history and significant pre-accident medical history had to be thoroughly examined.

[27] With respect to the plaintiff's impecuniosity, the defendants rely on the case of *Myers v. Metropolitan Toronto (Municipality) Police Force*, [1995] CarswellOnt 152 (Div. Ct.) where the court at paragraphs 19, 20 and 22 stated:

> [19] A rule based on impecuniosity would defy consistent interpretation and application. What would be the definition of "impecuniosity"? Would it depend on the income and expenses of the party claiming impecuniosity? If so, would expenditures on only the bare necessities of life be considered as justifiable? Would it depend on assets and liabilities? If so, must all assets be fully encumbered before one is impecunious?
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> [20] Even if the meaning of the rule based on impecuniosity could be established, by what process could the court or the opposing party check

> on the truthfulness and accuracy of the claim? Could there be examinations during the course of an action similar to examinations in aid of execution? These potential problems, in my opinion, provide sound practical reasons for not permitting alleged impecuniosity to prove a shield against cost sanctions…
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> [21] Because of the importance of avoiding a situation in which litigants without means can ignore the rules of the court with impunity, and the distastefulness of creating a rule incapable of consistent application, the learned trial judge in the case at bar, in my opinion acted reasonably in refusing to take into account the impecuniosity of the plaintiff. The orders fell squarely within his discretionary power. The appeal is dismissed.

[28] There were fifteen witnesses and fifty-two exhibits and each party had two lawyers in full-time attendance at the trial.

[29] The defendants' disbursements from the date of the offer to settle of August 26, 2017 total $25,252.10, while their total disbursements total $60,513.88.

[30] The defendants request partial indemnity costs up to the date of their offer and substantial indemnity costs thereafter in the total amount of $211,070.39, inclusive of HST plus disbursements, in the amount of $60,513.88 for a total of $271,584.27.

[31] Alternatively, they request partial indemnity costs throughout in the total amount of $155,862.71, inclusive of HST plus disbursements, in the amount of $60,513.88 for a total of $216,376.59.

Plaintiff's Position

[32] The plaintiff agrees that the offers by both sides as set out above are accurate.

[33] The plaintiff then goes on to state, as the jury found, that she was not contributorily negligent for the accident.

[34] The plaintiff then submits, pursuant to Rule 49.10 of the *Rules of Civil Procedure*, that she obtained a judgment on the issue of liability that was more favourable than either of her offers dated May 1st or May 10, 2017 and therefore she is entitled to partial

indemnity costs to the date of the defendants' offer of April 26, 2017, on all issues of damages, liability and contributory negligence.

[35] She further submits that she is entitled to substantial indemnity costs for any work performed, or disbursements incurred, with respect to the issue of liability or contributory negligence after May 1, 2017.

[36] The plaintiff then submits that the defendants' claim for costs are too high based on the assumption that plaintiff's counsel would do more work and their fees are lower.

[37] The plaintiff further submits that the plaintiff would not expect to pay any more than partial indemnity costs following the date of the defendants' offer to settle of April 26, 2017 and that there are no exceptional circumstances in this case to justify departure from this principle.

[38] The plaintiff, in her submissions, then takes the court through what the jury found, based on its answers to the questions it was asked to decide.

[39] The plaintiff further submits that this case was potentially worth more than the jury ultimately rewarded and therefore the plaintiff should not be penalized for pursuing the case.

[40] The submission in the foregoing paragraph is one that could likely be made in the majority of cases and plaintiff's counsel did not provide any case law to bolster this submission.

[41] The plaintiff submits, but does not explain, what is important about the plaintiff being successful on the issue of liability. The court was not directed to any cases similar to this case, where this factor influenced the quantum of costs.

[42] The plaintiff then submitted that the defendants made an already complex case more complicated by cross-examining the plaintiff's economic expert, when the court allowed him to be recalled when a government bill was introduced in the Ontario Legislature to increase minimum wage, by failing to admit liability, by emphasizing the

plaintiff's pre-accident medical history. I do not recall this portion of the cross-examination being unduly lengthy and certainly defendants' counsel was entitled to cross-examine.

[43] With respect to the importance of the issues, the plaintiff essentially summarized her evidence at trial about how the accident has affected her. I do not believe anyone takes issue with the fact that this trial was important to the plaintiff.

[44] With respect to the conduct of either party, which tended to shorten or lengthen the trial, the plaintiff again submits that the defendants are at fault for not admitting liability. The plaintiff further complains that the defence examinations, both in-chief and on cross, were too long.

[45] She also submits that the use of the two medical experts by the defendants was improper and vexatious because of comments made by judges about their testimony in other trials. In addition, she states that Dr. Clifford was counselled by the College of Physicians and Surgeons of Ontario with respect to his medical reports.

[46] With respect to whether or not a party should have denied or admitted a fact, the plaintiff once again submits that the defendants did something improper and or lengthened the trial unnecessarily by not admitting liability for the accident.

[47] The plaintiff further submits that the court should exercise its discretion against awarding costs to the defendants, which would have the effect of working an undue hardship on her and effectively offsetting her award against the costs, resulting in effectively no payment being made to her.

[48] For this proposition she relies on the case of *Elbakheit v. Palmer*, 2012 ONSC 3666 where the judge stated at paragraphs 43 and 44:

> [43] The only other matter relevant to the question of costs pertains to the undue hardship that would be caused by an award of costs to the defendants in this matter. Although the defendant's instructions are to seek sufficient costs so as to offset the amount of the judgment and the plaintiff's partial indemnity costs up to February 10, 2012, the verdict of the

> jury in this case makes it plain that the jury concluded physical and/or psychological injury sustained in the accident would continue to disrupt Amira Elbakheit's ability to be gainfully employed, or to pursue her stated objective of upgrading her education before returning to the workforce. An amount of costs awarded to the defendants that would have the effect of completely offsetting the judgment would deprive Amira Elbakheit of funding for ongoing psychotherapy, and would have some bearing on her ability to complete her schooling due to the family's reliance on social assistance. I note that Browne J. deprived the defendants of an award of costs in *Kourtesis v. Joris*, [2007] O.J. No. 3603 (S.C.) in similar circumstances.
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> [44] Having regard to all the circumstances in this case, including the results achieved, the offers to settle and the factors in Rule 57.01, I declined to exercise my discretion to deprive the Plaintiffs of their partial indemnity costs.

[49] Other than the fact that Ms. Britten is on Social assistance the facts of both cases are very different.

Decision

[50] Both parties filed extensive briefs on the issue of costs.

[51] Both parties blame the other party for taking an intransigent position on settlement at the pretrial.

[52] In Ontario, costs generally, if not overwhelmingly, follow the event.

[53] In this case, the plaintiff's claim for damages pursuant to the statement of claim was for in excess of one million dollars.

[54] The plaintiff had no difficulty in proving her orthopedic injuries, including a nasty compound fracture to her left elbow, however, for the most part, the plaintiff's position was that she suffered from chronic pain which was attributable to the orthopedic injuries.

[55] As happens in many personal injury actions, the plaintiff is economically disadvantaged in comparison to the defendant(s), which are usually represented by an insurance company.

[56] That being said, the plaintiff retained a law firm which holds itself out to be expert in the field of personal injury litigation.

[57] In this case, the plaintiff was fifty-five years of age and, from an objective point of view, had had a pretty tough life before the accident.

[58] She has very little education and very little work experience, except for some in food preparation. She was let go from the last two jobs she had and had not been working for many months before the accident and there was no evidence that she had been looking for a job during that period of time.

[59] She is 55 years of age and unfortunately for her, she had a myriad of serious pre-accident medical conditions, including difficult to control high blood pressure, kidney disease, occasional gout, GERD, osteoporosis, some headaches and neck pain, occasional back pain, sciatica, depression and she was/is morbidly obese. In about 2012 she developed balance problems after taking a certain medication. She takes numerous medications on a daily basis.

[60] Hopefully the plaintiff, Ms. Britten, was fully advised in language she could understand about offers to settle and their consequences.

[61] The court has to assume that the plaintiff's lawyer fully explained to her the merits/consequences of accepting or not accepting the defendants' offer to settle, particularly the last offer for $375,000, plus costs, given her pre-accident work history, medical problems and financial status.

[62] In addition, it would be common for the issues of offers to settle and costs to be discussed at a pretrial conference.

[63] She chose, with the advice of her lawyer, not to accept the offer and to proceed with what everyone knew was a three week trial.

[64] If I were to accede to the defendants submissions, it would effectively create a class of plaintiffs who could litigate with impunity because costs should not be awarded against them.

[65] In this case, with the advice of her lawyer and with full knowledge of all of the facts of the case, including the significant potentially negative facts of her pre-existing condition and work history, the plaintiff chose to gamble on what she would have known was going to be approximately a three week jury trial.

[66] While the court has sympathy for the plaintiff in the final result, it was her risk analysis prior to the trial, presumably with the assistance of her legal counsel, that led to the matter not being settled, for more than the jury awarded.

[67] Rule 49.10 (2)(c) reads, “Where an offer to settle 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.”

[68] Despite the significant submissions from both sides with respect to the issue of costs, on the facts of this case, I see no reason to deviate from the normal rule with respect to costs.

[69] Therefore the plaintiff shall have her partial indemnity costs up to the date of the offer to settle.

[70] I accept the defendants’ submission, at paragraph 97 of their reply cost submissions, dated July 12, 2017. Therefore, the plaintiff shall be entitled to her partial indemnity costs up to the date of the offer, in the amount of $37,699.70 plus HST. She

shall also be entitled to her disbursements up to the date of the offer in the amount of $68,993.76.

[71] The defendants shall have their partial indemnity costs from the date of the offer to settle in the amount of $97,712.70 plus HST. In addition, they shall be entitled to their disbursements of $25,252.10.

James W. Sloan

Released: August 2, 2017

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Defendants

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J.W. Sloan J.

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