2013 CarswellOnt 4826, 2013 ONSC 2336, 227 A.C.W.S. (3d) 333

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Mader v. Hunter

Helen Marie Mader, Plaintiff v. Warren Hunter and Motors Insurance Corporation, Defendants

Ontario Superior Court of Justice

Moore J.

Judgment: April 22, 2013
Docket: 07-CV-340202

Counsel: David Lavkulik, for Plaintiff

Jonathan Schreider, for Defendant, Hunter

Subject: Civil Practice and Procedure; Torts

Civil practice and procedure --- Costs — Offers to settle or payment into court — Offers to settle — Failure to accept offer — General principles

Plaintiff injured in motor vehicle collision in 1998 — Plaintiff's claims for non-pecuniary damages found to be compensable — Jury determined defendant's negligence was sole cause of collision and awarded plaintiff damages totalling $794,603 — Plaintiff had made offers to settle and amount recovered at trial exceeded offers — Motion by plaintiff for costs — Costs awarded; costs fixed on partial indemnity basis to 2006 offer to settle and substantial indemnity basis thereafter — Trial lasted 13 days and occurred 13 years after collision — Complex and demanding trial — Costs affixed at $400,000 plus HST plus disbursements of $125,840.90 plus HST.

Civil practice and procedure --- Costs — Particular orders as to costs — Miscellaneous

Plaintiff injured in motor vehicle collision in 1998 — Plaintiff's claims for non-pecuniary damages found to be compensable — Jury determined defendant's negligence was sole cause of collision and awarded plaintiff damages totalling $794,603 — Plaintiff had made offers to settle and amount recovered at trial exceeded offers — Motion by plaintiff for costs — Costs awarded; costs fixed on partial indemnity basis to 2006 offer to settle and substantial

indemnity basis thereafter — Trial lasted 13 days and occurred 13 years after collision — Complex and demanding trial — Costs affixed at $400,000 plus HST plus disbursements of $125,840.90 plus HST.

Cases considered by *Moore J.*:

Gardner (Litigation Guardian of) v. Hann (2012), 2012 ONSC 2006, 2012 CarswellOnt 3959 (Ont. S.C.J.) — considered

John Doe v. Ontario (2007), 2007 CarswellOnt 7531 (Ont. S.C.J.) — considered

Pagnotta v. Brown (2002), 2002 CarswellOnt 2666 (Ont. S.C.J.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 131 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 49.10 — considered

R. 49.10(1) — considered

R. 57 — considered

R. 57.01(1) — considered

MOTION for costs.

***Moore J.*:**

1 Ms. Mader was involved in a motor vehicle accident on 11 May 1998. She brought this action for damages arising from that accident and asserts that her ongoing limitations are permanent serious impairments of important physical, mental or psychological functions.

2 This action proceeded to trial before a jury on 9 January 2012, over 13 years after the accident. The trial continued through 13 days. Both liability and damages remained live issues during the trial. On a contested motion determined while the jury was deliberating, I found that Ms. Mader's claims for non-pecuniary damages were com-

pensable and, ultimately, the jury determined that Mr. Hunter's negligence was the sole cause of the accident and awarded Ms. Mader damages in amounts totaling $794,603.00.

3 At issue now is the matter of costs of the action. Ms. Mader seeks an order fixing costs on a partial indemnity basis to the date of her offer to settle the action, delivered on 1 May 2006, and on a substantial indemnity basis thereafter. Mr. Hunter questions the quantum of costs items claimed for both fees and disbursements. He submits that the total amount of costs claimed is excessive and should be substantially reduced.

4 He insists that the issues in this action did not warrant the involvement in trial preparation and for counsel fees at trial of two senior counsel. Mr Frank is a 1982 call and Mr. Lavkulik was called to the Bar in 1995.

5 Here, it is argued, there is little basis for the addition of a second senior counsel as: the case was neither factually nor legally complicated. Mr. Hunter submits that it was a relatively straight forward rear-end soft tissue injury case; the defendant led no evidence on the issue of liability and plaintiff's counsel was advised prior to trial that the "stroke defence" had been abandoned; and, the case did not involve any complex, novel or important issues of law.

6 Mr. Hunter admits that the size of the case was quite substantial but insists that much of this is accounted for due to plaintiff's counsel's excessive preparation which, he submits, was disproportionate to the amount of legal work needed to properly prosecute a case of this nature.

7 Mr. Hunter raises and relies on *Pagnotta*[FN1] in support of his view that he should be sheltered from the cost of over working the plaintiff's file and quotes Killeen J. who stated in that case:

> If lawyers wish to expand such grossly inordinate amount of billable hours on **relatively routine cases**, they may feel free to do so subject to their client's approval but they cannot expect judges to encourage such inefficient expenditures of time when their costs are to be fixed following trial. Judges and assessment officers have a duty to fix or assess costs at reasonable amounts and in this process they have a duty to make sure that the hours spent can be reasonably justified. The **losing party is not to be treated as a money tree** to be picked willy-nilly by the winner of the contest.
>
> (Emphasis added)

8 Mr. Hunter therefore submits that Ms. Mader's claims for costs of two senior counsel at trial is unreasonable for a case that focused almost exclusively on damages and reflects as well an unnecessary duplication of time, work and effort by counsel.

9 So questions arise as to whether this really is a relatively routine case and, in any event, one in which the plaintiff is over-reaching in her approach to costs issues. In my view, this was anything but a relatively routine case. Liability was not admitted and the issue had to be addressed in Ms. Mader's evidence and that required preparation.

10 More importantly, the damages issues that Mr. Hunter demanded be proven at trial and that his counsel urged

the court and the jury to make findings upon that would seriously reduce her awards were many and complex. He made no reasonable settlement offers. He has not shared with the court particulars of what his reasonable expectations were for plaintiff's costs.

11 Ms. Mader submits that she delivered five offers to settle the action, being:

a) $583,500 — May 1, 2006;

b) $375,000 — April 30, 2010;

c) $297,000 — October 24, 2011;

d) $300,000 — December 9, 2011; and

e) $190,000 — December 28, 2011.

12 Her offers all added costs to the amounts for damages offered and four of the plaintiff's offers added interest to those amounts.

13 Consideration of offers to settle brings to mind the views expressed by Perell J. on the subject, views with which I concur:[FN2]

> The court's discretion to award costs is designed to further three fundamental purposes in the administration of justice: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (CanLII), [2003] 3 S.C.R. 371; *Fong v. Chan* (1999), 48 O.R. (3d) 330 (C.A.); *Fellowes, McNeil v. Kansa General International Insurance Co. 1997 CanLII 12208 (ON SC)* (1997), 37 O.R. (3d) 464.
>
> Costs are designed to be a tool to administer justice and to control access to justice. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, *supra*, LeBel J. for a majority of the Supreme Court of Canada stated in para. 26:
>
> Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are

served by the modern approach to costs.

14 Ms. Mader's recovery at trial clearly and convincingly exceeded the amounts offered, thereby positioning her to seek the advantages of rule 49.10(1).[FN3] She adds that, as she also made numerous additional informal settlement proposals/invitations to discuss settlement, plus three offers to settle at amounts ranging between $65,000 and $100,000, plus interest and costs and that her settlement positions have been vindicated by the outcome of the case.

15 In her costs submissions, Ms. Mader identified ten stages in the progress of the action from its inception through to and beyond the completion of the trial. She describes reasons why she has given discounts to Mr. Hunter during various stages for work done and services rendered that do not apply solely to the benefit of this action. By way of example, during the period of time between March of 2005 and May of 2006, she was involved in another accident and she submits that further productions, investigations and assessments were required. Counsel docketed 276 hours in this period but only 102 are claimed. The balance unclaimed is allocated to claims other than those made against Mr. Hunter.

16 Ms. Mader therefore submits that, to the extent that I may consider time spent and timekeepers' hourly rates as relevant in the exercise of my discretion in fixing costs, 1,454 hours have been properly docketed to the credit of this action, with a suggested overall value of $435,422.00.

17 As for time spent, Ms. Mader submits that she is mindful that it is significant, but the majority of the time spent related to preparing this action for trial (twice) and for counsel fees at trial. Her other claims were resolved by the end of July 2010 and the damages sought in the other matters were modest and involved no income losses or housekeeping claims, claims in this matter that the jury assessed at over $750,000.

18 She allows that her counsel docketed substantially more time than defence counsel did but argues that this should have been anticipated and was not unreasonable as the plaintiff had been put to the strict proof of her claims and bore the burden therefore of obtaining, producing and proving medical and employment records dating over decades of time. She also had to interview and prepare over 20 witnesses, 11 of whom were called at trial. In contrast, she submits, Mr. Hunter called only one witness at trial.

19 In any event, Ms. Mader points to the decision of D. Wilson J. in the *Gardner* case[FN4] in support of her approach to detailing reasonable bases for her claims made here. In *Gardner*, Wilson J. fixed costs at $52,000 to the date of the Plaintiff's offer, plus $650,000 in substantial indemnity costs thereafter, plus applicable tax and disbursements. Although Plaintiff's counsel sought higher amounts, Her Honour fixed partial indemnity rates for senior counsel at $300 per hour and $450 per hour on a substantial indemnity basis.

20 Ms. Mader argues that the trial in *Gardner* was double the length of this trial but the Plaintiff's offer to settle was delivered there only 2.5 years before trial, whereas Ms. Mader's offer was delivered nearly 6 years before trial. The *Gardner* action extended over 8 years before trial but this action extended over 13 years.

21 Ms. Mader submits that she was required by Mr. Hunter, through undertakings requested and given at her examinations for discovery, to obtain, review and produce thousands of pages of documents from some 45 medical

facilities covering 23 years of her life, no fault insurance benefits documents covering a 14 year period and education, employment and tax documents covering a 28 year period. She submits that over 41,000 pages of photocopies were generated by her counsel in this effort and that they sent out over 1,310 letters, 3,600 emails and 3,600 pages of faxes in this matter.

22 In light of the defences raised to Ms. Mader's claims, including that her post accident limitations and complaints were due to pre-accident medical issues, such as stress and anxiety, or other issues, such as losing her job, a 1998 fall, house related problems and alleged compulsive hoarding tendencies and/or the consequences of her 2005 car accident, her counsel had to carefully review all productions and to seek expert input in interpreting their significance.

23 The number and complexity of content of the productions relevant to issues outstanding at trial required Ms. Mader's counsel to organize and produce documents in multiple copies of joint briefs. Each copy contained 418 tabs and 5,731 pages. She argues that she should not be required to bear the cost of the time, effort and the expense of this exercise alone.

24 Ms. Mader allows that she contributed significantly to the delay in moving this matter forward during the first 7 years of its history and seeks but modest costs for that interval. She allows that she was sanctioned by the court for her delay and ordered to pay costs following motions in 2003. She points out however that delay was added to by Mr. Hunter, who brought on a number of motions to dismiss her claims at a time when she was self-represented, unemployed and unable to retain counsel. The action was dismissed and delayed further thereby but later re-instated. Mr. Hunter raised a defence later in the action's progress that Ms. Mader had suffered a stroke and that that event caused or contributed to the accident. That defence had to be investigated and responded to, with further delay necessarily following.

25 Mr. Hunter insists that the plaintiff's disbursements are excessive in the extreme and beyond what a losing party could reasonably expect to pay. He points to four experts retained by the plaintiff who prepared reports and updated reports during the course of the litigation. He argues therefore that plaintiff's counsel did not use sufficient restraint in preparation of the case and numerous updated reports were not reasonably justified.

26 The difficulty I have with this submission is that the action continued over such a long time and its damages issues grew in number and complexity such that the logic of the argument fades, absent specifics of why the updated reports were not reasonably necessary or helpful in preparing the experts to give their evidence at trial. A party can't put the plaintiff to the strict proof of her case and then complain that the cost of doing just that is too high, especially where the party sheds no light for the court on what his reasonable expectations of that exercise were.

27 This said, however, Mr. Hunter makes a good point on the disbursements sought for the reports of Drs. Gallay and Kerwin, who did not give evidence at trial. Ms. Mader argues that such disbursements should nevertheless be allowed, as the reports were produced, read and relied upon by experts who did attend and testify at trial, including the doctor called by the defence. That may or may not be so; the record does not reflect it.

28 I cannot assess the reasonableness of the expenses associated with marshaling evidence that was not called at

trial and disallow the disbursements incurred for those experts.

29 As to the remaining disbursements, Ms. Mader insists that all have been identified in her Bill of Costs and most were incurred after her other matters settled in July 2010. I agree and accept that she has given appropriate credit for disbursements incurred but paid for by others in the context of her other claims. The disbursements claimed from Mr. Hunter are admittedly significant in size but reasonable, she submits, given the nature of the issues arising in the action.

30 Further, and importantly, Ms. Mader submits that Mr. Hunter was given advance notice of many disbursements and invited him to discuss settlement and/or how to avoid incurring his jeopardy for such disbursements. She kept him apprised of the growing and expected future costs and disbursements claims but he chose not to respond appropriately.

Analysis

31 Ms. Mader is entitled to the benefits afforded by rule 49.10 and shall have her costs fixed on a partial indemnity basis to the date of her settlement offer of 1 May 2006 and on a substantial indemnity basis thereafter.

32 In fixing costs, the court need not attempt a line by line analysis of the bill of costs under consideration nor should the process become a mathematical exercise of applying hourly rates to docketed hours. There must be a balance achieved between recovery of a fair and reasonable amount for services rendered and disbursements incurred considered in the context of the particular case and the reasonable expectations of the party called upon to pay the amount to be fixed.

33 The starting point for the process is Section 131 of the *Courts of Justice Act*[FN5] and the General Principles outlined in rule 57 of the Rules of Civil Procedure.[FN6] As such the costs to be awarded in this matter are in my discretion but will reflect my consideration of the general principles detailed in rule 57.01(1) and overall fairness in the circumstances of this case.

34 The court may consider the outcome of the action, as I have done here. Ms. Mader enjoyed complete success on the liability issue and it appears that she was not offered an opportunity to resolve the case short of trial on a basis remotely resembling the outcome she ultimately realized.

35 It must be remembered that the damage assessments, while substantial by any measure, were the product of the theory upon which damages claims were built. The defence offered a competing theory, that Ms. Mader's complaints were not accident related and not Mr. Hunter's responsibility. Clearly the jury chose against the defence theory and accepted the plaintiff's theory, virtually entirely, on the heads of damages that the jury awarded money for.

36 This was a long, complicated and very demanding trial. It was, at the same time, a very well thought out, planned and presented case that Ms. Mader's counsel placed before the jury. All aspects of her injuries, her course of treatment and recovery and of her current functioning and future plans, goals, limitations and realistic expectations were fully and fairly developed in clear, concise and helpful evidence.

37 The health care issues were many and complex. Ms. Mader's counsel was challenged to marshal the evidence necessary to help the jury to appreciate and assess the issues. The outcome of the case was a matter of enormous importance to Ms. Mader and her ability to function physically, emotionally, socially and vocationally in her future.

38 Often, costs claims involve services rendered and expenses incurred throughout the conduct of the action. In fixing costs over such protracted timelines and proceedings in the litigation, the court considers the complexity and importance of various proceedings but tends to apply rates for timekeepers that remain constant throughout (though often adjusted for inflation over time). As such, rates reflect a blended average of all aspects of services rendered and that may result in the undervaluing of services rendered in the immediate shadow of and during trial.

39 In this case, however, the rates charged by Ms. Mader's counsel did not grow markedly over time and, in any event, most of the time at issue here relates to the preparation for and attendance at trial, very recent events. I find the hourly rates billed, for partial indemnity purposes, were reasonable. I would grow those by a factor of 1.5 times to generate appropriate substantial indemnity rates. I will reduce the trial counsel fee to an extent however to reflect the fact that Ms. Mader was indeed represented at trial by two senior counsel. I allow counsel fees for Mr. Lavkulik, as senior trial counsel, as that was the role he fulfilled in that forum, and counsel fees for Mr. Frank, as junior counsel.

40 Trials demand much from counsel. They are not an arena for the timid. Trials challenge the skills, training and experience of any counsel. They present difficulties and pitfalls not easily avoided. This case is no exception; in fact it proves the point. To the extent that billing rates are a relevant factor, to consider rates for services rendered at trial or in preparation for trial at a low, blended rate is not reasonable in a case where the services at issue, almost entirely trial related, involve such high levels of complexity. As such, I prefer to view them in this case at the highest levels of those usually thought applicable for timekeepers of each level or range of experience considered.

41 I accept the explanations offered by Ms. Mader regarding why this matter took so long in wending its way to trial and accept the extent to which she has accordingly reduced her claims as being reasonable.

42 The fact that her counsel docketed substantially more time than defence counsel asserts was reasonable or necessary overlooks the fact that the defence maintained the position throughout the case and in respect of settlement opportunities afforded Mr. Hunter along the way that the threshold issue was defensible and that the injuries and limitations complained of were not significant and/or accident caused. Ms. Mader was caught between a rock and a hard spot. She had no option but to prepare for trial on all issues. In such circumstances, Mr. Hunter cannot reasonably expect to be relieved of liability to pay very substantial costs following the trial, a trial that he made the inevitable consequence of his intransigent position.

43 Beyond this, I accept Ms. Mader's position that Mr. Hunter was kept appraised of mounting costs and disbursements claims and he chose to ignore alternatives other than an outcome imposed upon him at trial. He had the advice of experienced and capable counsel who, as the trial approached, must be taken to have appreciated the very real and substantial exposure to costs approximating the magnitude of costs sought here.

44 In addressing the extent to which the plaintiff's claims exceed the reasonable expectations of the defendant, I

am also struck by the fact that Mr. Hunter has not tendered any evidence of what expectations he held from time to time as the trial date approached and/or as the trial unfolded.

45 In the unlikely event that he did not consider the size and shape of the costs exposure he might face if Ms. Hunter prevailed at trial, surely he was aware of the growing size of his own cost of defending the action to and through a trial. The extent to which defence costs informed Mr. Hunter about the plaintiff's costs remains a mystery here since Mr. Hunter has chosen not to share particulars of his own trial preparation and presentation costs.

46 Certainly Mr. Hunter is not obliged to support his position here by reference to his own litigation expense experience in this case but a defendant proceeds at his peril, however, if he chooses not to assist the court with such clearly relevant and very likely helpful information.

Disposition

47 Having considered the positions of the parties and all relevant factors informing the fixing of costs in a matter such as this and having stepped back to consider the overall fairness of the costs to be awarded in the circumstances of this particular case, I fix costs as follows: the plaintiff shall recover costs fixed in the sum of *$400,000.00* plus applicable H.S.T., plus disbursements of *$125,840.90*, plus applicable H.S.T.

Costs awarded.

FN1 *Pagnotta v. Brown*, [2002] O.J. No. 3033 (Ont. S.C.J.) at paras. 24-25

FN2 *John Doe v. Ontario* [2007 CarswellOnt 7531 (Ont. S.C.J.)], 2007 CanLII 50279 at paras. 10-11.

FN3 3 *Rules of Civil Procedure*, O. Reg. 284/01, s.1; 575/07, s.6

FN4 *Gardner (Litigation Guardian of) v. Hann*, 2012 ONSC 2006 (Ont. S.C.J.)

FN5 R.S.O. 1990, c.C.43

FN6 R.R.O., Reg. 194.

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