CITATION: Mitton v. Ministry of Transportation, 2025 ONSC 2645
COURT FILE NO.: 17-CV-11-A1
DATE: 20250430

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Ronald Busch Plaintiff	Michael Beeson for the Plaintiff
– and –	
Cristy Mitton Defendant	R. Steven Baldwin for the Defendant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, REPRESENTED BY THE MINISTER OF TRANSPORTATION FOR THE PROVINCE OF ONTARIO and CARILLION CANADA INC. Third Parties	Martin P. Forget and Earl Murtha for the Third Parties
	HEARD: In writing

COSTS DECISION

HOOPER J.

[1] This matter involved a motor vehicle collision on February 12, 2015. On that day the defendant, Christy Mitton, lost control of her vehicle, crossed the centre lane, and collided with the vehicle operated by the plaintiff, Ronald Busch. Mr. Busch suffered serious injuries. He commenced an action against Ms. Mitton.

[2] Ms. Mitton commenced a third-party claim against the parties responsible for winter maintenance operations for the subject highway – the Ministry of Transportation for the Province

of Ontario and Carillion Canada Inc., its winter maintenance operator. The third parties had a singular defence and will be collectively referred to in this decision as the MTO.

[3] In her cost submissions, the defendant concedes that there was never any issue of contributory negligence in the main action. The only issue in the main action was damages. The entire focus of the defendant's liability argument was against the MTO.

[4] The matter was mediated in December 2020 and pre-tried in December 2023. Although I cannot take into account anything that happened in those without prejudice proceedings, I note that the only subsequent offer served by the defendant in this action required the MTO to pay 50% of the offer. I accept the position by plaintiff's counsel that the defendant's requirement that the MTO contribute 50% of any settlement was a fundamental term of the defendant's settlement position throughout this litigation. As will be discussed further below, I find this to be entirely unreasonable.

[5] The action was scheduled to be tried commencing June 10, 2024. It was set for 4-5 weeks in length. On May 31, 2024, the plaintiff and defendant finally resolved the main action for $210,000 plus prejudgement interest with only costs outstanding to be agreed upon or assessed. I have been asked to fix the plaintiff's cost award as part of this decision.

[6] The Minutes of Settlement in the main action includes the following term:

> The plaintiff shall have and maintain his witnesses listed in Schedule A to these Minutes under summons to attend trial and will cooperate in having himself and those witnesses attend trial for the purpose of the defendant's claim against the third parties to give evidence to satisfy the court that the amount of this settlement as between the plaintiff and defendant was reasonable as provided in the *Negligence Act*, R.S.O. 1990, c. N.1, s.2.

[7] Section 2 of the *Negligence Act* sets out the following requirement for recovery between tortfeasors:

> 2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the

> tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled. R.S.O. 1990, c. N.1, s. 2.

[8] The reason the Minutes of Settlement make reference to section 2 of the *Negligence Act* is because when the plaintiff and defendant finally resolved the main action, the MTO refused to accept the settlement was reasonable. It took the position that the defendant would have to prove the damages as against it.

[9] Mr. Busch testified briefly in the trial before me. I checked, and the MTO was present at his examination for discovery. MTO's counsel would therefore have seen what I did – an outstanding witness who spoke clearly without exaggeration. His brief evidence of his damages at trial included the fact that, at the time of this accident, Mr. Busch was a member of the Canadian military. He started to serve in the military at the age of 20. He became a helicopter pilot in 1995 and served overseas in five deployments. The collision in February 2015 caused a crush fracture to his heel bone. While damages were not before me at trial, in his evidence Mr. Busch stated that he lost his qualification to fly helicopters while recovering from this injury and had not been able to return.

[10] I am not reiterating Mr. Busch's evidence as findings of fact, however, I find it deeply concerning that the MTO would not accept a relatively modest settlement of $210,000 as reasonable given Mr. Busch's evidence of his injuries and lost career.

[11] Days before the commencement of trial, I conferenced with counsel for the defendant and the MTO to work out any pretrial issues. At that time, I learned of the MTO's position on the settlement of the main action. The parties informed me that there would be a motion argued at the commencement of trial as to whether I could be told the amount of the settlement and rule on its reasonableness or whether I would have to hear all of the damage evidence and assess Mr. Busch's damages myself. The MTO was taking the position that an entire assessment of damages was required.

[12] Following that discussion, I asked my judicial assistant to send the following on my behalf:

> I have reflected on the discussion at the case conference yesterday. At the motion on Monday, I would like the following to be addressed: If the trial requires a full hearing on both damages and liability, and I assess damages higher than the settlement amount, and if I find some portion of liability on the Ministry, does the Ministry have to pay the percentage of the damages assessed at trial or the private agreement between the plaintiff and defendant?

[13] Within hours of my judicial assistant sending that inquiry, the MTO accepted that the settlement amount of $210,000 was reasonable. I find that this was because the MTO knew that if the court heard from Mr. Busch and his experts, there was a real risk his damages would be assessed much higher than $210,000. I find that the MTO should have accepted the settlement was reasonable when it was reached on May 31st. Instead, they were content to drag Mr. Busch through even more stress and expense than he had already suffered. The MTO's position on this issue was entirely unreasonable and will be factored into its cost award.

Legal Principles in Awarding Costs

[14] The court has discretion in awarding costs: s. 131 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43. Rule 57.01 of the *Rules of Civil Procedure* provides the court with guidance by enumerating certain factors the court may consider when assessing what costs are appropriate: *Zander Sod Company Limited v. Solmar Development Corp.*, 2011 ONSC 3874 at para. 11.

[15] Ultimately, in determining costs, the overriding principles are fairness and reasonableness. Costs must also be proportional.

[16] When determining fairness, reasonableness, and proportionality when awarding costs after the settlement of an action, the court should not focus solely on the amount of the settlement but should also take into account the stage of the proceeding when the settlement occurred. Here, the resolution of the main action was within days of the commencement of a 4-5 week trial. What is fair, reasonable, and proportional on the eve of trial will be very different than when a settlement occurs early in the litigation.

[17] Neither party had an offer compliant with Rule 49 of the *Rules of Civil Procedure* in that no formal offer made was better than the settlement ultimately reached. While the dollar amount of the defendant's offer to the plaintiff was equivalent, that offer required a 50% contribution from the MTO who refused to do so. It was therefore not capable of being accepted by the plaintiff.

Costs Sought by the Plaintiff

Legal Fees

[18] The plaintiff provides two scenarios for legal fees:

> a) costs on a partial indemnity throughout (including post-settlement) in the amount of $237,791.36 (inclusive of HST); or
>
> b) costs on a partial indemnity up to the settlement of the main action and costs on a full indemnity basis thereafter in the amount of $245,323.27 (inclusive of HST).

[19] The costs incurred post-settlement were the result of the MTO's position that the settlement was not reasonable.

Position of the Defendant on the Plaintiff's Costs

[20] The defendant submits that the legal fees claimed are out of proportion to the ultimate settlement reached. She further suggests that there is considerable duplication in the legal time expended as multiple lawyers have had carriage of the file over the years. The defendant suggests the appropriate amount of legal fees should be $70,000.00. No math was provided to support this position except that it is 33% of the settlement amount.

[21] I find as a fact that the defendant's insurer was steadfast in its position that there could be no settlement without contribution from the third party. I further find that to be an unreasonable position particularly in this case where the plaintiff had no potential contributory negligence and had objective orthopedic injuries. The plaintiff had also made a reasonable offer to resolve this case, at least as of April 2024 (the date of the plaintiff's formal offer).

[22] When there is a third-party proceeding, the potential liability of the third party is irrelevant to the main action. The plaintiff must prove liability on the defendant. Once that occurs, the defendant can assert its claim for contribution and indemnity against the third party. Although the court usually tries the cases together for consistency and efficiency, the lis between the plaintiff is only with the defendant. If the defendant decides to dig in its heels and refuses to entertain settlement discussions without the participation of the third party, which I find happened in this case, it is trying to meld the two actions together.

[23] The defendant was insured. The insurer is a sophisticated litigant who was instructing its counsel. The insurer knew it was ultimately responsible to the plaintiff for all damages. It had the funds to pay the claim in full yet it decided to make a tactical decision to drag out this litigation, putting undue pressure on an innocent plaintiff, even after the plaintiff had reduced his claim to an amount well within the range of what could have been awarded at trial. In my view, once the plaintiff made his offer in April 2024, the matter should have resolved. Instead, the defendant insisted on contribution from the third party. This forced the plaintiff to prepare for a lengthy trial. While it was open to the defendant to make these tactical decisions, it does so at the risk of exposing itself to additional costs.

[24] As a result, in my discretion on costs, I accept the plaintiff is entitled to legal fees on a partial indemnity basis up to the settlement and on a full indemnity basis thereafter for a total amount of legal fees of $225,000 inclusive of HST. In making this assessment, I have accepted and ordered the full indemnity amount post-settlement as set out in the Bill of Costs in the amount of $18,103.75. That post-settlement amount is part of the $225,000 ordered.

Disbursements

[25] Disbursements should be paid in full including the reports for future care and actuarial services. Those witnesses were to be called for trial. The only disbursement that should not be paid

is the report of R.J. Skirda. That report was not served or relied upon. After deducting the report for R.J. Skirda, disbursements are awarded in the amount of $57,251.79.[1]

Total Award to the Plaintiff

[26] The total cost award to the plaintiff is $282,251.79.

Third Party's Position on Costs

[27] The third party takes the position that it was entirely unreasonable to bring it into this litigation and seeks partial indemnity costs in the amount of $153,348.50 plus disbursements. I note that the cost submissions of the third party delve into settlement positions at the mediation and pretrials. I have not considered those settlement positions as they are without prejudice.

[28] The third party was successful in its defence of the third-party claim and is entitled to costs.

Defendant's Response to the Third Party's Position on Costs

[29] The defendant submits that the third party has failed to provide the actual amount charged to the client and therefore the court cannot assess the accuracy of the Bill of Costs put forth.

[30] It is true that there is no indication of the actual hourly rate charged by counsel to the client. In its cost submissions, counsel for the third party requests the court base an assessment of hourly rate *consistent* with what counsel of similar experience charge. I note that within the Bill of Costs itself, counsel carefully asks for an hourly rate based on a "partial indemnity scale" rather than a "partial indemnity rate".

[1] Note that there was an error within the disbursement list provided by the Plaintiff which has been corrected in this costs decision.

[31] I am not prepared to assess an hourly rate that is based on comparisons to other counsel with the same level of experience. Costs are to "indemnify" parties – either on a partial, substantial, or full indemnity basis. The court cannot assess what it is indemnifying without knowing what is actually being charged to the client. I therefore accept the defendant's position that I cannot rely upon the amounts set out within the MTO's Bill of Costs as it does not provide that invaluable piece of information.

[32] As a result, I am reducing the amount of legal fees from $173,283.81 (inclusive of HST) to $125,000 (inclusive of HST) on the basis that I have not been provided the actual rate charged.

[33] In addition, in my analysis of the plaintiff's costs, I allowed full indemnity legal fees to the plaintiff for post-settlement time spent. Those post-settlement fees totalled $18,103.75 inclusive of HST. Those fees were only necessary because the MTO took the unreasonable position that damages had to be proven at trial. While I have ordered those costs be paid by the defendant to the plaintiff, I am also ordering the MTO to reimburse the defendant for those costs. That amount will be reduced from the MTO's cost award.

[34] Therefore, the total fees payable by the defendant to the MTO is $125,000-$18,103.75 = $106,896.25. With disbursements, the total cost award to the MTO is $155,739.31.

Conclusion

[35] The defendant will pay the following:

a) Costs to the plaintiff inclusive of legal fees, disbursements and HST in the amount of $282,251.79.

b) Costs to the third parties inclusive of legal fees, disbursements and HST in the amount of $155,739.31.

Justice Jaye Hooper

Released: April 30, 2025

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Third Parties

COSTS DECISION

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