

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Joshua Russell Dyke, Ann Catherine Dyke, and James Vernon Dyke, Plaintiffs

-and-

The Bombshelter Pub, The University of Waterloo, University of Waterloo Federation of Students, John Doe, Laura Franco-Valencia, Rachel Vesz, University of Waterloo Police Services, Daniel Legault and Meghan O’Hara, Defendants

BEFORE: MacNeil J.

COUNSEL: *G. Bodnaryk* – Lawyer for the Defendants/Moving Parties, The Bombshelter Pub, University of Waterloo Federation of Students, Laura Franco-Valencia and Rachel Vesz

J. Gaynor – Lawyer for the Plaintiff/Responding Party, Joshua Russell Dyke

DECISION ON COSTS

[1] The defendants/moving parties, The Bombshelter Pub, University of Waterloo Federation of Students, Laura Franco-Valencia and Rachel Vesz, made a motion seeking an order compelling the plaintiff, Joshua Dyke, to answer outstanding undertakings and certain refusals given at his examination for discovery. They were substantially successful on the motion.

[2] The parties were unable to settle the issue of costs. They have both provided written submissions on the issue. This is my decision on costs payable for the motion.

General Principles

[3] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that an award of costs is in the discretion of the court.

[4] Rule 57.01(3) of the *Rules* provides that, when the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. Tariff A establishes the fees and disbursements that are allowable under Rules 57.01 and 58.05.

[5] Rule 57.01(1) sets out factors to be considered by the court in exercising its discretion to award costs, including:

- the result in the proceeding;
- any offer to settle or to contribute made in writing;
- the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- the amount claimed and the amount recovered in the proceeding;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- whether any step in the proceeding was: (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution;
- a party's denial of or refusal to admit anything that should have been admitted; and
- any other matter relevant to the question of costs.

[6] Rule 1.04(1.1) provides that, in applying the rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[7] Modern costs rules are designed to advance five main purposes: (1) to indemnify successful litigants for the cost of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to discourage and sanction inappropriate behaviour by litigants; and (5) to encourage settlements: *Fong v. Chan*, 1999 CarswellOnt 3955, 128 O.A.C. 2 (Ont. C.A.), at para. 22; 394 *Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 7238, at para. 10.

[8] Ultimately, in fixing costs, the primary principles remain fairness, reasonableness and proportionality.

[9] As stated by the Ontario Court of Appeal in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 26, when fixing costs, the calculation of hours and time rates is only one factor to be taken into account. The overall objective is “to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.” (See also *Zesta Engineering Ltd. v. Cloutier*, 2002 CarswellOnt 4020, [2002] O.J. No. 4495 (Ont. C.A.), at para. 4.)

Position of the Defendants/Moving Parties

[10] The defendants seek costs in the amount of \$4,302.13, payable within 30 days.

[11] They propose that a rate of 65% apply to calculate partial indemnity costs, as that was the rate the plaintiff used in his costs outline, and calculate that costs amount plus disbursements to total \$5,246.50.

[12] The defendants submit that they were successful in 9 of the 11 issues raised in the motion, an 82% success rate. Applying this 82% to the total of \$5,246.50 results in the requested amount of \$4,302.13 for costs.

Position of the Plaintiff/Responding Party

[13] The plaintiff submits that success on the motion was mixed. Of the defendants' eleven requests, the Court ordered compliance on five but denied relief on three. Regarding these three requests, a formal motion was likely unnecessary given that a summary of certain of the information requested was provided to the defendants on February 6, 2024, and the plaintiff did not prepare two of the other documents ordered to be produced.

[14] In the circumstances, the plaintiff asks that costs of the motion either be "in the cause" or that the parties each bear their own costs.

Analysis

[15] The defendants were substantially successful on their motion. Generally speaking, the expectation is that costs are awarded to the successful party respecting each step taken in a proceeding. The information ultimately ordered to be produced by the plaintiff was relevant to issues raised in the pleadings. Accordingly, I decline to order that the parties each bear their own costs.

[16] With respect to the plaintiff's submission that costs be "in the cause", in my view, there is no reason to deny the defendants their costs at this point in time. The justness of an award of costs on this motion does not depend on who is successful at trial. Therefore, I decline to order costs "in the cause".

[17] I agree with the defendants that the full legal fees and disbursements amounts submitted by each side are very similar. I find that this reflects the reasonable expectations of both sides.

[18] I have considered the following factors:

- a. It was reasonable for the defendants to have made the motion.
- b. The issues raised on the motion were of importance to the defendants.
- c. The defendants' materials were much more involved and detailed than the responding materials of the plaintiff.
- d. The defendants were substantially successful on the motion.
- e. The partial indemnity rate claimed for the work completed is reasonable.
- f. The total hours claimed by the defendants is also reasonable given the motion materials that had to be prepared.

- g. In considering the plaintiff's bill of costs, I find that he could reasonably have expected to pay costs in the range of the amount sought in the event of lack of success on the motion.
- h. The defendants have already reduced the amount of costs claimed to account for the relief they were not successful in obtaining.

[19] Having regard to all of these factors, and considering the balancing exercise required under Rule 57.01 and the guidance provided by the *Boucher* decision of the Ontario Court of Appeal, I am satisfied that awarding partial indemnity costs to the defendants/moving parties in the amount of \$4,302.13, inclusive of HST and disbursements, is fair, reasonable and proportionate in the circumstances.

Disposition

[20] Based on the foregoing, this court orders that the plaintiff pay costs to the defendants/moving parties fixed in the amount of \$4,302.13, payable within 30 days of release of this decision to The Dominion of Canada General Insurance Company.

MacNEIL J.

Released: August 22, 2025