

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: John Sampson and Diane Sampson, Plaintiffs

-and-

Trevor Hitchen, Defendant

BEFORE: MacNeil J.

COUNSEL: *Kevin Henderson* – Lawyer for the Plaintiffs

Edward Chadderton and Alexandre Vigneault – Lawyers for the Defendant

HEARD: July 9, 2025 (via Zoom videoconference)

ENDORSEMENT

[1] The parties requested a ruling from the court on the following three issues:

- (a) whether the Canadian Emergency Response Benefit (CERB) received by the plaintiff, John Sampson, should be deducted from the award for past income loss;
- (b) the amount of partial indemnity costs payable by the defendant to the plaintiffs; and
- (c) the amount of assessable disbursements payable by the defendant to the plaintiffs.

[2] Written submissions were provided on behalf of the parties and oral submissions were made. This is my ruling on the three issues raised.

BACKGROUND

[3] The jury awarded the plaintiffs a gross judgment of \$602,748.00. That amount was comprised of: \$250,000.00 for general damages; \$130,000.00 for past loss of income; \$167,748.00 for future cost of care; \$15,000.00 for out of pocket expenses; and \$40,000.00 for Diane Sampson’s damages.

[4] The parties have agreed that the following deductions from the jury verdict are appropriate:

Past Accident Benefits paid:	\$39,890.01
Accident Benefits settlement:	\$47,000.00

CPP Disability Benefits: \$10,739.00
Family Lw Act deductible: \$23,395.04

[5] Prior to trial, the plaintiffs made a formal offer to settle, dated September 4, 2024, for the amount of \$650,000.00 plus costs and disbursements. The defendant made an offer to settle, dated September 6, 2024, for the amount of \$375,000.00 plus costs and disbursements.

[6] The parties are in agreement that, since neither party achieved a result better than their offer to settle, the plaintiffs are entitled to their partial indemnity costs of the action.

[7] The plaintiffs are seeking a total costs award of \$563,394.62, comprised of \$350,000.00 plus \$45,500.00 HST for partial indemnity legal fees and \$167,894.62 for disbursements.

ANALYSIS

(a) *Should the Canadian Emergency Response Benefit (CEBR) received by the plaintiff, John Sampson, be deducted from the award for past income loss?*

[8] Between May 28, 2020 and September 28, 2020, Mr. Sampson received a total of \$14,000.00 in income support payments under the *Canada Emergency Response Benefit Act*, S.C. 2020, c. 5, s. 8. The defendant submits that the award made by the jury for past loss of income should be reduced by the CERB sum that Mr. Sampson received, pursuant to s. 267.8(1)2 of the *Insurance Act*, R.S.O. 1990, c. I.8.

[9] Section 267.8(1) provides for the deduction of prescribed amounts from an award of damages for income loss and loss of earning capacity in a motor vehicle accident action. It reads:

267.8 (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by the following amounts:

1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.
2. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.
3. All payments in respect of the incident that the plaintiff has received before the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment.

Position of the Plaintiffs

[10] It is the position of the plaintiffs that the defendant should not be entitled to a deduction for the CERB because Mr. Sampson is in an overpayment position and is, at law, required to repay those funds to the Government of Canada. Section 12(1) of the *Canada Emergency Response Benefit Act*, obliges a person who receives the CERB income support payment to repay the benefit if it is determined that that person should not have received CERB or was overpaid. It reads:

Return of erroneous payment or overpayment

12(1) If the Minister determines that a person has received an income support payment to which the person is not entitled, or an amount in excess of the amount of such a payment to which the person is entitled, the person must repay the amount of the payment or the excess amount, as the case may be, as soon as is feasible.

[11] Section 13(1) of the *Canada Emergency Response Benefit Act* provides a six-year limitation period for action or proceeding to be taken to recover CERB money owing. That limitation period has not yet expired.

[12] The plaintiffs rely on the decision in *Grieves v. Parsons*, 2018 ONSC 1905, at para. 43, affirmed 2019 ONCA 335, where the court discussed the deductibility of a benefit when it must be repaid in the context of an overpayment. In that case, the defendants took the position that the jury award needed to be reduced by the \$36,709.71 income replacement benefits amount that had been received by the plaintiff. The plaintiff argued that the \$36,709.71 received should be reduced by a \$2,887.94 overpayment on income replacement benefits received, as this was required to be repaid under s. 52(1) of the *Statutory Accident Benefits Schedule*, O. Reg. 34/10. The plaintiff had been sent correspondence from his statutory accident benefits insurer advising him of his repayment obligations. The defendants took the position that the plaintiff could not deduct the \$2,887.94 overpayment because there was no evidence led at trial that the plaintiff intended to pay back any amount received in income replacement benefits. The trial judge concluded that the overpayment amount should be deducted, holding at paras. 48-49:

48 In addition, the plaintiff has a legal repayment obligation under s. 52(1) of the *Statutory Accident Benefits Schedule*. This is not a matter of evidence, it is a matter of law. In my view these repayment obligations must be included in any calculation of the collateral benefits.

49 Accordingly, the \$2,887.94 overpayment on income replacement benefits received will not be included in the collateral benefits deducted in accordance with s. 267.8(1) of the *Insurance Act*.

Position of the Defendant

[13] The defendant submits that, in order to prove deductibility under s. 267.8(1)2 of the *Insurance Act*, a party must establish that the CERB payment was (i) “for income loss or loss of earning capacity” and (ii) that it was “in respect of an incident”: *Ferreira v. Hopper*, 2024 ONSC 5385, at para. 10.

[14] It is the position of the defendant that to qualify and maintain eligibility for CERB, Mr. Sampson must have been otherwise able to work during the period for which benefits were available: *Ferreira*, at para. 28. Here, the plaintiffs have not provided any evidence that Mr. Sampson was “not also unable to work as a result of the COVID-19 pandemic”. Further, the plaintiffs have not provided any evidence that Mr. Sampson has been called upon to repay the CERB benefit provided. If CERB is not deducted from the award, then this will present a case of double recovery.

[15] Counsel for the plaintiffs sought an order at trial that any mention of CERB be omitted from discussion or reference throughout the trial. This prevented the defendant from making any submissions with respect to Mr. Sampson’s CERB benefits and in relation to any potential ability to work but for COVID-19, and the receipt of the benefit. To now claim that Mr. Sampson’s CERB benefit should not be deducted from the award, despite the requested court order that any reference to same should be omitted from trial, would be prejudicial to the defendant.

Discussion

[16] I have concluded that the \$14,000.00 CERB payment made to Mr. Sampson should not be deducted from the jury award for past loss of income for the following two reasons.

[17] First, I am not satisfied that the CERB payment was a payment made “in respect of the incident” for the purposes of s. 267.8(1) of the *Insurance Act*.

[18] In *Demers v. B.R. Davidson Mining & Development Ltd.*, 2012 ONCA 384, at para. 48, the plaintiff had been injured in a car accident and she sued the defendants for damages for her personal injuries. The plaintiff worked for a health-care service provider at the time of the accident and continued to work there afterwards until she stopped working “due to disability”. The plaintiff then applied for and received disability benefits from the Canada Pension Plan (CPP) and the Hospitals of Ontario Pension Plan (HOOP). The parties brought a motion on an agreed statement of facts seeking a determination, among other things, whether the CPP and HOOP disability benefits were deductible under s. 267.8(1)2 of the *Insurance Act* from any award for loss of income or loss of earning capacity, as a matter of law. The motion judge held that neither of the disability benefits were deductible from damages on account of income loss or loss of earning capacity.

[19] The defendants in *Demers* appealed the motion judge’s decision submitting that the benefits compensated the plaintiff for loss of earning capacity and were therefore deductible under the Act. On appeal, the plaintiff argued that the motion judge’s decision should be upheld for two reasons: (i) she receives the CPP and HOOP benefits only because of her disability and not for any loss of earning capacity; and (ii) she does not receive those benefits “in respect of the incident”, that is, in respect of the car accident in which she was injured. The Ontario Court of Appeal dismissed the appeal, holding, at paras. 44, 48-50:

44 To be deductible under s. 267.8(1)2 payments must be “in respect of the incident”. I agree with Ms. Demers’ submission that the CPP disability benefits she receives are payments in respect of her disability, not payments in respect of the

incident – that is the accident for which she claims damages for her personal injuries. On this ground too, I would dismiss the appeal.

...

48 The context in which the phrase “in respect of” is found in s. 267.8(1)2 of the *Insurance Act* is similar to its context in s. 9 of the *Crown Liability and Proceedings Act*. The phrase is tied to the incident, in this case the car accident in which Ms. Demers was injured. Her CPP benefits, as in *Sarvanis*, are not tied to the incident. Instead, they depend on her disability and on meeting the qualifications for receiving these benefits. Accordingly, I conclude that CPP disability benefits are not paid to Ms. Demers “in respect of the incident” and therefore are not captured by s. 267.8(1)2.

49 The analysis of the question whether HOOP disability benefits are deductible does not differ from the analysis for CPP disability benefits. Thus, Ms. Demers’ HOOP benefits, too, are not deductible from payments for loss of earning capacity.

50 There is one distinction between the two benefits. Unlike the case with CPP disability benefits, there is no amending regulation to now make HOOP benefits deductible. However, the absence of an amendment does not change the analysis.

[20] The language of s. 267.8(1)2 of the *Insurance Act* reads the same in *Demers* as in the case currently before the court. There was no evidence tying Mr. Sampson’s receipt of the CERB benefit to the motor vehicle accident that caused his injuries. Therefore, I find that the CERB payment was not paid to him “in respect of the incident”, being the motor vehicle accident for which the plaintiffs claimed damages for personal injuries.

[21] The amending regulation referred to by the Court of Appeal is O. Reg. 461/96 – Court Proceedings for Automobile Accidents that Occur On or After November 1, 1996, made under the *Insurance Act*. Pursuant to s. 5.2 of that regulation, a CPP disability benefit is deemed to be a payment in respect of an incident for income loss or loss of earnings for the purposes of s. 267.8(1)2. Notably, a CERB benefit is not.

[22] Thus, I find that Mr. Sampson’s CERB payment does not fall within the purview of s. 267.8(1)2 and so is not required to be deducted from the past income loss damages award.

[23] The second reason why I am of the view that Mr. Sampson’s CERB payment should not be deducted from the past income loss award is because he may be required to reimburse the government for those funds. Given that there is no certainty that Mr. Sampson is entitled to keep the \$14,000.00 CERB payment, I find it inappropriate to grant the relief requested by the defendant. The concern is that, if the defendant can deduct the \$14,000.00 CERB amount from the past income loss portion of the award and the government subsequently demands that Mr. Sampson repay the same amount, this would provide the defendant with a windfall and Mr. Sampson would not recover all of the amounts that the jury awarded to him.

[24] The defendant relies on *Ferreira v. Hopper*, where the court had to decide a motion respecting whether, pursuant to s. 267.8(1)2, benefits received were deductible from damages awarded for injuries suffered in a motor vehicle accident. In that case, liability had been admitted prior to trial and the only issue for determination by the jury at trial was damages. The plaintiff had received the Canada Emergency Response Benefit (CERB) and the Canada Recovery Benefit (CRB). The motion judge found that at no point during the trial did the plaintiff concede that any portion of his absence from work was due to any reason other than his inability to work because of the motor vehicle accident. It was therefore held that the CERB and CRB amounts were deductible from the \$100,000.00 jury award for past loss of income. However, I find *Ferreira* to be distinguishable from the case before me. It does not appear that the repayment obligation set out in s. 12(1) of the *Canada Emergency Response Benefit Act* was brought to the attention of the court in *Ferreira*, nor did the court make a clear ruling on whether the CERB payment was made “in respect of the incident”. Accordingly, I decline to follow *Ferreira*.

[25] I conclude that the \$14,000.00 CERB income support payments received by Mr. Sampson shall not be deducted from the damages awarded by the jury for past income loss.

(b) *What is the amount of partial indemnity costs payable by the defendant to the plaintiffs?*

Position of the Plaintiffs

[26] While successful at trial, the plaintiffs acknowledge that they did not beat their own offer to settle and, therefore, are entitled to partial indemnity costs. They seek legal fees in the amount of \$350,000.00 plus HST of \$45,500.00, for a total of \$395,500.00 for the trial.

[27] The plaintiffs submit that the amount of legal fees sought is fair and reasonable in all of the circumstances. Their counsel have substantial trial experience. The hourly rates claimed are consistent with both the case law and the 2005 costs grid. The time of lawyers who did not work on the trial has been removed from the bill of costs. The plaintiffs’ lawyers worked as a two-lawyer team, dividing up the work effectively. The case was moderately complex with respect to the medical evidence and the cause of Mr. Sampson’s impairments. Liability was not admitted until days before the trial. The plaintiffs were required to confront several issues relating to causation and the impact of a cancer diagnosis and its effect on Mr. Sampson’s claims for future care and future loss of income. This was a high-stakes case for the plaintiffs. Given their financial means, an adverse verdict would have been disastrous. The costs claimed are proportionate to the success achieved by the plaintiffs. The requested amount for costs is what a losing party could be expected to pay following a trial. The costs claimed are significantly less than the jury award and are well within a reasonable range for an action that has spanned over 5 years concluding with a trial that lasted nearly 3 weeks.

Position of the Defendant

[28] It is the position of the defendant that a reasonable range of costs it could reasonably be expected to pay is between 15-30% of the net damages award. The plaintiffs’ total combined net damages award, after deductions, was \$467,723.96. Accordingly, a reasonable costs award ranges

between \$70,158.59 and \$140,317.18. A costs award higher than that range would be contrary to the principle of indemnity.

[29] The defendant admitted liability at trial in order to reduce the length of the trial. The defendant was unable to admit liability earlier in the action because the plaintiffs were unwilling to exchange an admission of liability to limit the claim to policy limits: *Selby v. Naray*, 2023 ONSC 6302, at para. 19.

[30] This case did not feature any extraordinary element of complexity. These were relatively routine claims for general damages, loss of income, and care costs.

[31] The defendant's bill of costs shows substantial indemnity legal fees in the amount of \$162,291.84 and partial indemnity legal fees in the amount of \$108,126.76, both inclusive of HST. Total disbursements are in the amount of \$103,574.22.

General Principles

[32] 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.

[33] 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.

[34] 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.

[35] 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.

[36] 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. Misk*, 2010 ONSC 7238, at para. 10.

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

[38] 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.)

[39] Among the factors the court must consider is the principle of proportionality. As McCarthy J., explained in *Aacurate General Contracting Ltd. v. Tarasco*, 2015 ONSC 5980, at para. 15:

I am mindful that the principle of proportionality calls upon the court to consider the amount claimed for costs in relation to the amount recovered in the judgment, as well as the reasonable expectation of the parties. In my view, however, proportionality cannot and should not be routinely invoked to save litigants from the actual costs of proceedings in circumstances where those litigants have put forth a wholly unmeritorious defence to a legitimate claim or have caused the proceeding to become unduly prolonged or complicated. The principle should be applied thoughtfully and in a balanced fashion along with the other factors set out in rule 57.01.

[40] While the amount ultimately awarded at the end of the trial needs to be considered when addressing the issue of costs, a successful party should not be unduly undercompensated for costs which were legitimately incurred: *Gardiner v. MacDonald Estate*, 2016 ONSC 2770, at paras. 19, 65, affirmed 2016 ONCA 968.

Discussion

[41] In the written costs submissions of the plaintiffs, there was no indication of what the terms of the solicitor-client retainer agreement were respecting legal fees or if the plaintiffs had entered

into a contingency fee agreement with their lawyers. Further, no detailed dockets were submitted setting out the time and work undertaken by the plaintiff's lawyers.

[42] In this case, I am satisfied that the plaintiffs were compelled to take their claim through to trial. This was a moderately complex case given the issues raised, including causation and the impact of Mr. Sampson's cancer diagnosis, the experts required, and the nature of the relief being sought. The trial took place over the course of almost 3 weeks. Liability was not admitted until days before the trial. Counsel for the plaintiffs clearly had more legal work to do to prosecute the case than the defendant had to do to defend against it. Further, I accept that the case was of great importance to the plaintiffs, and that a loss at trial would have been a significant burden to them so success was crucial. Accordingly, it is not unreasonable that the plaintiffs are claiming an amount for legal fees greater than those of the defendant. The defendant took the risk of defending the claim in the manner that it did. The defendant could reasonably have expected to pay costs in the event of lack of success at trial.

[43] At trial, the plaintiffs' claim for damages was in the range of \$1,147,160.00. The jury award was for more than half of that. This is not a case where the amount ultimately recovered by the plaintiffs was so modest that it would be grossly disproportionate to make an award of partial indemnity costs in a range claimed by the plaintiffs. In my view, the defendant's focus on proportionality in proposing the range of costs it did ignores the principles of indemnity and access to justice.

[44] I do not find the hourly rates of the plaintiffs' lawyers to be unreasonable. I also do not find the hours claimed to be overly excessive, given the number of years the litigation had been ongoing and given the length and complexity of the jury trial. The plaintiffs had two lawyers at trial, one called in 2008 and the other in 2017, who shared the workload. Both were experienced in personal injury litigation. There was nothing the plaintiffs did to unnecessarily lengthen or complicate the trial.

[45] Among the witnesses called at trial, there were six expert witness called by the plaintiffs and four expert witnesses called by the defendants. The testimony of those witnesses included medical evidence and computational opinion evidence that needed to be distilled and delivered in a meaningful way. Cross-examination of the defendant's expert witnesses was also an important feature of the trial work.

[46] A number of motions were also made at the trial that had to be prepared and argued.

[47] Counsel for both parties were well-prepared, effective and efficient advocates at trial.

[48] The plaintiffs' bill of costs shows that there were other lawyers and clerks who also worked on the file. I accept the submissions of counsel for the plaintiffs that they have voluntarily deducted \$15,000.00 in items from their bill of costs, including removing the time of lawyers who did not work on the trial and removing the time for post-trial work. As well, the plaintiffs assert that they have reduced the amount sought from \$369,771.50 to \$350,000.00 plus HST.

[49] Having regard to all of these factors, and considering the jurisprudence, the balancing exercise required under Rule 57.01, and the guidance provided by the *Boucher* decision of the Ontario Court of Appeal, I find that awarding partial indemnity costs to the plaintiffs in the amount of \$290,000.00, plus HST in the amount of \$37,700.00, for a total of \$327,700.00 is fair, reasonable and proportionate in the circumstances.

(c) ***What is the amount of assessable disbursements payable by the defendant to the plaintiffs?***

[50] The plaintiffs are seeking assessable disbursements in the amount of \$167,894.62, inclusive of HST, for the trial.

[51] The defendant takes issue with two classes of disbursements being claimed:

- (a) for meetings with experts that took place in September 2024 prior to the adjournment of the original trial date, as these are duplicative; and
- (b) \$9,600.00 for two home modification reports prepared by an expert who did not testify at trial.

Position of the Plaintiffs

[52] With respect to the disputed expert meeting disbursement, the plaintiffs submit that the matter was originally scheduled to proceed to trial on September 16, 2024. However, it was adjourned after the defendant served a report of Dr. Meyers on September 6, 2024. The issues raised by Dr. Meyers became a live issue at trial. Prior to the adjournment, the plaintiffs' counsel had initial preparatory calls with some of their experts but these were not final preparation meetings. Accordingly, given the relatively short adjournment, these preparatory meetings were not duplicated in the lead up the April 2025 trial. Further the defendant did not give a warning of the incoming report from Dr. Meyers. Therefore, it was not unreasonable of the plaintiffs to have begun preparing their experts for trial.

[53] With respect to the home modification expert reports, the only reason this expert was not called a trial was because the plaintiffs moved into an accessible condominium before trial that removed the need for significant home modifications. The plaintiffs' relocation ended up reducing the defendant's exposure by hundreds of thousands of dollars and reducing the length of the trial. The disbursement of the home modification expert was a reasonable one at the time the reports were commissioned. A party can recover disbursements incurred for witnesses who are not ultimately called to give evidence at trial: *Rochon v. MacDonald*, 2014 ONSC 51, at paras. 34-35. Not permitting recovery of disbursements for experts who do not testify would be a disincentive to run trials as efficiently as possible: *Moustakis v. Agbuya*, 2024 ONSC 4981, at para. 80.

Position of the Defendant

[54] The defendant objects to the claimed disbursement for meetings held between the plaintiffs' counsel and the plaintiffs' experts prior to the adjourned September 2024 trial date. The

defendants' written submissions indicate that the matter was pre-tried on June 24, 2024, and the matter was formally set down for trial for the Fall 2024 sittings commencing on September 16, 2024. On or about August 27, 2024, counsel for the defendant advised that he had been called for a jury trial in Bracebridge which was to begin on September 11, 2024 and carry through to September 23, 2024. On or about September 6, 2024, the defendants' counsel "followed up on the above conversation to reiterate the conflict with the Bracebridge trial and requested consideration of an adjournment of the subject trial". The trial was adjourned, on consent, to the sittings commencing on April 7, 2025.

[55] With respect to the home modification expert reports, the defendant submits that, ultimately, at trial, the damage claim relating to home modifications was effectively abandoned as, prior to trial, the plaintiffs moved to an accessible condominium that accommodated Mr. Sampson's physical limitations. As a result, at trial, they sought only modest amounts for adding a few aides to the bathroom and no expert evidence was tendered regarding home modifications. The report served detailed extensive renovations allegedly required to a home or the plaintiffs' trailer, almost none of which were sought nor needed when they purchased their condominium. The defendant submits that this case is distinguishable from *Rochon* since, in that case, the court held that disbursements for a psycho-vocational status report should be allowed because the report "satisfied the defendants" about a particular issue in dispute, which meant that evidence on the subject was unnecessary at trial. Here, it was the plaintiffs' decision to move that rendered the home modification reports irrelevant and inapplicable. The home modification issue was not obviated due to the defendant being satisfied with the reports or with the evidence.

Discussion

Expert Meetings

[56] Given the defendant's submission that its request for an adjournment of the September 2024 trial was made only 10 days before the sittings were to commence, it is understandable that some preparation had been done by the plaintiffs' counsel and experts to prepare for trial. While the adjournment was consented to by the plaintiffs, there was nothing before me to establish that that consent was on a without costs basis. Typically, adjournments of proceedings are granted if there is no prejudice to the other party that cannot be compensated for by way costs. Here, it seems to me that the costs of preparing a witness in anticipation of an upcoming trial, which trial is then adjourned shortly before its commencement date at the request of the defendant, is not a cost that the plaintiffs should be expected to absorb. The defendant should pay that cost. I also accept the submissions made on behalf of the plaintiffs that their claimed costs relate to counsel's "initial preparatory calls with some of their experts". And that, given the relatively short adjournment, those meetings were not duplicated in the lead up to the April 2025 trial when final preparation meetings were held.

[57] Accordingly, I decline to order that the expert meetings item be deducted from the plaintiffs' disbursements.

Home Modification Reports

[58] Costs of an expert report prepared but not relied upon can be recoverable if the costs were reasonably incurred in contemplation of or in preparation for the litigation. In *Moustakis*, at paras. 79-81, the court discussed how not permitting the recovery of disbursements incurred for experts could disincentivize parties from efficiently prosecuting a trial, stating:

79 A party can recover disbursements incurred for witnesses who were not called to give evidence: *Rochon v. MacDonald*, 2014 ONSC 591, at paras. 34 and 35.

80 There are various reasons why experts may be retained but not called as witnesses at trial. It is difficult if not impossible for counsel to know exactly how the evidence will unfold and what evidence may no longer be required. A rule that disentitles a party to a disbursement for an expert not called to testify could act as a disincentive to running trials as efficiently as possible, limiting evidence only to that which is necessary and saving time and money as well as judicial resources.

81 I am satisfied that it was reasonable for the Plaintiff to incur the disbursements for the various experts in this case.

[59] As the Ontario Court of Appeal held in *MDS Inc. v. Factory Mutual Insurance Company*, 2021 ONCA 837, at paras. 16, 19, 20 and 21, a party should be allowed to recover the reasonable disbursements for: (a) expert advice regardless of whether the expert reports were introduced at trial or relied on by the trial judge; and (b) expert reports reasonably necessary for the conduct of the proceeding, whether or not the expert is called to give evidence. The Court of Appeal further held that the reasonableness of retaining the expert is to be considered at the time the expense is incurred and not in hindsight.

[60] The court is to assess whether the report was a proper expenditure given the circumstances of this case. At the time the home modification expert was retained and the disputed report(s) obtained, the plaintiffs had not yet purchased the accessible condominium. So, home modifications was an issue that the plaintiffs were going to have to prove at trial in the event that their then residence(s) needed to be made accessible for Mr. Sampson. I find that the obtaining of such an expert report(s) was necessary and a reasonable disbursement at the time the expense was incurred. There is nothing before the court to establish that the plaintiffs knew in advance of obtaining the reports that the evidence would not end up being needed at trial.

[61] Since the disputed home modifications expert reports were legitimately necessary to prove the claim at the time the disbursement was incurred, I decline to order that the related \$9,600.00 disbursement be deducted.

DISPOSITION

[62] Based on the foregoing, the following is ordered:

- (a) The CERB payment is not deductible from the plaintiff John Sampson's past loss of income award.
- (b) The plaintiffs are entitled to partial indemnity costs in the amount of \$327,700.00, inclusive of HST.
- (c) The plaintiffs are entitled to disbursements in the claimed amount of \$167,894.62.

MacNEIL J.

Released: November 17, 2025