

CITATION: Austin v. MacFarlane, 2026 ONSC 1466
COURT FILE NO.: CV-20-00000023
DATE: 2026-03-10

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Dale Robert Austin)
) *Joseph Kennedy, for the Plaintiff*
Plaintiff)
)
– and –)
)
Lynn Melanie MacFarlane)
) *Paul Trenker, for the Defendant*
Defendant)
)
)

2026 ONSC 1466 (CanLII)

DECISION ON COSTS

BELLOWS, J.

- [1] This cost decision relates to my trial decision of January 23, 2026, in *Austin v. MacFarlane*, 2026 ONSC 463. In accordance with that decision, I received written submissions from both parties.
- [2] The plaintiff seeks costs on a partial indemnity basis as the successful party to the action. The defendant submits that no costs should be payable because the action ought to have proceeded under Rule 76 Simplified Procedure, given that the award was under \$200,000.00.
- [3] The action was brought under the ordinary procedure because the plaintiff’s claim included compensatory damages of \$119,595.75, plus \$100,000.00 in general damages and an additional \$100,000.00 in punitive damages.
- [4] Section 131(1) of the *Courts of Justice Act* provides that “costs of and incidental to a proceeding are in the discretion of the court, and the court may determine by whom and to what extent costs shall be paid.”

- [5] The plaintiff argues that I ought to rely on r. 57.01(1) of the *Rules of Civil Procedure*, which provides the factors, in addition to the result of the action, that the court may consider in exercising discretion. The plaintiff seeks a cost award of \$77,264.97, calculated on a partial indemnity basis.
- [6] The defendant argues that r. 76.13 ought to supersede any decision I might make under r. 57.01 and no costs should be awarded.
- [7] Given that the respondent's r. 76.13 argument, if successful, would render any analysis on r. 57.01 costs moot, I will begin with an assessment of that submission.

Rule 76.13 Assessment

- [8] Rule 76.13 states:

76.13 (1) Regardless of the outcome of the action, if this Rule applies as the result of amendment of the pleadings under subrule 76.02 (7), the party whose pleadings are amended shall pay, on a substantial indemnity basis, the costs incurred by the opposing party up to the date of the amendment that would not have been incurred had the claim originally complied with subrule 76.02 (1), (2) or (2.1), unless the court orders otherwise.

(2) Subrules (3) to (10) apply to a plaintiff who obtains a judgment that satisfies the following conditions:

1. The judgment awards exclusively one or more of the following:

- i. Money.
- ii. Real property.
- iii. Personal property.

2. The total of the following amounts is \$200,000 or less, exclusive of interest and costs:

- i. The amount of money awarded, if any.
- ii. The fair market value of any real property and of any personal property awarded, as at the date the action is commenced.

(3) The plaintiff shall not recover any costs unless,

(a) the action was proceeding under this Rule at the commencement of the trial; or

(b) the court is satisfied that it was reasonable for the plaintiff,

(i) to have commenced and continued the action under the ordinary procedure, or

(ii) to have allowed the action to be continued under the ordinary procedure by not abandoning claims or parts of claims that do not comply with subrule 76.02 (1), (2) or (2.1).

(4) Subrule (3) applies despite subrule 49.10 (1) (plaintiff's offer to settle).

- [9] I accept the defendant's argument that I must consider r. 76.13 and that it is mandatory unless I find it reasonable for the plaintiff to have commenced and continued the action in the ordinary procedure.

- [10] In considering how r. 76.13 applies here, I have reviewed the Court of Appeal’s assessment in *Sundial Homes (Sharon) Limited v. Wei*, 2025 ONCA 102, and its predecessor case, *Garisto v. Wang*, 2008 ONCA 389.
- [11] *Sundial* is the most recent Court of Appeal authority on this issue. It takes care to remind us that “[t]he language of r. 76.13 is mandatory. It stipulates that a party ‘shall not recover any costs’ unless the court is satisfied that it was reasonable for the party to continue the action under the ordinary procedure”: at para. 25. At para. 22, the Court finds that, although the plaintiff was correct to commence the application under ordinary procedure, there came a time when it became unreasonable to continue under ordinary procedure “in circumstances where it knew that there was a significant risk that it would ultimately recover less than the prescribed amount. It sought to avoid having its damage claim fall below that limit through the two questionable mechanisms...”: at para. 26.
- [12] As noted in para. 17 of *Garisto*:
- The purpose of the simplified procedure regime is to reduce legal costs and to enhance access to justice by making available a cheaper and more expeditious procedural regime appropriately geared to the litigation of modest claims. That important purpose will be undermined if the costs sanctions built into the simplified procedure regime are not enforced. On the other hand, rule 76.13 has a built-in safety valve and provides that costs may be awarded even when a plaintiff recovers less than \$50,000, if it was "reasonable" for the plaintiff to have commenced or continued the action under the ordinary procedure.
- [13] In *Garisto*, the Court of Appeal relied on the trial judge’s instruction to the jury that it would be open to them to find for the plaintiff within a range that extended both above and below the threshold for simplified procedure as it then was.
- [14] Although the present case does not involve a jury instruction, as the trial judge, “[t]he reasonableness of the appellant's decision to proceed under the ordinary procedure must be assessed on the basis of the facts as they existed before the jury's verdict”: *Garisto*, at para. 21.
- [15] In making my findings on damages, I carefully considered the quantum of damages sought – both compensatory and non-compensatory. I did not find the claims for general damages or punitive damages to be vexatious or unreasonable. The plaintiff did achieve partial success on his claim for general damages. I did not dismiss the plaintiff’s punitive damages claim without careful consideration. It was certainly open to the Court to consider a higher quantum of damages.
- [16] Given the foregoing, I find that it was reasonable for the plaintiff to commence and continue with the action under ordinary procedure and reject the defendant’s reliance on r. 76.13 to order no costs.

Rule 57.01 Assessment

[17] Rule 57.01(1) sets out a non-exhaustive list of factors to be considered, as follows:

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) 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;

(0.b) 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;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs.

[18] The defendant did not refer to any factors in r. 57.01. As such, I will review those that are relied on by the plaintiff and any others I find especially relevant, though not necessarily in the order in which they are listed in the rule.

[19] Justice Perell succinctly summarized the caselaw the purpose of costs in *394 Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 7238, at para. 10 as follows:

Modern costs rules are designed to advance five purposes in the administration of justice: (1) to indemnify successful litigants for the costs 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 the sanctioning of inappropriate behaviour by litigants in their conduct of the proceedings; and (5) to encourage settlements [References omitted, emphasis added.]

The Amount Claimed and the Amount Recovered

[20] The plaintiff sought compensatory damages of \$119,595.75, general damages of \$100,000.00, and punitive damages of \$100,000.00. The plaintiff was completely successful in recovering their compensatory damages, and partially successful on the general damages claim, receiving \$10,000.00. The plaintiff was not successful in their claim for punitive damages.

Offers to Settle

[21] The plaintiff has provided each written offer to settle as a part of my consideration under r. 57.01; they are as follows:

- a. October 20, 2021 – plaintiff offer: \$110,000.00, inclusive of costs.
- b. August 21, 2023 – plaintiff offer: \$200,000.00, inclusive of costs.
- c. March 2025 – defendant offer: \$10,000.00, inclusive of costs.
- d. May 12, 2025 – plaintiff offer: \$119,575.75, no costs payable by either party.
- e. August 20, 2025 – plaintiff offer: \$115,000.00, no costs payable by either party.

[22] Each of the plaintiff's offers stated that it was open until five minutes after the start of the trial. The defendant's offer was open until the commencement of the trial. Of note, there was no counteroffer made to either of the plaintiff's two subsequent offers. Trial commenced on September 8, 2025.

[23] Except for the August 2023 offer, the plaintiff was more successful after the trial with a total award of \$129,595.75, plus pre- and post-judgment interest in accordance with the *Courts of Justice Act* and as a general principle, he is entitled to costs on a partial indemnity basis: see *Bell Canada v. Olympia & York Developments Ltd.* (1994), 17 O.R. (3d) 135 (C.A.); *George v. Landles*, 2012 ONSC 6608.

[24] In exceptional cases, the court may award damages on a higher scale. I do not find this to be an exceptional case.

The Complexity of the Proceeding, the Importance of Issues, and the Duration of Trial

[25] This trial was scheduled for five days but was shortened to four. Both liability and damages were at issue at trial. There was little common ground between the parties, and therefore, the issues were important to the determination of the matter.

[26] The parties both presented their case efficiently. On the issues for trial, the parties held disparate positions, which were irreconcilable without findings of fact based on the evidence presented to the Court. I do not find that either party unnecessarily lengthened the trial.

The Experience of Counsel – The Rate Charged and Time Spent

[27] I have reviewed the Bill of Costs filed with the plaintiff's written submissions. I find the time spent, use of law clerk as appropriate, and rate to be commensurate with a lawyer with 23 years of experience, all to be reasonable in all the circumstances.

Conclusion

[28] Having regard to all the factors relevant to this case under r. 57.01, and in light of my findings regarding the applicability of r. 76.13, costs shall be awarded to the plaintiff, payable by the defendant within 60 days in the amount of \$77,264.97.

Bellows, J.

Released: March 10, 2026

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Dale Robert Austin

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DECISION ON COSTS

Justice R.A. Bellows

Released: March 10, 2026