

CITATION: Co-operators General Insurance v. Doobay and
Doobay v. Co-operators General Insurance, 2023 ONSC 4075
COURT FILE NO.: CV-14-00000874-0000
COURT FILE NO.: CV-16-00000287-0000
Date: 2023-07-06

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: The Co-operators General Insurance Company v. Doobay
AND RE: Doobay v. The Co-operators General Insurance Company
COUNSEL: Jonathon Kahane-Rapport, counsel for the Plaintiff / Defendant,
The Co-Operators General Insurance Company
Mark Stoiko, counsel for the Defendant / Plaintiff, Doobay
BEFORE: The Honourable Mr. Justice P. R. Sweeny
HEARD: May 25, 2023

ENDORSEMENT RE: COSTS

Introduction

[1] These two claims were tried before me with the jury. In one claim, The Co-operators General Insurance Company was the plaintiff and Bagwandat (Ron) Doobay was the defendant. In that claim, the Co-operators claimed return of benefits paid and punitive and exemplary damages against the defendant. That claim was issued September 10, 2014. In the other claim, Mr. Doobay claimed income replacement benefits and other statutory accident benefits from the Co-operators General Insurance Company. That claim was issued May 14, 2016.

[2] Both claims proceeded before me with a jury. The jury found that Mr. Doobay was not catastrophically impaired and not entitled to IRBs. The jury awarded the Co-operators \$52,499.58 for repayment of benefits and \$7,500.42 for punitive damages from Mr. Doobay. The Co-operators was wholly successful in the trial.

[3] I am now to determine the issue of costs. It is clear, and Mr. Doobay does not dispute, that the Co-operators are entitled to costs of this trial. The issues are on what scale and what amounts. There is also an additional issue of the potential payout of an Adverse Costs Insurance Policy issued by AXIS Reinsurance Company (Canadian Branch).

[4] The Co-operators say that they are entitled to costs of the proceeding on a partial indemnity basis up to the date an offer to settle was made and on a substantial indemnity basis after that offer to settle was made. Mr. Doobay says any costs award should be limited given his limited financial means.

Impecuniosity of the Plaintiff

[5] In *Kesete v. Gaspar*, 2022 ONSC 6860 Taylor J. addressed this same argument made by Mr Doobay. He noted in that case that in *Baines v. Hebar*, 2013 ONSC the court held there was no utility in making an award of costs against an unsuccessful plaintiff who did not have the financial ability to pay an award of costs and would be unlikely to achieve the financial ability to pay an award of costs in the future. In *Baines*, the plaintiff was self-represented at trial. He also noted that the Divisional Court in *Nassab (Litigaiton Guardina of) v. Erinoakkids*, 2017 ONSC 2740, in referring to the circumstances in which the inability of a party to pay costs may be relevant factor held that such cases will be few and far between. Taylor J. also observed, in that case, that there was adverse costs insurance available.

[6] In this case, I note the plaintiff at the time of surveillance, appeared to own a rental property and a home. There is no evidence as to what happened to those substantial assets. I also observe that in this case there is adverse cost consequences insurance but this is not a determining factor in my decision.

Law

[7] Subject to the provisions of an Act or the rules of this court, costs are in the discretion of the court: s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. In exercising that discretion, I may consider the result, any offers to settle and the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.), at para. 24. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 2002 CanLII 25577 (ON CA), 21 C.C.E.L. (3d) 161

(Ont. C.A.), at para. 4.

Offers to Settle

[8] On February 22nd, 2023, Co-operators made a rule 49 offer to settle these two proceedings on the basis of a payment of \$10,005.00.

[9] Co-operators, as a plaintiff, beat the offer because they were awarded \$60,000.00 by the jury. In the normal course, Co-operators, as plaintiff, would be entitled to costs on a substantial indemnity basis from the date of the offer.

[10] Mr. Doobay made no formal offers to settle.

[11] There were also attempts to resolve the claim during the course of the trial. Co-operators offered \$50,000.00 which was rejected by Mr. Doobay.

[12] The two actions were tried together. Co-operators was the plaintiff in one and the defendant in the other. An offer to settle by a plaintiff that is less than the amount awarded at trial entitles the plaintiff to substantial indemnity costs from the date the offer was made: rule 49.10(1). On that basis, Co-operators is entitled to costs on a substantial damage basis for the trial of that action. With respect to an offer to settle by a defendant, if the plaintiff recovers less than the defendant offered, this results in the defendant obtaining partial indemnity costs from the date the offer was made: rule 49.10 (b). A defendant is not entitled to more than partial indemnity costs as a result of the operations of the provisions on offers to settle not accepted.

[13] In this case, the plaintiff pursued his claim that was meritless. Mr. Doobay's evidence was rejected by the jury. He was not a credible witness. He refused to acknowledge that he was the person in the surveillance video. He represented that his withered arm was as a result of the accident when it was not and was a pre-existing condition which had been that way for many years. He presented himself to the medical assessors as living a severely limited ability to engage in any activities. This was in stark contrast to the person who was seen in the extensive, weeks of, surveillance.

[14] This is an unusual case. The *Insurance Act* no longer allows for claims to be brought for SABS in court. They are now all determined by the Tribunal.

[15] Co-operators received a result more favourable than its offer to settle. How do I take this into consideration? I am fixing not assessing costs, but I will set out my rationale, so the parties understand my reasoning on this issue. In the end, I am satisfied in considering all the relevant factors, that the amount I have fixed for costs and disbursements is the appropriate amount. Of the total trial days of 19, noting some were short days, Co-operators, as plaintiff and defendant, used 5 days for its evidence, I will award substantial indemnity for those 5 trial days. I would also award substantial indemnity for the preparation time after the offer to settle was made in roughly the proportion as the trial time for the Co-operators case in relation to total trial time: 5 days to 19 days which I will round to 25%.

[16] This was not a complicated case. It was not complex. It was a straightforward credibility case, and the plaintiff had no credibility.

[17] Co-operators submitted a bill of costs which was not in the proper form. It itemized some 1,304 pieces of correspondence which took up 28 pages of the submission. Rather than outlining the actual hours spent and attributing them to the relevant aspects of the case, for example, pleadings, discovery, pretrial, trial preparation and trial, I was provided with a link to a series of accounts rendered, leaving me to figure it out. After the hearing, I did ask for a breakdown of disbursements which were provided to me.

[18] There was an arbitration held before FSCO in March 2016. It appeared that there was a settlement reached. Mr. Doobay purported to rescind the settlement. A motion was brought by Co-operators to enforce the settlement. On September 28, that motion was dismissed with costs awarded to Mr. Doobay in the amount of \$5,000.00. Those costs were paid by Co-operators

[19] The matter was to proceed back to arbitration. The prior arbitrator was recused as a result of him having been advised of the settlement. Ultimately, Mr. Doobay withdrew his application. Co-operators sought costs of the arbitration and were awarded \$5,500.00. These have not yet been paid.

[20] The costs of the arbitration have already been dealt with by an award. In my view, they cannot be claimed in these proceedings. This is not a case where, as in *Carr v. Modi*, 2016 ONSC 1300, there was the recovery of SABS that might be a benefit to the defendant. The issue of the costs has been decided by the Tribunal.

[21] I will not award costs claimed by Co-operator in the years before the claims were issued. That time is related to the arbitration, and also to providing advice to the co-Operators on how to handle this claim.

Quantum of costs

[22] Mr. Doobay did not provide a Bill of Costs. He did not challenge the amount claimed in terms of its reasonableness. His main argument was that he cannot pay. I have already addressed that argument and it is not persuasive in this case.

[23] I allow **\$3,000.00** for pleadings in both actions on a partial indemnity basis.

[24] For the costs up to the offer to settle on February 3, 2023, the total legal fees claimed by the invoices for that period of time (as allowed by me) are \$20,062.50. I fix the partial indemnity costs at 65% of full indemnity costs: \$13,046.53 rounded to **\$13,000.00**.

[25] For the trial and trial preparation after the offer to settle, the defendant's counsel charged an hourly rate of \$360.00. That would be full indemnity. I set the partial indemnity rate at \$215.00 per hour and the substantial indemnity rate at \$304.00 per hour, being 85% of the full indemnity rate. The Defendant's counsel spent 60 hours for trial preparation before the trial and then attended the trial. Apportioning the trial preparation in line with the trial time, about 75% would be partial indemnity and 25% substantial indemnity. 45 hours at \$215.00 is \$9,675.00 and 15 at \$304.00 is \$4,560.00. I fix **\$14,234.00** for this pretrial preparation.

[26] I will set a per diem for trial time. I consider about 10 hours per day for the trial days to be reasonable, this includes preparation. I include the per diem for the day of the mid-trial pretrial. This is 20 days total. I fix the partial indemnity rate at \$2,500.00 per day for 15 days for \$37,500.00 and at \$3,500.00 per day on a substantial indemnity basis for 5 days for \$17,500.00, a total of **\$55,000.00**.

[27] Co-operators claimed \$37,227.98 for trial disbursements. In addition to that amount, I allow: \$231.00 for the claim and transaction levy; \$175.00 for the statement of defence and \$1,500.00 for copying and printing of documents and witness fees for a total of \$39,133.93 rounded to **\$39,100.00**. For the reasons outlined above, the disbursements claimed with respect to the arbitration are not allowed by me.

[28] In the result, Co-operators is entitled to its fees of \$85,234.00, plus HST of \$11,080.42, for a total of \$96,314.42, which I round to \$96,300.00 for fees, plus disbursements of \$39,100.00 for a total of **\$135,400**, all inclusive, to be paid by Mr. Doobay.

The Judge Insurance Policy

[29] Mr. Doobay has purchased after the event insurance. That policy would provide coverage of up to \$100,000.00 in the event that Mr. Doobay was not successful. He was not. In this case, I am not required to address whether the Co-operators have any rights to the proceeds because Mr. Doobay concedes that the \$100,000.00 under the Policy should be paid to Co-operators. He consents to this.

[30] The insurer had no notice of this hearing. I am not making any determination as to whether the insurer is obligated to pay. Based on the consent of Mr. Doobay, any proceeds that are payable to Mr. Doobay shall be paid to the Co-operators.

[31] In the result, there will an order as follows:

Bagwantdat (Ron) Doobay shall pay to Co-operators \$135,400.00, all inclusive for costs forthwith.

Any proceeds payable under The Judge After-The-Event Insurance Certificate, Policy No. CTS795849-PI-000818, with an effective date of April 27, 2009, shall be paid to Co-operators.



P.R. Sweeny, R.S.J.