

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Lisa Majerczyk

**AND:**

Rodolfo Manalo

**BEFORE:** S. J. WOODLEY J

**COUNSEL:** Doug Wright, Counsel for the Plaintiff

Michael Kennedy, Counsel for the Defendant

**HEARD:** November 6, 2023

**REASONS FOR DECISION RE COSTS FOLLOWING TRIAL**

**OVERVIEW**

1. On January 10, 2017, the plaintiff and defendant were in a motor vehicle accident that resulted in an action by the plaintiff for compensation for injuries arising from the accident.
2. The trial of the action was heard by a jury over four weeks in May and June of 2023, with the jury's verdict being received on June 6, 2023.
3. By their verdict the jury awarded the plaintiff the following amounts:

- i. General damages: \$55,632.76 (net of deductible)
- ii. Past income loss: \$15,143.00
- iii. Future income loss: \$349,000.00
- iv. Attendant care: \$84,000.00
- v. Past treatment: \$18,000.00
- vi. Future treatment: \$100,000.00

**Total Jury Award: \$621,755.76**

4. The plaintiff was the successful party at trial and no offers to settle were exchanged that affect costs.

5. Both parties agree that the plaintiff is entitled to her costs on a partial indemnity basis.
6. The plaintiff, who is subject to a contingency fee arrangement with her lawyers, is seeking partial indemnity, based on the lawyer's estimated/reconstructed dockets and actual disbursements as follows:

i.	Fees:	\$372,690.00
ii.	HST:	\$ 48,449.70
iii.	Disb:	\$116,889.68

**Total Fees/Disbursements Sought on Partial Indemnity Basis: \$537,889.68**

7. As partial indemnity costs are equal to approximately 60 per cent of the actual docketed fees, this means that the plaintiff's lawyer estimates that they would have docketed approximately \$620,000 on account of fees.

### ISSUE

8. The sole issue to be determined is the appropriate amount of fees and disbursements payable to the plaintiff by the defendant following trial.
9. As part of this determination, I must decide whether the plaintiff is entitled to recover *all* legal fees incurred, including those fees that relate to the accident benefits hearing, that was not attended by the defendant.

### FACTS

1. On January 10, 2017, the plaintiff and defendant were in a motor vehicle accident.
2. Following the accident, the plaintiff commenced a claim for accident benefits against her own automobile insurer, Economical, due to the insurer's refusal to pay income replacement benefits ("IRB").
3. In August of 2018, the plaintiff retained legal counsel, Doug Wright of Sokoloff Lawyers.
4. Following retention of legal counsel, Economical began paying IRBs to the plaintiff, and required the plaintiff to attend a series of multi-disciplinary insurer's assessments.
5. On December 28, 2018, plaintiff's counsel had issued a Statement of Claim as against the defendant for compensation for injuries arising from the accident.
6. The defendant delivered a Statement of Defence and Jury Notice on or about April 11, 2019.
7. The examinations for discovery of both parties were conducted in person in Oshawa on

December 2, 2019.

8. On January 20, 2021, the parties, including Economical, participated in an unsuccessful mediation, held virtually.
9. In March of 2021, the defendant made an offer to settle for \$10,000 plus disbursements.
10. On April 26, 2021, Economical ceased paying IRBs to the plaintiff and a hearing relating to the payment of accident benefits was scheduled commencing August 16, 2021, to determine payment of the accident benefits, including the IRBs.
11. In May of 2021, the defendant advised that it would not further discuss settlement until after the accident benefits hearing.
12. The accident benefits hearing commenced August 16, 2021, by videoconference at the Licence Appeal Tribunal (“LAT”) and concluded on October 1, 2021, following which counsel filed extensive written submissions.
13. The principle issues in dispute at the LAT hearing were: (i) whether the plaintiff had sustained a catastrophic impairment; and (ii) the plaintiff’s entitlement to IRBs. The witnesses at the LAT hearing were essentially the same as later appeared at the trial of the within action.
14. At the LAT hearing, the plaintiff was represented by Mr. Wright, and Economical was represented by Martin Forget. The defendant was not a party to the proceeding and did not participate in the LAT hearing.
15. On November 12, 2021, the within action was pre-tried virtually and scheduled for trial commencing May 16, 2022.
16. On April 26, 2022, the defendant made a further formal offer to settle for \$300,000 plus costs and disbursements to which the plaintiff countered with an offer of \$750,000 plus costs and disbursements.
17. On May 12, 2022, the plaintiff made an all-inclusive offer to settle for \$475,000.
18. On May 13, 2022, being the last business day prior to trial, the Court advised that the matter would not be reached during the May sittings. The plaintiff withdrew its offer to settle this same day.
19. The trial was adjourned to the fall 2022 trial sittings.
20. On October 10, 2022, the Court advised the parties that the matter was further adjourned to the May 2023 trial sittings.
21. On November 7, 2022, the LAT decision was released. By the decision, the plaintiff was

entitled to receive IRBs beyond April 26, 2021, on the basis that she was unable to perform any occupation or employment for which she was reasonably suited by reason of her education, training, and experience. The LAT decision did not, however, accept that the plaintiff had sustained a catastrophic impairment.

22. Economical sought a reconsideration of the LAT decision regarding payment of the IRBs and the plaintiff sought a reconsideration regarding the finding that the plaintiff was not catastrophically impaired.
23. The plaintiff was approved for CPP disability payments on May 4, 2023.
24. On May 15, 2023, in the present action, the parties appeared for trial and the jury was chosen.
25. During the afternoon of May 15, 2023, the parties participated in a further unsuccessful pre-trial.
26. The trial in the present action proceeded on May 16, 17, 23, 24, 25, 26, 30, 31, and continued June 1, 2, 5, and 6, 2023.
27. On June 7, 2023, following receipt of the jury's verdict, the parties participated in a Zoom call to discuss post-trial issues and scheduling.
28. Reconsideration of the LAT decision was received on June 22, 2023, which effectively dismissed the request and confirmed the previous findings.
29. As noted, the parties agree that the plaintiff is entitled to receipt of her legal costs and disbursements on a partial indemnity basis.
30. The plaintiff seeks payment of \$372,690.00 in fees plus HST on a partial indemnity basis for payment of those legal services provided to the plaintiff, including the LAT hearing.
31. The defendant submits that the fees sought by the plaintiff are excessive as are the disbursements. The defendant submits that the plaintiff's estimate of fees is based on reconstruction as the plaintiff is subject to a contingency fee agreement and no dockets were kept. The defendant submits that the time keeping of the defendant is based on actual time docketed and is much more reflective of the actual time spent by plaintiff's counsel. The defendant acknowledges that the plaintiff is entitled to fees on a partial indemnity basis, but such fees must be fair and reasonable considering all of the circumstances of this case.

## **THE LAW AND ANALYSIS**

### **Entitlement to Costs**

1. Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, provides that subject to the provisions of an Act or the rules of court, the costs of and incidental to a proceeding or step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.
2. The general principle is that a successful party is entitled to costs. It is accepted that this general principle should not be departed from unless there is good cause to do so.
3. The general principles that apply in fixing costs are set out in Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194.
4. Pursuant to Rule 57, in exercising discretion under s. 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 made in writing:
  - i. 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;
  - ii. 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;
  - iii. the amount claimed and the amount recovered in the proceeding;
  - iv. the apportionment of liability;
  - v. the importance of the issues;
  - vi. the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding;
  - vii. whether any step in the proceeding was,
    1. improper, vexatious or unnecessary, or
    2. taken through negligence, mistake or excessive caution;
  - viii. a party's denial or refusal to admit anything that should have been admitted;
  - ix. whether it is appropriate to award any costs or more than one set of costs; and
  - x. any other matter relevant to the question of costs.
5. The fixing of costs is not a mechanical or mathematical exercise and should reflect what the court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs to the successful litigant. See: *Davies v. Clarington*, 2009 ONCA 722; and *Zesta Engineering v. Cloutier*, CanLII 25277.

6. The overriding consideration is that the amount fixed for costs should be fair and reasonable in all the circumstances and is an amount that the losing party could reasonably have expected to pay is unsuccessful. See: *Boucher v. Public Accountants*, 2004 CanLII 14579 (ONCA).
7. I am required to fix costs in all but exceptional cases. This is not an exceptional case, and I will fix the costs.

### **Amount Sought**

8. Counsel for the Plaintiff provided a Bill of Costs/Costs Outline based on “reconstructed dockets” detailing the work completed and time spent for *both* the LAT hearing *and* the trial of the within action. However, counsel acknowledged that their fees are based on a contingency agreement with the client, which was not provided to the Court.
9. As is apparent, the amount of costs sought to be recovered by plaintiff’s counsel does *not* represent the actual costs the plaintiff is liable to pay to her counsel.
10. The defendant argues that the Bill of Costs provided by the plaintiff is not sufficiently detailed to allow for an assessment of the reasonableness of the time spent on the work and the duplication of any services. The defendant notes that many of the fees are presented in “block” fashion.
11. It is my view that plaintiffs’ counsel’s failure to keep dockets is not fatal to the claim for costs. The Bill of Costs is sufficiently detailed to permit an assessment of the work done, time spent, and rates properly chargeable, when compared to defendant’s counsel’s Bill of Costs, which was based on actual docketed time.
12. Given that I have been provided with a Bill of Costs from the defendant based on actual dockets, I am of the view that there is a basis to determine the reasonableness of the “reconstructed” dockets, including an assessment of the time spent and the rates properly chargeable.

### **Hourly Rates Charged by Counsel**

13. As for the hourly rates claimed, plaintiff’s counsel claims rates at more than double those charged to the defendant for his lawyers. The highest rates charged by plaintiff’s counsel is \$900 per hour attributed to Mr. Wright and Ms. Sokoloff, called to the Bar in 1990 and 1989 respectively. The highest rate charged by defendant’s counsel is \$340 per hour charged by Teresa Hartley, called to the Bar in 2003. Mr. Kennedy, called to the Bar in 2009, was lead counsel at trial, and billed at a rate of \$300 per hour.
14. I do not view the rates applied to plaintiff’s counsel to be excessive. Mr. Wright and Ms. Sokoloff were called to the Bar over 30 years ago and are at the height of their careers. They are both eminently capable and had they charged fees based on an hourly rate as opposed to a contingency fee, \$900 per hour is not untoward. Having said this, defence raises a valid point that the proposed rate of \$900 per hour would not have been the rate in 2018 but would have increased over the life of the file before reaching the proposed fee of \$900 per hour in

2023. This same reasoning would apply to all rates sought to be applied to all plaintiff's counsels' rates.

15. As for the rates charged by defence submitted for comparison, these rates are on the lower end of the scale. Mr. Kennedy proved himself to be a competent, capable, well-prepared, and efficient litigator. Mr. Kennedy's 2021 rate applied was \$265 per hour which increased to \$300 per hour in 2023 and was weight averaged to \$292.43 per hour. Mr. Kennedy was supported at trial by Ms. Souffront, whose fees were also separated by year and weight averaged. The fact that defence counsel's rates were charged on the lower end of the scale does not affect the reasonableness of the rates charged by plaintiff's counsel. However, the failure of plaintiff's counsel to apply a weighted average to their fees does affect the reasonableness of the rate. In the circumstances, for the purposes of determining reasonableness, I would apply a weighted average to plaintiff's counsels' hourly rate (2018 to 2023) resulting in an approximate 25 per cent downward adjustment to all fees sought.

### **Costs for the LAT Hearing**

16. The plaintiff sees full costs for pursuing statutory accident benefits (SABs) as part of the costs sought against the defendant.
17. Guidance with respect to the test to be applied to fixing costs in these circumstances is outlined in *Cadieux v. Cloutier*, ONCA 903 by reference to the following factors:
- i. The fees and disbursements actually billed to the plaintiff in pursuit of the SABs;
  - ii. Relevant factors in Rule 57.01, including whether the litigation of the SABs claim involved particular risk or effort;
  - iii. The proportionality of the legal costs and expenses incurred by the plaintiff to the benefit of the SABs reduction to the defendant;
  - iv. Whether the SABs were resolved by settlement or arbitration;
  - v. Any costs paid as a result of the settlement or arbitration;
  - vi. Whether all or any portion of the costs were incurred as a result of unusual or labor-intensive steps that should not reasonably be visited upon the tort defendant;
  - vii. Whether plaintiff's counsel was acting on a contingency fee basis and if so, the terms of the arrangement; and
  - viii. The overall fairness of the allocation of the costs of pursuing SABs as between the plaintiff and the SABs insurer and as between the plaintiff and the tort insurer.
18. The facts in the current case that apply to the factors are as follows:

- i. No legal fees were billed for pursuit of the SABs benefits.
  - ii. The hearing was lengthy and hard fought. The insurer, Economical, was represented by a highly skilled litigator, Martin Forget, required extensive written submissions, and was returned for reconsideration.
  - iii. No dockets were maintained for the hearing, and it is impossible to discern the relative division of fees excepting that plaintiff's counsel noted that almost identical witnesses were called over a similar time period as the trial.
  - iv. The SABs were determined as part of binding arbitration.
  - v. The terms of the contingency fee agreement, other than being set at 33 per cent, has not been disclosed.
  - vi. The plaintiff pursued the SABs benefits for her own benefit, however, given the jury's verdict, the defendant is the ultimate beneficiary of the IRBs obtained by the plaintiff.
19. Applying the facts to the principles of *Cadieux* and keeping in mind overall fairness and proportionality as required by Rule 57, it is my view that plaintiff's counsel is entitled to a portion of the "reconstructed" time related to the LAT hearing on the basis that such time constituted trial preparation for the tort action. Beyond trial preparation, however, in the present case I find any further allocation of time would result in unfairness to the defendant.
20. To this end, I have reviewed the plaintiff's reconstructed dockets relating to the LAT hearing and SABs on the basis that a portion of that time would otherwise have been necessarily expended prior to trial of the tort action as preparation.

### Disbursements

21. The defendant claims the following disbursements are excessive and should be considered "overhead":

i. Photocopy:	\$1,873.70
ii. Photocopy (outsourced):	\$26.00
iii. Fax copies:	38.50
iv. Print cost	\$8,684.90
v. Office supplies	\$500.00
vi. Zoom Meetings	\$400.00
vii. Docusign Fee	\$10.00
<b>TOTAL WITH HST</b>	<b>\$13,032.40</b>

22. The court in *Lloyd v. Bush*, 2020 ONSC 2892, considered similar charges and held that many of the charges are properly overhead expenses not recoverable.
23. The Court of Appeal in *Moon v. Sher*, 2004 CanLII 39005 (ONCA), determined that disbursements may be recoverable if they were reasonably necessary for the conduct of the hearing, the amount charged is reasonable and charged to the client, and the expense does not fall within standard office overhead.
24. In addition to the above noted disbursements, the defendant submits that the fees charged by many of the experts is excessive. Having viewed these fees, I note that the fees include time for the LAT hearing and in my view only a portion of those fees may be considered trial preparation, with the remainder of the fees to be deducted as a disbursement.

### **Overall Fairness and Proportionality of Fees Charged**

25. The Plaintiff seeks fees on a partial indemnity basis of \$372,690.00 plus HST of \$48,449.70, plus disbursements.
26. These same fees converted to a total indemnity basis equal \$620,000.00 plus HST of \$80,600.00, plus disbursements.
27. For comparison purposes, counsel for the defendant submitted a Bill of Costs which details the actual time dockets kept and records the total fees payable on a partial indemnity basis of \$164,002.80 plus HST of \$21,320.36, plus disbursements.
28. These same fees converted to a total indemnity basis equals \$273,338.00, plus HST, plus disbursements.
29. As is apparent, there is a wide margin between the parties' claimed fees. The question is not who is right, but what is fair and proportionate considering all the circumstances of the case, including the costs that the losing party may reasonably expect to pay.
30. The plaintiff claimed damages of \$3 Million by her claim and the total amount awarded by the jury was \$677,143.
31. The defendant argues that the jury award is subject to assignment such that the actual award is approximately \$257,632.76. However, this submission was made without the benefit of my assignment award, which I determined was limited to 10 years. As a result, the net amount of the award is approximately \$477,143 – but the actual award remains at \$677,143.
32. No offers to settle that were exchanged attract cost consequences and are therefore not considered by me.
33. Costs for the proceeding are to be determined on a partial indemnity basis considering the applicable caselaw, the principles found at Rule 57, as balanced by overriding fairness and proportionality.

**CONCLUSION**

34. In considering the costs award payable, I have determined an amount that in my view reflects a fair and reasonable assessment of the amount that should be paid to the successful party rather than an exact measure of the actual costs of the successful litigant. I have specifically considered the expectations of the parties, including the defendant, as a relevant factor.
35. Having considered all applicable principles, including the principle of proportionality and fairness, the “reconstructed” dockets, both parties’ bills of costs, and disbursements, that the following represents a fair and reasonable amount chargeable to the defendant in the circumstances of this case, which amounts include a portion of the LAT hearing fees attributable to trial preparation, I hereby fix the plaintiff’s fees and disbursements as follows:
- i. Fees: Partial Indemnity Fees fixed at \$195,000.00 (based on \$325,000 for full indemnity) for preparation and attendance at the two-week jury trial with the preparation time represented by a partial consideration of the time spent on the LAT hearing;
  - ii. HST on Fees: \$25,350.00
  - iii. Disbursements subject to H.S.T. \$71,513.02 (having deducted as per the authorities the following sums: \$8,694.90 print cost; \$183 LAT summons; \$3,782.60 LAT transcripts; \$4,000 updated RSM report (excessive); \$3,000 Dr. Kiraly LAT; \$1650 Dr. Razvi LAT; \$5,000 Dr. Ahn LAT; and \$600 Dr. Qureshi LAT; \$1,750 Mediation Fee; \$400 Zoom meetings; and \$500 office supplies);
  - iv. HST on Disbursements: \$9,296.69;
  - v. Disbursements not subject to HST: \$1,814.66 (after deducting fees for witnesses who did not attend trial);

**TOTAL PARTIAL INDEMNITY FEES/HST:           \$220,350.00**

**TOTAL DISBURSEMENTS/HST:                 \$ 82,624.37**

**TOTAL FEES/DISBURSEMENTS/HST:         \$302,974.37**

36. As a result of the foregoing, I find that the total amount due and owing on account of partial indemnity fees, HST, and disbursements is \$302,974.37, which amount shall be paid to the plaintiff within 30 days of today's date.

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Justice S.J. Woodley

**Released: November 6, 2023**