**CITATION:** Lawless v. Joanovits, 2024 ONSC 1561
**BARRIE COURT FILE NO.:** CV-12-1353
**DATE:** 20240314

2024 ONSC 1561 (CanLII)

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** MATTHEW LAWLESS, JOSHUA DANIEL LAWLESS and SARAH ANN LAWLESS, Plaintiffs

**AND:**

LASZLO JOANOVITS, Defendant

**BEFORE:** THE HON. MR. REGIONAL SENIOR JUSTICE M.L. EDWARDS

**COUNSEL:** Karen N. Vigmond and Liane Brown, for the Plaintiffs

Mark Elkin and Deborah J. Lewis, for the Defendant

**HEARD:** By written submissions

# ENDORSEMENT

## Overview

[1] After a five day jury trial the plaintiff was awarded a net judgment of $18,000. The parties were encouraged to resolve issues relating to pre-judgment interest and costs but were unsuccessful. The court received written costs submissions from the parties together with their respective bills of costs. The plaintiff seeks $11,502.00 in pre-judgment interest plus partial indemnity costs of approximately $114,000 plus disbursements of $18,677. The defence argues that no costs should be awarded, largely because the plaintiff's recovery fell within either the jurisdiction of the Small Claims Court or the Simplified Rules. The defence also seeks its costs with respect to the abandoned claims made by the plaintiff for past and future wage loss as well as the *Family Law Act* claim of Ms. Lawless.

## The Facts

[2] This was a jury trial, the main focus of which related to whether the defendant was liable to the plaintiff under the *Occupier's Liability Act*. In addition, the quantum of general damages was disputed.

[3] The trial itself occupied approximately four days of evidence plus a day for closings and the jury deliberation.

[4] The questions that the jury had to answer were whether or not the plaintiff had proven on a balance of probabilities that the defendant was liable for the plaintiff's injuries and if the plaintiff succeeded in establishing such liability, whether or not there was any contributory negligence on the part of the plaintiff. The only other question that the jury had to decide was the quantum of general damages.

[5] The jury answered the questions by finding that the defendant was liable to the plaintiff. The jury apportioned liability 70% against the plaintiff and 30% against the defendant.

[6] The plaintiff suggested to the jury an amount for general damages in the range of $125,000 to $150,000 while the defence suggested to the jury an award of general damages of $25,000. Ultimately the jury awarded the plaintiff $60,000. After netting out the apportionment of liability, the plaintiff recovered a net general damage award of $18,000.

[7] Leading up to the trial, the court has been advised that the plaintiff made a Rule 49 offer of $150,000 plus costs and disbursements which was followed by a second Rule 49 offer of $100,000 plus costs and disbursements. The defence made no offer to settle.

**Legal Principles**

[8] The most basic legal principle as it applies to an assessment of costs is to ensure that the costs awarded are fair, reasonable, proportionate and reflect what the losing party could reasonably anticipate paying: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. 3d 291 and *Davies v. Clarington (Municipality)* (2009), 1 O.R. 3d 666. The court is also required to consider the factors set forth in r. 57.01 of the *Rules of Civil Procedure*. Of particular significance, as it relates to this matter is the apportionment of liability against the plaintiff.

[9] Ms. Vigmond, on behalf of the plaintiff, suggests that the defence took a hard ball approach to the litigation which was inconsistent with the goals of the civil justice system and as a result the plaintiff incurred significant costs which the plaintiff should be entitled to recover. Ms. Vigmond further suggests that the strategy employed by the defendant was a strategy employed by the defendant's insurer. Ms. Vigmond suggests that the bullying strategy adopted by the defendant's insurer should not deny a plaintiff access to justice.

[10] The actual outcome of this case, in my view, reflects strategies by both sides, neither of which strategies was reflected in the outcome at trial. The plaintiff suggested an outcome that in no way reflected the plaintiff's contributory negligence. The plaintiff further advanced a strategy in relation to the quantum of damages claimed that was not consistent with the jury verdict.

[11] It can be equally said, however, that the defence adopted a strategy of no liability. This strategy is reflected in the fact that the defence made no formal offer to settle. The defendants suggested range of damages was equally inconsistent with the damages awarded by the jury. This was a case that could and should have been resolved if both sides had reflected the risks of litigation reflected in the jury's award.

2024 ONSC 1561 (CanLII)

[12] As a general comment, a significant number of the cases that proceed to trial in this jurisdiction and across the province are personal injury jury trials. These trials are expensive and time consuming. All too often as trial judges, we see trials that could have been avoided if both sides had taken a more realistic position as it relates to both liability and damages.

2024 ONSC 1561 (CanLII)

[13] All parties are entitled to their day in court. Parties are entitled to have an honest disagreement on issues of liability and damages. When a party takes a no liability position as reflected by the fact the defence made no Rule 49 offer such a position fails to recognize the risks of litigation.

[14] There are few, if any, cases which can be described as having no risk. Resolution of cases requires all parties (and this includes the insurers who instruct defence counsel in most personal injury cases) to make an informed and realistic assessment of risk. That risk should be reflected in a party's Rule 49 offer. The defence position in this case did not reflect any realistic assessment of risk. If the defence advances a no risk position the defence must expect that such a position may ultimately result in a costs award in favour of the plaintiff even when the jury awards the plaintiff something that falls within the jurisdiction of the Small Claims Court or the Simplified Rules.

[15] While the ultimate award in this case did fall within the jurisdiction of the Small Claims Court and/or the jurisdiction of the Simplified Rules, the fact remains that the defence took a position of no liability as well as an assessment of damages that was well below what this court would have awarded.

[16] An award of costs that exceeds the amount of damages assessed by the jury might be seen by some as disproportionate. While an award of costs must be proportionate it must also be seen to be reasonable and fair. It must also reflect an amount that the losing party might reasonably have anticipated paying in the event of non-success at trial.

[17] In this case I have the benefit of a bill of costs from the defence that sought partial indemnity costs in the amount of approximately $22,000 up to the date of trial. If one adds the trial costs of two counsel it would not be difficult to suggest that the total defence partial indemnity costs, inclusive of trial costs, would be more than $40,000. It is not therefore difficult for the defence to have anticipated that the plaintiff's costs would have exceeded the defence costs given that it is a well recognized fact that the plaintiff, having the onus of proof, would likely incur greater costs than those incurred by the defence.

[18] Taking into account all of these factors in my view, an appropriate award of costs to the plaintiff is an amount of $50,000. There is no issue in my view as it relates to the disbursement claim made by the plaintiffs and as such, the plaintiffs will recover $50,000 plus HST plus the disbursements claimed of $18,677.42.

[19] As it relates to the issue of pre-judgment interest, I see no reason to interfere with the pre-judgment rate that the defence has applied in this matter given that the defence has already paid the general damages of $18,000 plus pre-judgment interest of $8,500, plus the $3,000

subrogated OHIP claim and the $712.50 of pre-judgment interest on the OHIP subrogated claim. The difference between the amount suggested for pre-judgment interest and the defence is no more than approximately $2,300.

[20] As for the defence request for costs as it relates to the abandoned FLA claims and income loss claims this request is denied. Parties should be encouraged to narrow the claims that ultimately go to trial. While the plaintiff could have been more focused and timely as it relates to the claims that would be advanced at trial, I see no reason to materially punish the plaintiff with an award of costs. Regardless the costs incurred as it relates to the abandoned claims are not material to the overall award and in fixing the plaintiff's costs I have also taken into account the claims that were ultimately abandoned on the eve of trial.

2024 ONSC 1561 (CanLII)

M.L. EDWARDS, R.S.J.

**Date:** March 14, 2024