

**CITATION:** Balpinar (Estate) v. Economical Mutual Insurance Company et. al, 2025 ONSC 419  
**COURT FILE NO.:** CV-18-76493  
**DATE:** 20250120

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** THE ESTATE OF ERCAN BALPINAR, BY ITS LITIGATION  
ADMINISTRATOR, SAFINUR BALPINAR, Plaintiff

**AND:**

THE ECONOMICAL MUTUAL INSURANCE COMPANY and 1457927  
ONTARIO LTD. c.o.b. as HIGHLAND AUTO BODY, Defendants

**BEFORE:** C. MacLeod RSJ

**COUNSEL:** Elise J. Hallewick & Carmen Baru, for the Plaintiff

Martin Forget & Ainsley Shannon, for the Defendant Economical

**HEARD:** In writing

**COSTS DECISION**

[1] On December 30, 2024, I released my trial decision (2024 ONSC 7239). There remained three outstanding issues. Those were adjustment of the judgment to take into account the *Pierringer Agreement*, calculation of pre-judgment interest and costs.

**I. Net amount of the judgment**

[2] The amount I awarded the plaintiff was \$18,008.86. It has now been disclosed that the amount paid by Highland under its settlement with the plaintiff was \$5,000.00. As agreed by the plaintiff, this amount must be deducted from the judgment. Accordingly, the net amount to be paid by Economical is \$13,008.86.

**II. Prejudgment Interest**

[3] Pursuant to s. 128 (1) of the *Courts of Justice Act*, prejudgment interest runs from the date a cause of action arises until the date of the judgment.<sup>1</sup> In this case, the cause of action arose when Economical advised that it would not pay for further repairs and advised the plaintiff of various options including the right to sue. Upon receiving that communication, the plaintiff issued the claim on May 17, 2018. That is the appropriate date for calculation of PJI although the plaintiff did not actually incur the repair costs until 2023.

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<sup>1</sup> *Courts of Justice Act*, RSO 1990, c. C.43, as amended

[4] The statutory rate for actions commenced in May of 2018 was 1.5 percent per annum. The plaintiff has calculated interest on the \$13,008.86 net damages award using this formula. The plaintiff's calculation is \$1,292.14. The defendant does not dispute this calculation. Accordingly, the judgment will issue for \$13,008.86 plus \$1,292.14 for PJI.

### III. Costs

[5] This brings us to the question of costs. The plaintiff made what he intended to be a Rule 49 offer on October 25, 2024 in the amount of \$9,000.00 inclusive of interest plus "partial indemnity costs", HST and assessable disbursements in an "amount to be agreed upon or fixed by the court". The plaintiff argues that he beat this offer. Given that the action had been commenced in 2018, this offer was almost on the eve of trial but the rule allows such offers provided they are served at least seven days before the trial commences.

[6] If Rule 49 applies, then the plaintiff would presumptively have partial indemnity costs to the date of the offer and full indemnity costs thereafter.<sup>2</sup> While the purpose of Rule 49 is to encourage settlement and to discourage parties proceeding to court unnecessarily, the language is not absolutely mandatory. The Rule applies "unless the court orders otherwise." The jurisdiction to order otherwise, however, is to be narrowly construed and used only if the interests of justice require it.<sup>3</sup>

[7] The plaintiff has provided both a Bill of Costs and a Costs Outline pursuant to Rule 57. The documents reveal that the legal costs incurred by the plaintiff to the end of trial totalled \$45,022.50 plus HST of \$5,852.93 and disbursements of \$1,976.93 (total \$52,855.13). I note that the plaintiff originally was represented by different counsel and there is nothing in the costs submission dealing with steps such as pleading, production, discoveries or pre-trial. The Bill of Costs deals only with trial preparation and the trial itself. The Defendant did not provide its own costs outline or disclose its own costs although the *Rules* and standard practice require it to do so if it is disputing the reasonableness of the fees. It may be taken that the Defendant does not dispute that the costs as described were actually incurred.

[8] Despite referring to extensive jurisprudence on costs and despite relying on Rule 49, the plaintiff does not actually state the amount he is seeking in his written costs submissions. Bearing in mind that the plaintiff has the onus of demonstrating how the Rule applies under Rule 49.10, this is a peculiar omission. I could perhaps presume that the breakdown in the Bill of Costs between trial preparation and the costs of trial is intended to capture this. In that case, the fee amounts would be \$16,237.30 (partial indemnity for trial preparation) and \$16,157.25 (substantial indemnity for the trial). That would be a cost request of \$32,394.55, plus HST and disbursements which is within the cap imposed by Rule 76.<sup>4</sup>

[9] There are issues with these amounts, however. Firstly, the plaintiff had two counsel at trial. While it is often a very good idea for counsel to divide the responsibilities of a trial, to ensure that less experienced counsel gain trial experience or any number of other reasons for doing so, this is not

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<sup>2</sup> Rule 49.10, *Rules of Civil Procedure*, RRO 1990, Reg. 194 as amended

<sup>3</sup> See *Gill v. Gill*, 2024 ONCA 877 @ para. 42 - 44

<sup>4</sup> Rule 76.12.1 puts an upper limit on cost recovery of \$50,000 for fees and \$25,000 for disbursements.

the kind of complex trial in which those costs should be passed onto the other side. I would not award costs for two trial counsel in a case such as this even if I was prepared to apply Rule 49 and award substantial indemnity costs of the trial.

[10] Secondly, although a Rule 49 offer will not be invalid simply because it includes an undefined amount for costs, this situation is unusual.<sup>5</sup> The plaintiff was offering to settle the case for \$9,000.00 inclusive of interest but expected to recover the costs of the action on a partial indemnity scale. The issue of costs was and is very much in dispute because the Defendant has always been of the view that this matter should be in Small Claims Court. This raises issues of proportionality, of all of the factors listed in Rule 57.01 and of the specific authority of the court to deny a plaintiff costs in these circumstances under Rule 57.05. There is nothing in the offer that suggested the costs the plaintiff would be seeking would cover anything other than all costs incurred since the start of the litigation. While the costs demand now put forward seems to be somewhat less than the cost of six years of litigation, it is still disproportionate to the amount recovered.

[11] A Rule 49 offer that includes a demand for costs can be somewhat circular because whether or not the plaintiff has beaten the offer will depend on whether or not the court awards costs.<sup>6</sup>

[12] There is also a competing policy in Rule 57. Rule 57.05 (1) provides that “if a plaintiff recovers an amount within the monetary jurisdiction of the Small Claims Court, the court may order that the plaintiff shall not recover any costs”. Rule 57.05 (5) provides that if a plaintiff includes a type of relief not available in Small Claims Court simply to avoid the requirement to proceed in that court, the plaintiff may be liable for costs.

[13] Enforcement of Rule 49 is intended to discourage parties from resorting to trial when a trial should not be required and there is a reasonable offer to settle on the table. Rule 57.05 is intended to penalize a party who inappropriately maintains an action in this court when it obviously ought to have been pursued in Small Claims Court.<sup>7</sup> Had the matter proceeded in Small Claims Court then the costs recovery would have been limited by statute to 15 percent of the amount claimed plus reasonable disbursements. Costs in Small Claims Court are therefore limited to at most \$5,250 unless certain narrow exceptions apply.<sup>8</sup>

[14] In the circumstances of this case, there was never any significant chance of the plaintiff recovering more than the policy limit (the value of the vehicle) which only slightly exceeded the Small Claims Court limit. In fact, the apparently successful repair, was an amount much less than that. The claims for multiple years of storage charges, the cost of purchasing a replacement vehicle,

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<sup>5</sup> See analysis of Rule 49 offers in *Elbakhiet v. Palmer*, 2014 ONCA 544 and cases cited therein

<sup>6</sup> See *Wilds v. 1959612 Ontario Inc.*, 2024 ONSC 4632

<sup>7</sup> *Ridwan v Eichenberg*, 2017 ONSC 1380

<sup>8</sup> S. 29, *Courts of Justice Act*, *supra*, limits costs to “15% of the amount claimed” “unless the court considers it necessary in the interests of justice to penalize a party or a party’s representative for unreasonable behaviour in the proceeding”. Since the maximum that may be claimed in Small Claims Court is \$35,000, the presumptive upper limit for costs is 15% of that amount or \$5,250.00.

and the claim for punitive damages were fanciful when measured against the ordinary measure of damages in breach of contract cases and the duty to mitigate.

[15] This action should either have been started in Small Claims Court or transferred there as soon as it became clear what the damages were.

[16] I am not prepared to deprive the successful plaintiff of costs entirely. Economical could have attempted to settle by agreeing to the offer and proposing a reasonable amount for costs. A fairer approach in this case is the approach adopted in *Wilds*, supra. I will award costs on the Small Claims Court scale.

[17] As noted, the cap on costs in Small Claims Court is \$5,250 or \$5,932.50 inclusive of HST. The Defendant did not dispute the claim of \$1,976.93 for disbursements.

[18] In conclusion, the plaintiff shall have costs of \$7,909.26 inclusive of fees, disbursements and HST.

#### **IV. Judgment**

[19] In conclusion there shall be judgment to the plaintiff for \$13,008.86 in damages, \$1,292.14 for PJI and \$7,909.26 for costs.

January 20, 2025

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Justice C. MacLeod

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**BEFORE:** Regional Senior Justice Calum MacLeod

**COUNSEL:** Elise J. Hallewick & Carmen Baru, for  
the Plaintiff

Martin Forget & Ainsley Shannon, for  
the Defendant Economical

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**COSTS DECISION**

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Regional Senior Justice C. MacLeod

**Released:** January 20, 2025