RECENT STATEMENTS BY THE COURTS OF ONTARIO ON THE LAW OF COSTS

by
Roseanna R. Ansell-Vaughan

In the last year, the Courts of Ontario have delivered a cluster of decisions on costs that speak to various issues including the proper scale of costs; the circumstances which warrant an award of costs; when a Rule 49.10 offer matters and when a Rule 49.13 offer does; the circumstances under which a self-represented party will receive costs and how much; and the mechanics of claiming costs.

This paper will highlight some of these decisions and how they affect your practice.

The Proper Scale of Costs

The Rule: Partial Indemnity

In a short costs endorsement in *Laczko* v. *Alexander*,[1] Justice Weiler of the Ontario Court of Appeal confirmed that partial indemnity costs are the general rule and summarized the law with respect to the entitlement to substantial indemnity costs.

The matter involved an appeal of a lower Court's decision to extend the time for appealing the striking of the Appellant's Statement of Defence. The Respondent who successfully resisted the motion sought substantial indemnity costs on the basis of the Appellant's failure to comply with his disclosure obligations. Partial indemnity costs were awarded.

Justice Weiler succinctly summarized the basis of a Court's power to award costs and when a party is entitled to substantial indemnity costs.

- The Court's discretion to award costs is governed by s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and by Rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

- Costs should be awarded on a partial indemnity basis unless justice can only be done by complete or substantial indemnification per *Foulis* v. *Robinson*.[2]

- As a general rule, justice will only require substantial indemnification where there has been "reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young* v. *Young*. [3]

---

[1] 2012 ONCA 0872.

[2] (1978), 21 O.R. (2d) 769 (C.A.).

In this matter, although Justice Weiler found the Appellant's unjustified failure to comply with his disclosure obligations to be clearly "worthy of rebuke", it was not “reprehensible,” “scandalous,” or “outrageous” such as to merit an award of costs against it on a substantial indemnity basis.

This case serves as a neat reference for the principle that, provided no other Rule applies, partial indemnity costs are the rule and substantial indemnity costs are the rarity.

Substantial Indemnity: The Exception

Predictably, counsel often seek to justify an award of substantial indemnity costs. In ***Glenn* v. *Osmun***,[4] that attempt succeeded.

The motion that gave rise to the award was a motion to amend a Statement of Claim. The source of the Court's willingness to impose substantial indemnity costs in this matter was clearly the conduct of counsel responding to the motion. The Court found that several actions on the part of counsel were improper, including engaging in the "abhorrent" practice of cross-examining an affiant in court, alleging that the affiant had been pressured into swearing the affidavit by more senior counsel, in addition to an unreasonable refusal to consent to the proposed motion. The Court clearly found counsel's conduct to be "worthy of rebuke", calling it "unacceptable" and worthy of "condemnation". All-inclusive costs of $7,000.00 were awarded.

In ***Sagan* v. *Dominion of Canada General Insurance Co.***,[5] counsel for the defendant insurer succeeded in obtaining an award on a substantial indemnity basis where a baseless bad faith claim was made.

In this matter arising from the Plaintiff action against its Accident Benefits carrier for non-earner benefits, "a litany of unsupported allegations of bad faith, misconduct and incompetence against" was asserted against the defendant insurer.

On a motion for summary judgment, Justice Lofchik found that the Plaintiff "did not provide any evidence to support those allegations" and yet maintained the claim for bad faith right up to the hearing of the motion. His Honour cited case law holding that an award of substantial indemnity costs may be appropriate where a party makes "empty" bad faith allegations and he noted that the positive consequence of such awards is "to diminish frivolous and speculative litigation, to cause litigants to focus on the real

---

[3] [1993] 4 S.C.R. 3.

[4] 2014 ONSC 3186.

[5] 2014 CanLII 16478 (S.C.J.)

issues". A total of $8,600 in fees was awarded, which represented partial indemnity costs up to the date of the hearing, and substantial indemnity costs of the hearing.

Clearly, the Courts of Ontario intend that the award of substantial indemnity costs remain an extra-ordinary award for extra-ordinary facts.

Rule 49.13 Offers

In the lengthy decision in ***Elbakhiet* v. *Palmer***,[6] the Court of Appeal addressed a variety of issues relating to offers to settle, and in particular considered the effect of Rule 49.13. That Rule reads as follows:

> **49.13** Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer. R.R.O. 1990, Reg. 194, r. 49.13.

The underlying action involved a motor vehicle accident where at the conclusion of trial, the jury awarded damages to the Plaintiffs in the amount of $144,013.07, exclusive of prejudgment interest. The Defendants had made two offers to settle, the second of which was $145,000, also exclusive of prejudgment interest. The Trial Judge then awarded costs to the Plaintiffs totaling almost $579,000.

On appeal, three main issues were raised:

1. Was the Appellants' second offer to settle made at least seven days before the commencement of the hearing as required by rule 49.10(2)?

2. Did the appellants prove that the Respondents obtained a judgment as favourable as or less favourable than the terms of the second offer to settle?

3. Even if the second offer to settle did not meet the requirements of rule 49.10, did the trial judge err in awarding the Respondents their costs in the amount of $578,742.28 despite the Respondents' modest success at trial and the offers to settle made by the Appellants?

On the first question, although the offer at issue was made six days before the start of the larger proceeding that was the trial, the Court found that the trial effectively started on the first day of evidence. Calculated from this date, the offer was made more than seven days before the start of trial.

On the second question, the key issue for the Court's consideration was whether the offer at issue was sufficiently clear to permit a determination of whether it exceeded the

[6] 2014 ONCA 544.

judgment. The clarity issue arose because the offer did not specify to what part of the judgment the interest rate should apply. In particular, it was problematic that the provision for prejudgment interest in the offer neither provided for a specified amount nor a specified rate. Nevertheless, the Court recognized that "uncertainty" should not invalidate Rule 49 offers. In any event, the Court held that the Respondents could know with sufficient precision whether to accept the offer as the uncertainty about the amount of prejudgment interest did not prevent the Respondents from fairly determining whether to accept the offer or proceed with the trial.

The third issue, which the Court called the real issue, was whether the scale of costs awarded was correct. The Court recognized that it is only where a plaintiff's judgment is as favourable as or less favourable than the terms of the offer to settle that the defendant is entitled to costs in accordance with rule 49.10(2). The Court also recognized that there is no "near miss policy" in this regard.

Ultimately, the Court held that the Trial Judge had erred in failing to consider Rule 49.13 which required a court to take a more holistic approach, and not an overly technical one, in determining costs. The Court stated that Rule 49.13 is not concerned with technical compliance with the requirements of Rule 49.10. The Court recognized that the Appellants complied with the spirit of Rule 49.13 even if they might have technically failed to serve an offer that exceeded the result at trial. Also noted was the fact that the Respondents had sought approximately $1.9 million in damages, yet had recovered only $145,000.00. In light of the damages awarded, the costs award was deemed unreasonable and the Trial Judge's award was reversed by reducing it to $100,000.

Motions for Security for Costs May Be Obsolete

Motions for security for costs are often brought where a plaintiff does not reside in the province where the action commenced and does not have assets in the jurisdiction that would be sufficient to satisfy an adverse cost award. Such motions are often granted. However, third party funding insurance may make the chances of success of these motions much rarer.

Bridgepoint Indemnity Company ("BICO"), which advertises itself as providing a level playing field for personal injury litigation through "adverse cost protection for claimants" and "disbursement protection for lawyers" is publicizing a recent unreported success by Ontario counsel, Howie, Sacks & Henry, in defeating a motion for security for costs in Alberta.[7] The underlying action, which was commenced in Alberta, is stated to arise from a horseback riding accident that occurred in that province involving an Ontario resident. The Plaintiff had purchased legal cost protection from BICO, presumably a policy of specific insurance providing coverage for security for costs orders as part of the larger coverage provided. (A copy of that agreement has not been circulated.)

[7] http://bicocanada.ca/lawyers/blog/BICO-Legal-Cost-Protection-Successfully-Used-to-Defeat-Security-for-Costs-Application.php

At their motion for security for costs, the Defendants reportedly argued that as they were not parties to the contract, and therefore not entitled to direct payment by BICO in the event costs were awarded to them, the arrangement failed to provide the sort of "security" that was the subject of the motion.

This argument was rejected by the Motion Judge who reasoned that if the agreement was breached or cancelled prior to the resolution of the claim, the Defendants could bring a further motion for security for costs as required. In the words of Plaintiff's counsel, “In essence, the judge found the fact the plaintiff purchased the indemnity agreement to protect himself from an adverse cost order, at personal expense, was sufficient to show that the defendant’s costs would be protected.”

In light of the success of plaintiff's counsel, entering into such agreements may become more common. This may not necessarily be bad news for the defence bar.

The courts of Ontario have already stated, in the class action decision of *Bayens* v*. Kinross Gold Corporation*, that it is an appropriate term of such funding agreements to require that the third party funder pay into court security for a defendant’s costs. There is no obvious reason why the same ought not to apply to the motor vehicle accident context. That being, a defendant may wish to consider whether there is a benefit to compelling a plaintiff, firstly, to obtain this coverage by bringing a motion for security for costs where the plaintiff has not already done so, and secondly, to force payment of sufficient funds into court.

Particular Conduct Giving Rise to an Award of Costs – Or Not

In the past year, the Courts of Ontario have reiterated that mediation ought to be meaningful and done in good faith, failing which there will be costs consequences.

In ***Ross* v. *Bacchus***,[8] a jury awarded a plaintiff injured in a motor vehicle accident a total of $248,000 in damages following a six-day jury trial.

Although the defendant's insurer had attended a mediation, Justice Ramsay was highly critical of the insurer's conduct in agreeing to attend only a brief mediation at "limited cost". His Honour found that the insurer had failed to participate in a mediation "in any meaningful sense" and went so far as to call its participation a "sham" that failed to satisfy an insurer's obligation to settle the action expeditiously, as expressed in s. 258.6 of the Act. His Honour proceeded to award $140,000 in costs, in addition to a further $60,000 for the defendant’s non-compliance with its obligations under the *Insurance Act*.

Also notable is the decision in ***Graat* v. *Adibfar***[9] where Justice D. Brown stated that where a party takes the position in advance of the mediation that it is not prepared to

[8] 2013 ONSC 7773.

[9] 2013 ONSC 3264.

negotiate and that no settlement discussions would take place, such a party should expect to recover only a modest amount in the form of costs for that step in the litigation. In this case, $500 was awarded in the face of claim for $3,000.00.

The Courts have also held that some conduct that gives rise to costs is not claimable at all – if the cost is incurred as a result of the Court's conduct.

In ***State Farm Mutual Automobile Insurance Company* v. *Assessment Direct Inc.***,[10] Justice Lederer held that time spent in court waiting for a motion to be heard is not recoverable. His Honour noted that in this matter, counsel was required to be in court at 10:00 a.m. but the motion was not heard until 2:30 p.m. His Honour did not accept as a general proposition that a losing party ought to bear these costs. Rather, in such circumstances, each client ought to assume the attendant costs.

Self-Represented Plaintiffs and the Court's Directions as to the Quantum of Costs

Also on the issue of the appropriate quantum of costs, the Court of Appeal held that a successful self-represented litigation who was a lawyer was entitled to costs in a higher amount than a non-lawyer.

In ***Pirani* v. *Esmail***,[11] on an appeal of the lower court's judgment and costs order, the Court held that the appellant lawyer, who succeeded in having the action at issue dismissed against him, was entitled to partial indemnity costs.

The parties put forward different arguments as to the appropriate costs award. The appellant lawyer produced a Bill of Costs based on his regular hourly rate, in addition to fees charged in respect of another lawyer and law clerks of his office. The respondent argued that virtually all of the time claimed by the appellant was for time spent because he was a party and therefore, those amounts were not claimable. He also argued that the appellant had not shown that any of the time spent was time lost to remunerative work.

The Court held that the appropriate amount of costs lay somewhere between the two positions. The Court affirmed, per *Fong* v. *Chan* (C.A.), that lawyers who represent themselves in litigation are entitled to costs. Self-represented litigants, however, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. Rather, costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation and that, as a result, they incurred an opportunity cost by forgoing remunerative activity. In this matter, the Court awarded costs only for that time expended while specifically engaged in the tasks of counsel,

[10] 2014 ONSC 3770.

[11] 2014 ONCA 0279.

rather than a party. The Court appeared willing to infer that time spent doing so would otherwise have been spent in remunerative work.

Notably, a Court has also considered the issue of whether to impose a costs order when a party is represented by counsel yet is not being charged any fees.

In ***Watkins* v. *Toronto Terminals Railway***,[12] the plaintiff was represented by her husband who, as expected, was not charging her any fees. Following the plaintiff's successful dismissal of the defendant's motion to remove her husband as lawyer of record, the Master held that costs were properly awarded, but on a reduced basis. The Master reasoned that the circumstances were similar to those of the pro bono counsel context, although the usual issue of the profession's commitment to ensuring access to justice did not apply. The Master held that even when a party is not paying his or her lawyer, the functions of costs orders are in play. In particular, costs orders form part of the potential risk that a party ought to consider in undertaking a contemplated steps in an action. Irrespective of the fact that one of the primary purpose of costs orders – indemnification – did not apply, a failed motion ought to attract a consequence in the form of costs. 25% of the costs requested was ordered payable.

In addition to these two cases where the Courts have clarified who may receive costs, the decision of Justice Parayeski in ***Winters* v. *Hallimand***[13] offered some insight into who can be ordered to pay costs.

The underlying action, phrased in occupier's liability, was dismissed and the successful Defendants sought partial indemnity costs of $139,615.42 and disbursements of $62,671.15. The Defendants further asked that any costs award be payable by the Plaintiffs, who included seven *Family Law Act* claimants, either on the basis of joint and several liability, or, alternatively, on some proportional basis as between the main Plaintiff and the *FLA* claimants, and the OHIP claimants. The Plaintiffs pled impecuniosity. The Court awarded costs to the Defendants in the form of $50,000 for fees and $25,000.00 for disbursements.

In reply to the request that the *FLA* claimants and OHIP contribute to the costs, the Court further made a proportionate share order whereby each of the seven *FLA* claimants were responsible for $5,000.00, OHIP for 2 percent of the total, and the main Plaintiff being responsible for the balance. The Plaintiffs pointed to a body of case law exempting *FLA* claimants from costs awards on the basis that their claims are merely statutory and derivitory ones, and in particular pointed to the decision in *Boyuk* v. *Loblaws Supermarkets Ltd*., where it was stated that if unsuccessful *FLA* claimants are automatically exposed to costs, it would discourage those claims despite the intention that such claims be available. In reply, the Court stated that it was not apparent how this blanket approach balanced the indemnity principle with concerns over access to

[12] 2014 ONSC 5971.

[13] 2014 ONSC 5759.

justice. The Court added that in appropriate circumstances, some claims ought to be discouraged.

How to Claim Costs

It now appears that bringing a Bill of Costs to Court on a motion is not only good practice, it is a pre-requisite to a successful claim and a successful argument that another party's costs are unreasonable.

In ***Fram Elgin Mills 90 Inc*. v. *Romandale Farms Limited***,[14] Justice Kiteley expressed what appears to be a judicial intention that going forward – at least insofar as she and D. Brown J. are concerned – to enforce more strictly the requirement set out in Rule 57.01(6) that parties appearing on a motion present a Bill of Costs so as to permit the Court to address costs immediately. Her Honour stated as follows:

> [9] I agree with the observation made by D. Brown J. in *AGF Management Limited* v. *Westwood Holdings Group Inc.* [2013 ONSC 2816] at paragraph 25 that the requirement in rule 57.01(6) has not been enforced in the Toronto Region and that the time had come to do so.

Her Honour went on to emphasis the importance of doing so:

> [10] Rule 57.01(6) is designed to ensure that the issue of costs of a motion not take on a life of its own requiring additional written submissions and attracting additional unnecessary costs. That rule also encourages fairness and balance in that counsel are expected to estimate their costs and prepare to take a position on costs without necessarily knowing the outcome of the motion.

A failure to present a Bill of Costs, although not warranting the denial to a successful party of some recovery of costs, will give rise to the disappointment of not being awarded costs that might otherwise have been expected. In this case, Her Honour awarded costs to the successful party in the amount set out in the unsuccessful party's Bill of Costs.

Also offering some insight on how to successfully claim costs is the decision in ***Finn Way General Contractor Inc*. v. *S. Ward Construction Inc*.**[15] In this decision, Justice Shaw was engaged in assessing the costs claimed by a successful plaintiff in the face of claims by the defendant – who had not submitted a Bill of Costs – that the costs claimed were excessive. Justice Shaw noted that as the defendant had not submitted a Bill of Costs, its criticism of the quantum claimed as being excessive was to be accorded very little weight, and certainly less weight than it would, had the defendant produced its own.

---

[14] 2014 ONSC 4715.

[15] [2014] O.J. No. 3640 (S.C.J.).

On this point, His Honour stated:

> 27 Ward submits that the time claimed by Finn Way…is excessive. However, an attack on the quantum of costs as excessive, without producing one's own Bill of Costs is, as stated by Winkler J., as he then was, in *State Farm Mutual Automobile Inc. Co.* (2003), 64 O.R. (3d) 135 (S.C.J.), "no more than an attack in the air."
>
> 28…I therefore have Ward's criticism of excessive time incurred by Finn Way's counsel without knowing the time docketed by Ward's own counsel in preparing for and attending on discoveries and trial. Because of that, the criticism loses some of its force.

Roseanna R. Ansell-Vaughan is an associate at Hughes Amys LLP in Toronto.