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

by
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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; under what circumstances a self-represented party will receive costs; the "reasonableness" of disbursements; and the division of costs between a plaintiff and a defendant.

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]

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[1] 2012 ONCA 0872.

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

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

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 have come up with many novel arguments to justify an award of substantial indemnity costs. In *Jennings* v. *Latendresse*,[4] that attempt failed.

In this matter, the Defendant brought a successful threshold motion and thereafter claimed costs on a substantial indemnity basis.

The Defendant then made a claim for substantial indemnity costs based firstly, on an offer to settle that was more favourable than the result achieved by the Plaintiff and secondly, alleged bad behaviour on the part of the Plaintiff.

The Defendant argued that he had made an offer to settle for an amount of money and had "beaten" that offer by securing the dismissal of the Plaintiff's claim. The Defendant recognized that in light of these circumstances, Rule 49.10 has no application (since the Plaintiff did not "recover" a judgment). Accordingly, the Defendant relied upon the residual discretion of the Court pursuant to Rule 49.13 to take into account any offer to settle made in writing in the making of a costs award.

The Defendant further argued that the Plaintiff's behaviour was egregious and deserving of sanction such as to warrant imposing substantial indemnity costs under Rule 49.13. In support of this allegation, the Defendant stated that the extent of her success at trial spoke to the fact that the action ought never to have been brought.

Justice Cavarzan of the Ontario Superior Court rejected these arguments of the Defendant.

His Honour confirmed that Rule 49.10 has no application in cases where the Plaintiff fails to recover judgment and that there was a residual discretion in the Court pursuant to Rule 49.13 to take into account any offer made in writing. His Honour also recognized that apart from the operation of Rule 49.10, elevated costs will only be awarded on a clear finding of reprehensible conduct on the part of the party against whom the costs award is made. However, no such behaviour was found in this matter.

[4] 2012 ONSC 6982.

Justice Cavarzan stated that the fact of a Plaintiff's loss at trial ought not to be taken as proof that the case ought not to have been brought to trial and that decision to do so qualifies as "egregious behaviour". His Honour noted that if this were a determinative consideration, there would hardly be a case in which the winning side would not be entitled to an enhanced costs award. Although counsel for the Defendant put forward various other grounds as a basis for a finding of egregious behaviour on the part of the Plaintiff, the Court stated that those allegations amounted to nothing more than common occurrences in civil litigation that did not consume an inordinate amount of trial time and which amounted to no more than an attempt by Plaintiff's counsel to represent his client effectively.

Accordingly, partial indemnity costs were awarded.

This case is a reminder that success will not necessarily carry the perk of a significant costs award.

Full Indemnity: Solely for Sordid Cases

The Courts have also offered some guidance as to when "full indemnity" costs will be awarded.

Full indemnity costs, which represent a complete or near complete indemnification of the claiming party's costs, are very, very rare. The Courts of Ontario have held that such an award is appropriate in circumstances that are still more exceptional than those justifying substantial indemnity costs.[5] Like substantial indemnity costs, full indemnity costs will only be awarded where there has been "reprehensible, scandalous, or outrageous" conduct or where such conduct has been alleged. In such circumstances, an award of full indemnity costs is designed to chastise improper conduct and deter others.[6]

In the case of *D'Souza* v. *Linton*,[7] the Court found just such circumstances.

This matter involved truly extraordinary facts, which the Court referred to as "sordid". It appears that the self-represented Plaintiffs, D'Souza and D'Gama, purported to have obtained an *ex parte* default judgment bearing the signature of Justice Penny, of the Ontario Superior Court, against the vendors and purchasers they sued in a real estate transaction. The purported judgment declared the Defendants guilty of conspiracy and fraud, and awarded the Plaintiffs $60,000 in damages, $48,000 in exemplary damages, and $5,000 in costs. The Plaintiffs then sent copies of the judgment to the Defendants,

[5] *1483677 Ontario Inc*. v. *Crain*, 2010 ONSC 1353.

[6] *Baryluk (c.o.b. Wyrd Sisters)* v. *Campbell*, 2009 2009 CanLII 34042 (SC).

[7] 2013 ONSC 70.

representing it to be an authentic, valid judgment of the Court, and then used that judgment to threaten serious consequences, including criminal proceedings.

It was subsequently revealed that no copy of the Motion Record could be located within the Court file, the Court had no record of this motion ever being on the docket for the date it was alleged to have been heard, and Justice Penny was not sitting in Motion's Court that day. In addition, Justice Penny stated that he would never have given judgment for the extraordinary relief requested.

Justice Penny found that the Plaintiffs, or one of them acting in concert with the other, had falsified his signature on the judgment. He stated that the Plaintiffs' conduct, in essentially faking the judgment of the Court and attempting to enforce it, constituted a scurrilous and fraudulent attack on the administration of justice. The Plaintiff's actions amounted to a contemptuous and reckless disregard for the judicial process that was calculated to obstruct or interfere with the due course of justice in these proceedings. Justice Penny found that the facts of this case "fully" fit the meaning of the phrase "reprehensible, scandalous or outrageous conduct".

The Defendants were duly awarded costs on a full indemnity basis, in an amount exceeding $40,000.00.

The Problem Case: When Partial Indemnity = Full Indemnity

In *Geographic Resources* v. *Peterson*,[8] the Court addressed the situation where in awarding partial indemnity costs, the award reflects the actual costs incurred by a party given the very low rates for counsel fees charged to the client.

In this case, Justice Aitken sitting in the Divisional Court dealt with the claim for costs of the successful Respondents who were represented by counsel retained by LAWPRO. The key issue before the Court was whether, in the course of awarding partial indemnity costs, the *actual* costs incurred by the Respondents could be awarded in light of the fact that LAWPRO's counsel rates were comparable to the partial indemnity scale counsel rates.

The Appellants proposed that the costs claimed on a partial indemnity basis by counsel for LAWPRO ought to be reduced by 60% to reflect the principle of partial indemnity. In this regard, the Appellants relied upon the decision in *Boucher* v. *Public Accountants Council for Ontario*[9] where the Court stated that the granting of an award of costs on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle.

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[8] 2013 ONSC 1041.

[9] 2004 CanLII 14579 (Ont. C.A.).

The Respondents argued that *Boucher* was a product of an older regime that had no application to the case at bar. The Respondents further argued that notwithstanding that the amounts claimed amounted to full indemnity, the amount was still less than what the Appellants would expect to pay under the partial indemnity costs grid.

Justice Aitken agreed with the Respondents, stating that she found no principled basis which could justify the costs award proposed by the Respondents. Indeed, she noted that nowhere in the current costs regime is there any required relationship between partial indemnity and actual costs. The main caveat in the jurisprudence is that recovery on a partial indemnity basis cannot *exceed* a litigant's actual costs.

Justice Aitken noted that in fixing partial indemnity costs, the court need not look at the actual fee arrangement between solicitor and client and discount that arrangement to ensure that recovery is "partial". Rather, the court ought to consider the pertinent factors laid down in the rules in fixing the amount of recovery appropriate on a partial indemnity basis. So long as the amount is equal to or less than the actual fees and disbursements charged, then the amount arrived at by reference to the factors listed in the rules will be the amount of the award – whether that represents 50% of actual fees, 75% of actual fees, or even 100% of actual fees.

Justice Aitken concluded by stating that there is no reason why a client's fee recovery ought to be reduced because the client has negotiated a favourable rate with counsel, so long as the total of the indemnity does not exceed the fees actually charged.

In the result, Aitken J. awarded almost the full amount of the actual costs, instead of 60% of that amount as proposed by the plaintiffs/appellants.

The "Reasonableness" Of Disbursements

Historically, the Courts of Ontario have taken a relatively deferential approach to awarding costs for assessable disbursements. The Courts have been largely content to make any such costs claimed payable by the losing party and have demurred from questioning the quantum claimed. The Courts had good reason to do so: the costs claimed for disbursements did not include a profit to the party claiming them and engaging in a detailed scrutiny of disbursements is a distasteful task that a judge is understandably not eager to undertake.

With the decision of Justice Edwards of the Ontario Superior Court in *Hamfler* v. *1682787 Ontario Inc.*,[10] those days appear to be over.

In this case, which involved an assault, the Plaintiff made all the usual claims in a personal injury action: general damages, past and future income loss; and future care

[10] 2011 ONSC 3331.

costs. The Plaintiff was entirely successful in establishing liability against the Defendants and was awarded $200,000 for damages. The Plaintiff then submitted a Bill of Costs seeking $87,680 for partial indemnity costs, plus disbursements of $93,542.99. Justice Edwards was largely content with the legal fees claimed. However, he was concerned with the quantum of the disbursements.

Justice Edwards confirmed that the key consideration with respect to awarding costs for disbursements was whether the amount claimed was "fair and reasonable" and emphasized the overriding principle governing a Court's discretion to award costs as "reasonableness".

Justice Edwards recognized that disbursements can and often do form a significant component of the overall claim for costs, as they did in this case, and that the quantum of disbursements claimed can be a very significant "impediment" to getting a case resolved. However, there has been little appellate guidance with respect to the appropriate standard to apply when reviewing the reasonableness of a disbursements, other than the direction that a disbursement must be reasonable, not excessive, and have been charged to the client in order to be recoverable (as stated by the Ontario Court of Appeal in *Moon* v. *Sher*.[11]

Justice Edwards then stated a list of questions to be considered in determining whether an expert's fee is excessive before reducing the disbursements claimed. Those questions are:

> 1. Did the evidence of the expert make a contribution to the case, and was it relevant to the issues?
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> 2. Was the evidence of marginal value or was it crucial to the ultimate outcome at trial?
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> 3. Was the cost of the expert or experts disproportionate to the economic value of the issue at risk?
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> 4. Was the evidence of the expert duplicated by other experts called by the same party? Was the report of the expert overkill or did it provide the court with the necessary tools to properly conduct its assessment of a material issue?

In applying these questions to the case at bar, Justice Edwards was critical of the fact that three medical experts were called by the Plaintiff to give evidence, although no evidence was called from any treating doctors. Also, although the Plaintiff's productions did not indicate any substantial change in his overall level of income, the Plaintiff chose to call an economist to suggest he had suffered a very substantial past income loss and

[11] (2004), 246 D.L.R. (4th) 440).

would suffer a substantial loss of income in the future. Justice Edwards described the Plaintiff's approach as a "Cadillac" approach which despite the cost, provided no assistance to the Court as to how the various medical doctors arrived at the amount they charged for the preparation of their reports and attendance at trial.

In the end, the list of disbursements of approximately $93,000.00 was reduced to $51,000.00, inclusive of GST and HST.

This decision sends an unequivocal message to all counsel, both Plaintiff and Defendant, that counsel should expect much greater scrutiny of their disbursements. If counsel cannot explain the quantum of the costs claimed beyond a boilerplate statement that the amount claimed from the losing party represents a bill paid, there is the risk that this expense will not be recoverable.

This case will likely also affect how cases are carried to trial. In particular, this case ought to be interpreted as a warning that if counsel choose to prove their cases with expert evidence rather than the evidence of treating physicians, they do so at their pocket's peril.

The Division of Costs Between a Plaintiff and Co-Defendant Where No Liability Is Found Against one Defendant

In *Sousa* v. *Jahagirdhar*,[12] the Court was faced with the common scenario where, although it is clear to the plaintiff that one party has no liability, the plaintiff refuses to consent to a release of that party without an admission of liability from another defendant. In such cases, plaintiffs routinely refuse this request and do so without penalty. This decision alters that practice.

The facts involve a motor vehicle accident where a left-turning vehicle collided with another vehicle that entered an intersection on an amber light. The involved drivers denied any liability and took the position that the uninsured Defendant, Jahagirdhar, was entirely at fault for the accident. The Plaintiff then amended his claim to include a specific claim against his own insurer pursuant to the uninsured driver provision, which the Court accepted was a reasonable step to take at the time. Following the Plaintiff's examination for discovery, the Plaintiff wrote to the Defendants indicating that he was prepared to release the uninsured carrier from the action if the Defendants agreed that one of the Defendants was at least 1% liable. The Defendants refused, and the Plaintiff took the position that he was forced to keep the uninsured carrier in the action so as to insure coverage was available to him.

The uninsured coverage carrier brought a motion for summary judgment. The motion was opposed by the two Defendants while the Plaintiff did not take a position on the

[12] 2012 ONSC 5153.

motion. On that motion, the uninsured carrier succeeded in obtaining the dismissal of the action against it on the basis that the other Defendants were 1% liable.

The issue then arose as to who would pay the costs award granted. The parties agreed on the quantum of the uninsured carrier's costs, but not on whether the Plaintiff or the Defendants should pay it.

The Defendants submitted that it was the responsibility of the Plaintiff to pay the uninsured carrier's costs of the action up to and including the day of the summary judgment motion. The Defendants further submitted that the costs of the summary judgment motion should be payable on a 50-50 basis as between the two Defendants and the Plaintiff.

The Plaintiff argued that this was an appropriate case for a Sanderson Order (where the unsuccessful defendant is ordered to pay the costs of the successful defendant).

In exercising his authority pursuant to s. 131 of the *Courts of Justice Act* and Rule 57 of the *Rules of Civil Procedure*, Justice O'Neill of the Ontario Superior Court noted in particular that this Rule permits a court to consider "the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding" and "whether any step in the process was (i) improper, vexatious or unnecessary, or taken through negligence, mistake or excessive caution". He evidently found such conduct in the matter before him. He referred to the fact that the involvement of the uninsured carrier could have been ended a year earlier had the Plaintiff's offers to consent to the release of the uninsured carrier been accepted, and the fact that on the motion, the Defendants had taken the position that the uninsured Jahagirdhar was entirely at fault.

Justice O'Neill ordered the Plaintiff to pay 60% of the insurer's costs of the action and the Defendants to pay 40% of the quantum previously agreed upon by the parties. He further ordered that the costs of the motion for summary judgment be paid 50% by the Plaintiff Kevin Sousa, and 50% by the Defendants.

This case is significant because it stands as a warning that a plaintiff will not be immune from exposure to costs where it refuses to consent to the release of one party – against whom only a modest change of success exists – in the absence of an admission of liability from another. Clearly, to the Court's view, whether or not liability can be established against one defendant is irrelevant as to whether another defendant is properly forced to participate in litigation.

Duplicative Claims Justify Substantial Indemnity Costs

In *Carriere Industrial Supply Limited* v. *2026227 Ontario Inc.*,[13] Justice David Brown of the Ontario Superior Court wrote a decision explaining his award of substantial

[13] 2013 ONSC 1016.

indemnity costs against the Plaintiff for a duplicative action that was discontinued. Although the amount of money was modest (the costs were fixed at $2,866.81), Justice Brown recognized that an important practice issue was raised by his award and he addressed it at length.

On September 10, 2012, the Plaintiff and others obtained an order from a judge of the Toronto Region Commercial List to commence an application (CV-12-9838-00CL) as representatives of a class of former clients of the Defendant and others. By an order dated October 12, 2012, Justice Edwards directed that the application proceed to a trial of the issues and made other orders.

On December 20, 2012, with the assistance of other counsel, the Plaintiff commenced a second action in Sudbury against the same defendants named in the Toronto Representative Proceeding seeking essentially the same relief and based on the same facts. Four weeks later, the Plaintiff discontinued this action by serving and filing a Notice of Discontinuance.

One of the Defendants, the Toronto-Dominion Bank, brought a motion pursuant to Rule 25 of the *Rules of Civil Procedure*. This Rule, which came into effect in 2010, permits a defendant to bring a motion for an award of costs for a discontinued action. The Bank sought its substantial indemnity costs even though it was not formally served with the Statement of Claim.

Justice Brown quoted with agreement Master McLeod's comments in *N12 Consulting Corp*. v. *Hulford*[14] that "whether the action is treated as dismissed for delay or discontinued, the court has complete discretion to fashion a costs award that is in the interests of justice", and the view of Morden & Perell, the authors of *The Law of Civil Procedure in Ontario*,[15] who stated:

> "… to be relieved of costs, the plaintiff must satisfy the court that the material filed discloses a bona fide cause of action that is not frivolous or vexatious and that he or she was justified in commencing a lawsuit."

In defending the claim for costs, the Plaintiff explained that the Sudbury action was issued to preserve a limitation period out of a concern that a claim for relief that was personal to it, rather than to the other parties, was not covered in the representation order. Having satisfied itself that this was not an issue, the Sudbury action was discontinued.

Justice Brown was not moved to sympathy by the Plaintiff's argument. Characterizing the Plaintiff's conduct as "one of the seven deadly litigation sins" that "violated the rule against the multiplicity of legal proceedings", Justice Brown stated that:

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[14] 2012 ONSC 7306.

[15] (Toronto: LexisNexis, 2010) at p. 401.

> "Simply put: litigants who seek relief before the Superior Court of Justice must pick the county in which they wish to assert their claims and stick with their choice; they cannot hedge their bets by starting a duplicative second action in another county. To do so constitutes a misuse of the resources of this court, and such conduct should be discouraged by the court through an award of substantial indemnity costs."

Finishing with a literary flourish, Justice Brown rejected the other arguments of the Plaintiff as to why the Defendant's request for costs ought to be denied and stated that the *Rules of Civil Procedure* must be applied to resolve civil disputes in the least expensive manner and not to "crank up the costs by relying on technical arguments worthy of the Bleak House era".

Confirming that “elevated costs should only be awarded on a clear finding of reprehensible conduct", Justice Brown found that the Plaintiff's was of such a flavour, and ordered the payment of the full amount sought by the Defendant, which significantly the Plaintiff had not disputed in its argument.

Counsel be warned: the Courts of Ontario will not suffer their dockets to be cluttered with duplicative claims and parties will not be permitted to hide behind caution to avoid a costs order on a substantial indemnity scale.

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

In *Tiago* v. *Meisels*,[16] Justice Stinson dealt with a claim for costs by the Plaintiffs arising from their successful defence of a motion for summary judgment brought by the Defendants.

Justice Stinson stated that as the successful parties, the Plaintiffs would ordinarily be entitled to an award of costs in their favour, however as they were not represented by counsel, they are not entitled to an ordinary costs ward. Nevertheless, Justice Stinson recognized that the Plaintiffs "undoubtedly" incurred properly recoverable expenses in responding to the motion and he was evidently prepared to order compensation for these expenses. He stated that he would receive written submissions from the parties, limited to three double spaced pages plus a listing of expenses, if the parties could not agree on costs.

After some delay following from a possible appeal by the Defendants, the Plaintiffs prepared submissions on costs and the Defendants responded with nine pages of

[16] 2012 ONSC 5090.

submissions, which inspired the Plaintiffs to tender a reply of an additional nine pages, supplemented by four appendices.

Justice Stinson was clearly unimpressed with the conduct of both parties.

Justice Stinson confirmed the current state of the law as follows:

Self-represented parties such as the Plaintiffs are not automatically entitled to costs, nor are they entitled to costs calculated on the same basis as those of a litigant who retains counsel. A judge of the Ontario Courts may exercise his or her discretion to award costs to a self-represented litigant only if that party can prove:

> 1) the litigant devoted time and effort to do the work ordinarily done by a lawyer; and
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> 2) that as a result, she or he incurred an opportunity cost by foregoing remunerative activity.

Where an opportunity cost is proven, a self-represented litigant should only receive a nominal, moderate or reasonable amount. Quoting with agreement from *Mustang Investigations Inc*. v. *Ironside* (2010), 103 O.R. (3d) 633 (Div. Ct.), Justice Stinson stated: "Simply stated, no proof of opportunity cost, no nominal costs available."

Justice Stinson noted that although the Plaintiffs stated in their submissions that they devoted considerable time and effort to do the work that would ordinarily be done by a lawyer which time could otherwise have been spent earning income, they filed no evidence of lost opportunities or the income they might have earned during the personal time they devoted to the litigation. Accordingly, he reduced the Plaintiffs' claim for costs in excess of $23,000.00 to $2,312.00.

The Defendants requested a set off for the costs of two previous court appearances that were adjourned at the request of the Plaintiffs. Justice Stinson stated that although in the "ordinary course" he would have done so, he would not in this case as a sanction to the Defendants for ignoring his direction as to the length of their costs submissions

Let the pain of the parties in this case be a lesson to the rest of us: a claim for costs must be proven – always and by everyone – and the directions of the Court as to the form of costs submissions are "directions", not "suggestions".

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