CITATION: Cami v. Shankar, 2018 ONSC 4167
COURT FILE NO.: CV-14-51282
DATE: 20180703

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Besnik Cami

AND:

Shakil Shankar and Shiu Naraiu

BEFORE: Justice G. Dow

COUNSEL: *Marin James Nati*, for the Plaintiff

Maia Abbas, for the Defendants

HEARD: June 22, 2018

COSTS ENDORSEMENT

[1] This matter proceeded at trial with a jury June 4 to June 14, 2018. It involved a claim by the plaintiff for damages arising from a motor vehicle accident on November 1, 2013. The defendant admitted liability and the questions to the jury asked them to assess general damages, loss of income, both past and future, future medical or rehabilitation services and future housekeeping. The jury assessed each head of damage at zero.

[2] I determined the threshold motion with regard to general damages in favour of the defendant and provided counsel with my draft reasons (2018 ONSC 3756) on June 22, 2018 before hearing submissions on costs.

[3] The defendant seeks their costs on a partial indemnity basis and tendered a bill of costs claiming $63,836.55 for fees inclusive of HST plus disbursements totaling $36,931.97, again, inclusive of HST. The total is $100,768.52.

[4] The plaintiff conceded the defendants entitlement to costs but that the amount sought was excessive in the circumstances and ought not to exceed $65,000 inclusive of fees, HST and disbursements.

[5] There were three offers to settle made during litigation. The two offers by the plaintiff, April 6, 2018 and May 22, 2018 were for $65,000 and $20,000 plus costs to be agreed upon or assessed. These are of no consequence aside from demonstrating the plaintiff's evaluation of the case for settlement purposes.

[6] The defendants offer May 8, 2018 permitted the plaintiff to consent to a dismissal without costs until May 21, 2018. Thereafter and until the commencement of the trial, the plaintiff could pay the plaintiff $10,000 for costs and sign a full and final release. Following

commencement of the trial, the offer notified the plaintiff the defendants would be seeking substantial indemnity costs. Counsel for the defendants acknowledged this offer did not trigger the costs consequences provided for under R. 49.10 (2).

[7] Counsel for the plaintiff made a variety of submissions as to why the amount sought by the defendants was excessive. This included the defendant was actually insured and that the defence was directed by an insurer who chose to play "hardball". I reject that position given the plaintiff, through his counsel, was well aware from the outset the defendant was insured and would vigorously defend the action as it was entitled to do. Despite its offer to settle, the plaintiff sought damages in the amount of $1,000,000 plus interest and costs in its prayer for relief. More importantly, the plaintiff, through counsel, addressed the jury seeking $75,000 for general damages, past loss of income in the range of $130,000 to $150,000, future loss of income of $100,000 and future medical and rehabilitation services in the amount of $10,000. This totals $315,000 to $335,000. I would echo the comment of Justices Firestone in *Lakew v. Munro*, 2014 ONSC 7316 at paragraph 33 that the "threshold provisions contained in the Insurance Act provide a full statutory defence to general damage claims arising out of motor vehicle accidents. The defendant was fully within its right to vigorously defend the action in accordance with those provisions and with his assessment of the claims for pecuniary damages."

[8] Plaintiff's counsel set out examples how the trial could have been shortened. This involved calling a witness employed by the plaintiff's insurer to tender the property damage file, particularly colour photographs of the damage to the plaintiff's vehicle which showed little visible damage. This led to the cover letter of the file from the appraiser being marked as an exhibit by plaintiff's counsel in which the appraiser described "severe damage to the rear bumper gate and rear panel". This witness was examined in less than 40 minutes and is not a basis to reduce the account of counsel for the defendants.

[9] Similarly plaintiff's counsel submitted Dr. Czok, the physiatrist who examined the plaintiff at the request of his own insurer for the purpose of a claim for accident benefits, was unnecessary. Dr. Czok was called by the defendants whom merely confirmed her authoring a report in which she requisitioned Mr. Cami undergo diagnostic testing. Dr. Czok tendered an addendum report following receipt of those results confirming a right shoulder and lumbosacral sprain and strain. Dr. Czok was examined in less than 90 minutes. This is also not a basis for any substantial reduction in the quantum of the defendants' Bill of Costs.

[10] The key witness would appear to be the defendants' medical expert, Dr. Lipson, a physiatrist who found Mr. Cami to be inconsistent in both his complaints and examination. As I noted in my decision on the verbal threshold, Dr. Lipson also found Mr. Cami's pre-accident health records to be inconsistent with what Mr. Cami told him. Dr. Lipson concluded Mr. Cami had suffered only soft tissue injuries and was not disabled from working.

[11] The fees charged and claimed in the Bill of Costs total $18,550, $8,950 being for two reports rendered and $9,600 for attending trial in the afternoon on June 11 and the morning of June 12, 2018 which was required to complete his examination, cross-examination and re-examination. In this regard, I rely on the comments of Justice Edwards in *Hamfler v. Mink*, 2011 ONSC 3331 at paragraph 17. Justice Edwards sets out a number of questions to ask in

determining the reasonableness of expert fees. Clearly Dr. Lipson made a contribution with relevant evidence and was not "expert overkill".

[12] An issue arose with regard to service and use of an August 10, 2017 investigation and surveillance report given it was served within the 90 days before trial. Counsel for the defendants sought to use the contents of the report to impeach the credibility of the plaintiff. Following submissions, I ruled that despite the late service, the content of the report could be utilized if Mr. Cami gave any evidence which contradicted the surveillance. He did not. This obviated the need to show the video or call the investigator. The plaintiff admitted doing physically demanding work as a handyman on consecutive days including changing a tire on his van as depicted in the surveillance.

[13] In the reasons for my ruling, I did indicate there might be costs consequences given the lack of a credible explanation for late service of the report. The cost of the four reports listed and claimed as disbursements $10,669.38. However, only two of the reports were utilized. As with other disbursements listed, such as witness conduct money for individuals not called, it is my view these are not properly claimed or payable and factor into my decision.

[14] I was also asked to consider the financial situation of the plaintiff but without any details of it aside from trial evidence which indicated the plaintiff had not been able to work since his fall and injury on October 7, 2017 and that he and his family have been living in the same home for the past 9 years. In my view, this is insufficient to consider a reduction of the defendants' entitlement to costs.

[15] Counsel also pointed to production motions not specifically detailed in the defendants' Bill of Costs which proceeded November 8, 2016 and February 16, 2018. These resulted in costs awards, believed to $2,000 in each instance. That is, there was time claimed for which compensation had been determined and thus, the total amount of hours sought for fees was excessive.

[16] Finally, counsel for the plaintiff submitted the time and fees ought to be reduced specifically with regard to preparation for trial on the basis it was excessive. In this regard, trial preparations were noted to have begun three months before the trial commenced and appears to have been somewhat in excess of one hour of preparation for each hour of trial time sought to be recovered. Each party had an associate or junior counsel attend and gown. Unlike associate counsel for the plaintiff, associate counsel for the defendants did not examine or cross-examine any of the witnesses. I acknowledge it was only associate counsel who had appeared before me to make submissions on the awarding of costs.

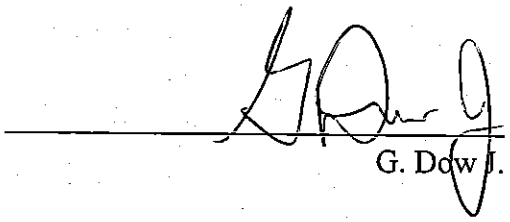
[17] I am in agreement with and propose to follow the key considerations identified in the cases referred to me by counsel. These can be summarized as:

a) Overall, the court should give greater consideration to an amount that is fair reasonable for the unsuccessful party to pay than that of the actual costs incurred by the successful party, (see *Boucher v. Public Accountant's Council for the Province of Ontario* (2004), 188 O.A.C. 201 at paragraph 52);

b) Rather than conduct a mathematical exercise with line by line review of the Bill of Costs, the Court of Appeal has directed trial judges to reflect on what the reasonable amount should be paid by the unsuccessful party (see *Davies v. Clarington (Municipality)*, 2009 ONCA 722 at paragraph 52).

[18] Having reflected on all of the above, I conclude some reduction is required from the partial indemnity amount sought by the defendants. However, I note the requested reduction sought by the plaintiff is more than $35,000. I am unable to conclude how the areas submitted result in a reduction that large. Further, I was not persuaded an amount greater than $65,000 would not be in the contemplation of the plaintiff or his counsel. Specifically, I am mindful of the damages sought from the jury by the plaintiff exceeded $300,000. In addition, there was no other evidence such as a Bill of Costs prepared by plaintiff's counsel to his client in an amount that would support this position.

[19] As a result, I award the defendants their partial indemnity costs, fixed at $85,000 inclusive of fees, HST and disbursements and payable in 60 days.



G. Dow J.

Date: July 3, 2018