CITATION: Hyeon Joo Kim Lee v. Fahime Rezai, 2015 ONSC 3140
COURT FILE NO.: CV-12-464652
DATE: 20150520

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HYEON JOO KIM LEE, Plaintiff	Sang Jae Boon, for the Plaintiff
– and –	
FAHIME REZAI, Defendant	William M. Sproull, for the Defendant
	HEARD: March 16, 2015

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FAIETA, J

COSTS ENDORSEMENT

[1] An eleven-day jury trial was held with respect to a personal injury claim brought by the Plaintiff following an automobile collision. Liability was admitted. The jury awarded no damages to the Plaintiff. I subsequently granted the Defendant's motion for a declaration that the Plaintiff's claim for non-pecuniary loss and health care expenses was barred by subsections 267.5(3) and (5) of the *Insurance Act*, R.S.O. 1990, c. I. 8. The Plaintiff failed to demonstrate that she had suffered a permanent serious impairment of an important physical, mental or psychological function as a result of the collision.

[2] The remaining issue is to what extent, if at all, the Defendant should be awarded its costs of defending this action. The Defendant claims $209,475.05 in costs (including $47,438.18 for disbursements). The Plaintiff submits that no costs should be awarded to the Defendant.

THE LAW

[3] The Court has a broad discretion to determine by whom, and to what extent, costs of a proceeding shall be paid. However, this discretion is subject to the rules of the Court as outlined in section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

[4] The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provide the following direction to the Court when considering a request to award costs:

- In exercising its discretion to award costs under section 131 of the *Courts of Justice Act*, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

  (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

  (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

  (a) the amount claimed and the amount recovered in the proceeding;

  (b) the apportionment of liability;

  (c) the complexity of the proceeding;

  (d) the importance of the issues;

  (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

  (f) whether any step in the proceeding was,

    (i) improper, vexatious or unnecessary, or

    (ii) taken through negligence, mistake or excessive caution;

  (g) a party's denial of or refusal to admit anything that should have been admitted;

  (h) whether it is appropriate to award any costs or more than one set of costs where a party,

    (i) commenced separate proceedings for claims that should have been made in one proceeding, or

    (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

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(i) any other matter relevant to the question of costs;[1]

- In exercising its discretion with respect to costs, the court may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer;[2]
- Where an offer to settle is: (1) made by a Plaintiff at least seven days before the commencement of the hearing; (2) not withdrawn and does not expire before the commencement of the hearing; and (3) not accepted by the Defendant, and the Plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the Plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise;[3]
- Where an offer to settle is: (1) made by a Defendant at least seven days before the commencement of the hearing; (2) not withdrawn and does not expire before the commencement of the hearing; and (3) not accepted by the Plaintiff, and the Plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the Plaintiff is entitled to partial indemnity costs to the date the offer was served and the Defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.[4]

[5] While the traditional principle of indemnification is the paramount consideration in the assessment of costs, it is no longer the only consideration. An award of costs is informed by many other considerations as enumerated in Rule 57.01 and other provisions of the *Rules of Civil Procedure*. The consideration of these broader interests serves to further the efficient and orderly administration of justice.[5]

[6] Rather than engage in a purely mathematical exercise, an award of costs should reflect what the Court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant.[6]

[7] Although a cost award is typically based on partial indemnity, an elevated costs award is warranted when: (1) an offer to settle is made under Rule 49.10 or (2) the party against which a costs award is being made has engaged in reprehensible conduct.[7]

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[1] Rule 57.01(1).
[2] Rule 49.13.
[3] Rule 49.10(1), Rule 49.03.
[4] Rule 49.10(2); Rule 49.03.
[5] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371.
[6] *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 312 D.L.R. (4th) 278, at para. 52.
[7] *Davies*, at para. 40.

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[8] The considerations raised by the Rules and the submissions of the parties are addressed below under the following headings:

1) The Amount Claimed and the Amount Recovered

2) The Importance of the Issues and the Complexity of the Proceeding

3) The Conduct of the Parties

4) Offers to Settle

5) Principle of Indemnity

6) Proportionality

7) What Could the Unsuccessful Party Reasonably Expect to Pay?

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The Amount Claimed and the Amount Recovered

[9] The Plaintiff claimed $1 million in damages in her Statement of Claim. At trial, the Plaintiff asked the jury to award damages in the amount of $498,020.28 comprised of $100,000 in non-pecuniary damages, $12,000 in special damages and $386,020.48 for future health care costs. The Plaintiff did not claim loss of income.

[10] As the Plaintiff acknowledged in her costs submissions, the central issue at trial was her credibility. The jury awarded no compensation to the Plaintiff. The Defendant was wholly successful at trial.

The Importance of the Issues and the Complexity of the Proceeding

[11] The Statement of Claim was issued on October 1, 2012 seeking $1 million in general damages, and an undetermined amount of special damages. The Statement of Defence and Jury Notice were served on or about November 19, 2012. The Examination for Discovery of the Defendant took place on March 15, 2013. The Examination for Discovery of the Plaintiff took place on March 15, 2013, and December 3, 2014. In addition, the parties attended mediation and a pre-trial.

[12] Liability was admitted shortly before trial. By letter dated February 2, 2015, the Plaintiff agreed to restrict her claim to the Defendant's $1 million third party liability limits, plus costs, in exchange for the Defendant's admission of liability.

[13] At trial, which commenced on March 2, 2015, the issue of damages and the application of the *Insurance Act* threshold for personal injury tort claims were of importance to both the Plaintiff and Defendant, as well as the Defendant's insurer.

[14] In my view, the proceeding was not complex. It raised issues that would be expected in a soft-tissue personal injury action. Several motions were heard on the first and second day of trial that related to various matters included the admissibility of medical records and surveillance videos.

The Conduct of the Parties

[15] The Plaintiff submits that Defendant failed to disclose the report of Sarah Macrae, an occupational therapist, in Schedule "B" of the Defendant's Affidavit of Documents. In my view, the Defendant complied with her disclosure obligations under Rule 30.07 of the Rules in that:

- Ms. Macrae's report, dated February 4, 2015, was disclosed in advance of trial in Schedule "B" to the Defendant's updated Affidavit of Documents which was served on February 27, 2015;
- the Defendant claimed privilege over Ms. Macrae's report as it was to assist defence counsel in assessing the opinions and conclusions contained in the report of the Plaintiff's occupational therapist, Ashok Jain, dated January 20, 2014, and in preparing for the cross-examination of Mr. Jain on his anticipated testimony at trial;
- in any event, the Plaintiff did not demonstrate that she suffered any prejudice by the three-week delay in reporting the existence of Ms. Macrae's report.

[16] The Plaintiff submits that the Defendant's claim for costs should be dismissed based upon *Lefebvre v. Osborne.*[8] In *Lefebvre,* costs were not awarded to a Defendant that had successfully defended an action on the basis that he had failed to divulge the existence of a document which implicated another Defendant despite having been required by court order to produce all relevant non-privileged documents to the Plaintiff. I reject the Plaintiff's submission as none of the circumstances surrounding Ms. Macrae's report bear any semblance to the circumstances in *Lefebvre*.

[17] On the other hand, the Defendant's position is that an award of substantial indemnity costs is justified on the basis that the Plaintiff's conduct through trial was egregious given that the jury awarded no damages and that the Plaintiff refused to accept the Defendant's Offer to Settle dated February 6, 2015. While I accept the Defendant's submission that the Plaintiff refused to admit various issues resulting in motions at the commencement of trial, such as: (1) refusing to admit the deemed authenticity as well as admissibility of three surveillance videos served 90 days before trial, which required a private investigator to be available for cross-examination; and (2) refusing to admit the authenticity and admissibility of two internet videos

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[8] [1983] O.J. No. 2136 (H.C.)

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which required the Defendant to lead Affidavit evidence of Michelle Baik, it is my view that this conduct was not "egregious." As the Court in *Davies* noted, "...a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other."[9] In my view, there was no wrongdoing on the part of the Plaintiff that warrants a rebuke from the Court.

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Offers to Settle

[18] Several offers to settle were made in this action. None of the offers comply with Rule 49.10. However, they are relevant under Rule 49.13 which permits the Court to take into account any Offer to Settle made in writing, the date the offer was made and the terms of the offer.

[19] At a mediation held in December 2013, the Defendant made an Offer to Settle this action for the sum of $7,500 all-inclusive in exchange for a signed release and consent to dismissal of the action without costs. This offer was withdrawn after it was rejected by the Plaintiff. This offer was made once again at a pre-trial conference held on January 5, 2015. Once again this offer was rejected and thereafter withdrawn.

[20] The Plaintiff served an Offer to Settle by letter dated February 4, 2015 providing for $45,000 in general damages, $3,500 in special damages, $75,000 in future care costs, $9,834.05 in disbursements, and $18,525 in legal costs. This offer was to remain open for acceptance until February 11, 2015 with costs claimed on a partial indemnity basis until 3:30 p.m., after which date and time costs were claimed on a substantial indemnity basis. This offer was not accepted by the Defendant.

[21] The Defendant submits that the Court should consider its letter, dated February 6, 2015, which provided the Plaintiff with four different, time-limited, offers to settle:

1. consent to a dismissal of the action as against the Defendant on a without costs basis. This offer remained open until February 13, 2015;

2. consent to a dismissal of the action as against the Defendant, on a without costs basis, conditional upon payment by the Plaintiff of $5,000 to the Defendant. This offer remained open until February 20, 2015;

3. consent to a dismissal of the action as against the Defendant, on a without costs basis, conditional upon payment by the Plaintiff of $10,000 to the Defendant. This offer remained open until March 1, 2015;

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[9] *Davies*, at para. 45.

4. consent to a dismissal of the action as against the Defendant in exchange for payment by the Plaintiff of the Defendant's costs incurred for the defence of the action on a partial indemnity basis as agreed to or assessed. This offer remained open until the first witness was called at trial.

[22] The Plaintiff submits that the Plaintiff was "forced into trial" by the Defendant's settlement offer which required that $10,000 be paid to the Defendant if settlement was sought after February 21, 2015. I accept the Defendant's submission that the Defendant did not force the Plaintiff to commence this action nor did she force the Plaintiff to refuse very modest settlement offers in 2013 and 2015, nor to refuse an offer to dismiss this action without costs that was open until February 13, 2015. The Plaintiff decided to commence this action (which was ultimately found to have no merit) and to refuse the various settlement offers that were made by the Defendant. Like any one of us, the Plaintiff must live with her choices.

[23] The Plaintiff also submits that *Bilfochi v. Sherar*[10] is applicable. The Plaintiff relies upon the trial judge's decision which granted the Plaintiffs only one-half of their party and party costs on the basis that none of the Plaintiffs' offers attracted the costs consequences of Rule 49.10 and given that conduct had unnecessarily lengthened the trial. However, the Plaintiff did not address the Ontario Court of Appeal's decision, which reversed the trial judge on this point. The Court of Appeal stated that the "...trial judge fell into serious error in failing to consider the substance of those offers and a further offer made by Bifolchi and Lisgar shortly after the commencement of trial when deciding the appropriate order as to costs." For this reason and others, the Court varied the costs awarded by providing that the Plaintiffs were entitled to their full party and party costs.

Principle of Indemnity

[24] The Bill of Costs submitted by counsel for the Defendant attaches the various accounts sent to the Defendant's insurer and indicates the following:

- fees, $105,326.96 (Partial Indemnity);
- fees: $162,040.87 (Actual Costs);
- total disbursements: $47,438.18.

[25] The Defendant submits that this is a proper case for an order amounting to indemnity of the actual costs incurred by the Defendant as permitted by Rule 57.01(4)(d), given the low hourly rates charged by the Defendant's counsel.

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[10] (1995) O.R.(3d) 237, rev'd [1998] O.J. No. 1515 (C.A.)

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[26] The Defendant submits that:

> …lead counsel for the Defendant, William Sproull, had 17 to 20 years' experience between October 16, 2012 when the defence of this action was initiated and March 16, 2015 when the trial concluded; the rate of $265.00 hourly charged by William Sproull up to February 2015 is well below the $300 maximum for a lawyer of up to 20 years' experience as of 2005 in terms of partial indemnity costs (as of 2015, the $300.00 maximum would be $355.92 when adjusted for inflation at an aggregate rate of 18.64% since July 2005). Further the rate of $265.000 hourly charged by William Sproull as of March 2015 is well below the $350.00 maximum for a lawyer of 20+ years' experience as of 2005 in terms of partial indemnity costs (as of 2015, the $350.00 maximum in 2005 would be $414.25 when adjusted for inflation at an aggregate rate of 18.64% since July 2005).
>
> Similarly, junior counsel Courtney Madison had less than 1 year experience, and the $165.00 rate charged is well below the $225 maximum amount for a lawyer of less than 10 years' experience as of July 2005 in terms of partial indemnity costs (as of 2015, that $225.00 maximum would be $266.94 when adjusted for inflation). The amounts claimed for law clerk and student-at-law time at $125.00 hourly and $140.000 are higher than the July 2005 maximum amounts of $80.00 and $60.00 respectively, but when adjusted for inflation, those maximums would currently be $94.91 and $71.18 hourly. As such, the differential as of 2015, respectively, is $30.99 and $68.82 hourly.

[27] Although the Plaintiff does not challenge the hourly rates, the Plaintiff submits that counsel for the Defendant spent too much time with respect to a variety of activities including mediation, pre-trial conference, and trial preparation. While some of the charges relating to the number of hours for some tasks seem high (such as 13.1 hours for preparation and attendance at the mediation; 19.4 hours for preparation and attendance at the pre-trial conference) the Plaintiff has provided no basis or evidence to support her view that the number of hours billed by counsel for the Defendant (approximately 365 hours) should be reduced by 230 hours and that the number of hours billed by students should be reduced by 65 hours. I also note that the Plaintiff's counsel has not provided the Court with a copy of his Bill of Costs in order to provide some comparison of the time spent by counsel.

[28] The Defendant submits that where actual costs are below the level of partial indemnity as recommended by the Costs Subcommittee of the Civil Rules Committee upon the abolishment of the Costs Grid in July 2005, then actual costs may be awarded to the successful party on a partial

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indemnity basis. The Defendant relies on *Mantella v Mantella*[11] and *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*[12]

[29] In *Mantella* the Court stated:

> In this case, because of the rates at which counsel undertook Ms. Murray's defence, there is little difference between partial indemnity and full recovery costs. The actual fees charged by counsel are not the starting point of a costs analysis. Costs are an indemnity, and thus may not exceed the client's total liability to her solicitor; the client may not gain a windfall as a result of a costs award. However, in fixing partial indemnity costs, the court does not look at the actual fee arrangement between solicitor and client and discount that arrangement to ensure that recovery is "partial". Rather, the court considers 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. If counsel is prepared to work at rates approximating partial recovery costs, that is counsel's choice. There is no reason why the client's fee recovery ought to be reduced because she has negotiated a favourable rate with counsel, so long as the total of the indemnity does not exceed the fees actually charged.[13] [emphasis added]

[30] Subsequently in *Geographic Resources* the Divisional Court stated:

> … costs on a substantial indemnity basis are now set at 1.5 partial indemnity costs. The Costs Subcommittee of the Civil Rules Committee has suggested certain hourly rates as a maximum when fixing partial indemnity costs. There is no reference anywhere in the Rules to 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.[14] [emphasis added]

[31] I respectfully disagree with the above approach. In my view, it is inconsistent with the *Rules of Civil Procedure* and the Ontario Court of Appeal's decision in *Wasserman, Arsenault Ltd v. Sone*[15] and *Boucher v. Public Accountants Council for the Province of Ontario et al.*[16]

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[11] [2006] O.J. No. 2085 (S.C.), at para. 7.
[12] 2013 ONSC 1041, [2013] O.J. No. 717 (Div. Ct.), at para. 13.
[13] Paragraph 7.
[14] Paragraph 13.
[15] [2002] O.J. No. 3772, 164 O.A.C. 195 (C.A.)
[16] (2004), 71 O.R. (3d) 291 (C.A.), at paras. 35-36.

[32] In *Wasserman* the Ontario Court of Appeal stated:

Both of the respondents submit that based on the low hourly rate they had negotiated with their solicitors (which is less than the maximum hourly rate allowable under the partial indemnity costs grid), they should be awarded full indemnity. They assert that this amount would still be less than the appellants would expect to pay under the partial indemnity costs grid. Rumanek & Cooper submit that the respondents should be entitled to only partial, not full indemnity. We agree with this submission. There is no principled basis arising from the conduct of the parties in this case which could justify a costs award on the basis the respondents submit.

The costs grid scheme, which came into force on January 1, 2002 pursuant to O. Reg. 284/01, includes two scales of costs: partial indemnity and substantial indemnity. Partial indemnity means just that - indemnification for only a part, or a proportion, of the expense of the litigation. In *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.*, [2002] O.J. No. 921 (S.C.J.), Nordheimer J. wrote at para. 16:

> As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis.

The degree of indemnification intended by an award of partial indemnity has never been precisely defined. Indeed, a mechanical application of the same percentage discount in every case where costs are awarded on a partial indemnity scale would not be appropriate. In fixing costs, courts must exercise their discretion, with due consideration of the factors set out in rule 57.01(1), in order to achieve a just result in each case. We are fixing costs on a partial indemnity scale in the amount of $30,000 all inclusive.[17]

[33] In *Boucher* the Ontario Court of Appeal followed *Wasserman* and stated:

In my view, the granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motion judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award.[18]

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[17] Paragraph 3-5.
[18] Paragraph 36.

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[34] Both *Wasserman* and *Boucher* remain good law in Ontario. I am bound by those decisions.

[35] A costs award made on a partial indemnity basis should not have the practical result of eliminating the distinction in the Rules between partial indemnity, substantial indemnity and full indemnity costs, nor should a successful litigant effectively receive an award of costs on an elevated scale even though neither of the two criteria, articulated by the Ontario Court of Appeal in *Davies*, for an elevated costs award are satisfied.[19]

[36] A costs award on a partial indemnity basis should serve to provide some compensation to the successful party for their costs without putting access to the justice system beyond the reach of the losing party. Absent circumstances that would justify an elevated award of costs, the specter of partially unrecoverable litigation costs also serves to encourage parties to settle their differences.

[37] In any event, using the language in *Mantella* there is no evidence to suggest that the Defendant's counsel worked at rates approximating partial recovery costs. There is no evidence to suggest that the partial indemnity rates suggested by the Costs Subcommittee of the Civil Rules Committee in 2005, and relied upon by the Defendant, reflect the rates now charged by the auto insurance defence bar to their clients. Similarly, there is no evidence before me that the Defendant was charged anything other than market rates within the auto insurance defence bar for the legal services provided by its counsel nor any evidence of discussions between the Defendant's counsel and the insurer which would provide context as to the rates charged. In my view, it is just as likely that the Defendant's counsel did not work at discounted rates but rather worked at rates prevailing amongst counsel who serve auto insurance defence clients.

[38] The Plaintiff also submits that there are numerous disbursements that are excessive. The Plaintiff challenged Dr. Lipson's charges of $21,800. The Defendant advises that there was an error in Dr. Lipson's account and as a result his charges have been reduced to $10,000. The Plaintiff also takes issue with a charge of $4,097.50 from Sarah Macrae, a Certified Life Care Planner and Occupational Therapist, who provided a report to the Defendant to assist with the cross-examination of Dr. Kekosz and Mr. Jain. In my view, this charge is recoverable even though the report was protected by solicitor-client privilege given the utility that it served. The Plaintiff also challenged the cost of a video surveillance of the Plaintiff. However, she provided no basis to reduce the cost from $2,950 plus HST to $1,000 as requested.

Proportionality

[39] Another relevant consideration is proportionality.

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[19] See paragraph 7 above.

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[40] Rule 1.04(1.1) provides that in applying the *Rules of Civil Procedure* the Court shall make orders that are proportionate to the importance and complexity of the issues, and to the amount of money involved, in the proceeding.

[41] While not brought to the Court's attention, counsel should be aware of the Ontario Court of Appeal's decision in *Elbakhiet v. Palmer.*[20] In that case a Plaintiff in a personal injury action was awarded damages of $144,013.00 after a nine week trial. An offer to settle of $145,000 was viewed as not more favourable than the jury's award given the uncertainty in the interest provisions of the offer. The Defendant was awarded costs of $576,842. The Court of Appeal reduced the amount of costs to $100,000, inclusive of disbursements and HST. The Court stated at para. 38:

> … this amount takes into consideration all the factors to be considered under Rules 49 and 57, including the complexity of the matter and the manner in which the litigation was conducted, and in particular that the offer to settle was virtually the same as the Judgment. This amount is more consistent with the objectives of fairness and reasonableness and especially gives some attention to the need for some proportionality.[21]

What Could the Unsuccessful Party Reasonably Expect to Pay?

[42] In my view, the Plaintiff could have reasonably have expected to pay costs of this proceeding, which included a two-week long trial, on a partial indemnity basis given that in these circumstances elevated costs were not likely to be ordered as an offer to settle under Rule 49 was not made nor was the Defendant's conduct likely to be viewed as "reprehensible" if her claim for damages was unsuccessful.

Conclusion

[43] In *Boucher*, the Ontario Court of Appeal stated at para. 26 that "… the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the proceeding …".

[44] Having regard to the various considerations described above, it is my view that an award of costs on an elevated basis is not warranted. Further, it is fair and reasonable for the Plaintiff to pay the Defendant's costs on a partial indemnity basis in the amount of $75,000 plus disbursements of $35,638.18.

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[20] 2012 ONSC 2529, [2012] O.J. No. 2890; rev'd 2014 ONCA 544, 121 O.R. (3d) 616 (C.A).
[21] Paragraph 38.

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Mr. Justice M. Faieta

Released: May 20, 2015

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