CITATION: Sharma v. Stewart, 2017 ONSC 4333
COURT FILE NO.: CV-10-4197-00
DATE: 2017 07 24

2017 ONSC 4333 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SATISH SHARMA and SHAROJ SHARMA v. JESSE STEWART

BEFORE: LEMAY J

COUNSEL: D. Bianchi, Counsel for the Plaintiffs
S. Barclay, Counsel for the Defendant

COSTS ENDORSEMENT

[1] The Plaintiffs, Satish and Sharoj Sharma, were involved in a Motor Vehicle Accident on November 15th, 2008. They sued the Defendant, Jesse Stewart, for damages.

[2] Liability was admitted by the Defendant, and the Plaintiffs limited their claims to $1 million each. The matter went to trial in May of 2017 before a jury. It lasted for three weeks. At trial, the focus of the evidence was mainly on the issues of non-pecuniary damages and income loss. Some evidence was focused on out-of-pocket expenses.

[3] At the end of the trial, the jury returned with a verdict. While the jury awarded amounts for past expenses, the applicable deductibles under the *Insurance Act* wiped all of the monies awarded to the Plaintiffs except for travel costs in the sum of $400.00 for Ms. Sharma and $100.00 for Mr. Sharma. Based on this outcome, the Defendant accepted that the threshold motion was moot. The Plaintiffs took the position that the threshold motion was the Defendant's motion to bring. As a result, I did not have to consider the threshold issues.

2017 ONSC 4333 (CanLII)

[4] I am required, however, to fix the costs for this action.

[5] During the course of the trial, the Plaintiffs moved to have the expert report of Dr. Cheryl Miller admitted for the truth of its contents without calling Dr. Miller as a witness. The basis for this motion was that the Plaintiffs could not find Dr. Miller. I denied this motion for reasons given orally. The Defendant is seeking costs for this motion separately from the costs of the trial. I will also address these costs below.

<u>The Position of the Parties</u>

[6] Both parties filed initial submissions as well as reply submissions on costs. I have reviewed and considered these submissions in making my decision. At the outset, I should note that the parties addressed the costs

differently. The Plaintiffs split their costs claims completely, while the Defendant claimed for one set of costs against both Plaintiffs.

[7] These actions were heard together. I am of the view that it is most appropriate to fix one set of costs for this action.

[8] The Plaintiffs seek costs, inclusive of HST and disbursements, in the sum of $263,914.77 in full indemnity costs and, in the alternative, $189,206.01 in partial indemnity costs for the following reasons:

a. The Plaintiffs assert that they were successful in being awarded damages for pain and suffering, past loss of income, and past medical and transportation expenses. In particular, the Plaintiffs assert that they were successful in proving that they suffered injuries.

b. The Plaintiffs were correct to proceed to trial in the Superior Court of Justice instead of the Small Claims Court because of the complexity of the issues.

c. There were no operative Rule 49 offers in place in this case at the time of the trial.

2017 ONSC 4333 (CanLII)

[9] In the alternative, the Plaintiffs assert that no costs should be awarded in this case.

2017 ONSC 4333 (CanLII)

[10] The Defendant seeks costs in the sum of $170,403.57 inclusive of HST and disbursements on a partial indemnity basis for the following reasons:

a. The Defendant was successful in the bulk of the issues in this case.

b. The trial was longer and more expensive because of the conduct of the Plaintiffs and their counsel.

c. The Defendant acted reasonably by serving a Rule 49 offer that would have netted Mr. Sharma $5,000.00 plus 15% costs and disbursements, and Mrs. Sharma $20,000.00 plus 15% costs and disbursements. Although this offer was withdrawn before trial, the Defendant asserts that this offer should be considered in assessing costs.

[11] In the alternative, the Defendant asserts that there should be no costs for this trial.

[12] I also received reply submissions from both sides. The Plaintiffs challenged the Defendant’s assertion that their conduct delayed the trial in any significant way. The Defendant challenges the Plaintiffs’ assertion that they were

successful in this case. Given the recovery that the Plaintiffs obtained in this case, the Defendant also challenges the Plaintiff's decision to bring this case in the Superior Court of Justice.

2017 ONSC 4333 (CanLII)

The Law

[13] Rule 57.01 sets out a number of factors for the Court to consider in making a costs award. In this case, the most relevant of those factors are as follows:

a. The result in the proceeding.

b. The offers to settle made in writing by the parties.

c. The amount claimed and the amount recovered in the proceeding.

d. The conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding.

e. The amounts reasonably expected to be paid by the losing party.

[14] In addition, I note that where a jury award for any issue is reduced to $0 by application of the deductibles, the court is to treat the award as $0 for all purposes, including costs (see *Mandel v. Fakhim* 2016 ONSC 6538).

2017 ONSC 4333 (CanLII)

[15] Finally, the impecuniosity of a party is a factor that the Court may consider but a finding of impecuniosity is not a bar to an award of costs against the party that is claiming impecuniosity (see the discussion in *Balasundaram v. Alex Irvine Motors Ltd* 2012 ONSC 5840).

Analysis

The Effect of the Deductibles

[16] One of the key issues in this case is the effect of the jury verdict. In addressing the effect of the deductibles, the Plaintiffs assert that the overriding principle that should be applied is fairness and reasonableness to the parties. I accept this position. However, I also accept the reasoning of Myers J. in *Mandel, supra.* It is clear that I am to treat the jury's award as $0 where the deductible wiped out any award to the Plaintiff.

[17] All the Plaintiffs achieved in this proceeding was an award of a total of $500.00. The rest of the jury's awards have been reduced to $0 by the

deductibles, and should be treated as $0 awards for the purposes of fixing costs. This brings me to the result in this case.

2017 ONSC 4333 (CanLII)

The Result in the Proceeding

[18] The Plaintiffs assert that they were successful in this proceeding because they obtained some recovery from the Defendant in this case. I reject this assertion for a number of reasons

[19] First, as noted above, the fact that the Plaintiffs failed to obtain any recovery under any head of damage (except for a very nominal amount for travel expenses) means that the jury's verdict should be treated as $0 for all purposes. The Plaintiffs cannot claim success on any issues where they did not achieve an actual recovery from the Defendant. The Plaintiff did not achieve anything (other than obtaining some limited compensation for travel expenses) by bringing this action.

[20] Second, the Plaintiff asserts that they were successful because they proved their injuries. I reject that assertion for two reasons. First, by refusing to award the Plaintiffs any damages for any future losses, the jury made it clear that they did not view either of the Plaintiffs as having suffered any permanent impairment as a result of the accident.

[21] The Plaintiffs were seeking to prove that they had been permanently injured as a result of the accident. The bulk of the medical evidence, from both sides, was devoted to the question of whether the Plaintiffs had suffered permanent injuries as a result of the accident. The jury's verdicts only support the conclusion that the Plaintiffs suffered some temporary injuries as a result of the motor vehicle accident. This was one of the key issues in the case, and the Plaintiffs were unsuccessful on it.

[22] The other key issue in this case was the question of damages. The Plaintiffs were each seeking $1 million in damages, including significant past and future loss of income damages. The Plaintiff had an expert witness testify in order to quantify their damages from both past and future loss of income, and the expert quantified those damages in the hundreds of thousands of dollars. In assessing success, it is important to compare what was sought to what was achieved. The Plaintiffs recovered less than 1 percent of what they were seeking, and received no damages for any future losses. In my view, the Plaintiffs were also unsuccessful on the damages issue.

[23] The Plaintiffs were unsuccessful on either of the key issues in this case, and the Defendant was successful on these issues. In addition, the Plaintiffs also appear to have been unsuccessful in more general terms in this

2017 ONSC 4333 (CanLII)

case. As Myers J. noted in *Mankin, supra,* "it is certainly arguable that a plaintiff who seeks over $1 million in damages but who wins $3,000.00 has lost pure and simple."

[24] This is not a case where the Statement of Claim sought $1 million in damages, but the Plaintiffs advanced much more modest claims at trial. As I have noted above, the claims for past and future economic losses were in the hundreds of thousands of dollars, and there were also claims for other damages that were advanced through evidence at trial.

[25] In my view, the results of the case clearly support an award of costs to the Defendant.

The Offers to Settle

[26] The Plaintiffs assert that there were no Rule 49 offers that were operative at the time of the trial. I accept this position. However, it is still open to the Court to consider any offer to settle made in writing by either party throughout the course of the action. I was not provided with any information about any offers that the Plaintiffs made in this case.

2017 ONSC 4333 (CanLII)

[27] The Defendant, on the other hand, made offers to settle. In my view, those offers are a key factor in assessing the costs for this case. Up until February of 2017, the Defendant had an offer that Mrs. Sharma could have accepted that would have resulted in her obtaining a recovery of $30,000.00 plus interest and costs. Similarly, Mr. Sharma could have accepted an offer that would have resulted in him obtaining recovery of $5,000.00 plus interest and costs.

2017 ONSC 4333 (CanLII)

[28] In light of the outcome of the case, these offers were entirely reasonable. They also exceed the amounts that the Plaintiffs actually recovered by a wide margin. In my view, the Plaintiffs should have either accepted these offers or made reasonable counter-offers. They did neither, which supports an award of costs in favour of the Defendant.

The Conduct of the Parties

[29] The Defendant lists a number of complaints about the Plaintiffs' conduct of this case. I do not intend to address all of the issues, as the case was hard-fought, and the fact that I do not address a particular issue does not mean that I am rejecting the Defendant's position that the Plaintiffs conduct was inappropriate. However, this branch of the costs tests requires conduct of a party

that lengthened the trial. As a result, I will focus on the issues that may have lengthened the trial as those are the only relevant ones under this provision of Rule 57.01.

[30] First, there was the fact that Plaintiffs' counsel sought to serve an updated report from his economic loss expert in the middle of the trial. I was not provided with any convincing explanation as to why these updates had not been prepared and served before the trial started. Defence counsel rightly objected to this late report, and I ruled that it was inadmissible. Counsel for the Plaintiff continued to attempt to have the information in the supplementary report placed before the Court by asking questions of the expert designed to elicit this information in front of the jury. Both the argument over the late service of the report and the attempts to ask the expert to perform the impermissible calculations unnecessarily lengthened the trial. However, the trial was not significantly lengthened, so the adjustment for this issue should be modest.

[31] Second, there was the fact that Plaintiff's counsel sought to cross-examine Dr. Rezneck on findings made about his reports in previous cases. I ruled that cross-examining an expert about judicial findings in previous cases where that expert had testified was not within the scope of proper cross-examination. The argument on this ruling, and the consideration of the cases

2017 ONSC 4333 (CanLII)

that counsel for the Plaintiff filed consumed a couple of hours of court time. Raising this issue unnecessarily lengthened the trial time, and it should also be considered in a minor way in assessing the costs.

[32] This brings me to the conduct of Plaintiffs' counsel before the jury during his closing argument. Counsel for the Defendant correctly notes that she successfully raised four objections to Plaintiffs' counsel's oral argument. Four successful objections in one closing argument of approximately an hour was an unusual event and of some concern to the Court. Reviewing the details of one of these objections will illustrate the problems with Plaintiffs' counsel's final argument.

[33] Neither of the Plaintiffs produced their 2016 tax returns or notices of assessment for this action, although the tax returns were due to be filed with Revenue Canada approximately a week before the trial started. Ms. Barclay raised this issue as a gap in the evidence. In his closing argument, Mr. Bianchi, on behalf of the defendants, sought to assure the jury that, although this evidence was not before them, neither of the Plaintiffs had earned any significant income in 2016. I was required to admonish Mr. Bianchi for giving evidence in his closing statement, and to direct the jury to disregard his comments.

2017 ONSC 4333 (CanLII)

[34] In my view, this type of conduct needlessly added to the time that the Court and the parties were required to spend on the trial, and is not appropriate. However, since it did not significantly add to the amount of Court time, it is another incident that I will give limited weight to in my assessment of costs.

2017 ONSC 4333 (CanLII)

[35] This brings me to the Plaintiffs assertion that they are impecunious. As I have noted above, this is a factor that a Court will consider in assessing a costs award. However, in this case, I am not prepared to give it any weight for three reasons:

a. The Plaintiffs did not provide evidence of their income for 2016, so there is no evidence before me as to whether their financial circumstances remain the same as they were in previous years.

b. It is clear that Mr. Sharma continues to work, and has continued to earn an income.

c. Both of the Plaintiffs have a costs insurance policy which, as I understand it, will cover costs and disbursements in the amount of up to $100,000.00 each. In my view, a party should not be able to argue impecuniosity when it has a source of funds that will pay most, if not all, of the costs awarded in favour of another party.

[36] Overall, the conduct of the action by the Plaintiffs and their counsel provides some support for an award of costs against the Plaintiffs, and the Plaintiffs are not entitled to any deduction from the award of costs on account of their alleged impecuniosity.

The Reasonable Expectations of the Parties

[37] As I have noted above, the various factors in this case generally support an award of costs in favour of the Defendants. One of the gauges of the reasonable expectations of the parties are the costs that they themselves are claiming. In this case, the Plaintiffs are claiming $180,000.00 in partial indemnity costs. The Defendants are claiming an amount that is slightly less.

[38] This was a three week trial with a significant volume of documents, and a series of expert witnesses. In this case, the costs award that the unsuccessful party would expect to pay in this case would be between $90,000.00 and $100,000.00. This amount should be discounted to take into account that the Plaintiffs did recover very limited damages.

[39] Accordingly, when all of the factors are considered, I am of the view that a costs award in favour of the Defendant in the sum of $65,000.00 plus disbursements and HST is appropriate.

2017 ONSC 4333 (CanLII)

2017 ONSC 4333 (CanLII)

Disbursements

[40] As noted above, I have accepted that the Defendant was more successful in this case, and should be entitled to some costs. However, I am of the view that (with two exceptions) the Defendant should be entitled to recover the entirety of his disbursements. Virtually all of the disbursements that the Defendant incurred were related to the issues of income loss and the medical condition of the Plaintiffs. Given that the Plaintiffs recovered nothing for either income loss or their medical condition, the Defendant's disbursements were generally reasonable.

[41] The two exceptions are the costs for the attendance for Dr. Lang and Dr. Rezneck at trial, and the costs of the mediation. First, the Defendant seeks costs for the attendance of Dr. Rezneck and Dr. Lang at trial in the sum of $28,815.00 in total. Dr. Rezneck charged more for his attendance than Dr. Lang did. In my view, the amounts both of them charged for a day's work are unreasonable, unjustifiable and beyond the expectations of any party. As a result, I reduce this disbursement to a total of $7,500.00 for each doctors' attendance for a total of $15,000.00.

[42] The second issue is the mediation fee. As noted in *Lakew v. Munro* (2014 ONSC 7316 at paragraph 82), the Defendant's insurer pays all reasonable

fees and expenses of the mediator in motor vehicle cases. As a result, I am not prepared to allow this disbursement either, and I reduce the disbursement account by $1,123.95.

2017 ONSC 4333 (CanLII)

[43] In the result, the Plaintiffs shall pay the Defendant's disbursements in the amount of $64,638.04 inclusive of HST and disbursements.

Costs of the Motion

[44] The Defendant seeks costs for the motion in the sum of $1,321.37 on the basis that the Defendant was successful on the motion, and that this is a reasonable amount to award. The Plaintiffs did not take a clear position on this issue in their submissions.

[45] I am of the view that the Defendant is entitled to the costs that they seek for this motion. Some context is appropriate. Dr. Miller completed an expert report sometime in 2014. This matter was set for trial for the May, 2017 blitz in Brampton during 2016. That blitz commenced May 8th, 2017. The Plaintiffs made no efforts to contact Dr. Miller between the time her report was completed in 2014, and the end of April 2017. The Plaintiffs' counsel made his first efforts to contact Dr. Miller in the last week of April.

[46] These efforts to contact Dr. Miller were limited to internet searches for her, sending her e-mails and attempting to call her. No efforts to subpoena her, or have a private investigator contact her were made. However, counsel for the Plaintiffs argued that Dr. Miller was not available and her evidence should be admitted under section 52 of the *Evidence Act*.

[47] I found that the report was inadmissible. Part of the reason for my decision was the dilatory efforts of Plaintiffs' counsel to find Dr. Miller. More efforts should have been made before this motion was brought. On the facts before me, there was no basis for the Plaintiffs' motion to admit Dr. Miller's report.

[48] As a result, the Plaintiffs shall also pay the sum of $1,321.17 to the Defendant on account of the costs of the mid-trial motion.

<u>Disposition</u>

[49] For the foregoing reasons, the Plaintiffs shall pay the following sums to the Defendant:

a. On account of the legal fees for the trial $65,000.00 plus HST, for a total of $73,450.00

2017 ONSC 4333 (CanLII)

b. On account of the disbursements for the trial $64,638.04, inclusive of HST.

c. On account of the costs of the motion the sum of $1,321.17, inclusive of HST.

2017 ONSC 4333 (CanLII)

[50] These costs are to be paid within thirty (30) days of the release of this endorsement.

____

LeMay J.

DATE: July 24, 2017

CITATION: Sharma v. Stewart, 2017 ONSC 4333
COURT FILE NO.: CV-10-4197-00
DATE: 2017 07 24

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SATISH SHARMA and SHAROJ SHARMA v. JESSE STEWART

BEFORE: LEMAY J

COUNSEL: D. Bianchi, Counsel for the Plaintiffs
S. Barclay, Counsel for the Defendant

COSTS ENDORSEMENT

LeMay J.

DATE: July 24, 2017

2017 ONSC 4333 (CanLII)