

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Caterina Lamantia and Joseph Lamantia

Plaintiffs

- and -

Luigi Ciardullo

Defendant

Present:

For Plaintiffs: Mr. A. Sachedina

For Defendant: Mr. A. Krajden

Reasons on Costs Assessment

The parties in this action appeared by their solicitors before me on October 29 and November 12, 2013. Mr. A. Sachedina, represented the Plaintiffs and Mr. A. Krajden represented the Defendant. After the submissions concluded on the second day, I reserved by decision on the assessment until now.

Facts

This assessment was brought on by the Plaintiffs as a result of an accepted Offer to Settle made in this case, particulars of which I refer to later.

This action was commenced in May 2007, by the Plaintiffs against the Defendant for damages resulting from a motor vehicle accident between the two vehicles driven by Ms.

Lamantia and Mr. Ciardullo. The Plaintiffs maintained that the accident was caused by the negligence of the Defendant. As a result of the collision Ms. Lamantia claimed she received serious injuries of a permanent nature. Mr. Sachedina in his brief recital of the facts indicated this was a chronic pain case and that liability was not an issue. At issue were the injuries received and also the issue of economic loss sustained by Ms. Lamantia. She owned her own business and it was claimed that her injuries affected her work and forced her to sell the business.

The facts of this case were related to me in a very brief manner by the Plaintiff's counsel. As near as I can tell, and this is assumed by looking at the list of disbursements submitted for assessment, discoveries were held but of whom and for how long I do not know. A mediation was attempted in the later part of 2011 and a pre-trial was held in the spring or summer of 2012.

It was shortly after the pre-trial that an offer to settle was made on July 30, 2012 by the Defendant and it was accepted by the Plaintiffs. This offer provided that the Defendant would pay to the Plaintiffs the sum of \$70,000.00 inclusive of pre-judgment interest plus costs, H.S.T. and disbursements to be agreed upon or assessed. The parties agreed to \$16,950.00 on the solicitor fees but could not reach an agreement on the disbursements. Hence the assessment hearing was scheduled to have the disbursements assessed.

The total of the disbursement account of the Plaintiffs as tendered for assessment is as follows:

<u>Disbursements</u>	<u>GST + HST</u>	<u>PAID</u>	<u>TOTAL</u>
\$41,966.98	\$4,975.26	\$709.25	\$46,232.99

Rules and Criteria

The rules governing costs in litigations are set out in Rules 57 and 58 of the Rules of Civil Procedure. I make mention of only the applicable parts of these rules as it pertains to the case at bar.

Rule 58.01 states:

Where a rule or order provides that a party is entitled to costs of all or part of a proceeding and the costs have not been fixed by the court, they shall be assessed in accordance with rules 58.02 to 58.12.

In this particular case, the assessment was authorized by the Offer to Settle, which stated if the costs were not agreed to then they were to be assessed.

Rule 58.05(1) states:

- (1) If costs are to be assessed the assessment officer shall assess and allow,
 - (a) lawyers' fees and disbursements in accordance with subrule 57.01(1) and the Tariffs; and
 - (b) disbursements for fees paid to the court, a court reporter, an official examiner or a sheriff under the regulations under the Administration of Justice Act.
- (2) No other fees, disbursements or charges shall be assessed or allowed unless the court orders otherwise.
- (3) No disbursements other than fees paid to the court shall be assessed or allowed unless it is established by affidavit or by the lawyer appearing on the assessment that the disbursement was made or that the party is liable for it.

In this particular case, Mr. Sachedina complied with this rule by stating all the disbursements claimed had been paid and provided copies of invoices and where applicable, receipts.

An assessment officer, in an assessment, may also consider certain factors set out in Rules 57.01 and 58.06(1) and they are summarized as follows:

- 1) principle of indemnity/experience of lawyer where applicable, rate and hours.
- 2) amount of costs a party can reasonably expect to pay
- 3) apportionment of liability
- 4) importance of issues
- 5) amount claimed and recovered
- 6) complexity
- 7) duration
- 8) conduct of party to lengthen or shorten
- 9) steps in proceeding that were improper/vexatious or unnecessary
- 10) denial or refusal to admit
- 11) any other relevant matter

The criteria set out in rules 57.01(1) and 58.06(1) are generally inapplicable here because we are just dealing with disbursements. However, the amount of costs a party liable to pay the costs could reasonably expect to pay and the amount claimed and recovered are certainly relevant to this case.

The Law

Counsel for both parties have referred me to three cases to help me in my decision making concerning the assessment.

Mr. Sachedina referred to the following cases:

- (1) Risorto v. State Farm Mutual Automobile Insurance Co.
64 O.R. (3d) 135, 32 C.P.C (5th) 304

(2) Turner v. Dyck - Endorsement on costs of Mr. Justice Fedak
2005 CanLII 25100 (ON SC)

Mr. Kraiden on the other hand has referred to the following case:

(1) Hamfler v. 1682787 Ontario Inc. et al ON SC 3331 - Costs Endorsement of
Mr. Justice M. Edwards

Both the Risorto and the Hamfler cases refer to Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291 and Moon v. Sher (2004) 246 D.L.R. (4th) 440. Those cases, both of the Court of Appeal of Ontario, set out the principle, that in determining costs “the overriding principle that the court must consider is that the result must be fair, reasonable and within the reasonable expectations of the parties.”

The Hamfler case is more on point than the other two cases mentioned by Mr. Sachedina. In the Hamfler case, Mr. Justice Edwards spends a lot of time dealing with the fixing of disbursements claimed in the case before him.

In paragraph number 1 of his decision Justice Edwards states:

“As trial judges we are frequently reminded that we must perform a gatekeeper function when it comes to the admissibility of expert opinion evidence. We are also frequently reminded about how costly litigation has become. Proportionality has become an ever increasingly important factor in assessing costs. All of these concerns are at the forefront of my decision when it comes to the reasonableness of the plaintiff’s costs demands in this matter, particularly when it comes to the question of the reasonableness of the disbursement claim.”

Then in paragraph number 7, after referring to the comments of the court in the Boucher case about the fairness and reasonableness of costs in litigation, he states:

“While the aforesaid comments are most often quoted in relation to the assessment of the fees component of a costs award, they are in my opinion, equally applicable to the determination of whether a disbursement is both properly assessable and reasonable in the amount claimed. In my approach to the fixing of the costs and disbursements claimed by the plaintiffs. I am guided by this basic principle that I must fix an amount that is fair and reasonable under all the circumstances.”

I agree with what Mr. Justice Edwards has to say above, that proportionality, fair and reasonableness are of prime importance. I have followed these principles in my previous decisions and will do so as well in this decision.

As mentioned before Mr. Sachedina has presented a disbursement bill for \$46,232.99. Mr. Krajden, lawyer for the defendant, challenges the bill in four main areas. I will go through each of these areas and present Mr. Krajden's arguments and Mr. Sachedina's reply arguments and make my ruling on each as I go along.

The first objection I wish to deal with of Mr. Krajden is the reports of the three medical experts. Those experts were Dr. Ogilvie-Harris, an orthopedic surgeon; Dr. Gladstone, a neurologist; and Dr. Berbrayer, a physiatrist. Mr. Krajden argues that he should only have to pay for one expert - Dr. Berbrayer. He maintains there was duplication in the reports and that only one of the doctors would have been called at trial being Dr. Berbrayer, because he dealt with the chronic pain issue, which is what this case at bar was about.

Mr. Sachedina in reply stated that it was necessary to have all three reports done. He argued that the onus is on the plaintiff to meet the threshold of serious and permanent injury. He had to employ the services of Dr. Ogilvie-Harris and Dr. Gladstone to determine whether the injuries to the plaintiff were orthopedic or neurological. He submits he would have been negligent if he had not sent the plaintiff to those doctors. He also argued that all the reports were a reasonable amount and were all necessary.

I again refer to the Hamfler case (supra). At paragraph number 14 Mr. Justice Edwards states:

"Reasonableness and proportionality dictate that the court take a long look at the claim for costs and disbursements in its overall determination as to the reasonableness and fairness of the amount claimed."

And later at paragraph number 17 he states:

In determining the reasonableness of whether an expert's fee is excessive, various factors should be taken into account before reducing the disbursements claimed. In that regard, the following types of questions may focus the courts attention:

1. Did the evidence of the expert make a contribution to the case, and was it relevant to the issues?
2. Was the evidence of marginal value or was it crucial to the ultimate outcome at trial?
3. Was the cost of the expert or experts disproportionate to the economic value of issue at risk?
4. Was the evidence of 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?

While the case at bar did not go to trial, the questions to be asked are very applicable and are helpful to me in making my decision.

In regards to the three medical expert reports, I have to agree with Mr. Krajden that he should only be liable to pay for one of them. I agree with him that only Dr. Berbrayer would have been called at trial. The reports of Dr. Ogilvie-Harris and Dr. Gladstone would have not had any relevance to the issue of chronic pain. Their reports came to the conclusion that the problem of Ms. Lamantia was not orthopedic or neurological. There would have been no contribution made to this case to help the court make its decision on the injury issue. Mr. Krajden cannot be reasonably expected to pay for these reports. Therefore, I will not allow the disbursement for Dr. Ogilvie-Harris report of \$3,809.73 + H.S.T. of \$495.26 = \$4,304.99. I will also not allow the disbursement of the report of Dr. Gladstone of \$2,950.00 + H.S.T. of \$383.50 = \$3,333.50. The total of the two is \$7,638.49.

The second area of argument for Mr. Krajden concerns the disbursement for the two economic loss reports. There were two - (1) Krofchick Valuation Partners for \$14,663.25 and (2) Rich Rostein for \$4,100.00.

Mr. Krajden submitted that the reports were duplications and that the Krofchick report was grossly excessive and the claim of the Plaintiff did not warrant what he called a “cadillac report”. He draws attention to the disparity in price of the two reports. The Krofchick report disbursement he states just had a bill and did not set out the hours spent nor the hourly rate.

Mr. Sachedina on the other hand said an economic report was necessary because they were claiming the Ms. Lamantia had a business which she had to give up and suffered an economic loss. He states he only became involved in this case at the pre-trial stage and he could not explain why two economic reports were done. Although the pre-trial justice recommended he only claim for one, Mr. Sachedina nevertheless claimed for both. He could not explain the difference in price other than to say that the Krofchick firm was the best in the business and that is what they charged.

The pre-trial justice indicated in his recommended value of the claim that there was an economic loss. When I asked which report he relied on more, I was advised that he relied on both reports.

Therefore I must conclude that both reports were of value and helped the court. The dilemma that I have, is should I allow both or one and if I allow both do I allow them both in full. This problem is further compounded by the fact that neither report was tendered to me so I could compare them. No information was tendered as to whether the second one (Rostein) used the first one, to make his bill lower.

I am allowing a disbursement for both reports, since they were both useful to the court in the pre-trial. I however cannot allow the Krofchick report in full as one can only conclude that it was excessive if the same result or value to the court was achieved by a report (Rostein) for a much lower price.

However, what do I reduce the Krofchick report down to. Mr. Justice Edwards in the Hamfler case was faced with the same dilemma when it came to amounts charged by

comparable experts (psychologists), he simply lowered the higher bill to be almost identical to the lower one.

I see no reason to vary from that course of action. In the absence of any evidence as to why the economic loss reports were different and also that both very of equal importance, I reduce the Krofchick disbursement down to \$4,100.00 + H.S.T., the same as the Rostein report. That makes a deduction of \$10,563.25 + H.S.T. of \$1,373.22 for a total of \$11,936.47.

The third area that Mr. Krajden objects to is the amounts charged by The Professional's Choice (the occupational therapist) totalling \$5,842.00 exclusive of H.S.T. Mr. Krajden felt these bills were excessive. He stated that he felt the visit with Dr. Zasowski, mentioned as part of the invoice, could not have lasted for more than an hour. He argued that the fees charged should have been one third of what they charged.

Mr. Sachedina, on the other hand, argued the fees were reasonable. He stated that occupational therapists are often used in cases such as this one. He also adds that the fee for Dr. Zasowski's report is included in the charge. He stated he needed the report to properly prove his case.

I have to agree with Mr. Sachedina that the report was necessary. It not only included a meeting with Dr. Zasowski, it also included an in home assessment. Mr. Krajden, although he states the fee is high, he offers no examples or evidence to prove his argument it is excessive. I have also considered the four questions Mr. Justice Edwards says should be considered, in reducing any disbursement. Having done so, I rule that the disbursement for The Professional's Choice is fair and reasonable and I will allow it in full.

The fourth area of argument for Mr. Krajden is proportionality. He states proportionality is of prime importance and he uses the Hamfler case as authority for that. He contends total disbursements of over \$46,000.00 is excessive. They amount to about two

thirds of what was settled on. He goes on to say that allowing the disbursements in full would set a dangerous precedent.

Mr. Sachedina states all the fees were necessary and were reasonable.

I have to agree with Mr. Krajden that proportionality is of prime importance here. An assessment officer at the end of a hearing, must step back a view what he or she has allowed or reduced. In this particular case, in light of what reductions I have made, I submit that the final total is proportional to amount of recovery agreed upon by the parties.

There was a question raised by Mr. Krajden about the photocopies, in that there were no indications of how many or what was the charge. Mr. Sachedina indicated that a photocopy log was at Tab 2 of the Disbursement Brief and that a 35 cent charge per photocopy was charged.

I reviewed the photocopy log and totaled the amounts and it added up to \$2,038.80. The total of the photocopies claimed by the Plaintiffs is \$2,778.26 - a discrepancy of \$739.46. Mr. Sachedina has only shown a breakdown of some of the photocopies and because of this I am reducing the charge for photocopies down by \$750.00 inclusive of H.S.T.

Mr. Krajden did not take issue with any other disbursements, so I can only assume that he was content with the rest. I have reviewed the remaining disbursements and based on reasonableness and proportionality, I will not reduce or disallow any further disbursements.

Costs

At the end of the hearing both counsel wished that I not delay signing my Certificate of Assessment to allow for objections to be filed. There was no mention of costs. In light of what I have decided on above, the results were mixed. Therefore there will be no order as to costs, as each side will absorb their own costs for the assessment hearing.

Summary

The Summary is as follows:

Disbursements claimed	\$46,232.99
Less Doctor's reports deductions	-\$7,638.49
Less Economic Loss report reduction	-\$11,936.47
Less Photocopies reduction	-\$750.00
Disbursements Allowed - TOTAL	\$25,908.03

My Certificate of Assessment is attached to my reasons.

Dated at Newmarket this 18th day of February 2014.

Original signed by G. R. Johnson

G. R. Johnson

Assessment Officer