Moore v. Getahun, [2014] O.J. No. 2117

Ontario Judgments

Ontario Superior Court of Justice

J.M. Wilson J.

Heard: October 15-17, 21-25, December 23, 2013.

Judgment: May 1, 2014.

Court File No. 06-CV-321339PD3

[2014] O.J. No. 2117 | 2014 ONSC 3931

Between Blake Moore, Plaintiff, and Dr. Tajedin Getahun, The Scarborough Hospital-General Division, Dr. John Doe, Jack Doe, Defendants

(31 paras.)

Case Summary

Civil litigation — Civil procedure — Costs — Assessment or fixing of costs — Whether amount fair and reasonable — Particular orders — Party and party or partial indemnity — Determination of costs of medical malpractice proceeding — Parties settled quantum of damages pre-trial — Liability issue determined in plaintiff's favour after eight-day trial — Plaintiff sought partial indemnity costs of $251,804 plus disbursements of $60,281 — Defendant challenged quantum claimed, arguing appropriate costs included $161,613 for counsel fees and $38,702 for disbursements — Plaintiff awarded legal fees of $216,395, representing 60 per cent of full indemnity, plus disbursements of $54,781 — Plaintiff assumed considerable risk in advancing claim that was tenaciously defended — Plaintiff entitled to fair and reasonable compensation for costs.

Health law — Health care professionals — Liability (malpractice) — Practice and procedure — Costs — Determination of costs of medical malpractice proceeding — Parties settled quantum of damages pre-trial — Liability issue determined in plaintiff's favour after eight-day trial — Plaintiff sought partial indemnity costs of $251,804 plus disbursements of $60,281 — Defendant challenged quantum claimed, arguing appropriate costs included $161,613 for counsel fees and $38,702 for disbursements — Plaintiff awarded legal fees of $216,395, representing 60 per cent of full indemnity, plus disbursements of $54,781 — Plaintiff assumed considerable risk in advancing claim that was tenaciously defended — Plaintiff entitled to fair and reasonable compensation for costs.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, *R.S.O. 1990, c. C.43, s. 131*

Ontario Rules of Civil Procedure, Rule 57.01(1)

Counsel

J.M. Regan, A. Sciacca, for the Plaintiff.

C. Kuehl, J. Hunter, for the Defendant, Dr. Tajedin Getahun.

DECISION ON COSTS

J.M. WILSON J.

1 The plaintiff was successful against the only defendant left in the action, Dr. Getahun, in this medical malpractice action that commenced in 2006 and concluded with the judgment in January 2014. The parties settled the question of damages in a pretrial in April 2013, for the amount of $350,000. The issue of liability was hard fought and took eight days to conclude.

2 The plaintiff seeks partial indemnity costs for this action in the amount of $251,804.45 inclusive of HST, and disbursements in the amount of $60,281.56, plus HST.

3 The defendant raises various issues challenging the quantum claimed and argues that an appropriate cost award would include $161,613.20 for counsel fees and $38,702.00 for disbursements, plus HST.

The defendant's arguments on counsel fees

4 The defendant concedes that similar time was spent by lead counsel for the plaintiff (Mr. Regan and Mr. Sciacca) as was spent by lead counsel for the defendants during the course of the proceedings, including trial preparation and attendance. The defendant does not question the time spent by the plaintiff's lead counsel. They did not disclose their hourly rates to assist in assessing the quantum.

5 However, the defendant argues that, over the course of the seven-year litigation, the plaintiff's junior lawyers expended 140 more hours than the defendants' and their law clerks expended 250 more hours. The defendant argues that this additional time should not be recoverable. Their suggested counsel fee reflects these reductions, as well the defence argument that the percentage the plaintiff claims for his partial indemnity request is too high.

6 With respect to the arguments to reduce counsel fees the defendant raises the following specific issues:

* 80 hours of associate time for preparation of the mediation brief was excessive. However, the defendant did not suggest how much time had been spent preparing the defence materials.

* The plaintiff's counsel claimed 196.6 hours for trial preparation and attendance at the trial with an experienced law clerk. 102.9 hours of this time was for attendance at the trial and work performed during the trial. The defendants' counsel attended at trial with an articling student. The defendants' counsel indicated that they have written off the articling student's time as it was a learning experience and therefore the law clerk time charged was excessive and should be similarly written off.

* As the motion for the admission of Dr. Orsini's report at the opening of trial was unsuccessful, there should be no costs awarded for that preliminary motion.

* The plaintiff erred in charging partial indemnity costs at the rate of 66% of full indemnity costs. The appropriate rate of recovery for partial indemnity costs is 55% of full indemnity costs.

7 In their reply, counsel for the plaintiff has responded to each of the defendant's cost submissions.

The plaintiff's response

8 By way of overview, the plaintiff responds to these arguments by arguing that as the plaintiff had the onus of proof in this case, it is not surprising that his counsel spent additional hours preparing for trial. The plaintiff relies on statements made by Justice Moore in *Frazer v. Haukioja*, *[2008] O.J. No. 5306* (S.C.), confirming that in medical malpractice cases the plaintiff has the onus of proof, and the time expended to advance a claim of medical malpractice is not necessarily equal to the amount of time spent to defend the case. At para. 19, Justice Moore states:

> I agree with the response position articulated by the plaintiffs. Quite apart from the fact that issues and evidence of considerable complexity had to be briefed, presented and argued at trial, the plaintiffs bore the burden of proof. It is not surprising in the least that more time would be spent by plaintiffs' counsel than by their opponents. Particularly is this so where, as here, the defendant admitted no liability and required issues of liability and damages be established.

9 The plaintiff argues that work was effectively delegated to junior counsel and experienced law clerks, and there was little duplication. This time spent by law clerks and junior counsel was efficiently spent and should be recoverable.

10 I adopt the reasoning of Justice Moore. I am sure that the dynamic by the defence of conceding nothing and vigorously and tenaciously defending was a theme of the seven years of litigation. This approach is obviously the entitlement of the defence, but if unsuccessful, cost consequences follow. Counsel for the plaintiff assumed considerable risk in advancing the claim and should be compensated fairly and reasonably if successful.

Use of articling students compared to law clerks

11 Counsel for the plaintiff argues that there is a distinction between using an articling student and using veteran law clerks in a trial. I agree that a student attending a trial is a learning experience and clearly if the party is unsuccessful at trial, it would be reasonable to write-off, or significantly write down this time. The defendants did not disclose the number of hours spent by their student preparing for and attending at the trial. The plaintiff used law clerks qualified in 1990 and 1991 to do much of the leg work on the file, both prior to trial, and during the trial proper. I conclude that this was efficient method in both instances, with hourly rates on a partial indemnity basis of $80. I conclude that it would not be reasonable to expect that this law clerk time would be written off. In my view there is a distinction between a veteran law clerk and an articling student's time.

Time spent on preparing mediation brief

12 The defence criticized the 80 hours spent by an associate in preparing the plaintiff's mediation and pretrial brief. The defence did not disclose how much time they had spent on this task. In this medical malpractice case, both proof of loss and liability were contested until six months before the trial date. However, preparation time on the mediation and pretrial brief resulted in the settlement of the issue of damages. I see no reason to reduce the time spent for this aspect of the case.

Motion to admit Dr. Orsini's report

13 Dr. Orsini's tragic death complicated the plaintiff's case, requiring a regrouping of the plaintiff's claim, locating another expert, and a motion to determine how to deal with Dr. Orsini's evidence at trial. Although the plaintiff was not successful in admitting the opinions outlined in Dr. Orsini's report for their truth, the factual evidence outlined in the report was admitted for that purpose.

14 It was reasonable to bring the motion, and fair to say that both parties relied upon the facts outlined in Dr. Orsini's report as well as his medical records. The defence made no concessions prior to trial with respect to this

important evidence and took the position in their factum that none of the contents of Dr. Orsini's medical report should be admitted. Further, the defence argued that Dr. Orsini was biased as a treating physician, which was not borne out by any of the evidence.

15 Defence counsel alluded to a difference between factual evidence and opinion evidence in their factum. However, it was only at the opening of the trial when the motion was argued that I raised with counsel the distinction between the admissibility of facts contained in Dr. Orsini's report as the treating physician, and Dr. Orsini's opinion evidence.

16 It was only during argument, in response to my questions, that the defendant's counsel conceded that an alternative approach was to admit the facts contained in Dr. Orsini's report as appropriate amplification of the hospital records, and to exclude any opinion. For these reasons, I conclude that the reasonable costs of preparing the motion materials with respect to Dr. Orsini's evidence, are recoverable on a partial indemnity basis.

Percentage that partial indemnity is to full indemnity

17 The plaintiff is entitled to his reasonable partial indemnity costs of this proceeding. The plaintiff has submitted his full indemnity hourly rates and seeks partial indemnity costs calculated at the rate of 66% of his full indemnity costs for the junior lawyers, 53% of costs for the law clerks, and 61% of full indemnity costs of Mr. Regan, senior counsel.

18 There is little legislative guidance as to the relationship between partial indemnity costs and full indemnity costs. The relationship between partial indemnity costs and substantial indemnity costs is clearly provided for in Rule 1.03 of the *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194*. This rule defines substantial indemnity costs as "costs awarded in an amount that is 1.5 times what would otherwise be awarded [*i.e.* partial indemnity costs]". Logically, then, partial indemnity costs are two-thirds, or 66%, of what would be the substantial indemnity costs award in any given case.

19 The relationship between substantial indemnity costs and full indemnity costs is also unclear. However, as counsel for the defendant argued, substantial indemnity costs are less than full indemnity costs. Accordingly, as partial indemnity costs equate to 66% of substantial indemnity costs, and substantial indemnity costs are less than full indemnity costs, partial indemnity costs must be somewhat less than 66% of full indemnity costs.

20 Courts have held that partial indemnity costs, as a rough estimate, are 60% of full indemnity costs. See: *Hanis v. University of Western Ontario*, 53 C.C.E.L. (3d) 86, 42 C.C.L.I. (4th) 65 at para. 46; *Allianz Global Risks US Insurance Co. v. Canada*, 2014 ONSC 1552, 2014 CarswellOnt 3377 at para. 3; *Lewis v. Cantertrot Investments Ltd.*, 2010 ONSC 5679, 1 C.P.C. (7th) 428 at para. 66. In one case a proportion of 55% has also been suggested: see *Boyd v. Taj Mahal Stables Inc.*, 2009 CarswellOnt 3613 at para. 12). In my view, as the hourly rates proposed by the plaintiff in my view are very reasonable, the 55% figure suggested by the defendant's counsel is too low. Furthermore, under s. 131 of the *Courts of Justice Act*, *R.S.O. 1990, c. C.43*, using a different percentage rate is within the court's discretion.

21 I am of the view that a partial indemnity costs award amounting to approximately 60% of the plaintiff's full indemnity costs, as determined by the court, is reasonable in this case, and in accordance with the case law.

22 I would not interfere with the claim for costs of Mr. Regan, which as calculated is slightly less than 61% of the full indemnity costs. I would reduce the percentage of costs claimed for the associate lawyers from 66% to 60%. I would increase the allocation for the percentage claimed for the lawclerks from 53% to 60% as outlined in Schedule A as follows:

Fees allowed for Mr. Regan (no change)	$98,280.00
Fees allowed for associate lawyers at 60% (reduced from $99,379.80)	$89,792.40
Fees allowed for law clerks at 60% (increased from $25,176.00)	$28,323.00
Total fees	$216,395.40

Conclusions on the requested counsel fee

23 It is helpful to have information about the time spent by both the plaintiff and the defendant's counsel. However, I note that the information provided by the defendant's counsel is somewhat selective as they have not included their hourly rates.

24 Calculation of costs pursuant to s. 131(1) of the *Courts of Justice Act* is not to be a mechanical application of the cost grid but a nuanced balancing, informed by the factors outlined in rule 57.01(1) of the *Rules of Civil Procedure*. In assessing the appropriate quantum of costs, I am guided by the overarching principle of reasonableness. See: *Andersen v. St. Jude Medical, Inc.* *(2006), 264 D.L.R. (4th) 557* (Ont. Div. Ct.).

25 I have looked at the overall fee requested and reviewed, in detail, the docketed time and the time spent at each stage of the proceeding, having regard to the factors outlined in rule 57.01(1). This case proceeded as a hard fought battle for some seven years, culminating in a settlement of damages six months before trial and an eight day trial on liability. I find that the amount of time spent by counsel and the requested counsel fee were both reasonable, without duplication, and within the reasonable expectation of the losing party, subject to the caveat of the percentage of recovery of partial indemnity costs being reduced to 60% of full indemnity costs.

Disbursements

26 On the disbursements, the defence argues:

* The $12,000 fee for demonstrative aids is excessive. A $3,500 fee would be appropriate.
* It was not reasonable for Mr. Regan to retain his brother in this matter and the $3,100 and $2,400 disbursements for the two reports of Dr. Regan should be disallowed.
* The $17,000 fee charged by Dr. Richards for his six reports, trial preparation and one day of trial attendance is excessive.
* Certain miscellaneous expenses including a medical textbook ($223.93), renting a locker for the trial ($270.00) and meetings ($330.92) is inappropriate.

27 Upon a review of the disbursements I do not find any of the arguments persuasive, with the exception of the request for payment in the amount of $5,500 for two medical reports prepared by Dr. William Regan, who is the

brother of lead counsel. The relationship was disclosed on the morning of the trial, and counsel for the plaintiff sought guidance from the court. In my view it was not appropriate to retain his brother to give evidence. There may not be an actual conflict of interest, but there is an appearance of conflict and lack of objectivity. In the attempt to bring objectivity and transparency to the retention and testimony of expert witnesses this was inappropriate, and I am of the view that there should be no disbursement permitted for this sum claimed.

28 The fees charged by Dr. Robin Richards are reasonable. He was the sole expert called by the plaintiff. He examined the plaintiff and wrote his first report in 2009 on issues of damages. After the passing of Dr. Orsini, he was subsequently retained as an expert on the issue of liability. He wrote five further reports. Admittedly they were short but spanned a period of four years and required a review of the materials. His fee for preparation for and attendance at a full day of the trial in the amount of $7,520 is reasonable. I note that although the defense challenged the fees charged by Dr. Richards, they did not disclose the quantum of fees charged by the two defense experts.

29 The miscellaneous expenses are reasonable.

30 For these reasons I fix the costs payable by the defendants in the amount of $216,395.40 plus HST representing approximately 60% of the full indemnity costs as well as disbursements in the amount of $54,781.56 plus HST ($60,281.56 - $5,500).

31 I thank counsel for their well-organized written submissions.

J.M. WILSON J.

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Schedule A

For the lawyers:

Counsel calculated:

$280 (hourly rate) x 66.6% =
$186 per hour (partial indemnity rate)

$186 x 534.3 hours
(as claimed by all lawyers
except Mr. Regan) = **$99,379.80**

60% calculation:

$280 (hourly rate) x 60% = $168 per hour (partial indemnity rate)

$168 x 534.3 hours
(as claimed by all lawyers
except Mr. Regan) = **$89,792.40**

For the law clerks:

Counsel calculated:

$150 (hourly rate) x 53% =
$80 per hour (partial indemnity rate)

$80 x 314.70 hours
(as claimed by the plaintiff) = **$25,176.00**

60% calculation:

$150 (hourly rate) x 60% =
$90 per hour (partial indemnity rate)

$90 x 314.70 hours
(as claimed by the plaintiff) = **$28,323.00**

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