Petryshyn v. Iachetta, [2006] O.J. No. 1431

Ontario Judgments

Ontario Superior Court of Justice

J.C. Moore J.

Heard: By written submissions, March 9, 23 and 27 2006.

Judgment: April 5, 2006.

Court File No. 02-CV-239019CM1

[2006] O.J. No. 1431 | 147 A.C.W.S. (3d) 563 | [2006] O.T.C. 338

Between Anna Petryshyn, plaintiff, and Christopher Iachetta and Northern Links Lawn Care Ltd., defendants

(62 paras.)

Counsel

James M. Regan, Q.C., for the Plaintiff

D. Lynn Turnbull, for the Defendants

ENDORSEMENT AS TO COSTS

J.C. MOORE J. (endorsement)

1 This action arose from a motor vehicle/pedestrian accident which occurred on 13 August 1997 on Windermere Avenue near its intersection with Bloor St. in Toronto.

2 The plaintiff had been roller blading with her younger brother and, in the moments preceding the accident, she rolled out onto Windermere Avenue with the intention to cross from its East to West side.

3 The individual defendant had been operating a pick-up truck, owned by his employer, the corporate defendant, in a southerly direction along Windermere Avenue as the Plaintiff rolled toward its west curb.

4 The defendants' vehicle was towing a lawn care utility trailer and it appears that a piece of metal extending from the rear left corner of the trailer struck and injured the Plaintiff.

5 At the time of the accident, the Plaintiff was 14 years of age. Her injuries were extensive and well documented in hospital and other health care records introduced into evidence at Trial; as well, the injuries, the course of recovery from them and future medical, social and possible vocational implications arising from them were fully described in oral evidence from leading orthopaedic and vocational specialists.

6 This case was tried before a Jury commencing on 30 January 2006. It continued over some 12 days thereafter and through jury deliberations to a verdict, rendered on 14 February 2006.

7 Counsel chose to give ranges of suggested general damage assessments to the jury. I found the ranges, based upon the view of the evidence of each counsel, to be reasonable. The ranges overlapped at the figure of $120,000.00. It was that figure (the low end of the range suggested by plaintiff's counsel) which encompassed the Jury's verdict for general damages.

8 The jury verdict also assessed damages for impairment of future income earning capacity at $80,000.00 and rehabilitation and vocational services at $7,400.00.

9 No specific future income loss number was urged upon the Jury by plaintiff's counsel but he did review the evidence of the expert, Professor Carr, who provided formulae to apply to annual loss numbers to calculate the present value of any future loss determined. Plaintiff s counsel sought a significant income loss number, one which would have yielded a substantially greater award than was actually obtained.

10 Professor Carr also produced a formula to allow for the calculation of the present value of an annual loss of household services. Plaintiff's counsel urged the jury to find such a loss in this case but the jury chose not to award any amount for this head of damages. On the claim for a management fee, the jury assessed zero dollars.

11 The plaintiff's case also included evidence regarding a claim for rehabilitation and vocational Services. The jury awarded $7400.00 on that claim, almost half the amount sought.

12 The jury found that the defendants had failed to establish that there was no negligence resting with them. In addition, the jury found that some contributory negligence rested with the plaintiff. In the result, liability was apportioned 55% to the defendants and 45% was allocated to the plaintiff.

13 With the agreement of counsel, I ordered that pre-judgment interest be awarded on general damages for the period between 13 August 1997 and 06 December 2004. Counsel calculated that this time interval encompassed 2672 calendar days; at a rate of 5% per year, interest on general damages therefore amounts to $43,923.29.

14 Counsel further agreed that the plaintiff should recover costs of the action on a partial indemnity basis and that the parties might make submissions to me, in writing, if they were unable to agree and, in that event, I would fix the plaintiff's costs entitlement.

Quantum of Costs Sought

15 The plaintiff requests an order fixing costs on a partial indemnity basis in the amount of $216,386.27. In addition, the Plaintiff seeks a premium to be fixed in the amount of $32,100.00.

16 The breakdown of claimed costs is:

*	$170,014.44	-	Fees
*	$35,671.83	-	Disbursements

*	$10,700.00	-	Written Submissions
*	$32,100.00	-	Premium
*	$248,486.27	-	TOTAL

17 The above numbers do not include time or disbursements incurred in connection with matters which were the subject of interim orders.

Applicable Law

18 The parties submit that the discretion of the court to assess and fix costs in a cases such as this one arises from Rule 57.01 of the *Rules of Civil Procedure* read in conjunction with s. 131(1) of the *Courts of Justice Act*, as those have been interpreted by relevant and binding case law. With that proposition, I fully concur.

19 The plaintiff submits that the issues necessarily to be considered and determined in the trial of this action were many and complex. Further, the plaintiff asserts that, from the outset, the plaintiff's claims were vigorously disputed and defended. Both liability and damages issues were in issue throughout the litigation and throughout the trial.

20 The defendants maintain that the plaintiff was the author of her own misfortune and completely at fault. No liability was conceded by the defendants.

21 Further, the plaintiff asserts that the nature and ongoing implications of the plaintiff's injuries were in issue throughout, thus necessitating the calling of multiple expert and lay witnesses at trial.

22 The plaintiff points to efforts made by her to expedite the trial process and to assist the jury (and the court) to an understanding of the evidence. The Plaintiff says that these efforts saved 2 days of trial time.

23 The defendants refer to the decision of Kileen J. in *Pagnotta v. Brown,*, *[2002] O.J. No. 3033*, [2002] Carswell Ont. 2666, a case they describe as a common garden-variety personal injury case and rely on this portion of the decision:

> "From my perspective, if lawyers wish to expend such grossly inordinate amounts of billable hours on relatively routine cases, they may feel free to do so, subject to their client's approval, but they cannot expect judges to encourage such inefficient expenditures of time when their costs are to be fixed following upon a trial."

24 The defendants elsewhere asset that "this action was not exceptionally complex (paragraph 37) and that "this trial was one of ordinary complexity, being a motor vehicle accident in which liability and damages were in issue" (paragraph 48).

25 With respect, I disagree with the defendants' characterization of this case and of the approach to its preparation and presentation by the Plaintiff. As to the former, it is my view that this was a very difficult and complex case, both

from a medical-legal and a liability exposure perspective. In fact, it was very much of a "swing case", one in which another jury might well have awarded significantly more (or less) to the Plaintiff.

26 Far from over-staffing or over-preparing this case, in my view, the approach to both preparation and presentation of the case was reasonable and meets the test of scrutiny a court adopts in the process of fixing trial costs.

27 The costs sought exceed the damages awarded. The court should not be concerned by this fact, the plaintiff asserts, and cites authority of this court to that effect. Specifically, reference is made to *Dybongco-Rimando Estate v. Lee, [2003] O.J. No. 534* (S.C.J.). Although the cited case is distinguishable in nature and on its facts, I agree with the principle that, in some cases, costs may surpass the amount awarded, that being a foreseeable risk of litigation.

28 The *Dybongo-Rimando* case is also cited as authority in support of the proposition that, in fixing costs, the trial judge will not attempt an item by item assessment according to the tariffs as would be done by an assessment officer (page 6); rather, the court will apply an after the fact analysis carefully but "with a dull knife, not a scalpel ... done with a sense of fairness" (page 7). I agree with this proposition, and so too do the parties.

29 In their submissions, the parties acknowledge that this process is not an assessment of costs and that the court is not to attempt a line-by-line analysis of each item of fees and disbursements claimed. Nevertheless, the defendants filed 40 pages of written submissions addressing a multitude of concerns, some helpful but many involving minor matters; the defendants appear to seek indirectly that which they cannot have directly.

30 In correspondence supplementary to the plaintiff's written submissions on costs, certain minor errors in the bill of costs are identified. Accordingly, the following deductions of time are made on consent - 0.7 of law clerk's time and 0.1 of a junior lawyer's time. These deductions amount to $91.00 plus GST of $6.37.

31 The plaintiff's costs brief identifies and describes the background and experience of the lawyers and clerks who participated in preparing and presenting this case and whose dockets are contained in the bill of costs. The involvement, where appropriate, of lower cost service providers is explained. The growing need for the involvement of senior counsel as the trial approached is described. The dockets indeed track the submissions and I am satisfied that the approach taken was reasonable and the time expended, including time claimed for preparation during the trial and on weekends, should be allowed.

32 At paragraph 56 of the plaintiff's costs brief, it is stated that Mr. Regan's hourly rate is $475.00 per hour. I assume that this is his rate in some cases. In the instant case, however, Mr. Regan's time is docketed in the bill of costs at $350.00.

33 The defendants refer to an excerpt from *Information for the Profession,* a document prepared by the Costs Subcommittee of the Civil Rules Committee, as follows:

> "It is anticipated that in considering rates, as one of the various relevant factors, courts will normally treat the rates set out below as maximum rates when fixing partial indemnity costs. ... It is further anticipated that the maximum rates would apply only to the more complicated matters and to the more experienced counsel within each category."

34 Rates quoted include lawyers practicing fewer than 10 years, more than 10 but less than 20 years and those practicing longer than 20 years respectively at $225.00, $300.00 and $350.00.

35 All other factors aside, I would be inclined to fix the hourly rates for Mr. Regan's time and that of the other timekeepers identified in the plaintiff's bill of costs according to these quoted rates. As will be seen from what follows, however, there are other factors to consider.

36 I have described the approach taken in preparation and presentation of this case as being reasonable. By using the word "reasonable", I mean to include the aspect of reasonable within the expectation of the defendants (and/or whoever will receive and honour the obligation to pay costs in this case for the defendants) as is discussed by Ground J. in his recent decision in *Canadian National Railway Corporation et al. v. Royal and Sunalliance Insurance Company of Canada et al.,* *(2006), 77 O.R. (3d) 612*, S.C.J. and the cases referred to therein.

37 By my calculation, Mr. Regan's docketed time totals 195.6 hours. If his hourly rate was $475.00 per hour, the total value of his docketed time would increase by about $25,000.00. This may underlie the reasoning behind the quantum of the claimed premium of $30,000.00 plus GST. That quantum was not otherwise explained in the plaintiff's submissions.

38 I am aware of the cases cited in support of the premium claim and the principles applied therein. With respect, I do not read those cases as endorsing a premium claim applicable to and supported by the facts of this case.

39 The award of a premium is intended to apply to extraordinary cases. In *Dybongco-Rimando (*supra), Quinn J. addressed the exceptional nature of the case before him as follows:

> "In total, the evidence and argument took 33 days, spread over three years. It was a challenge. The evidence was complex and intricately woven. In the past, I have referred to the trial as a puzzle with a thousand pieces. Some indication of the level of complexity can be gathered from the fact that written submissions on liability and damages exceeded 600 pages; and not one page was wasted ... (page 3)"

40 Later, Quinn J. added:

> "Merely winning a complex case is insufficient to warrant a premium, for it would result in a premium being allowed in almost every medical negligence action in which the plaintiff was successful."

41 At the conclusion of the trial, I commended both counsel for their courteous, thorough and excellent advocacy. That Mr. Regan deserved the accolade is certain but it does not describe conduct supportive of a premium in this case.

42 I am mindful of the submission that there was financial risk to the plaintiff posed by the intransigent settlement position of the defendants. Indeed such risk is a factor recognized by courts considering the applicability of a premium in any given case. In motor vehicle accident cases, with liability and damages in dispute, the risk of an adverse outcome not un-common.

43 Moreover, the risk created for the plaintiff in this case was not entirely unreasonable, when viewed against the actual outcome. As detailed above, the plaintiff's recovery under each head of damages sought and on liability, positioned the Plaintiff far short of her apparent expectations, as those may be measured by the submissions made in closing argument to the jury. The outcome is relevant both to the premium claim and to the amount of costs to be fixed.

44 In the circumstances, I do not accept that "the facts of this case and the excellent result warrant an award of a premium" (paragraph 92; Costs Brief of the plaintiff).

45 The defendants rely upon Rule 57.01(1)(b) referencing the principle of "The apportionment of liability" and Rule 57.01(1)(a), "The amount claimed and the amount recovered in the proceeding" and other principles in arguing for a discount from otherwise reasonable levels of recovery for fee and disbursement items. I agree that the two principles, above, are appropriate to the exercise of my discretion in this case.

46 I am not persuaded by the submission that costs should by reduced because of the conduct of the plaintiff (Rule

57.01(1)(e)(f) - Paragraphs 50 - 59 of defendants' submissions). Absent a breach of a term of the agreement permitting of an adjournment of the trial, there is no reason why the plaintiff ought not continue to prepare the case during the time of that adjournment; indeed it would have been unwise for the plaintiff to do otherwise.

47 As to the production of information and documentation prior to trial, the defendants had the option to move for more complete production, if they were so disposed. Now is not the time to raise concerns that should have been addressed before the trial stage of the litigation.

48 The defendants raise concerns about matters of disbursements in their submissions, paragraphs 67 through 88. I will address those which I consider to be of merit.

49 I am not prepared to allow attendance fees paid to potential witnesses who did not testify at trial. As those particulars are not available, I would fix the conduct money recoverable on this basis: the plaintiff called 7 witnesses, in addition to herself; I would allow each a fee of $53.00 for a total of $371.00. The plaintiff seeks only $357.00 and I therefore allow that amount.

50 Disbursements are claimed for 3 expert witnesses, Dr. Ogilvie-Harris, Professor Carr and Mr. Kent Bowman. No issue appears to be taken by the defendants to allowing recovery for amounts due or paid to these witnesses for their respective reports. In any event, I am content to award those amounts in full.

51 As to preparation time charged for attendance at trial, I am mindful of concerns expressed elsewhere stemming from the fact that the tariff does not specifically make allowance for preparing to testify at trial. In my view, such concerns must be balanced against the fact that preparation may be both necessary and useful to the expeditious and economical presentation of a given case.

52 In this case, the presentation of evidence through Dr. Ogilvie-Harris, Mr. Bowman and Professor Carr was helpful to the jury and some allowance for preparation is reasonable for each expert.

53 None of the expert witnesses were required to give evidence over an extensive time frame. I am content to allow more than the *per diem* rate referred to in the tariff, except in the case of Mr. Bowman.

54 Accordingly, I fix the disbursement amounts for the experts as follows:

Dr. Ogilvie-Harris -	report	- $4,624.00
	prep	- $500.00
	trial	- $840.00

		$5,964.00
Professor Carr -	report	- $4,620.00
	prep	- $500.00
	trial	- $840.00
		$5,960.00
Mr Bowman -	report	- $1,100.00
	prep	- $ 500.00
	trial	- $ 200.00

$1,800.00

55 Parking expenses and courier charges are disallowed.

56 The daily charge for use of the interview/consulting room is allowed for 12 days, for a total of $449.40, plus GST.

57 By my calculation, and exclusive of GST and before reducing the award to reflect the liability and damages outcome of this trial, the total amount assessed for Disbursements is $28,393.77.

58 From this total I deduct 20%. In so doing, I am mindful of the fact that many disbursement amounts must be incurred before the plaintiff could hope to effect any recovery at trial. Most disbursements involve money owed or paid to individuals other than the plaintiff's lawyers. As well, there is no formula I can determine to accurately measure disbursement amounts against litigation results. As such, the net recoverable disbursements are $22,715.02, plus GST.

59 In all of the circumstances, I fix the net recoverable billing rates of the listed timekeepers in the bill of costs as follows:

Regan - $220/hour

Grayson - $90/hour

Seguin - $90/hour

Frino - $90/hour

Korloff	-	$90/hour
Reale	-	$70/hour
Deans	-	$70/hour
MacLean	-	$70/hour

60 These rates, applied to the hours docketed produce the following:

Regan	-	$220 x 195.6 hours	=	$43,032.00
Grayson	-	$90 x 90	=	$1,548.00
Seguin	-	17.2	=	$20,331.00
Frino	-	51.5	=	$4,635.00

Korloff	-	9.7	=	$873.00
Reale	-	$70 x 57.4	=	$4,018.00
Deans	-	316.9	=	$22,183.00
MacLean	-	7.7	=	$539.00
				$97,159.00

61 Taking into account all of the above, the plaintiff shall recover fees, inclusive of GST of **$**103,862.76, (being $103,960.13 less the docket errors and GST above); plus **$**24,305.06 for disbursements, including GST.; plus costs of the preparation of written costs submissions fixed at **$**2,675.00, including GST.; for a Total of $130,842.82.

62 The Plaintiff shall also recover Pre-Judgement Interest fixed at $43,923.29.

J.C. MOORE J.
