CITATION: Grammatico v. Chambers, 2012 ONSC 5640
COURT FILE NO.: CV-08-0989
DATE: 20121004

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
STEFANO GRAMMATICO also known as STEVE GRAMMATICO and LINDA ANNA GRAMMATICO Plaintiffs	I. Mair and R. Littlejohn, for the Plaintiffs
– and –	
BRUCE CHAMBERS, Litigation Administrator for THE ESTATE OF JASON FRANK MEDEIROS, deceased Defendant	T. McCarthy and S. Brown, for the Defendant
	HEARD: July 6, 2012

REASONS FOR DECISION ON COSTS

DiTOMASO J.

INTRODUCTION

[1] This is a motor vehicle accident case in which the plaintiff Stefano Grammatico suffered serious personal injuries. His wife Linda Anna Grammatico had a significant *Family Law Act* claim. The defendant Jason Frank Medeiros died as a result of this accident.

[2] After a three week trial with a jury, judgment was entered on June 7, 2012 in the amount of $137,000 plus interest and costs.

[3] The jury awarded general damages to Mr. Grammatico in the amount of $118,000 and damages under the *Family Law Act* to Mrs. Grammatico in the amount of $34,000. After applying the statutory deduction of $15,000, she was awarded the sum of $19,000.

[4] Further, the jury assessed Mr. Grammatico's future economic loss caused by the motor vehicle accident at zero. The jury also assessed Mr. Grammatico's claim for damages for loss of future home maintenance services at zero, loss of future handyman services at zero, and future care costs at zero.

[5] The matter was adjourned to July 6, 2012 at which time I heard submissions from counsel in respect of pre-judgment interest and costs after having received written submissions from them.

[6] Having considered the proceedings at trial, the jury's verdict dated June 7, 2012 and both the written submissions and oral submissions by counsel, I now deliver my reasons in respect these outstanding issues.

[7] The parties do not disagree that pursuant to s. 267.5(9) of the *Insurance Act* and the Ontario Court of Appeal decision in *Rider v. Dydyk*, (2007) ONCA 687, para. 23, the statutory deductions from a plaintiff's assessed damages are not to be considered in determining a party's entitlement to costs. Accordingly, the total jury award is considered by this court for the purpose of determining costs entitlement without deducting any statutory deductibles which in this case is the sum of $15,000 attributable to the *Family Law Act* damages in the amount of $34,000 assessed in favour of Mrs. Grammatico. Therefore, the total amount considered for the purposes of determining costs is the sum of $152,000.

[8] The defendant delivered an offer to settle dated November 4, 2011 in the amount of $125,000 plus interest on $75,000 and costs.

[9] The plaintiffs submit that they were successful at trial as the amount of the jury award exceeded the defendant's offer to settle.

[10] The plaintiffs claim that they are entitled to partial indemnity costs from the initial date of retainer, June 18, 2007 through trial to June 7, 2012.

[11] The defendant disagrees and takes a different position. The defendant claims the following:

(i) Costs of the action and the trial from November 4, 2011;

(ii) In the alternative each side should bear their own costs;

(iii) In the further alternative, the plaintiffs should be entitled to extremely limited costs after November 4, 2011;

(iv) In any event, the defendant is entitled to his costs for responding to the plaintiffs' motions heard on May 2 and May 15, 2012.

BACKGROUND AND POSITION OF THE PARTIES

[12] The parties have a fundamentally different view as to who was the "successful" party after trial given the jury's verdict and given the defendant's offer to settle.

[13] Because the plaintiffs received judgment in excess of the offer to settle, they claim that they are the successful party and are entitled to their costs throughout including the trial on a partial indemnity scale. Those costs are significant. They amount to the sum of $235,719.53 for costs and $154,236.84 for disbursements for a total of $389,956.37 including HST.

[14] Throughout the proceedings, the plaintiffs submitted that Mr. Grammatico had suffered a mild traumatic brain injury together with chronic pain syndrome as a result of the accident. It was submitted that these serious injuries had a profound effect on his life, with his family and at work. Medical witnesses testified about his disabilities, how they impacted his life, the life of his wife and family, his ability to work and, more troubling, what the future held in store for Mr. Grammatico because of those disabilities. In particular, the plaintiffs advanced a claim for future economic loss and the loss of future home maintenance services, loss of future handyman services and future care costs. In this regard, not only were medical witnesses called but also other expert witnesses who gave expert opinion testimony regarding these claims. In addition, evidence was heard from family members and fellow workers who described how Mr. Grammatico's personality had changed and his ability to work had been diminished because of the injuries sustained in the accident.

[15] Ultimately, this was the case presented and heard by the jury on behalf of the plaintiffs Grammatico. It was argued by plaintiffs' counsel that this was a case where the plaintiffs should receive a significant damage award from the jury, especially in respect of the future economic loss and other future claims.

[16] The defence perceived this case much differently. From the outset, the defence viewed this case as a general damages case. When the case was presented at trial both liability and the threshold had been admitted. General damages and *Family Law Act* damages were admitted owing to the plaintiffs subject to the jury's assessment. However, the defence was steadfast that this motor vehicle accident did not cause Mr. Grammatico any future economic loss. No amounts were payable for these claims and on behalf of the defendant Mr. Medeiros, no amounts would be paid. The plaintiffs put significant numbers to the jury as to the kind of recovery being sought. In the end, while not insignificant damages were awarded to the plaintiffs, the jury awarded Mr. Grammatico zero in respect of the four categories of future economic loss and future claims. The defence submits that the jury's verdict reflects an acceptance for the most part of the defence case and not the plaintiffs' case. The defence submits that the defendant is the "successful" party at trial. They claim entitlement to costs from November 4, 2011 (date

of first time this matter was scheduled to proceed to trial) and forward, through to the conclusion of the trial on June 7, 2012.

[17] The defence argues that on the fundamental issues at trial it was successful. The plaintiffs' assessment of their case was wrong and that a court should accord significant costs consequences to such a miscalculation see: *Ksiazek v. Halton (Police Services Board)*, 2010 ONCA 341, paras. 38 and 39. It is submitted that the court should be guided by the principles in the Ontario Court of Appeal decision in *Lawson v. Viersen* 2012 ONCA 25 which called upon the court to take a more holistic approach in exercising its discretion with respect of costs. When considering offers to settle and even offers that do not comply with Rules 49.10 and 49.11, in *Lawson* at para. 47 the court held:

> Rule 49.13 is not concerned with technical compliance with the requirements of Rule 49.10 or 49.11. It calls on the judge to take a more holistic approach.

[18] This holistic approach is urged upon this court to consider when determining the issue of costs. In this context, the court may consider if the plaintiffs are better off after judgment in accordance with the jury's verdict than the plaintiffs would have been having regard to pre-trial offers to settle. The defence submits that the court should exercise its discretion, consider Rule 57 factors, Rule 49.13 and the holistic approach in *Lawson* when determining costs.

[19] As far as the defence is concerned, the costs claimed by the plaintiffs are disproportionate, unfair and unreasonable. In particular, given the outcome of the trial, the fees and, specifically, the disbursements are excessive, inflated and unreasonable.

[20] The plaintiffs maintain that they are entitled to partial indemnity costs from the initial date of retainer through to the end of trial. They maintain that they are the successful parties. The *Rules of Civil Procedure* do not express success in terms of either "largely successful" or "minimally successful". All claims advanced on behalf of the plaintiffs were reasonable and supportable by the evidence. The jury awarded significant general damages to Mr. Grammatico and also sizeable damages to Mrs. Grammatico under *Family Law Act*. The amounts recovered at trial pursuant to the jury verdict exceeded the defendant's offer to settle dated November 4, 2011. The parties did attempt to settle these proceedings short of trial including mediation but all of those attempts, although genuine and continuing, were unsuccessful. The defendant's offer was clearly exceeded by the jury verdict, notwithstanding the jury returning zero awards on respect of all future claims. The plaintiffs submit that it was necessary to call expert evidence in respect of all claims being advanced. They assert that the economic evidence was productive and all of the experts have been paid. The plaintiffs submit it would represent undue hardship to expect them to accept a reduction of their disbursements when they were successful in this lawsuit in accordance with the Rule 49.

[21] The materials submitted on behalf of the plaintiffs did not include any reference to the *Lawson* decision.

ISSUES

[22] Against this factual context a difference of opinion as to which party was "successful" at trial, gives rise to the following issues to be determined:

(a) Calculation of pre-judgment interest;

(b) Which party is entitled to costs and in what amount?

(c) Which party is entitled to costs of two pre-trial motions?

ANALYSIS

[23] Even though the plaintiffs' recovery at trial exceeded the defendant's offer to settle, there remains an issue as to which party was the successful party at trial. The defence maintained that it was the successful party pointing to the jury verdict which shutout Mr. Grammatico on the big money claims. The plaintiffs maintained that they were the successful parties having obtained a jury award in excess of the defendant's offer to settle. The fundamental issue at this juncture is entitlement to and quantum of costs.

[24] Before dealing with the issue of costs, I will address the issue of pre-judgment interest.

(a) Pre-Judgment Interest

[25] I find the date from which pre-judgment interest runs is June 20, 2007. On that date, plaintiffs' counsel delivered notice of the Grammatico claim to the insurers of Mr. Medeiros by fax and to the estate of Mr. Medeiros by registered mail. I disagree with the defence position that pre-judgment interest should have commenced in August of 2008 when further particulars were provided to State Farm from plaintiffs' counsel.

[26] Having reviewed the text of the letter sent on June 20, 2007, I am satisfied that both Mr. Medeioros' insurer and the estate of Mr. Medeiros were given proper notice regarding the Grammatico claim.

[27] Having so found, counsel agreed that the appropriate interest factor is 24.8219. This interest factor is applied to the sum of $137,000 being the jury award less the statutory deduction.

[28] Accordingly, both counsel agree that pre-judgment interest on the jury's award less the statutory deduction of $15,000 is the sum of $34,015.73. When added to the judgment award less statutory deduction in the amount of $137,000, the total amount of the judgment plus pre-judgment interest is the sum of $171,015.73. This is based upon pre-judgment interest running from June 20, 2007 at an interest factor of 24.8219.

(b) Which Party is Entitled to Costs and in What Amount?

[29] The issue to be determined here is entitlement and quantum in respect of legal fees and disbursements.

Entitlement

[30] Section 131 of the *Courts of Justice Act* provides that the costs of a proceeding are in discretion of the court. In exercising that discretion, Rule 57 of the *Rules of Civil Procedure* sets out various factors to be considered by the court when exercising its discretion under s. 131. The overarching principles of fairness and reasonableness are at the core of the exercise of the court's discretion in respect in assessing costs. Whether the costs award is "fair and reasonable" was considered by the Ontario Court of Appeal in *Davies v. Clarington (Municipality)* 2009 ONCA 722 at paras. 51 to 56. There the Court of Appeal cited several principles that must be considered when awarding costs as set out by the Divisional Court in *Andersen v. St. Jude Medical, Inc.*, [2006] O.J. No. 508 as follows:

> [51] In *Andersen v. St. Jude Medical, Inc.*, [2006] O.J. No. 508, 264 D.L.R. (4th) 557 (Div. Ct.), the Divisional Court set out several principles that must be considered when awarding costs [at para. 22]:
>
> > (1) The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher, Moon* and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638, [2005] O.J. No. 160 (C.A.).
> >
> > (2) A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495, 118 A.C.W.S. (3d) 341 (C.A.), at para. 4.
> >
> > (3) The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
> >
> > (4) The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with

> like substantive results": *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222, [1998] O.J. No. 2897 (C.A.), at p. 249 O.R.
> (5) The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

[52] As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on 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. In *Boucher*, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice".

[53] Here, while the trial judge identified the importance of a reasonableness assessment, with respect, in arriving at a costs award of $509,452.18 her reasons do not indicate that she conducted an assessment, or at least a sufficient one, in accordance the requirements set out in *Boucher*. Furthermore, although the trial judge did find that the parties would have reasonably expected Blue Circle to have *claimed* costs of this magnitude, she was, according to *Boucher*, at para. 38, obliged to consider the expectations of the parties concerning the quantum of the costs *award*.

[54] It is difficult to accept that the settling defendants would have expected that they would be faced with an award against them of this magnitude particularly in the light of Blue Circle's limited involvement in the proceedings. Blue Circle did not participate in the examination or cross-examination of any witnesses. In Blue Circle's own costs submissions, it is acknowledged that their case took two hours in total to put in. The parties could not have expected that the trial judge would treat the costs incurred after the February 2005 offer in the manner she did. They could not have expected that, through an elevated costs award, the trial judge would effectively reward Blue Circle for the assistance its counsel provided during the settlement discussions.[3] Further, in

> considering the expectations of the parties, it is appropriate to compare the costs claimed by and awarded to the various parties. The trial judge awarded Blue Circle an amount in legal fees that was almost double those that were received by the plaintiffs. The settling defendants could not have anticipated a disparity of this nature.
>
> ---
>
> [3] While the assistance of counsel for Blue Circle in the discussions that led to the settlement among all but Blue Circle is commendable, it is not, in my view, a basis upon which to make the settling defendants pay Blue Circle's costs on an elevated basis.
>
> [55] The results of this "fair and reasonable" analysis demonstrate that the appellate intervention is warranted.
>
> [56] Turning to quantum, taking into consideration the circumstances of this case and applying to them the relevant factors set out in rule 57.01, and the fair and reasonable test expressed in *Boucher*, in my view the amount of $300,000 would be appropriate.

[31] In discussing the overriding principle of reasonableness, the court noted *Boucher v. Public Accountants Council for the Province of Ontario et al,* [2004] O.J. No. 2634.

[32] In addition, the court ought to consider the amount awarded at trial in light of any Rule 49 offers. In this case, there was only one Rule 49 offer extended by the defence in accordance with offer dated November 4, 2011.

[33] When considering the effect of any such offer, the discretion of the court may still be exercised in accordance with Rule 49.13 despite Rules 49.03, 49.10 and 49.11.

[34] Rule 49.13 provides that despite said rules, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

[35] In *Lawson v. Viersen* 2012 ONCA 25, the Ontario Court of Appeal held that Rule 49.13 allowed a judge to consider offers even though the offers do not comply with Rules 49.10 or Rule 49.11. At para. 46, the court held:

> Rule 49.13 is not concerned with technical compliance with the requirements of Rules 49.10 or 49.11. It calls on the judge to take a more holistic approach.

[36] The defence submits that in this case, "a more holistic approach" is warranted. Upon consideration of the defendant's offer to settle, it is submitted that the plaintiffs would

have been better off to accept that offer than to proceed to trial, recover what they did, and thereafter incur legal costs which are almost double the recovery.

[37] In my analysis in respect of the issue of costs, I am aware of the court's discretion, the manner in which it is to be exercised giving effect to Rule 57 factors, offers to settle, overarching principles of reasonableness, fairness and proportionality and the more "holistic" approach discussed by the Court of Appeal in *Lawson*.

The Defendant's Rule 49 Offer

[38] The total jury award for the purposes of costs is the sum of $152,000 which does not include the deduction of any statutory deductible per the Court of Appeal's decision in *Rider v. Dydyk*. The defendant's offer to settle dated November 4, 2011 was in the amount of $125,000 plus interest on $75,000 and costs.

[39] At judgment, the defendant's offer and the judgment awarded can be calculated and compared as follows. Interest has been calculated at 5 per cent from the notice date, June 20, 2007 to the date of judgment, June 7, 2012:

(a) $152,000 with pre-judgment interest at 24.8219% = $189,729.29 less

(b) $125,000 with pre-judgment interest on $75,000 at 24.8219% = $143,616.43

Difference of $46,112.85

[40] This was the only relevant valid written offer made by the defendant. It is clear that the defendant's offer to settle was exceeded by the jury verdict in the amount of $46,112.86.

[41] The defendant submits that it is entitled to costs of the action and the trial from November 4, 2011 (when the matter first came on for trial but was adjourned to the spring sittings of May 2012) but in the alternative, the defendant submits that each side should bear their own costs.

[42] I disagree with each of these positions.

[43] I find that the plaintiffs are entitled to partial indemnity costs from the initial date of retainer, namely June 18, 2007 through to the date of judgment, June 7, 2012. The plaintiffs' award at trial exceeded the jury verdict. I have examined the contextual background regarding attempts by the parties including the plaintiffs to settle this case. I am aware of an unsuccessful mediation and further aware of unsuccessful settlement discussions which proved fruitless. Against this backdrop, the defendant extended his offer to settle which proved to be insufficient in arriving at resolution. I do not agree with the interpretation of the offer advanced by the defence which contended that in reality, the gross amount of the settlement offer was $170,000 for all damages. On my reading of the offer, the defendant offered to settle all claims in the amount of $125,000 with interest on $75,000 and costs.

[44] I do not agree that the defendant was the successful party in this case notwithstanding that the defence had achieved significant victory at trial regarding the defendant's future loss claims. Nevertheless, I find that the plaintiffs were the overall winners at trial successfully achieving a result in excess the defence's offer to settle.

[45] I have considered the Rule 57 factors as well as the effect of rule 49.13.

[46] In respect of the Rule 57 factors, none of these factors either alone or combined would cause me to exercise my discretion so as to deprive the plaintiffs of an award of partial indemnity costs from June 18, 2007 to the date of judgment, June 7, 2012.

[47] As for a consideration of the effect of Rule 49.13, I have considered the conduct of the parties in attempting to reach a settlement prior to trial. I have also considered the effect of the defence offer dated November 4, 2011. That offer does reflect what the defence considered to be the value of this case for settlement purposes and also reflected the position of the defence that this was a general damage case. That having been said, I find that the amount that was offered was not enough either to settle the case or to exceed what the plaintiffs were awarded at trial.

[48] Having considered the exercise of discretion through these various lenses, I am not satisfied that the defence is entitled to partial indemnity costs. Rather, my ultimate finding is that the plaintiffs are entitled to partial indemnity costs throughout and through the trial to judgment on June 7, 2012.

[49] That having been said, the real issue is quantum of fees and disbursements given the fact that those fees and disbursements claimed by the plaintiffs are almost double the amount awarded at trial. Regarding proportionality, I have considered Rule 1.04(1.1) of the *Rules of Civil Procedure* which provides that in applying Rules 49 and 57, *inter alia*, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Quantum of Fees

[50] Rule 57 provides discretionary factors to be taken into account upon the exercise of discretion under s. 131 of the *Courts of Justice Act* when awarding costs. The court may consider in addition to the result of the proceeding and any offer to settle the amount claimed and recovered, the complexity and importance of the matter, the reasonable conduct of any party which unduly lengthened the proceedings, scale of costs and any offer to settle, the principle of indemnity, hourly rate, the time spent and the principle of proportionality, and the amount that a losing party would reasonably expect to pay.

[51] The defendant also submits fees were excessive in that three counsel were engaged in the trial on behalf of the plaintiffs and Mr. Littlejohn's attendance was unnecessary.

[52] In respect of the Rule 57 factors, the defendant refused to admit liability in this case until November 4, 2011, days before the first trial sittings. The defendant also refused to admit any item in the plaintiffs' request to admit, refused to authenticate and permit the

filing of any of the plaintiffs' treating records in advance of trial; and took steps to force the matter on for trial on May 2, 2012 knowing that the plaintiffs' orthopaedic expert Dr. Ogilvie-Harris and neurologist Dr. Warren Goldstein were unavailable to attend at this trial.

[53] Nevertheless these experts and others were available and were required for the first jury trial. These experts would have been called in the first jury trial had it proceeded. In preparation for the first jury trial, lay persons, colleagues and co-workers came forward and changed the complexity of the lawsuit. This required more specialized experts for the second trial. I find there was a genuine effort to resolve this lawsuit. However, the mediation was not successful. I further find that counsel were engaged in settlement discussions subsequent to a judicial pre-trial, which again proved unsuccessful.

[54] I find that all of these attempts to settle represented "a genuine and continuing effort to settle the case" representing a pattern of effort advocated by the courts. Despite efforts to come to resolution, the matter proceeded to trial.

[55] Mr. Littlejohn and Mr. Mair were trial counsel. Inclusive of HST, Mr. Littlejohn claims fees in the amount of $122,815.01 on a partial indemnity scale. Mr. Mair, on the same scale of costs, claims the sum of $112,904.52 inclusive of HST for total fees claimed in the amount of $235,719.53.

[56] The plaintiffs called evidence in support of the claim of Mr. Grammatico that he suffered a mild brain injury and chronic pain syndrome as a result of this motor vehicle accident. Mrs. Grammatico advanced a *Family Law* Act claim. The matter was moderately complex which reflects the hours spent and the rates charged. There were a number of experts who gave evidence regarding these injuries. Other witnesses testified about how the injuries impacted economic loss and future. There was substantial time spent in respect of this matter and the hourly rates are comparable to those rates from defence counsel. The number of hours and the number of lawyers were comparable for a three week trial of this kind. Just as there were two plaintiffs' counsel at trial, there were also two defence counsel. There was a third lawyer on the plaintiffs' side who participated in the trial. However, her participation was minimal. The real issue was whether Mr. Littlejohn ought to have participated in this trial. I find that he should have and that it was reasonably necessary for him to do so. He was fully familiar with this case having assumed carriage of the matter from the very beginning. It would have been unrealistic in all the circumstances for Mr. Littlejohn not to have been engaged in this case from start to finish.

[57] I have reviewed the partial indemnity bill of costs presented by Mr. Mair. Ms. Ghorbani was the third counsel who was in attendance during the trial. While I find it reasonable that her time was spent in assisting trial preparation, with respect, I find that her participation in the trial was of limited assistance. Her trial and travel time were a combined 97.5 hours at $180 an hour in the amount of $17,550. While I would not discount Mr. Mair's fees, I would discount the fees generated by Ms. Ghorbani by half allowing the amount of $8,775. While her attendance at trial may have been of some

assistance, I do not find it reasonable that the plaintiffs should recover the full amount of her fees. While the defence did not have a third counsel involved at trial, I note that they were assisted by a law clerk throughout the duration of the trial. In this regard, there would be some proportionality and comparison involving the role and assistance at trial of third counsel and the defence law clerk.

[58] Otherwise, I find Mr. Mair's fees, hourly rate and time spent to be fair and reasonable.

[59] I make the same comment in respect of Mr. Littlejohn's hourly rates and hours spent. He did much of the work in respect of this file although he did receive some assistance from support staff and a lawyer in his office.

[60] I turn to preparation for trial both for the November and May sittings. Mr. Littlejohn claims the sum of $21,067.80 in that regard. There would have been some duplication in respect of the same trial preparation and I would reduce Mr. Littlejohn's trial preparation for both sittings from $21,067.80 to $14,000. Accordingly, there is a discount in his fees of $7,067.80 rounded to $7,000. I further find that in the double preparation for trial there was further duplication in Mr. Littlejohn's office and would further discount fees in the amount of $1,719.53. The total discount for Mr. Littlejohn's fees is the sum of $8,719.53. The total reduction of fees (Ms. Ghorbani and Mr. Littlejohn) is in the amount of $17,494.53. Said amount is deducted from the claim for fees in the amount of $235,719.53 leaving allowable fees in the amount of $218,225 inclusive of HST.

Quantum of Disbursements

[61] The most contentious issue in respect of costs relates to disbursements. The plaintiffs claimed the sum of $154,236.84 regarding disbursements. The defence takes serious issue in respect of the claimed amount when the amount recovered at trial is compared against the amount claimed. The defence position is that the because the plaintiffs recovered no damages for future economic loss and future loss claims, the plaintiffs are not entitled to any disbursements relating to those claims.

[62] The plaintiffs submit that the experts who were called were necessary, their expert evidence was required to prove significant injuries being claimed by Mr. Grammatico. Non-medical witnesses were called to also testify as to the effects of the motor vehicle accident on Mr. Grammatico and the impact of those injuries giving rise to future economic loss and other future loss claims. The disbursements being claimed were reasonably necessary for the conduct of this case and were provided by Tariff A items 26 and 35. There were no "runaway experts" in our case unlike in *Hamfler* (see *Hamfler v. Mink*, ONSC 3331. The plaintiffs were obligated to put their best case forward which was done here.

[63] Notwithstanding the defence seeking disbursement reductions, the plaintiffs were successful and bested the defence offer. Further, the plaintiffs' counsel submitted all the disbursements had been paid and those experts who did testify at trial were reasonably

necessary. Plaintiffs' counsel advances a claim for disbursements in the amount of $154,236.84 inclusive of HST.

[64] The main argument of the defence is that the defendant should not be required to pay for disbursements associated with experts and other witnesses regarding the economic claims advanced by the plaintiffs which claims were entirely rejected by the jury. Applying a "holistic approach" and exercising my discretion regarding disbursements I have considered the defence submissions in respect of reductions sought by the defendant at the costs hearing (a) for objectionable disbursements in the amount of $74,957.21 and (b) for inflated disbursements in the amount of $22,651.92. The total disbursements proposed by the defendant are in the amount of $61,000.73.

[65] Plaintiffs' counsel concedes that the disbursements sought in the amount of $154,236.84 should take into account a reduction for Mr. Mair's agency fee in the amount of $4,372.

[66] In respect of the objectionable disbursement list, there were a number of doctors who neither testified at trial nor was a medical report filed. There was also an economic damages witness who did not testify at trial. Using the same numbering as found on the objectionable disbursement summary I make the following findings:

1. Economic Consultants Report - $16,555.09. This amount relates to the economic damages issue and involved Deborah Carter and S. Kertzman. Mr. Kertzman testified at trial but Deborah Carter did not. I would reduce this claim by $6,555.09 being the approximate amount referable to Deborah Carter.

2. Dr. Hanick Report - $4,700. Dr. Hanick was not called to testify and his report was not filed. There were other medical reports that were not filed regarding which the plaintiffs claim a disbursement. The plaintiffs' counsel submits that these reports were obtained and were helpful to the plaintiffs' case. I cannot gauge whether they were helpful because they were never produced. Rather, plaintiffs' counsel chose not to call the medical witnesses and not to produce their reports. In such circumstances, they will not be permitted to claim a disbursement. Accordingly the amount of $4,700 in respect of Dr. Hanick's report is disallowed.

3. Dr. Lee Report - $3,400. Dr. Lee was not called to testify and his report was not filed. This amount is disallowed.

4. Dr. Ogilvie-Harris Report - $3,500. Dr. Ogilvie-Harris was not called to testify and his report was not filed. This amount is disallowed.

6. FSCO Application for Arbitration - $100. This amount relates to a claim for accident benefits and is not applicable. It is disallowed.

7. Dr. Goldstein's Report - $2,295. Dr. Goldstein was not called to testify and his report was not filed. This is amount is not allowed.

8. FCE Report of Jacobs Pain Centre - $750.00. The FCE assessor was not called to testify and the report was not filed. This amount is disallowed.

9. Occupational Therapy (Ability) Report - $2,540. The occupational therapist was not called to testify and the report was not filed. This amount is disallowed.

10. There are number of reports from Dr. Young, the family physician. Dr. Young was not called to testify and his reports were not filed. His reports total the sum $6,675. I would disallow this amount. Further, there are amounts claimed for trial preparation and consultation fee for Dr. Young totalling $1,473. He did not attend to give evidence at trial and I would disallow this amount as well. His medical records were filed at trial and this regard I would allow $1,200 which would have the effect of reducing all of the Dr. Young disbursements to $7,048.

25. The disbursements relating to the economic consultants report and the evidence and the attendance by Mr. Kertzman will not be reduced. Neither will the disbursements in respect of the evidence given by Mr. Kobzey. It was reasonable for these witnesses to attend to give their evidence in respect of the plaintiffs' claim for economic future loss. Notwithstanding the fact that the jury came back with zero amounts for these future claims, nonetheless, the evidence of the economic witnesses was necessary and reasonable.

11. The FAE of Jacobs Pain Centre - $500. The FAE assessor was not called to testify and the report was not filed. This amount is disallowed.

17. Dr. Ogilvie-Harris Report - $3,500. He was not called to testify and his report was not filed.

18. Bank charges of $140. This is not recoverable and disallowed.

19. Dr. Ogilvie-Harris' Report - $1,000. He was not called to testify and his report was not filed. This amount is disallowed.

20. Attendance fees for Richard Wolbeck - $200. This witness was not called and this amount is disallowed.

21. Medical illustrations - $442.80. These were not relied upon during the trial. This amount is disallowed.

22. Linda Grammatico's attendance fees - $106. She was a party to these proceedings and should not have been paid attendance fees. This amount is disallowed.

23. Dr. Hanick's trial cancellation fees - $3,000. He did not testify at trial. This amount is disallowed.

28. Limousine for Dr. Ko - $1,264.28. Dr. Ko was paid an attendance fee on the tariff. The limousine service was not provided by the tariff. This amount is disallowed.

29. Bank charges of $60 are disallowed. This is not recoverable.

31. The Mair Agency Fee in the amount of $4,372 is also disallowed.

[67] Accordingly, the total of the reduced items on the objectionable disbursement list is in the total amount of $42,933.17. HST payable on said amount is $5,581.31. I find that the total amount of the reduction for objectionable disbursements is the sum of $48,514.48 inclusive of HST.

[68] Quite apart from the simple assertion that the medical reports from witnesses who did not attend trial to give evidence were reasonably necessary, it is of no assistance not to having had the opportunity to review those reports in order to be satisfied these reports were in fact reasonably necessary.

[69] The total amount sought by the plaintiffs inclusive of HST was $158,609.86 according to the defence summary before taking out Mr. Mair's agency fee. Having reduced the sum of $48,514.48 for objectionable disbursements, the disbursement subtotal is $110,095.38. This amount is subject to a consideration of reduction sought by the defendant for inflated disbursements.

[70] The inflated disbursements claimed by the defence are in the amount of $22,651.92.

[71] I have reviewed the amounts for the various witnesses and amounts charged for their trial preparation. I do not find the amounts charged unreasonably high under the circumstances. I would reduce the inflated disbursement list in relation to photocopies. I would reduce the amount of $12,712.10 to $9,000 reducing the amount claimed by $3,712.10. Travel at $135.55 is unspecified and not available under the tariff. This figure is disallowed. Stationery and supplies at $361.75 is part of plaintiffs' counsel's overhead and is not allowed. The transaction levy at $50 is part of plaintiffs' counsel's legal office overhead, not available under the tariff and disallowed.

[72] All of the other items are fair, reasonable and I would allow them.

[73] The total amount reduced under the inflated disbursement list is the sum of $4,259.20. HST on that amount is the sum of $553.69. I would disallow the inflated disbursements in the amount of $4,812.89 all inclusive. When this sum is deducted from the disbursement subtotal of $110,095.38 the total amount of allowable disbursements is the sum of $105,282.59.

[74] I have taken into account the success of the plaintiffs at trial, the amount recovered when compared to the defence offer to settle, the Rule 57 factors and the holistic approach as stated in *Lawson*. I have also taken into account the principle of proportionality as well as the overarching principles of reasonableness and fairness. Having taken all of those

matters into account, I conclude that the plaintiffs are entitled to costs in the amount of $323,507.59 rounded to $323,500 all inclusive of fees, disbursements and HST.

(c) Which Party is Entitled to Costs of Two Pre-Trial Motions?

[75] There are costs in respect of two pre-trial motions for me to decide.

[76] In respect of the first motion, the plaintiffs brought a motion on May 2, 2012 to adjourn the trial. The motion was dismissed with costs to be determined by the trial judge. The defendant has prepared a costs outline claiming substantial indemnity costs in the amount of $3,798.15.

[77] I find that the defendant was the successful party in respect of this motion. Costs follow the event but not on a substantial indemnity scale. I would award the defendant costs of the motion on a partial indemnity scale in the amount of $1,000.

[78] The second motion was brought by the plaintiffs for production of unedited surveillance videos and further and better affidavit of documents. The motion was returnable May 15, 2012. Apparently, defence counsel complied in advance of the motion and provided what was requested. The motion was withdrawn with costs to be determined by the trial judge. The defence takes the position that the motion was unnecessary as it would have willingly provided the requested surveillance documentation and an updated draft affidavit of documents if requested by plaintiffs' counsel. Such materials were provided on May 10, 2012. The defence seeks costs in the amount of $5,418.97 on a substantial indemnity scale. I have no material from the plaintiffs' counsel in respect of this motion. I do not have before me a copy of the court's endorsement regarding this matter.

[79] The plaintiffs' counsel brought a motion unilaterally. It received the documentation before the return date of the motion. Having so received the material, it withdrew its motion. I would award no costs in respect of this motion to either side. Each party will bear their own costs given the fact that the motion produced the disclosure sought and the motion did not proceed.

[80] I would offset the costs of $1,000 payable by the plaintiffs to the defendant in respect of the first motion from the total costs assessed in the amount of $323,500.

[81] Accordingly, the plaintiffs are entitled to costs from the defendant in the amount of $322,500.

CONCLUSION

[82] There shall be an order in respect of pre-judgment interest and costs as follows:

(a) The plaintiffs are entitled to pre-judgment interest on the sum of $137,000 from June 17, 2007 to the date of judgment June 7, 2012 in the amount of $34,015.73. Said pre-judgment interest is calculated applying the interest rate factor of 24.8219% for the periods specified;

(b) The plaintiffs are entitled to costs payable by the defendant on a partial indemnity scale in the amount of $322,500 for fees, disbursements and HST all inclusive;

(c) The defendant is entitled to costs of the first motion returnable May 2, 2012 in the amount of $1,000 all inclusive which amount has been accounted for in the ultimate disposition of costs. As for the second motion returnable May 15, 2012, there shall be no costs awarded in respect of this motion. Each party shall bear their own costs in respect of same.

DiTOMASO J.

Released: October 4, 2012