CITATION: Shearer v. Sewchand, 2013 ONSC 6760
PETERBOROUGH COURT FILE NO.: 267/08
DATE: 20131029

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
STONE SHEARER, a minor, by his Litigation Guardian, Angela Shearer: ANGELA SHEARER, personally and ROBERT SHEARER	)	Mr. Aleks Mladenovic and Mr. Carr Hatch, for the Plaintiffs
Plaintiffs	)	
	)	
– and –	)	
	)	Mr. Mark Veneziano and Ms. Dena Varah, for the Defendant
Dr. KENNETH SEWCHAND	)	
Defendant	)	

HEARD: By Written Submissions

H.K. O'CONNELL, J.

COSTS ENDORSEMENT

Overview

[1] I released my judgment on this matter on June 13, 2013.

[2] These are my reasons on the issue of costs.

Position of the Plaintiffs

[3] The Plaintiffs provided both submissions on costs as well as reply submissions to those of the Defendant.

[4] The primary submission of the Plaintiffs is encompassed in their comprehensive outline, complemented by dockets and correspondence that is germane to an assessment of a

consideration of Rule 49 of the *Rules of Civil Procedure*. Counsel, Mr. Mladenovic, also references the decision in *Taylor et. al. v. Morrison*[1].

[5] The Plaintiffs submit that they had complete success at trial. They seek costs totalling **$200,718.25** plus HST of **$26,093.37**. Of the amount of **$200,718.25**, $**51,038.50** is apportioned to partial indemnity recovery for the time prior to the formal offer that was made on May 04, 2012, and $**149,679.75** is apportioned to substantial indemnity recovery post offer date. In addition the Plaintiffs seek Assessable Disbursements of **$52,248.45**.

[6] The Plaintiffs trace the factors set out in Rule 57.01(1). They are as follows:

Amount claimed and recovered

[7] The Plaintiffs note that damages were agreed to just prior to the commencement of the trial. Those damages total $190,000.00 inclusive of pre-judgment interest up until commencement of trial, plus costs and disbursements.

Complexity

[8] The Plaintiffs submit that the proceedings were complex, given the nature of the negligence as I found it to be, and the evidentiary underpinnings to prove it, as well as the numerous medical reports, opinions and records that were required. The Defendant defended the claim with vigour. Four days of trial time were required. Issues of clinical judgment and surgical misadventure were front and centre. In addition the Plaintiffs conducted a "full work up of damages and prepared for trial with damages as a live issue, up until May 08, 2012, when the damages were settled."

Importance of the issues

[9] The issues were important. The minor plaintiff, Stone Shearer was significantly affected by the doctor's negligence. Not only was Stone the recipient of hearing loss due to the negligence, he required hospitalization, surgery, rehabilitation, and ongoing therapy. He also required ongoing therapy to address his facial paralysis, wrought by Dr. Sewchand's negligence.

[10] The Plaintiffs argue that the doctor vigorously defended the case in the face of overwhelming evidence against him. His refusal to settle, or even to engage in settlement discussions, "was the sole reason for this trial."

Conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceedings

[11] The Plaintiffs tried to settle this on an ongoing basis. A formal offer to settle was proffered. Extensive efforts were made prior to that event to settle via the Plaintiffs

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[1] *Superior Court of Justice, Toronto, Court file # 99 CV172328*

efforts both at mediation and at the pre-trial stage. Counsel notes that he wrote Defendant's counsel after the discovery of the Defendant to posit that "the liability issues would seem to have crystallized and indeed, it is my belief that this case will be difficult to defend."

[12] The Plaintiffs also submit that a juxtaposition of the evidence of the doctor at his discovery and at trial, leads to the conclusion that the doctor "was less than forthright in giving his evidence."

[13] The Plaintiffs argue that Dr. Sewchand:

> ..tailored his evidence to fit the theory of the case. More importantly, Dr. Sewchand obstinately refused to settle this case, even after it was clear that his care was indefensible. Dr. Sewchand rebuked countless efforts by the Plaintiffs to settle this case. Dr. Sewchand never made any effort to try to resolve this case, even after the pretrial judge advised his counsel that he should. This trial proceeded solely because Dr. Sewchand refused to settle. Dr. Sewchand put the Plaintiffs to the strict proof of every aspect of the case, including causation. The parties did not agree on damages until May 8, 2012.

A party's denial of or refusal to admit anything that should have been admitted

[14] The Plaintiffs argue that:

> Liability, including breach of the standard of care and causation appeared to crystallize after Dr. Sewchand's Examination for Discovery and certainly after delivery of Dr. Rutka's expert report, yet the Defendant argued these issues at trial. There was never any evidence whatsoever suggesting that the injuries to the Plaintiff did not arise from complications related to the medical procedure in issue, yet Dr. Sewchand would not admit causation and even called expert evidence to suggest the Plaintiff's theory of causation was "speculation".

[15] The offer to settle was formally extended on May 04, 2012 for a total quantum of $150,000.00 inclusive of prejudgment interest, plus disbursements and costs. The judgment on damages exceeds the offer by 31%. Substantial indemnity costs therefore should flow from May 04, 2012.

Position of the Defendant

[16] In equally robust submissions, Mr. Veneziano argues that the total costs sought by the Plaintiffs are "disproportionate to the damages awarded, the complexity of the issues and are entirely inconsistent with the reasonable expectations of the defendant."

[17] The proposition that the Plaintiffs' efforts to settle and the insistence of Dr. Sewchand to proceed to trial, should be rewarded with full indemnity costs, is not sustainable. The Defendant had the right to go to trial. His position was not untenable. In this respect his position was supported at trial by his expert, Dr. Dickson.

[18] The Defendant says that Plaintiff's counsel "over prepared for a relatively straightforward trial." Damages were settled to save trial time. "The court did not assess these damages such that the Plaintiffs can claim to have "beaten" their offer."

[19] The Defendant argues that costs of $**100,000.00** are appropriate, plus disbursements for a total of $**150,000.00**. It is argued that this quantum is proportionate to the damages award and is in line with the Defendant's reasonable expectation for recovery in costs.

[20] It is suggested that the claim for substantial indemnity damages from May 04, 2012 because the Plaintiffs' beat their offer, is perverse in its logic. It is submitted that the Plaintiff's approach breeds judicial inefficiency. Citing *Walker Estate v. York Finch General Hospital*[2] the Defendant argues that the agreement on damages saved trial time, and encourages agreements that save costs.

[21] The Defendant says that his agreement to $**190,000.00** in damages was a "significant compromise." In any event the court cannot make a determination as to whether the agreement for damages in this amount was excessive or not, as the court was not required to assess the damages.

[22] The Defendant also argues the costs are excessive. Applying *Rule* 131 of the *Courts of Justice Act*, and *Rule* 57.01 of the *Rules of Civil Procedure*, the court must turn its eye to fairness and reasonableness. The question is what is "fair and reasonable for the unsuccessful party to pay in a particular proceeding."[3]

[23] Simply put says the Defendant the costs sought are not fair and reasonable given the nature of this action. Defence costs were significantly lower than that claimed by Plaintiffs' counsel. A juxtaposition of the respective costs incurred by counsel for the Plaintiffs and that of the Defendant, illustrates says Mr. Veneziano, the lack of reasonableness in the Plaintiffs' cost argument.

[24] Mr. Veneziano says:

> There is no reasonable argument that Mr. Mladenovic had to spend twice as much time directly before and during trial to prepare. The "burden of proof" did not change the essential elements of trial preparation and execution-preparing and examining witnesses, researching law and arguing the case. The fact is that both sides had to prepare for their examination in chief and cross-examination, all of which were important to the final disposition of the matter.

[25] Proportionality as set out in *Rule* 1.04(1.1) of the *Rules* is referenced, as is case law that speaks to proportionality. In this vein, counsel says that "the principle of proportionality dictates a much reduced costs award in light of the agreed upon damages. The trial time

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[2] [1999] O.J. No. 644 (C.A.)
[3] *Boucher v. The Public Accountants for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.)

and witness list were both proportional to the award- four days (not even full court days) and four witnesses- and the costs should be similarly proportional."

Responding Cost Submissions

[26] In a concise retort, Mr. Mladenovic challenges the position of the Defendant that *Walker Estates* stands for what they say it does. The offer to settle in Walker was only $100.00 less than what was agreed to, "a discount of less than 1/8000ths." That was held not to be a compromise, however in the case at bar, the offer extended was discounted 31% from what was achieved. The offer of the plaintiff contains the "requisite element of compromise necessary for a Rule 49 offer."

[27] Counsel references the Court of Appeal decision in *Spek v. Van Alten* (2005) CanLII3941 to illustrate the legitimacy of its position in relation to Rule 49. In the case at bar the offer was open until the commencement of trial as is clear from the correspondence from Mr. Mladenovic to Mr. Veneziano. Allowing Dr. Sewchand to "proceed to trial in the face of that existing offer and now seek immunity from Rule 49.10 simply because he settled damages… would make a mockery of Rule 49.10."

[28] In relation to Dr. Sewchand's reasonable expectation of costs, the decision in *Frazer v. Hoakioja*[4] is referenced. There the court noted that "there must be a balance between the recovery of a fair and reasonable amount for services rendered and disbursements incurred and the reasonable expectation of the paying party."

[29] The costs and disbursements are fair and reasonable, and "are also in accordance with what Dr. Sewchand should have expected in this case." Counsel for the Plaintiffs wrote and continued to write counsel for the Defendant to note that costs were rising and would continue to rise. Indeed towards the end of April 2012, counsel for the Plaintiffs noted that he would be spending all of his time on trial preparation.

[30] In addition Mr. Mladenovic submits that the allegation of over-preparedness by counsel for the Plaintiff, "ignores the reality that plaintiffs invariably spend more time preparing their case for trial than do defendants." Reference is made to further dicta of Justice Moore in *Frazer*.

[31] Likewise Justice Newbould in *Stetson Oil and Gas Ltd. v. Stifel Nicholaus Canada Inc.*[5] stated: "I also realize that it is normal that the work to be done by a Plaintiff to build a case is far more than the work needed to be done by a Defendant to defend the case…."

[32] Justice Newbould also noted that "in fixing substantial indemnity costs it is not appropriate to look in hindsight as to the work done."

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[4] [2008] O.J. No. 5306 (S.C.J.)
[5] (2013) O.N. SC5213(Can LII)

[33] The Plaintiffs agree that Dr. Sewchand had the right to take the case to trial, and do not suggest that it was a vexatious decision. However he proceeded in the face of an offer to settle within the context of the recommendation of the pre-trial judge that he ought to settle. To quote Mr. Mladenovic's position:

> Dr. Sewchand's right to a trial does not trump the Plaintiff's right to be fairly compensated for the costs and expenses incurred to achieve a successful outcome. The Plaintiffs would be prejudiced if, notwithstanding the trial victory, they are deprived of the costs and disbursements they seek. Indeed such an outcome would have a chilling effect on future litigants with relatively modest means.

[34] As for proportionality, Mr. Mladenovic argues that although it is a factor, reasonableness and fairness, complemented by equity, are the most important factors.

[35] Reference is made to Justice Daley's decision in *A& A Steelseal Waterproofing Inc. v. Kalovski* 2010 ONSC 2652. Justice Daley noted the failure of the defendant to make an offer to settle and the context of the outcome of the trial, and said:

> Further, while costs awarded must be reasonable, it is not the case that the mere fact that costs exceed the damages awarded renders such an award inappropriate: (*Bonaiuto v. Pilate Insurance Co.*, 2010 CarswellOnt1039 (Ont. S.C.J.). As has been stated, the fact that costs significantly exceed the amount at stake, at least in the main action, is regrettable but it is well known to counsel that this is one of the risks involved in pursuing or defending a case. As was noted by Lane J. in *163972 Canada Inc. v. Isacco*, [1997] O.J. 838 (Ont.Ct. Gen. Div.): "to reduce the Plaintiff's otherwise reasonable costs on this basis would simply encourage the kind of intransigence displayed by the Defendants in this case."

[36] Mr. Mladenovic ends his reply submissions by saying:

> The words of Justice Daley could just as easily be written in relation to this case. Dr. Sewchand displayed remarkable intransigence in the face of countless efforts to settle by the Plaintiffs and the admonition of a Pre-Trial Judge. His conduct should not be condoned or encouraged by reducing the costs award.

Decision

[37] I have taken pains to set out the position of counsel both to do justice to their very able submissions and to narrow the basis of my reasons.

[38] I accept the position of Mr. Mladenovic for the Plaintiffs. This case, like all cases, presented the Defendant with the right of a defence, and a vigorous one. However I accept that the case had a hallmark of intransigence. Ongoing efforts to settle were made by the Plaintiffs, taking in the time frame of August 05, 2009 culminating in the formal offer to settle of May 04, 2012. The triggers for settlement discussion, all initiated by the Plaintiffs, were focused on the evolution of the action as they saw it and which in turn was accurate.

[39] It is important to note as well that the settlement of damages occurred on the eve of trial. The work had been done. Nothing was really diminished in the work effort of counsel for the Plaintiffs post that time period. There was no excessive demand to settle made by the Plaintiffs.

[40] The preparation for trial had to be intense. The stakes were high, especially for the Plaintiffs. The Plaintiffs' as counsel Mr. Mladenovic notes in his submissions "were forced to incur considerable legal costs and disbursements to secure a decisive trial victory."

[41] It is clear to me that the preparation and costs incurred were not on their face, unreasonable or disproportionate to either the litigation undertaken or the reasonable expectation of the Defendant, Dr. Sewchand. I therefore accept that the time spent and costs incurred by counsel for the Plaintiffs are not excessive. They are rather, reasonable and fair.

[42] I am also cognizant of the fact that proportionality is a live issue in the assessment of any cost determination. However I cannot lose sight of the nature of this case. I adopt the following submission of Mr. Mladenovic:

> It would be a pyrrhic victory if the Plaintiffs are now denied the costs they seek. Denying the Plaintiffs the costs they seek would work a great injustice, since the Plaintiffs (most notably, young Stone Shearer himself,) would be forced to pay these legal costs from the trial award. This would create a chilling effect on future plaintiffs whose cases are meritorious yet modest.

[43] Simply put given all of the factors present in this case the Plaintiffs should not suffer from a diminishing of their just desserts given their complete success at trial. Nor should access to justice be compromised by the pyrrhic victory that would be occasioned in this case if the damages judgment is compromised in its integrity, to pay for trial costs.

[44] In this regard I find that the court should not focus too antiseptically on the individual principles of costs, without the equity of their global application. In this respect the Court of Appeal very recently reminded that:

Each case must be decided in its own context. What has to be determined is an amount that is fair and reasonable in the circumstances and is consistent with the reasonable expectations of the parties. (emphasis added by me)

[45] Applying the need to look at the landscape of context, and the reasonable and fairness guidepost, as well as the reasonable expectation of the parties, I find that the Plaintiffs are entitled to their costs in the amount of $**200,718.25** plus HST of $**26,093.37**, plus Assessable Disbursements of $**52,248.45**.

[46] If counsel wish I can endorse the costs order in Peterborough the week of November 04, 2013.

Mr. Justice H.K. O'Connell

Released: October 29, 2013

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BETWEEN:

STONE SHEARER, a minor, by his Litigation Guardian, Angela Shearer:
ANGELA SHEARER, personally and ROBERT SHEARER

Plaintiffs

– and –

Dr. KENNETH SEWCHAND

Defendant

REASONS FOR JUDGMENT

H.K. O'Connell, J.

Released: October 29, 2013