Costs Issues from Trial

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What quantum of costs can a successful party reasonably expect to be awarded when the anticipated length of the trial was exceeded by a considerable margin? This question was explored by the court in *Sarno v. Murphy,* 2019 ONSC 7008.

Following a three and a half week jury trial, the plaintiff was awarded $36,000 in damages. After application of the statutory deductible, the action was dismissed, and submissions made with respect to costs.

Principles

Following the principles enunciated in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A) and *Davies v. Clarington* (Municipality) (2009), 100 O.R. (3d) 66 (Ont. C.A.), and in keeping with rules 49 and 57 of the *Rules of Civil Procedure,* Justice Varpio considered the objective of awarding costs:

> The overall objective of the costs regime is to award a quantum of costs that is fair and reasonable to the unsuccessful party in the particular circumstances, rather than awarding an amount determined by the actual costs incurred by the successful litigant.[1]

Defendant's Position

The defendant submitted that they were entitled to costs as they were successful in beating their offer at trial. With reference to a few offers having previously been exchanged, Justice Varpio noted the defendant's offer of $200,000 plus costs and disbursements, which was made 30 days prior to the trial.

Though initially seeking substantial indemnity costs, defence counsel conceded during oral arguments that they were entitled to partial indemnity costs of $211,234.92.

Plaintiff's Position

In response, the plaintiff took the position that they should be entitled to their costs, or in the alternative, that no costs should be awarded, given the defendant's conduct at trial. Four arguments were put forward by the plaintiff in support of this position:

1. As per s. 258.5(1) and 258.6(1) of the *Insurance Act,* insurers are obligated to attempt good faith resolutions;
2. Mediation was suggested by the defendants in 2018, scheduled, then postponed. A second mediation date was subsequently abandoned after the defendant failed to confirm same;
3. The defendant failed to negotiate around the pre-trial judge's suggested settlement figure; and
4. The defendant failed to comply with its obligations under s. 258.5(1) and 258.6(1) of the *Insurance Act* (attempting to settle and mediating).

The plaintiff also took issue with the defendant's bill of costs, specifically with respect to preparation and attendance time for one day of discovery, as well as the number of hours spent for trial preparation.

Additional Submissions on Delay

Following written arguments, Justice Varpio requested counsel attend to make oral submissions on whether the defence counsel's conduct had unnecessarily lengthened the trial beyond the two weeks originally scheduled, to the three and a half weeks it ultimately took to complete.

It is of note that Justice Varpio met with counsel in advance of trial to compile a timetable to ensure the timely completion of the trial. During this meeting, the length of cross-examinations were discussed, particularly that of the plaintiff's, in light of four medical experts that were expected to fly in from Toronto, each with their own scheduling limitations.

It was also during this meeting that the court became aware of a motion, which had been brought by the defendant 30 days before trial, to obtain an order requiring production of the plaintiff's employment records. These records were produced on the eve of trial, with one day required for their review.

Court's Decision

Overall, Justice Varpio identified two problems that arose during the course of the trial:

1. Consent for the production order should have been sought 60 days before trial; and
2. The cross-examination of the plaintiff exceeded the defendant's anticipated length of time "by a considerable margin," which was compounded by the trial having to be adjourned one afternoon as a result of the plaintiff breaking into tears.

While Justice Varpio commended both counsel for their efforts to work together on the rescheduling of the witnesses, these issues ultimately resulted in the timetable becoming "completely out of orientation."[2]

The combination of these issues was found to have lengthened the trial 1.5 weeks beyond the time originally scheduled, which the plaintiff was not to be held responsible for.

Of note, the defendant was also found to have lengthened the trial unnecessarily by failing to have a good reason for cancelling the second mediation. It was held that the plaintiff should not have to pay costs associated with the failed mediation.

In consideration of the totality of the circumstances, the plaintiff was ordered to pay $150,000 all-inclusive to the defendant.

Conclusion

In advance of trial, thoughtful consideration should be given to the anticipated length of witness testimony, as well as any potential scheduling conflicts that may arise for expert witnesses, so as to ensure the trial is completed with the time allotted by the court.

Productions should be sought be well in advance of trial to avoid potential delays during the trial.

Should a party's conduct be found to have unnecessarily delayed the trial, this may be taken into consideration when assessing an award of costs, even to a successful party.

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[1] *Sarno v. Murphy,* 2019 ONSC 7008 (Ont. S.C.) at para 2
[2] *Sarno v. Murphy,* 2019 ONSC 7008 (Ont. S.C.) at para 10