

Offer of Without Costs Dismissal: Defendant Did Not Play Hardball

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Defendants and insurers are sometimes criticized if they refuse to offer a monetary amount to settle an action. However, a recent court decision shows that they should not fear doing so if their position is supportable.

In [Mundinger v. Ashton](#), 2020 ONSC 2024, Justice Charney referred to an Ontario Court of Appeal decision, wherein it was stated: “Under our system defendants are entitled to put the plaintiff to the proof, and there is no obligation to settle an action”.

Following an 11 day jury trial arising from an automobile accident, the plaintiff was awarded zero after applying the deductible and deducting collateral benefits. The defendant sought costs of \$160,000 all-inclusive.

Prior to trial, the defendant offered to settle on the basis of a without costs dismissal of the action. The plaintiff argued that the defendant played hardball and did not attempt to reasonably resolve the matter. The plaintiff also argued that any costs should be confined to the \$100,000 limits of an adverse costs insurance policy.

Justice Charney held that the existence and the amount of adverse costs insurance is an irrelevant factor in the fixing of costs. In this regard, His Honour stated:

Permitting a plaintiff to escape the costs consequences of an unsuccessful claim by limiting the unsuccessful plaintiff’s costs exposure to the amount of the plaintiff’s or law firm’s adverse costs insurance coverage would undermine the purpose of costs to promote settlement. It would permit a plaintiff to ignore reasonable offers to settle and take their chance at trial without risk of adverse costs consequences.

Justice Charney also indicated that the defendant’s settlement offer was perfectly reasonable in light of the result of the case. His Honour stated: “The defendant’s offer to

settle on a without costs basis contained a true element of compromise, and this cannot, in any sense, be described as ‘playing hardball’”.

The defendant was awarded costs in the requested amount of \$160,000.

Therefore, where circumstances warrant, an offer of a without costs dismissal is appropriate and represents compromise.

A defendant is entitled to put a plaintiff to the proof of his or her case. If the defendant's assessment of the case is correct, then he or she should generally be awarded costs. If the defendant's assessment of the case is wrong, then he or she will likely end up paying for it by an adverse costs award.

Taking a strong position does not necessarily translate to being unreasonable. Reasonable people can disagree on the merits of a case. This applies to defendants and plaintiffs alike.