

Bifurcated Trial, Bifurcated Offers, and Bifurcated Costs

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In a recent costs decision in *Blaese v. Metcalfe*, 2020 ONSC 3432, the Court dealt with some interesting issues regarding offers to settle in the context of bifurcated trials.

The parties in the action agreed to bifurcate the issues of liability and damages, and a trial on the issue of liability proceeded before a jury. The jury apportioned liability 92% against the plaintiff and 8% against the defendant.

Prior to trial, the defendants offered a without costs dismissal. The plaintiff offered to settle for \$300,000 plus interest and costs.

Justice Edwards noted that neither party made an offer that dealt exclusively with liability. He commented that, where a case proceeds to trial only on the issue of liability, it would assist the Court if the parties exchanged offers that dealt exclusively with the liability issue.

The plaintiff sought costs on a partial indemnity basis of \$120,000 arguing that the defendants' insurer had taken a "scorched earth approach" similar to those taken by insurers in a number of other decisions in which the Court ordered substantial indemnity costs. The plaintiff further argued that they were the successful party regardless of the fact that they succeeded in establishing only 8% liability against the defendant.

The defendants took the position that the Court should award costs in the amount of \$40,000 on the basis that the detailed breakdown of costs provided by the plaintiff demonstrated that a significant amount of the costs claimed were in relation to the issue of damages. The defendants further argued that the Court must consider only the conduct of the insurer as it relates to the particular action and not the conduct of insurers in unrelated matters.

Justice Edwards found that the plaintiff's bill of costs conflated the issues of liability and damages and held that, taking into account all the various principles regarding costs awards, an award of costs in the amount of \$55,000 plus disbursements was appropriate.

Justice Edwards commented that, particularly in the context of the COVID-19 pandemic, judicial economy is of utmost importance and both parties in this action should be commended for agreeing to bifurcate the trial.

His Honour suggested that the Civil Rules Committee should consider an amendment to the *Rules of Civil Procedure* that would allow the Court to bifurcate trials on the issues of liability and damages absent the consent of the parties.

A key takeaway from this decision is that, particularly in the context of the COVID-19 pandemic, parties should consider bifurcating trials where the result would be to save judicial resources.

Further, when the trial of an action has been bifurcated, the parties should deliver offers to settle that address the bifurcated issues separately so that costs can be assessed taking into account the bifurcated proceedings. For example, in a bifurcated trial dealing with liability first, the parties should serve offers with a liability percentage rather than a damages figure.

Justice Edwards' decision also indicates that the parties should submit costs outlines that reflect the bifurcation of issues, not the litigation as a whole.