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COST PROPORTIONALITY NOT ALWAYS KIND TO INJURED PLAINTIFFS

Darcy R. Merkur
PARTNER I THOMSON, ROGERS

When it comes to the issue of legal costs, the proportionality concept is a welcome feature in civil litigation but it can serve to penalize personal injury plaintiffs with modest personal injury claims.

For example, in *Mayer et al v. Shemon et al*, the plaintiffs were awarded $140,600 by a jury at trial, but had their partial indemnity cost claim of $422,055.41 denied by the Honourable Mr. Justice Ian F. Leach of the Ontario Superior Court of Justice in his decision released April 28th, (2014) ONSC 2622 (S.C.J.).

In his reasons denying costs to the plaintiffs, Justice Leach reviewed all of the Rule 57.01 factors in relation to cost awards.

Justice Leach highlights the overriding principle of reasonableness when it comes to the issue of costs. He then proceeds to review in detail the conduct of the trial and raises various criticisms of plaintiffs' counsel's approach – for example holding plaintiffs' counsel largely responsible for the extended length of trial, estimates by plaintiffs' counsel at 2 weeks and lasting close to 4 weeks.

The undercurrent to the court's reasoning in denying costs to the plaintiffs in *Mayer*, appears to be the fact that plaintiffs' counsel believed the case was a sizeable one, and pursued it as such, when defence counsel and the jury felt otherwise. For example, Justice Leach in reference to the plaintiffs' unwillingness to comprise from their settlement position, states that, "the plaintiffs seem to have engaged in no meaningful risk-analysis whatsoever, nor any corresponding willingness to compromise their claims in any degree, for the purpose of resolving the parties' dispute without trial."

In *Mayer*, plaintiffs' counsel had made a formal offer to settle for $1.5 million in damages after having successfully moved before trial to increase the quantum claimed. Defence counsel, on the other hand, made an all-inclusive offer of $200,000 as well as an offer for damages totalling $150,000 (broken down as $115,000, $15,000 and $20,000 to each of the various plaintiffs), plus partial indemnity costs.

Despite an unwelcome modest jury award, the plaintiffs claimed partial indemnity costs of $265,393.21 for fees inclusive of tax, and $156,662.20 for disbursements inclusive of tax, for a total all-inclusive cost claim of $422,055.41.

Claiming that they beat their offer to settle, defence counsel claimed their partial indemnity costs in the amount of $181,406.76.

In considering defence counsel's request for costs, Justice Leach ruled that defence counsel failed to establish they beat their formal offer given that their initial offer was improperly framed as an all-inclusive one and given that their subsequent offer did not state whether the offer was severable so as to allow each plaintiff to accept the amount offered.

In the end, Justice Leach ruled that justice would be best served in this case by denying costs to both sides and, accordingly, no cost order was made.

The *Mayer* case must not been seen as a precedent for denying cost claims of this magnitude in personal injury cases were the damage amounts involved are far less than the amount claimed for costs.

Personal injury litigation is extremely expensive. Even the simplest case is expensive to properly present at trial. With recent court decisions challenging the

admissibility of treatment reports that do not formally comply with the expert report rules, disbursements costs have increased drastically.

Access to justice requires personal injury claimants to be able to access the courts. For cases were the amounts involved are expected to be in the $100,000 to $250,000 range, the partial indemnity costs claimed will often fairly and properly exceed the amounts awarded.

The offer to settle rules are there to keep litigants acting reasonably. Defence counsel and insurers know the costs of trial and should not be surprised when cost claims exceed the amounts recovered. The solution is for defence counsel to make more reasonable offers and to make them earlier.

While improvements to the Rules of Civil Procedure to help reduce the cost of trial are welcome, until such rules are in place the cost of a medium size personal injury trial will continue to be out of proportion to the cost of the damages claimed and this reality must not serve to prejudice or constrain access to justice for personal injury claimants.

Darcy Merkur is a partner at Thomson, Rogers in Toronto practicing plaintiff's personal injury litigation, including plaintiff's motor vehicle litigation. Darcy has been certified as a specialist in Civil Litigation by the Law Society of Upper Canada and is the creator of the Personal Injury Damages Calculator.

For further inquiries on this article, please contact the author:

Darcy Merkur
dmerkur@thomsonrogers.com

or visit his web page at:
http://www.thomsonrogers.com/darcy-merkur

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THOMSON, ROGERS
Suite 3100, 390 Bay Street,
Toronto, ON M5H 1W2
Tel 416-868-3205
Toll Free 1-888-223-0448
Fax 416-868-3134

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