CITATION: Carr v. Modi, 2016 ONSC 1300
COURT FILE NO.: CV-10-394904
DATE: 20160419

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PHILLIP CARR

Plaintiff

AND:

NILAM R. MODI AND RAJENDRA MODI

Defendants

BEFORE: Lederer J.

COUNSEL: *David Wilson*, for the Plaintiff

M. Davies, for the Defendants

HEARD: February 17, 2016

ENDORSEMENT

[1] This is a motion brought by the plaintiff to resolve three outstanding issues that will complete a settlement that the parties have entered into.

[2] The plaintiff, Phillip Carr, began an action for damages that were the result of a motor vehicle accident. The accident took place on January 30, 2008. The action was commenced on January 12, 2010. The defendants delivered a Statement of Defence, dated July 30, 2010. The matter was scheduled for trial, to run for 15 days, beginning on September 28, 2015. On September 18, 2015, the defendants made an offer to settle. It was accepted by the plaintiffs on September 25, 2015.

[3] The settlement called for the defendants to pay $42,500 "...for all damages net of collateral benefits received or available, and net of any statutory accident benefits received or available."[1] As it happens, the plaintiff had made an application for accident benefits from his motor vehicle insurer. As a result, he received a weekly income replacement benefit in the amount of $326.45. The insurer terminated the benefit on May 20, 2009. The plaintiff applied for

[1] Offer to Settle, September 18, 2015, at para. 2.

mediation and, subsequently, arbitration. The primary claim was for income replacement benefits for the period after May 20, 2009. A hearing was held. The Arbitrator made and released her decision on July 23, 2010. She was satisfied that the plaintiff met the test of entitlement. Payment of his income replacement benefit was renewed and continued. Thus, the settlement was taken to be net of the value of the benefit that was the subject of the award of the Arbitrator.

[4] The settlement called for the defendant to include pre-judgment interest on the $42,500 "...as agreed, or as determined by the Court."[2] It also dealt with costs. It required that the defendants pay to the plaintiff "...his partial indemnity costs, disbursements and HST to be agreed upon or assessed to the date of this offer".[3]

[5] The parties have been unable to agree as to the basis on which pre-judgment interest should be calculated or as to the value of the costs. The three issues that remain reflect on these questions: The first issue is the rate at which pre-judgment interest is to be charged; the second and third issues concern the value of the costs to be paid. The first of these considers whether any of the costs of the arbitration concerning the income replacement claim should be included as a cost treated in the settlement, and the second refers to the appropriate quantum of costs.

[6] At the time of the accident and when the action was started, pre-judgment interest was assessed pursuant to the *Courts of Justice Act*, s. 128(2)[4]:

> Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66(2)(w).

[7] Rule 53.10 of the *Rules of Civil Procedure*[5] provides, as follows:

> The pre-judgment interest rate on damages for non-pecuniary loss in an action for personal injury is 5 per cent per year.

[8] It was acknowledged by the defendants that the entirety of the settlement was attributable to non-pecuniary loss. Accordingly, if things had remained as they were, there would be no question the rate of pre-judgment interest would be 5 per cent.

[9] As it is, there has been a change. On January 1, 2015, the *Insurance Act* was amended. Section 258.3(8.1) reads:

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[2] *Ibid*, at para. 3.
[3] *Ibid*, at para. 4.
[4] R.S.O. 1990, c. C. 43.
[5] R.R.O. 1990, Reg. 194

> Subsection 128 (2) of the *Courts of Justice Act* does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss in an action referred to in subsection (8).

[10] Subsection (8) of section 258.3 of the *Insurance Act*[6] states:

> In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, no pre-judgment interest shall be awarded under section 128 of the *Courts of Justice Act* for any period of time before the plaintiff served notice under clause (1)(b).

[11] Accordingly, s. 128(2) no longer has application to a claim for non-pecuniary loss arising from the use or operation of an automobile. In such a situation, there would no longer be recourse to r. 53.10 and the 5 per cent interest it directs. To calculate the rate of interest, it is necessary to go to the "default position" provided for in the *Courts of Justice Act.* Section 128(1) provides for the payment of pre-judgment interest:

> A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the *prejudgment interest rate,* calculated from the date the cause of action arose to the date of the order.
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> [Emphasis added]

[12] "Pre-judgment interest rate" is a defined term. Section 127(1) identifies "pre-judgment interest rate" as:

> …means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point.

[13] As already noted, this action commenced on January 10, 2012. The rate of pre-judgment interest provided for in the first quarter of 2012 was 1.3%.

[14] Given the wording of subsection 258.3(8), the rate can be applied and pre-judgment interest claimed from the date of the notice of claim referred to in subsection 258.3(1)(b):

> An action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall not be commenced unless,

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[6] R.S.O. 1990, c. I. 8

. . .

> (b) the plaintiff served written notice of the intention to commence the action on the defendant within 120 days after the incident or within such longer period as a court in which the action may be commenced may authorize, on motion made before or after the expiry of the 120-day period.

[15] The issue to be answered is which of the two prospective rates of interest is applicable to the settlement arrived at between the parties. The plaintiff submits that the applicable rate remains the 5 per cent that was in place prior to the January 1, 2015 amendments to the *Insurance Act*. The impact of the change is substantive. It affects in a material way the rights of the plaintiff. As such, it cannot have retrospective effect unless this is specifically provided for in the legislation. This is not so provided.

[16] Counsel for the defendant takes a different view. As she sees it, the change is merely procedural and, thus, can have, and does have, retrospective effect. In making this submission, counsel for the defendant relies on *Cirillo v. Rizzo*.[7] Drawing on a decision of the Court of Appeal, *Somers v. Fournier*[8], the judge distinguished between "entitlement" to pre-judgment interest which he found to be substantive and "quantification" which he identified as procedural. In *Somers v. Fournier*, the following observation was made:

> General conflict of laws principles regarding damages distinguish between an entitlement to damages and the quantification or measurement of damages. Remoteness and heads of damage are questions of substance governed by the lex loci delicti[9] whereas quantification or measurement of damages is a question of procedure governed by the lex fori.[10] [11]

[17] Since subsection 258.3(8.1) of the *Insurance Act* deals with quantification, that is, the effect of the calculation of the rate of pre-judgment interest, it is procedural and, accordingly, operates retrospectively.[12] On this basis, the new, and in this case lower, rate of interest would apply.

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[7] 2015 ONSC 2440.
[8] [2002] O.J. No. 2543; 60 O.R. (3d) 225.

[9] This is short for *lex loci delicti commissi* which in conflict of laws refers to the law of the place where the delict [tort] was committed
[10] In the conflict of laws, this refers to the laws of the jurisdiction in which a legal action is brought.[10]
[11] *Somers v. Fournier, supra*, (fn. 8), at para. 51.
[12] *Cirillo v. Rizzo, supra*, (fn. 7), at paras. 31 and 34.

[18] In *Cirillo v. Rizzo*, it was suggested that this is confirmed by the fact that the initial 5 per cent rate of interest originates in the *Rules of Civil Procedure.* "Counsel contends that the Rules of Civil Procedure are the means or mechanism by which the end or objective inherent in a substantive right or obligation is conferred or imposed, as the case may be, and that Rule 53.10 is a procedural rule."[13] On this basis, it was submitted that s. 258.3(8.1) of the *Insurance Act* amended a procedural rule. Accordingly, the amendment is procedural in nature and has a retroactive effect.

[19] To my mind, the better view is the one taken by counsel for the plaintiff. It is supported by the case law. *El-Khodr v. Lackie*[14] considered s. 258.3(8.1) of the *Insurance Act* and found that it was substantive law.[15] The judge found that *Cirillo v. Rizzo* was wrongly decided. It was based on a misreading of *Somers v. Fournier.* In that case, the court was dealing with a conflict of laws issue. Among other things, it was required to decide whether costs and pre-judgment interest should be decided pursuant to Ontario or New York State law. The question of whether the Ontario rule was substantive or procedural was determinative.[16] As referenced in *El-Khodr v. Lackie,* the Court of Appeal, in *Somers v. Fournier*, held that issues with respect to costs are considered to be procedural. They are incidental to the determination of the rights of the parties. Costs are not part of the *lis* between them.[17] On the other hand, the court in *Somers v. Fournier* found that pre-judgment interest is a matter of substantive law.[18] In setting aside the finding from *Cirillo v. Rizzo*, the court, in *El-Khodr v. Lackie*, referred to the following quotation from the Supreme Court of Canada to explain the difference between procedural matters and substantive law:

> The forum's procedural rules exist for the convenience of the court, and forum judges understand them. They aid the forum court to 'administer [its] machinery as distinguished from its product': Poyser v. Minors (1881), 7 Q.B.D. 329 (C.A.) at p. 333, per Lush L.J. Although clearcut categorization has frequently been attempted, differentiating between what is a part of the court's machinery and what is irrevocably linked to the product is not always easy or straightforward. . . .
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> [I]n the conflicts of law field . . . the purpose of substantive/procedural classification is to determine which rules will make the machinery of the

[13] *Ibid*, at para. 25.
[14] [2015] O.J. No. 4037, 2015 ONSC 4766.
[15] *Ibid*, at para. 47: "I cannot see how s. 258.3(8.1) could be considered anything but substantive."
[16] *Ibid*, at para. 33.
[17] *Ibid*, at para. 37, referring to *Somers v. Fournier, supra*, (fn. 8), at paras. 19 and 20.
[18] *Ibid*, at para. 38, referring to *Somers v. Fournier, supra*, (fn. 8), at para. 38.

> forum court run smoothly as distinguished from those determinative of the rights of both parties.[19]

[20] I also point out that the fact that r. 53.10 appears in the *Rules of Civil Procedure* does not render it procedural in nature. It is not where it appears, but what it does, that defines its nature as substantive and not procedural. In effect, the rule is incorporated into legislation by reference in s. 128(2) of the *Courts of Justice Act.*

[21] I find that s. 258.3(8.1) is substantive in nature. It does not operate retroactively. The interest rate of 5 per cent on pre-judgment interest, as found in r. 53.10, continues to apply. There are other cases which support this result.[20]

[22] Finally, on the issue of the rate of pre-judgment interest, I note that counsel for the defendants referred to s. 130 of the *Courts of Justice Act*:

> (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or section 129
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> (a) disallow interest under either section;
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> (b) allow interest at a rate higher or lower than that provided in either section;
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> (c) allow interest for a period other than that provided in either section.
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> (2) For the purpose of subsection (1), the court shall take into account,
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> (a) changes in market interest rates;
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> (b) the circumstances of the case;
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> (c) the fact that an advance payment was made;
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> (d) the circumstances of medical disclosure by the plaintiff;
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> (e) the amount claimed and the amount recovered in the proceeding;

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[19] *Ibid*, at para. 34, quoting from *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, 1994 CanLII 44. (SCC), [1994] 3 S.C.R. 1022, at p. 1072.
[20] *Cobb v. Long Estate,* 2015 ONSC 6799; and, *Vickers v. Palacious* 2015 ONSC 7647.

(f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and

(g) any other relevant consideration.

[23] She then drew the court's attention to the various rates of interest that have been applied in the pre-judgment context and noted that, with the exception of 2007 and 2008, it had been some years since the rate had approached, much less reached, 5 per cent (in the first quarter of 2001, it was 6.0 per cent). With this in mind, particularly bearing in mind that the court is to take into account "changes in the market rate", counsel submitted that it was appropriate that I exercise the court's discretion and impose a lower rate of interest. I decline to do so. The legislature, when it passed the amendments to the *Insurance Act*, could have determined to make the new rates retroactive or to lower the 5 per cent. It chose not to do so. I can see no reason why I should displace a decision of the legislature, especially one that has been so recently made.

[24] I turn now to the question of costs. The settlement provides the defendants shall pay the plaintiff's partial indemnity costs, disbursements and HST, to be agreed upon or assessed to the date of this offer. No agreement was reached. The parties asked the court to "assess" the costs.

[25] The decision of the Arbitrator who considered the claim for an income replacement benefit encouraged the parties to resolve the issue of "expenses" understood to be the costs of the proceeding. They were unable to do so. As a result, a telephone conference call took place and written submissions were delivered. "The criteria for awarding expenses and the amount of expenses which an arbitrator may order are set out in Section F of the *Dispute Resolution Practice Code*…."[21] The provisions of the *Dispute Resolution Practice Code* restrict hourly rates recoverable by insured persons against insurers to a maximum hourly rate of $150. There are restrictions and limitations with respect to payments referable to disbursements.[22] A Bill of Costs was prepared and delivered to the insurer in which fees were claimed in the amount of $18,289.05, as well as a claim for disbursements in the amount of $11,444.81, both inclusive of HST. The Arbitrator awarded "expenses" of $15,435 for fees and $11,234.63, both inclusive of HST, for a total of $26,669.63.[23] Counsel for the plaintiff does not think that this is enough. In his request for costs, he seeks a further amount in recognition of the cost of the arbitration.

[26] On an initial review, this seemed peculiar. The Arbitrator who conducted the proceeding, guided by the *Dispute Resolution Practice Code,* has determined the amount she concluded appropriate. How can it be that the court, which had no involvement in the arbitration, could be asked to supersede what she has done and impose a further order for more costs? For motor

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[21] Decision on Expenses, before Judith Killoran, at p. 2: The *Dispute Resolution Practice Code* is said to reflect the Schedule to R.R.O. 1990, Reg. 664 under the *Insurance Act*.
[22] Affidavit of Heidi Ann Buchanan, sworn January 28, 2016, at para. 19.
[23] Arbitration Order, dated March 10, 2011.

vehicle accident claims, Ontario has a mixed system: partly no-fault, partly tort. The arbitration was with respect to the plaintiff's claim for income replacement under the Statutory Accident Benefits Schedule ("SABS"), the no-fault part of the scheme. To the extent that an injured party is successful in an arbitration such as the one that took place here, it inures to the benefit of the tortfeasor because it lowers his or her liability, in this case for any claim for loss of income. An injured party cannot be compensated twice for the same loss. The value of the income replacement benefit is deducted from any award for loss of income in the tort claim. Counsel for the plaintiff submitted that, this being so, it is not out of place to expect the defendant to pay some of the costs of a proceeding that results in a benefit that accrues to any contiguous tort claim. Counsel provided case law which supports this request.

[27] In one case, Madam Justice D. Wilson observed that the payment of accident benefits is "…inextricably linked to the action against the driver because the defendant insurer can claim a deduction for amounts the Plaintiff receives from her own insurer. Thus, the solicitor for the Plaintiff is bound to pursue his client's entitlement to various benefits or face the argument at trial from the tort insurer that the Plaintiff could have and should have received benefits from the no-fault insurer."[24] The judge went on to quote, and agree with, another judge in another case:

> …In my view such pursuits are part and parcel of the Plaintiff's obligations in an action against the tortfeasor by reason of the releases available to the tortfeasor under the Insurance Act and only in any compelling circumstances should the unsuccessful tortfeasor escape responsibity to indemnify the Plaintiff for the costs of such pursuits…".[25]

[28] Justice Stinson came to a similar conclusion:

> It is quite something else, however, for the tortfeasor (or more accurately its insurer) to reap the benefits of the risk and expense undertaken by the plaintiff in commencing legal proceedings and risking adverse cost consequence (not to mention her own legal expenses) pursuing a claim for unpaid IRBs or STDs or LTDs, without the tortfeasor/insurer bearing the costs of accomplishing that result. To follow the defendant's approach would be to place an injured plaintiff who has recourse to IRBs or LTD coverage in a worse position than someone who does not. Such a result would be illogical.[26]

[29] This is not to say that such costs will always be included in any award that is made. Madam Justice D. Wilson has added a cautionary note:

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[24] *Ananthamoorthy v. Ellison,* 2013 ONSC 4510, at para. 21.
[25] *Ibid*, at para. 22, quoting from *Moodie v. Greenway*, [1997] O.J. No. 6525, at p. 2.
[26] *Anand v. Belanger*, [2010] O.J. No. 4064; 90 C.C.L.I. (4th) 138, at para. 32.

> …Tort defendants are not involved in the SABS process and have no ability to control it. It would be unfair as a general proposition, in my view, to lay the cost of the accident benefits pursuit at the feet of the tort defendants. There may be times when a tort defendant derives a clear benefit from the accident benefits matters by way of a deduction of the amounts from damages, and in those circumstances a judge fixing costs in a tort action may consider it appropriate that the tort defendant pay the costs incurred by the plaintiff in securing the benefits. At other times, however, there may be 'compelling circumstances,'… where it would be inappropriate to visit the costs of dealing with other insurers on a defendant in a tort claim. There is no hard and fast rule. [27]

[30] In the case I am asked to decide, the value of the income replacement benefit was said to be $95,000. The case settled for $42,500. Surely, it stands to reason that the plaintiff would have looked to the tortfeasor for a larger settlement had there been no statutory accident benefits to fall back on. The $95,000 would be deducted from any income loss claim made as part of the tort claim (s. 267.8(1)) of the *Insurance Act*). This being so, the tortfeasor is saved from that liability by the successful accident benefits claim.

[31] To my mind, this is a circumstance where it is appropriate for the tortfeasor to pay for some part of the costs of the arbitration.

[32] The cost of the accident benefit claim was:

> (1) for legal fees – $56,006.18 less $15,435.00, payable by the accident benefit insurer, leaving a net cost of $40,571.18; and,
>
> (2) for disbursements – $17,530.90 less $11,234.63, payable by the accident benefit insurer, leaving a net cost of $6,296.27.

[33] The plaintiff seeks $24,218.25 for fees. The claim for disbursements is included with the disbursements claimed as a whole and not divided between the arbitration and the tort claim. No objection was taken on the basis of the hours counted or hourly rates charged. Given the reduction from the actual cost, I find that, in the circumstances of this case, the costs award should include $24,218.25 on account of fees for the arbitration.

[34] This leaves the final concern, the overall assessment of costs. The plaintiff asks for a total of $114,799.11, made up of fees for the tort claim of $56,840.98, fees for the arbitration of $24,218.25 and disbursements after the deduction of the $11,234.63 paid by the accident benefits insurer of $33,739.88. Counsel for the defendants does not argue that the hours recorded were not worked or that the rates charged are too high for the counsel involved. Rather, she submitted

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[27] *Hoang v. Vicentini*, 2014 ONSC 5893, at para. 66.

that the overall costs, when measured against the results, are too high. It defeats the principle of proportionality: an "…award of costs must be proportionate to the amount recovered".[28]

[35] In this case, when the costs of the arbitration are removed, the costs that remain are the fees for the tort claim, $56,840.98, and the disbursements for the tort claim. The latter is calculated by taking the total of the cost of the disbursements, being $39,800.45 plus HST of $5,174.06 minus the amount paid by the accident benefits insurer, being $11,234.63, minus the amount of the disbursements associated with the arbitration that remained, being $6,296.27, leaving a total of $27,443.61.

[36] The total cost would be $56,840.98 + $27,443.61= $84,284.59.

[37] The benefit attributed to that cost would be $30,000 (the deductible) + $42,500 = $72,500.

[38] I agree with counsel for the defendant, remembering that the costs of the arbitration have been dealt with separately, the remaining costs are too high. The costs are more than the award.

[39] In recognition of the principle of proportionality, I reduce the costs attributable to the tort claim by $15,000, leaving an award of $84,285.59 – $15,000 = $69,285.59.

[40] Accordingly, I assess the costs to be awarded as: for fees of the arbitration $24,218.25 + for disbursements of the arbitration $6,296.27 + for both fees and disbursement of the tort claim $69,285.59 = $99,800.11.

[41] I order: (1) pre-judgment interest will be calculated using a rate of 5%; and (2) costs are assessed to be paid by the defendants to the plaintiff in the amount of $99,800.11.

[42] No submissions were made as to the costs of this motion. If the parties are unable to agree, I will consider written submissions on the following terms:

1. On behalf of the plaintiff, no later than 15 days following the release of these reasons. Such submissions are to be no longer than 3 pages, double-spaced, exclusive of any Bill of Costs, Costs Outline or case law that may be provided.

2. On behalf of the defendants, no later than 10 days thereafter. Such submissions are to be no longer than 3 pages, double-spaced, exclusive of any Bill of Costs, Costs Outline or case law that may be provided.

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[28] *Mullin v. Lagace*, 2015 ONSC 4267, at para. 24.

3. On behalf of the plaintiff, no later than 5 days thereafter, in reply, if necessary, and to be no longer than 1 page, double-spaced.

LEDERER J.

Date: 20160419