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INSURER REJECTS REASONABLE OFFER TO SETTLE AND IS HIT WITH A MASSIVE COST AWARD

In a recent costs decision, *Aviva Canada* (*"Aviva"*) was hit with a $237,017.50 substantial indemnity cost award. Madam Justice Sanderson, following a jury trial between the Plaintiff, *Maria Persampieri*, and various defendants insured by *Aviva*, rendered the decision. The jury in the action had awarded the Plaintiff damages of $20,414.83 following an earlier trial.

The decision involves an elderly Plaintiff who was injured in a motor vehicle accident in 2009. By the time the case got to trial in 2017, the Plaintiff was 84 years old. The decision is significant because the Plaintiff made a formal offer to settle her claims prior to trial for the reasonable sum of $10,000, plus costs. According to the trial judge, "the insurer here rejected a Plaintiff's offer that would have made it possible to pay minimal damages."

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In Ontario, the unsuccessful party in litigation is typically required to pay part of the successful party's legal costs. In circumstances where the successful party offers to settle a claim for less than the amount they are awarded at trial (as was the case here), the losing party is required to pay nearly all of the successful party's legal costs.

In the 8 year lead up to trial, *Aviva* made no offers to settle the claim. To the contrary, *Aviva's* counsel advised Plaintiff's counsel that it had an internal system of assessing motor vehicle accident claims and that it would not be willing to offer even $1.00 to resolve the claim. Plaintiff's counsel was advised that once this internal decision was made nothing along the road to trial could be done to alter that.

Fortunately, for the Plaintiff she was successful at trial and the jury awarded her an amount that exceeded her offer to settle by more than 2 times.

After the trial, submissions were made regarding the insurer's payment of the Plaintiff's legal costs. The Plaintiff, having "beat her offer", rightfully sought substantial indemnity costs for the significant legal expenses associated with advancing her claim through trial.

Aviva argued that any costs awarded should be modest and not disproportionate to the amount awarded by the jury.

The Judge noted that the proportionality principle is generally invoked to foster access to justice, "however a strict application of the proportionality principle here could work against the achievement of that goal and have the opposite effect," as *Aviva* was a "sophisticated insurer that made a tactical decision to reject a Plaintiff's formal Rule 49 Offer to Settle, understanding the risk in costs that it was taking by doing so."

The Judge astutely stated that to sanction under compensation of the Plaintiff's costs that were legitimately incurred could generally discourage plaintiffs with modest claims, from pursuing them at all.

The Judge was also critical of *Aviva's* early and unalterable decision in the litigation not to pay any tort damages. Justice Sanderson stated that, "adoption of such an unalterable decision making process would render meaningless and make a mockery of the pretrial resolution process, aimed as it is, at encouraging and effecting settlement to avoid unnecessary trials."

The Judge concluded the discussion by stating that, "total unwillingness to reassess/discuss settlement based on full information and advice should not be sanctioned in any way (including by sheltering insurers from the foreseeable costs consequences of such a decision should it fail to yield a result favourable to an insurer in a particular case.)" In my view, this decision harshly (but correctly) indicts the insurer's approach and conduct in this litigation.

From my perspective, there are many interesting aspects to this decision, including the following:

1. **The Judge's criticism of an insurer for a "total unwillingness to reassess/discuss settlement based on full information and advice."**

   The decision draws into focus the strategy of the insurer of not only resisting a claim that turned out to be meritorious, but adopting an approach at the outset (8 years prior to trial) that it would not reconsider along the way. The Judge strongly and correctly disparaged the very nature of entering into a litigation process with a closed mind, and unwillingness to consider new information and assess your position accordingly.

2. **The Plaintiff's willingness to take a substantial risk.**

   It cannot be lost that this 84 year old Plaintiff was taking a substantial risk in pursuing this modest claim to trial. As easily as she beat her offer by $10,000, she could have been awarded a sum less than her offer. In that case, the insurer would have insisted on its costs. The unbalanced risk/benefit proposition ($20,000 in damages awarded versus the potential to have to pay 6 figures in legal costs) would put enormous pressure on most plaintiffs. It appears that this risk proposition was somewhat balanced by the Plaintiff's decision to purchase insurance protecting her from adverse costs in this case.

3. **The outcome demonstrates the primary problem with the current contingency fee rules under the Solicitors Act when pursuing modest claims.**

   If Plaintiff's counsel was retained under a contingency fee agreement, their fees would likely be limited to a percentage of the $20,414.83 award (by way of example, approximately $6,125 based on a 30% fee percentage).

   The current rules regarding contingency fees require that the costs awarded would belong to the Plaintiff. It would be challenging for any accident victim to find a lawyer willing to invest hundreds of thousands of dollars of their time for the possibility of such a modest legal fee based on such an arguably small injury. This creates an access to justice issue with respect to the pursuit of valid claims that are modest. A reasonable observer would surely agree that the costs awarded against the insurer should help offset the Plaintiff's bill from his or her lawyer in these circumstances. This would provide some assurance to the lawyers of appropriate payment for legal fees in the event of a successful outcome, while at the same time fostering the important access to justice objective for the injured person.

4. **Could this have all been avoided?**

   Before the parties stepped into the courtroom for a 2.5-week trial after 8 years of litigation, they were effectively fighting over about $10,000.00 (and the legal costs incurred prior to trial). The Plaintiff was asking the jury for a substantial award and the insurer was asking for the Plaintiff to be shut out entirely. The real gap between the parties (based on their pre-trial offers) was modest especially considering the risks involved. Surely, there has to be a better way of resolving a claim like this than to go through an extended 8 year litigation process. It wasn't ideal for the 84-year-old Plaintiff, the insurer (who had substantial indemnity costs imposed against it), the backlogged court system or the public (6 members of the public were on this jury).

   When a decision like this is delivered, everyone involved in the litigation of personal injury claims needs to look in the mirror and ask how they can do better for their clients and how outcomes like this can be avoided in the future. ■■■

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HAVE QUESTIONS ABOUT THE STATUTORY ACCIDENT BENEFITS CHANGES, NEW CATASTROPHIC DEFINITIONS OR THE LAT APPLICATION?

At Thomson, Rogers we pride ourselves on keeping you informed. To arrange a Thomson, Rogers' Lunch and Learn, contact **Joseph Pileggi** at **416-868-3190** or jpileggi@thomsonrogers.com

UPCOMING EVENTS 2018

EVENTS
2018

April 7-8 Spring Motorcycle Show – International Centre, Toronto.
Stop by the Thomson, Rogers exhibit booth. For more information, visit thomsonrogers.com.

February 15 Spinal Cord Injury Ontario Ski & Snowboard Day – Craigleith Ski Club, Blue Mountains – Join Thomson, Rogers' Craig Brown, Ian Furlong and Joseph Pileggi for a day of fun.

February 28 Brain Injury Association of Sault Ste. Marie – Quattro Hotel & Conference Centre – Thomson, Rogers' David MacDonald and Darcy Merkur will be presenting.

May 2-4 Hamilton Health Sciences 25th Annual ABI Conference – Hamilton Convention Centre – Thomson, Rogers is proud to be the Platinum Sponsor.

As a member of the Personal Injury Alliance (PIA Law), Thomson, Rogers is proud to sponsor the following events:

February 11 BIST Inaugural Afternoon Tea & Mindfulness Workshop -
The Old Mill Toronto. For more information, visit bist.ca.

June 3 MADD Canada PIA Law Strides for Change (GTA) Event – JC Saddington Park, Mississauga. This is MADD Canada's annual 5K walk/run. For more information, visit madd.ca.

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