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Costs Consequences: The Case of Hoang v. Vicentini

by Thomas Durcan
Originally published in *Insurance Observer* (November 2014)

Thomas Durcan is a member of Blaney McMurtry's Insurance Litigation and Immigration groups. His practice is mainly focused on insurance disputes, with an emphasis on occupiers' liability, motor vehicle, and professional negligence claims. Thomas also acts for municipalities and other public authorities with an emphasis on claims involving infrastructure design and maintenance, as well as regulatory negligence.

Thomas has appeared as counsel in trials, motions, and interlocutory proceedings before the Ontario Superior Court of Justice and the Financial Services Commission of Ontario.

Thomas may be reached directly at 416.593.3933 or tdurcan@blaney.com.

The Ontario Superior Court recently sent a much-welcome message with respect to costs awards in its decision *Hoang v. Vicentini*. The action involved a six year old pedestrian who was struck by a car, just after being dropped off at a busy intersection by his father. The six year old was seriously injured. The Defendants named included the father of the six year old and the driver of the car.

The trial of this action concluded after seven weeks and after two mistrials. Liability was hotly disputed by the Defendants. The Plaintiffs delivered a Rule 49 offer which was aggressively set between $2,141,000 and $4,950,000 at various points during the litigation. The driver of the car also delivered a Rule 49 offer for $250,000 plus a pro rata share of costs and disbursements.

The Plaintiffs did not beat their Rule 49 offer at trial. The jury ultimately awarded the Plaintiffs $150,000 for general damages, $684,228 for future care costs, and modest F.L.A. awards. No damages were awarded for loss of income.

The issue of costs was complicated by the finding of liability only against one Defendant - the six year old's father named Hoang. He was found to have been negligent in dropping off his son at a busy intersection. The other Defendants, including Vincenti - the driver of the car - were found not liable. The Defendant father Hoang was uninsured and a separate coverage proceeding was ongoing.

The Plaintiffs sought costs of $967,604.69 plus taxes and disbursements of $429,011.80 for the tort action and $131,764.76 in costs for the accident benefits proceeding. The Plaintiffs also sought to avoid payment of costs to the successful Defendants by seeking to have those costs paid by the unsuccessful Defendant father.

In determining the costs to be awarded to the Plaintiffs, Madam Justice Darla Wilson considered the various factors enumerated under Rule 57 in exercising her discretion on costs. Madame Justice Wilson found that the Plaintiffs' counsel had "unrealistic expectations" which forced a lengthy and very expensive trial:

> 57 The solicitor for the Plaintiffs asked the jury to award Christopher between $2.5 million and $3.1 million for loss of income into the future and in excess of $10 million for future care costs. The formal offer to settle of the Plaintiffs was almost $5 million. This was an unrealistic expectation based on the evidence and does not represent a reasonable compromise. The costs being sought now by the Plaintiffs are not proportional to the outcome of the trial. One of the factors to be considered by the court is the amount claimed and the amount recovered.
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> 58 I agree that the unrealistic expectations of the Plaintiffs drove this matter on to a lengthy, very expensive trial. This was not a case where the Defendants refused to make an offer to settle and as a result, the Plaintiffs were forced to try the case.

> 59 In my view, in accordance with the principles set out in *Elbakhiet v. Palmer*, 2014 ONCA 544, it is neither fair nor reasonable to award the Plaintiffs costs of $1.5 million for a claim the jury assessed at approximately half of that number. The costs award must be proportionate to the amounts recovered. The unsuccessful Defendant(s) could not reasonably have expected to pay costs in this range should their liability arguments have been unsuccessful at trial.

The conduct of Plaintiffs' counsel was noted as not being "conducive to resolution":

> 87 In the case before me, clearly counsel for the Plaintiffs was advancing his clients' claims in an aggressive manner, which he was entitled to do. An advocate must argue passionately for his or her client and put the best case before the court on behalf of the client. However, this must be tempered with a realistic view of the evidence that has been marshalled in the case, and as noted in *Lawson v. Viersen*, must contain some "reasonable element of compromise." When the behaviour of the solicitor for the Plaintiffs is viewed as a whole, it cannot be described as conducive to resolution of the claim.

Madame Justice Wilson was particularly critical of the excessive hours spent by Plaintiffs' counsel which violated the rule of proportionality in awarding costs:

> 78 I recognize that the Plaintiff must build the case before the jury and this requires expending more hours than the defendants have to do to defend the case. I also appreciate that liability was hard fought by all Defendants. However, I find it astonishing that the Plaintiffs would need to spend approximately four times the number of hours that the defence counsel did for trial and that is not even counting the 534 hours of time that are claimed up to the time preparation for trial commenced. I do not believe this to be reasonable or necessary taking into account the facts of this case and furthermore, is clearly not a sum that an unsuccessful defendant could reasonably have expected to pay if the jury found against him. It is excessive. Further, I am mindful of the principle of proportionality and in my view, seeking costs of more than a million dollars plus disbursements is out of proportion to the result at trial.

After consideration of the Rule 57 factors and the principle of proportionality, Madame Justice Wilson fixed Plaintiffs' costs on a partial indemnity basis at $575,000 plus taxes.

As to disbursements, Madame Justice Wilson found that certain items claimed as disbursements were "excessive":

> 99 I have reviewed the disbursements. Certain items stand out as being excessive: photocopying in the sum of $49,203; courier costs in the sum of $7,094; the sum of $25,667.34 paid to Rapid Photo for large photos and prints. In addition, exorbitant amounts for various expert reports are listed: Hrycay engineers, $39,347.64 for reports and a further $39,593 for attendance at trial; Dr. Cooper, $9,900 for his report as well as a further almost $10,000 for trial attendance; Dimple Mukherjee charged $10,793 for coming to trial; Carol Bierbrier's report was $7,601 and her trial attendance cost was in excess of $5,500; and there is an invoice from MEA Forensic Engineers in the sum of $38,099.04, presumably for trial attendance. These are but a few of the disbursements listed on the Plaintiffs' bill of costs which are, in my view, unreasonably high. They total approximately $243,000.

The unsuccessful Defendant father was ordered to pay the Plaintiffs' costs of $575,000 plus taxes and $250,000 in disbursements.

As to which party would pay the costs of the successful Defendants, Madame Justice Wilson ordered the Plaintiffs to pay those costs. Her Honour declined to have them visited on the unsuccessful Defendant father as sought by the Plaintiffs by way of a Sanderson order:

> 108 I see no reason to depart from the usual order of costs following a trial. The Plaintiffs were not successful against Vicentini and Ford Credit and did not exceed their offers to settle; the Plaintiffs shall pay the costs as fixed. I see no basis for an order that Hoang pay the costs of his co-defendants as Hoang did not allege liability on the part of Vicentini and called no evidence to suggest there was negligence on the part of his co-defendants, nor were any submissions made to the jury or to the court in this regard. It was the Plaintiffs who kept Vicentini and Ford Credit in the action and argued throughout the trial that they ought to be found liable for Christopher's injuries. They were not successful and they must bear the burden of costs. As the Court of Appeal noted in *Lawson v. Viersen*, "cost consequences are result oriented" (para. 21).

The Plaintiffs were ordered to pay the successful Defendants' costs fixed as follows:

> 111 The Plaintiffs shall pay to the Defendant Vicentini his costs on a partial indemnity basis fixed at $350,000 inclusive of taxes plus the disbursements of $85,214.19. The Plaintiffs shall pay to the Defendant Ford Credit its costs on a partial indemnity basis fixed in the sum of $130,000 inclusive of taxes plus the disbursements of $43,695.39.

Madame Justice Wilson further declined to order that the unsuccessful Defendant father Hoang pay the costs of the accident benefits proceeding as this would be neither an appropriate nor a fair order:

> 71 In my view, it is neither appropriate nor fair for the Plaintiffs to include as part of the costs of this action in excess of 600 hours of time arising from the accident benefits matters. The tort defendants had no control over that process or the time expended or disbursements incurred. There were steps taken which are not routine: appeals of arbitration decisions, motions, judicial review proceedings. These steps are unusual and labour intensive. I do not know of the merits of the pursuit of the statutory benefits nor was I apprised of the results of the various motions or arbitration decisions. While the solicitor for the Plaintiffs may have had very good reasons to embark on these steps in the interests of his client, the high costs of doing so should not be visited upon the defendants in the tort action. In my view, the fees associated with pursuing the accident benefits cannot be claimed as part of the costs of this trial.

In this case, Plaintiffs' counsel paid dearly for adopting and maintaining an overly aggressive litigation strategy. Unreasonable time and money was spent and unrealistic settlement offers made by Plaintiffs' counsel which forced the action on to a disproportionately lengthy and expensive trial. The Plaintiffs were ultimately made to bear the costs consequences of their litigation strategy. ■