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Insurance Observer

COSTS CONSEQUENCES: THE CASE OF HOANG V. VICENTINI

Thomas Durcan

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.
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> 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

INSURANCE OBSERVER

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> 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. ■

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Called to the Ontario Bar in 2010, Tobin received his LL.B. from the University of Ottawa, Faculty of Law in 2009. Prior to law school, Tobin received an Honors Bachelor of Arts from Carleton University with a major in History.

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THE USE OF SOCIAL MEDIA IN BODILY INJURY CLAIMS

Tobin Horton

Introduction

Social media has become ubiquitous in our day-to-day lives. It is the communication medium for the younger generation. Advertisements declare that social media is the only way to "stay connected." For litigators, social media is a very useful tool for defending bodily injury claims - some plaintiffs literally put their lives online. Social media can obviate the need for surveillance and can be used to force a plaintiff's hand into equitable settlement of a claim or a dismissal without costs.

What follows is a brief synopsis of some initial considerations when a new claim arrives and some uses of social media in litigating bodily injury claims.

Initial Considerations

When a new claim is received, run a simple Google search using the Plaintiff's name. Conducting this search in even a perfunctory fashion is a great initial starting point. A Google search can identify typical items, such as Facebook accounts, Twitter accounts or LinkedIn profiles. Although these can be quite useful, there is a plethora of other information which may come up through a simple search.

The items that can be found can be extensive and reveal surprising and unknown aspects of a plaintiff's functionality. Some examples from my own litigation experience include:

- a Kijiji advertisement where the plaintiff has been advertising maid services;
- YouTube videos of a plaintiff who moonlighted as a reggae DJ;
- Photographs from a cricket league which depicted the plaintiff playing cricket; and,
- a martial arts blog, where the plaintiff posted photographs of himself doing karate.

These examples illustrate that, beyond the familiar avenues of investigation such as Facebook and Twitter, interesting discoveries can be made about a plaintiff who is not aware of the far-reaching capabilities of internet search engines.

Social Media

When searching social media, you should be mindful of the search parameters being used to track down a plaintiff. Using Facebook as an example, if the plaintiff's name is John Smith, it is prudent to search not only "John Smith," but also derivatives of his name: "Johnny Smith," "John S.," "Johnny S.," etc.

Facebook also provides modifiers to limit a search, such as by geographical location (e.g., "Burlington, Ontario") or by an institution (e.g., "York University"). This is where taking a detailed look at the records provided by counsel is important as they can provide insight into the search parameters to help track down a plaintiff. As an example again from my own experience, a doctor's clinical note made reference to the fact that a plaintiff was an aspiring hip-hop singer. Some digging on the internet revealed his hip-hop alias and this alias was his handle on Facebook and YouTube. A search of both revealed photographic and video evidence crushingly inconsistent with the plaintiff's alleged impairments.

When undertaking background research on a plaintiff through social media, be sure to use all resources available for maximum results. Be meticulous with the productions from counsel

and the online searches are of crucial importance when attempting to track down a plaintiff's profile.

Lesser Known Social Media Outlets

Although most people are familiar with more popular social media outlets - Facebook, Twitter and Instagram - there are other lesser known sites which may be helpful:

- **Wayback Machine:** This web site is essentially an internet archive of over 4 billion websites dating back to the 1990s. It allows a user to input a web address and select the point in time you would like to view. It is useful to find content which may have been modified since its inception.

- **Vine:** Especially popular with younger generations, Vine is a site which allows users to upload short, usually 7 seconds or less, video clips. This site is popular for videos that go "viral" - i.e., popular videos that become internet sensations - but also hosts more mundane videos, some of which may have been posted by a plaintiff.

- **Pinterest:** A social media site where users post items they enjoy or have interest in on their own board. The posted items can range anywhere from recipes for desserts to physical fitness pursuits and can provide useful insight into a plaintiff's hobbies or post-accident activity/functionality.

- **Tumblr:** This site is similar to a blog, but it contains photographs which can be shared with other users. Users can follow like-minded users and post photographs about activities or hobbies.

- **Shots:** This relatively new social media outlet is exclusively for "selfie-photographs" and users post pictures of themselves and friends doing various activities. Typically, the purpose of these photographs is to elicit other users to like or share the photographs, so they tend to be rather showy in nature.

Conclusions and Recommendations

Social media cannot be ignored. Courts have acknowledged that internet and social media are fair game for bodily injury actions. The information available to litigators who take the time to conduct thorough searches of that media can be quite significant and, in some circumstances, can significantly diminish the value of a claim. ■

COURT OF APPEAL AFFIRMS THE CROWN'S 10 DAY NOTICE PROVISION

Blaney McMurtry LLP

The *Proceedings Against the Crown Act* ("*PACA*") requires that 10 days' notice be provided to the Crown where the action involves occupier's liability, failing which, the claim is a nullity. Courts have been critical of the 10 day *PACA* notice and have been loath to apply it.

The recent decision of the Court of Appeal in *Daoust-Crochetiere v. Ontario (Natural Resources)* signals a welcome change in the Court's perspective. In that decision, the Plaintiff fractured his ankle while on Crown land - a boat launch at Wasaga Beach Provincial Park. The incident occurred on June 13, 2010. The Plaintiff did

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not provide the Crown with notice until October 27, 2010 - well beyond the 10 day notice period.

The Crown moved on February 28, 2014 to have the action summarily dismissed for failure to provide 10 days notice. Blaney's lawyers Sheldon Inkol and Thomasina Dumonceau represented the Crown.

The motion judge granted summary judgment and dismissed the Plaintiff's action. In turn, the motion judge denied the Plaintiff leave to amend his claim to plead a cause of action in contract as the basic two-year limitation period had expired.

The Plaintiff appealed and argued that the dismissal be set aside based on, amongst other things, discoverability, unfairness and the application of maritime law. The Court of Appeal dismissed the Plaintiff's appeal.

The Court of Appeal held that purpose of the 10 day notice provision under *PACA* is to "target occupiers' liability with a special and strict notice requirement," which would not be achieved by the interpretation proposed by the appellant. In turn, the Court refused to allow the Plaintiff to amend his claim to assert a new cause of action. By doing so, the Court effectively precluded the Plaintiff from recasting his action to circumvent the 10 day notice provision, thereby, preserving the integrity of the 10 day notice requirement and the essential nature of the action which was one grounded in occupier's liability.

The Court of Appeal's decision leaves no room for doubt that the "special and strict" notice requirements under *PACA* remain in full force and effect. ■

PRIORITY DISPUTE: THIRD PARTY VEHICLE RENTER VS. THE DEFENDANT VEHICLE OWNER

Timothy P. Alexander

In a very recent decision - *Elias v. Koochek* – the Court addressed the issue whether the insurer of a renter of a vehicle who is not named as a defendant in the main action, but has been brought into the action as a third party, has priority over the insurer of the owner of the rental vehicle.

The third party Moshe rented a car from Avis. The defendant Koochek was operating the vehicle with Moshe's consent when he was involved in a collision. Koochek's passengers sued him and Avis. Koochek refused to add Moshe as a defendant. Avis third partied Moshe and brought a motion for determination of a question of law – i.e., whether Moshe's insurer, Intact, was required to respond first to the plaintiffs' claim. The issue focused on the meaning of the term "insurance available" as that term was used in subsection 277(1.1) of the *Insurance Act*.

The Court concluded that the renter's policy issued by Intact responded first and that it did not matter that Moshe was not named as a defendant by the plaintiffs. In coming to this conclusion, the Court noted that finding

otherwise would circumvent the clear intent of the legislature that renter's policies should respond in priority to those of the owner of the rental car.

Although most plaintiff's lawyers will add renters as defendants when requested by the rental car's insurers, some still refuse to do so. This decision confirms that the priority provisions still apply even if the renter is brought into the action by way of third party claim. ■

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