

Case Name:

Hampel v. Giroux

**Between
Chantal Hampel, Plaintiff, and
Carmen Giroux, Rejean Giroux, Marc Hampel, John Doe
and Jane Doe, Defendants**

[2008] O.J. No. 2042

168 A.C.W.S. (3d) 486

Court File No. 2147/93

Ontario Superior Court of Justice

L.L. Gauthier J.

Heard: May 5, 2008.

Judgment: May 20, 2008.

(34 paras.)

Civil litigation -- Civil procedure -- Costs -- Assessment or fixing of costs -- Considerations -- Whether amount fair and reasonable -- Particular orders -- Special orders -- For reprehensible or inefficient conduct -- Offers to settle -- Determination of costs of a motor vehicle accident claim -- The defendants were awarded costs of \$87,000 -- The plaintiff's claim was dismissed by a jury -- The defendants sought costs of \$192,269 -- The defendants were entitled to costs on a partial indemnity basis prior to a 2007 offer to settle and substantial indemnity costs thereafter -- Defendant's costs were reduced by \$10,000 as sanction for counsel's inappropriate remarks to the jury and by \$12,500 for motions where the plaintiff was successful.

Determination of costs of an action for damages arising from a motor vehicle accident -- The plaintiff's claim was dismissed following a jury trial. The defendants sought costs of \$192,269; they claimed costs on a partial indemnity basis prior to a 2007 offer to settle and substantial indemnity costs thereafter. The defendants made two settlement offers; one for \$150,000 and the other for \$200,000. The plaintiff argued that the costs sought were excessive and unreasonable and that her inability to pay costs should be considered. She also argued that the defendant's counsel made inappropriate remarks and expressed opinions to the jury. Several interlocutory motions on which the plaintiff was successful or where no costs were awarded were included in the bill of costs.

HELD: The defendants were awarded costs of \$87,000. The defendants were entitled to partial indemnity costs of \$24,800 prior to the settlement offer and substantial indemnity costs of \$84,600 following the settlement offer. A fair and reasonable award for legal fees was \$85,000; disbursements of \$30,265 were awarded. The costs would be reduced by \$10,000 to sanction the conduct of defendant's counsel, and by \$12,500 for fees for motions where the plaintiff was successful.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131

Ontario Rules of Civil Procedure, Rule 57.01, Rule 57.01(0.b)

Counsel:

John B. Gorman, for the Plaintiff.

M. Greg **Abogado**, for the Defendants, Giroux.

1 L.L. GAUTHIER J.:-- On February 14, 2008, the Plaintiff's claim was dismissed following a trial by jury. The jury found that the Defendants were not liable for a motor vehicle accident which involved the Plaintiff and which occurred on May 3, 1983.

2 The Defendants Giroux now seek costs against the Plaintiff in the amount of \$192,269.06 inclusive of disbursements and GST.

3 Specifically, the Defendants seek partial indemnity costs up to the date of the first offer to settle, dated April 17, 2007, and substantial indemnity costs following that date.

4 The Defendants rely on the principle of indemnity, and further on the principle set out in the Court of Appeal decision in *S & A Strasser Limited v. Town of Richmond Hill* (1990), 1 O.R. (3d) 243, that where a plaintiff rejects an offer to settle and his/her action is ultimately dismissed, then the defendant is entitled to his/her costs on a partial indemnity scale up to the date of the offer and on a substantial indemnity scale thereafter.

5 The Bill of Costs produced by the Defendants is based on the actual accounts which were sent to the Defendants' insurer, therefore reflects 100% of the costs in connection with defending the Plaintiff's Claim. No amount was suggested to me as being appropriate for substantial or partial indemnity by the Defendants.

6 The Bill of Costs sets out the fees to the date of the first offer as being \$41,474.62, and from the date of the offer, forward, \$105,834.64. Both of these figures are inclusive of G.S.T.

7 The Plaintiff acknowledges the general rule that costs should normally follow the event, however argues that the Defendants should recover no costs whatsoever. In the alternative, the Plaintiff argues for partial indemnity costs only, over the entire period of the lawsuit. It is the Plaintiff's position that the improper expression of personal opinions on the part of counsel during his address to the jury, together with his improper comment to the jury regarding the failure of certain medical practitioners to testify should preclude the Defendants from being awarded any costs.

8 The Plaintiff also takes issue with certain disbursements incurred by the Defendants. These include but are not limited to:

- * the cost of report of Pauline Shenton, who testified on the issue of future care costs
- * the cost of Dr. Wallace's Medical Assessment;
- * the North Bay agent's account in connection with certain pre-trial motions;
- * the travel and accommodation costs of Toronto counsel.

9 The Plaintiff further relied upon the principle set out in Rule 57.01(0.b) that an award of costs should reflect the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the proceeding. No amount was suggested to me as being the amount of costs the unsuccessful Plaintiff could reasonably have expected to pay.

10 The Plaintiff also suggests that her inability to pay costs should be taken into account.

11 By virtue of Section 131 of the *Courts of Justice Act*, the court has a wide discretion when considering the issue of costs. That discretion must be exercised keeping in mind the factors set out in Rule 57.01 of the *Rules of Civil Procedure*.

12 In my view, the principle of indemnity, the reasonable costs expectation of the unsuccessful party, the amount claimed and the amount recovered, the offers made, and the conduct of a party are the relevant considerations in the case before me.

13 The Plaintiff's claim was for \$1,000,000. The Defendants were entirely successful in that the Plaintiff's claim was dismissed; she recovered nothing.

14 The Defendants had served two offers. The first one, dated April 17, 2007, was for payment to the Plaintiff of damages, inclusive of interest, in the amount of \$150,000, plus costs. The second one, dated January 9, 2008, was for payment to the Plaintiff of the sum of \$200,000, inclusive of interest, plus costs.

15 In accordance with the approach taken in *S & A Strasser Ltd. v. Richmond Hill (Town)*, *supra*, the Defendants would normally be awarded their costs, on a partial indemnity basis up to April 17, 2007, and substantial indemnity basis after that date.

16 As indicated earlier, the Defendants' Bill of Costs does not set out what the costs would be on a partial indemnity scale to April 17, 2007, or on a substantial indemnity scale to date. The amounts claimed on the Bill of Costs, for both time periods are virtually the same as the amounts which were billed to the Defendants' insurer. I am left to attempt to determine, without suggestion from counsel, what is appropriate on a partial basis and on a substantial basis.

17 As Armstrong J.A. pointed out in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), the fixing of costs involves more than a mere calculation using the hours docketed and the rate charged. Rather, the overall objective in fixing costs is to award an amount that is fair and reasonable for the unsuccessful party to pay, in the particular proceedings.

18 In doing so, I am taking into account the inappropriate submissions made by Defendants' counsel in his address to the jury.

19 Mr. Gorman complains about some seven or eight instances of the Defendants' counsel improperly expressing his personal opinion to the jury. To a large extent, certain of the examples cited by Mr. Gorman appear to be closer to an unfortunate choice of words, than to an outright expression of a personal opinion.

20 For example, the words, at page 2 of the transcript, "Let me sketch out for you why I take the position that there is ...", and at page 3, "and I say that it was a legitimate confusion ...", and at page 17, "my position on the issue", and at page 18, "the problem I have with that is ..." do not, in my view, present any disadvantage to the Plaintiff or her counsel.

21 However, there were some instances where the Defendants' counsel did express a personal opinion and used intemperate language. The following offensive statements are found at page 25 of the transcript:

Now the notion that she would have been a law clerk but for the accident is a difficult one for me, it's a difficult sell for me.

The notion ... that she would not have been able to do that job because law clerks have to carry big briefcases, I find laughable.

22 At page 26, the following comment is recorded:

The job of police constable and the job of a legal assistant and those calculations are based on assumptions that I do not accept ...

23 As well, during his address to the jury, Defendants' counsel, contrary to my specific instructions to him, suggested that the jury draw a negative inference from the fact that two physicians who treated the Plaintiff did not testify.

24 I did, prior to Mr. Gorman's address to the jury, instruct the jury to disregard those objectionable submissions made by Mr. **Abogado**. However, in my view, those objectionable submissions should attract a modest cost sanction against the Defendants. I will deduct \$10,000 from the award of costs, as an appropriate sanction in the circumstances of this case.

25 As well, there were a number of motions during this litigation which resulted in Orders that would have an impact on the costs submission:

- (i) Order of October 14, 1994. Defendants' motion is dismissed with costs to the Plaintiff on a party-party basis;
- (ii) Order of August 21, 1998. Defendants' motion dismissed, with costs awarded to the Plaintiff in the cause;
- (iii) November 26, 1996, Order for Plaintiff to comply with undertakings, no costs;
- (iv) Order of December 18, 2006, allowing the Plaintiff's motion and awarding costs to the Plaintiff in the amount of \$1,000.
- (v) Order of May 1, 2007, divided success, No costs awarded to either party.

26 According to my review of the accounts, some \$12,500 billed is related to the above mentioned motions and should be removed from the calculation of costs payable to the Defendants.

27 Having considered the length of time this matter took to reach its conclusion, and having considered the motions where no costs should be credited to the Defendants, and having factored in the \$10,000 sanction, and keeping in mind the relevant principles referred to above, I conclude that a fair and reasonable award for fees is \$85,000, inclusive of G.S.T.

28 I turn now to the matter of the disbursements. As indicated, Mr. Gorman took issue with those related to Pauline Shenton's Future Cost Analysis Report, in the amount of \$4771.54, and Dr. Wallace's Medical Assessment in the amount of \$4,400. But he did not, however, suggest an amount that he believed to be reasonable. I am not prepared to reduce the amounts without any suggestion as to why it should be reduced, or by how much.

29 The Agent's account, in the amount of \$4,315.81 was also disputed. As the Defendants were not successful on a number of motions and were not awarded costs of those motions, I am removing the agent's account from the calculation of the disbursements.

30 Mr. Gorman took issue with the amount charged for "outside photocopy". That entry was not itemized in the sense of indicating number of pages and rate charged. I am removing it entirely from the allowable disbursements.

31 I am also disallowing the travel, accommodation, and meal expenses relating to Defendants' counsel. Those are not properly recoverable in my view. The travel, accommodation, and meal costs for the Defendants themselves, however, is appropriate.

32 My calculation of the disbursements, with the above adjustments is \$30,265.54 plus G.S.T.

33 In conclusion, the Defendants are awarded their costs on a partial indemnity basis to April 17, 2007, in the amount of \$24,800, and on a substantial indemnity basis from that date forward, in the amount of \$84,600. After having factored in the sanction and the fees relating to the motions, I am of the view that the sum of \$87,000 is a fair award of costs in favour of the Defendants, inclusive of G.S.T.

34 In addition, the Defendants are entitled to receive from the Plaintiff the sum of \$30,265.54 for disbursements, plus G.S.T.

L.L. GAUTHIER J.

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