CITATION: Elbakhiet v. Palmer, 2012 ONSC 3666
COURT FILE NO.: 09-45524
DATE: 20120621

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
AMIRA KHALID MO ELBAKHIET, ABDELRHMAN ELKH AHMED and MAHA AHMED, a minor, and NIEM AHMED, a minor, by their Litigation Guardian, ABDELRHMAN ALKH AHMED	)	Joseph Obagi/Elizabeth Quigley, for the Plaintiffs
Plaintiffs	)	
– and –		
DEREK A. PALMER, ROCKIE PALMER, METCALFE REALTY COMPANY LIMITED and KINGSWAY GENERAL INSURANCE COMPANY		Kevin Nearing/Dalton McGuinty Jr., for the Defendants
Defendants		
	)	
	)	
	)	**HEARD:** Written Submissions

DECISION ON COSTS

TOSCANO ROCCAMO J.

Introduction

[1] On April 27, 2012, after nine weeks of trial, the jury in this case returned a verdict awarding the Plaintiffs the sum of $144, 013.07, broken down as follows:

(a) Non-Pecuniary Damages - $25,000

(b) Future Loss of Income - $ 87,852.75

(c) Future Care Costs – Psychotherapy - $6,160.32

(d) *Family Law Act* Claims – Non-Pecuniary Damages

(i) Mr. Ahmed - $5,000

(ii) Maha Ahmed - $10,000

(iii)Niem Ahmed - $10,000 **Total: $144, 013.07**

[2] Prejudgment interest, calculated in accordance with the *Courts of Justice Act*, R.S.O. 1990, Chapter c. 43 brought the total award to **$153,999.37.**

[3] A copy of the verdict sheet is **appended** to these Reasons.

Background

[4] The claims made by the Plaintiff, Amira Elbakhiet, relate to injuries she sustained in a motor vehicle accident on July 7, 2007 after which she complained of post-traumatic headaches, whiplash-related symptoms, and depression, among other things.

[5] In the Statement of Claim, the Plaintiffs sought general damages for Amira Elbakhiet of $175,000; special damages for her past loss of income; and future loss of income and earning capacity in the amount $1, 250,000. They further claimed unspecified amounts for her past and future health care, medical, rehabilitation and attendant care expenses. In addition, the husband and two children of Amira Elbakhiet sought damages pursuant to the *Family Law Act* R.S.O. 1990, c. F.3.

[6] There can be no doubt that the "great divide" between the parties was not over whether Amira Elbakhiet had sustained objective injury and associated loss in the accident. The jury found that she did. The key issue was whether the accident caused her to sustain a concussion or a mild traumatic brain injury, resulting in a post-concussive syndrome of dramatic proportions. The outcome in this case turned heavily on the Plaintiffs' credibility.

[7] The parties' positions at trial, as reflected in their Offers to Settle, were based upon polar opposite views of the Plaintiffs' credibility. It was not unreasonable for the parties to pursue this case through to trial. However, as is the inherent risk in so many cases of a similar nature, and as the cost consequences of this case reveal, the outcome represents a "bitter pill" for all concerned.

The Issues

[8] The parties raise no issue in their Costs Outlines with respect to the quantum of costs claimed by each on a partial indemnity basis, based on hourly rates and the time expended in the process. However, the Plaintiffs claim costs throughout the proceedings of **$578,742.28** all inclusive of fees, disbursements and taxes and the Defendants claim costs of **$313,964.61** all inclusive from the date of their second Offer to Settle dated February 9, 2012.

[9] The key issue is entitlement to costs, and whether the operation of Rule 49.10 (2) dictates the Plaintiffs' forfeiture of partial indemnity costs from the date of the Defendants' Offer to Settle dated February 9, 2012, and a corresponding award of partial indemnity costs to the Defendants from February 10, 2012 to the end of trial. The result turns on the timing and content of the Defendants' Offer.

The Burden of Proof

[10] Rule 49.10 (2) sets out the consequences of failure to accept a defendant's offer as follows:

> ***Defendant's Offer***
>
> (2) Where an offer to settle,
>
> (a) is made by a defendant at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the plaintiff,
>
> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

[11] Rule 49.10 (3) sets out the burden of proof as follows:

Burden of Proof

(3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2).

The Offers to Settle

[12] The Defendants served two Offers to Settle. The first Offer dated November 15, 2011, provided for payment to the Plaintiffs of all claims for damages and prejudgment interest in the total amount of $120,000 plus costs as agreed or assessed to the date of the Offer. The Offer to Settle remained open until after the commencement of the trial.

[13] The Defendants' second Offer was dated February 9, 2012 but was not served until February 10, 2012. It provided for payment to the Plaintiffs of all claims for damages in the total amount of $145,000 plus prejudgment interest in accordance with the *Courts of Justice Act*, and costs as agreed or assessed on a partial indemnity basis to the date of the Offer. It, too, remained open until after the commencement of trial, but specifically did not revoke the first Offer.

[14] The Plaintiffs served an Offer to Settle dated February 9, 2012, requiring payment by the Defendants of all claims for damages and prejudgment interest in the total amount of $600,000 plus costs on a partial indemnity basis to the date of the Offer, and on a substantial indemnity basis thereafter as agreed or fixed by the Court, and remained open until the commencement of trial.

[15] Unless the Defendants are able to establish that their Offer to Settle dated February 9, 2012 was made at least seven days before the "commencement of the hearing", they cannot satisfy the first of three pre-conditions to entitlement to costs under Rule 49.10 (2). The Defendants concede that their Offer of February 9, 2012 is only an effective Rule 49 Offer if the hearing is found to have commenced on February 22, 2012, having regard to the operation of Rule 3.01 which excludes the date of service, weekends and holidays in the computation of time.

The Timing of the Defendants' Offer

[16] The Plaintiffs contend that the hearing commenced on February 21, 2012, after the jury was selected, after opening statements were made by both sides, and after rulings were made on objections raised by the Defendants in relation to the Plaintiffs' reference to the Defendants'

surveillance evidence in its opening, and by the Plaintiffs in relation to the Defendants' reference in their opening to photographs of minor damage depicted to the Defendants' vehicle as a result of the accident.

[17] In my Opening Remarks to the jury, I provided instruction to the effect that statements made by either counsel in opening could not be considered evidence.

[18] No evidence was tendered until the Plaintiffs' counsel read into the record the content of certain medical records and reports pursuant to s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23, on February 22, 2012.

[19] The Plaintiffs point to the wording in Rule 52.07(1) pertaining to the order of presentation in jury trials, to suggest that a trial should commence with an opening address from the plaintiff. They maintain that, unless a trial begins with a plaintiff's opening, an anomalous result would occur anytime a defendant fails to exercise its option under Rule 52.07 (1) to open with leave of the court immediately after the plaintiff's opening, because an argument could be made that the case does not open before the defendant's address.

[20] In my opinion, time should begin to run in a trial by judge and jury with the calling of evidence. After the trial judge has provided opening instructions to the jury and after counsel have outlined their positions on the key issues at trial, as well as the anticipated evidence to be heard, only then does the jury begin to exercise its fact-finding mandate with the hearing of evidence.

[21] I find support for this interpretation in the leading authorities on the subject beginning with *Catherwood et al v. Thompson*, [1958] O.R. 326, 13 D.L.R. (2d) 238 (C.A.), where Schroeder JJ.A observed at pp. 331-332:

> In a general sense, the term "trial" denotes the investigation and determination of a matter in issue between parties before a competent tribunal, advancing through progressive stages from its submission to the court or jury to the pronouncement of judgment. When a trial may be said actually to have commenced is often a difficult question but, generally speaking, *this stage is reached when all preliminary questions have been determined and the jury, or a judge in a non-jury trial, enter upon the hearing and examination of the facts for the purpose of determining the questions in controversy in the litigation.* [Emphasis added]

[22] In Ontario, the Courts have consistently held that a jury trial commences for the purposes of a Rule 49 Offer when evidence is heard. See: *Kirkpatrick v. Crawford* (1987), 22 C.P.C. (2d) 86; *Jonas v.Barma* (1987), 22 C.P.C. (2d) 274; *Villeneuve v. Scott* (1998), 32 O.R. (3d) 414 (Gen. Div.); *Capela v. Rush* (2002), 59 O.R. (3d) 299 (S.C.); *Scarcello v. Whalley* (1992), 10 C.P.C. (3d) 19 (Ont. C. J. (Gen. Div.)).

[23] Few cases run contrary to the historical current of interpretation. See: *Bontje v. Campbell, Roy & Brown Insurance Brokers Inc.* (1994), 21 O.R. (3d) 545 (Gen. Div.) and *Hornick v. Kochinsky*, [2005] O.T.C. 292 (Sup Ct). I accept the Defendants' submissions that comments therein regarding the "commencement of the hearing" in a jury trial are *obiter*, as both cases involve trial by judge alone. Moreover, a brief reference to *Bontje* and *Catherwood* in *Piller v. Assn. of Ontario Land Surveyor's* (2002), 160 O.A.C. 333 (C.A.) was made in the context of the Court of Appeal's determination of when an administrative tribunal commences a proceeding.

[24] In any event, I would reconcile the result in *Piller* with the reasoning in *Bontje*, on the basis that the role of panel members on an administrative tribunal is closer to the role of a trial judge. Both are vested with carriage of the matter from the very start of proceedings. This is distinctly different from the separation of powers between a trial judge and jury. The mandate of the jury does not commence until it begins to examine the facts for the purpose of determining the questions in the litigation, whereas the role of a trial judge or member of an administrative tribunal commences immediately with the hearing of preliminary questions before evidence is tendered.

[25] It must also be observed that the Plaintiffs had from February 10 to February 22, 2012, a total of 14 calendar days, to consider the Defendants' Offer. Under the circumstances, I echo the sentiments of Sutherland J. in *Capela v. Rush*, *supra*, at para. 37 as follows:

> Once a written offer to settle has been received counsel for the offeree should be on guard in respect of the potential costs consequences of such an offer. Systemic delays in the commencements of hearings are not infrequent. Offers to settle are a common feature of civil litigation and many of such offers are made with costs consequences in mind and to bring to bear additional pressure to settle. The offers

> are made so very frequently as to make predictability of the costs consequences a most desirable attainment.

[26] By the date the jury began to hear evidence on February 22, 2012, the Plaintiffs had adequate opportunity to consider the Defendants' Offer. In the result, I find that the Defendants' Offer of February 9, 2012, meets the timing requirements in Rule 49.10 (2) (a).

The Content of the Defendants' Offer

[27] The Defendants' burden of proof under Rule 49.10 (2) requires them to establish that the Plaintiffs obtained a judgment as favourable as or less favourable than the terms of the Offer to Settle of February 9, 2012. The Plaintiffs maintain that, because the Defendants offered payment of all of the Plaintiffs' damages in one lump sum, it lacks certainty on its face in presenting no clear formula for the calculation of prejudgment interest under s. 128 of the *Courts of Justice Act*, which provides for different rates of interest for different types of claims. To illustrate the point, if the Defendants' offer of payment was only allocated to damages for the future losses, including future care costs and loss of future income, these heads of damages attract no prejudgment interest, and there would be no doubt that the Defendants' Offer to Settle would amount to payment of only $145, 000 plus costs, an amount short of the jury's total award inclusive of prejudgment interest at $153, 999.37. Under s. 128 of the *Courts of Justice Act*, only non-pecuniary damages attract an interest rate of 5%, and past income loss and damages generally accrue interest for actions begun in the third quarter of 2009 at a rate of 0.5% per annum. I also note that after application of the statutory deductibles under the *Insurance Act*, R.S.O. 1990, c. I. 8, the Plaintiffs would not recover any amount for general damages or for damages under the *Family Law Act*.

[28] The Defendants stress the fact that both Offers made by the Defendants came closer to the jury's verdict than the Plaintiffs' Offer to Settle. In addition, the Defendants note that, after application of the statutory deductibles under the *Insurance Act* pertaining to non-pecuniary damages and *Family Law Act* claims, the net award after nine weeks of trial was only $94,013.07. Finally, the Defendants argue that by "tinkering" with the prejudgment interest component of their Offer, the Plaintiffs are attempting to create an ambiguity and uncertainty in the Offer where none exists.

[29] The Defendants state that the underlying intention of their Offer to Settle of February 9, 2012, was to incorporate prejudgment interest on the entire amount offered for damages at the rate of 5% per year. In advancing the argument that their Offer was capable of clear understanding and computation of interest, the Defendants refer to the reasoning of Jennings J. in *Igbokwe v. Price*, 2004 CarswellOnt 1335 (S.C.J.). I would note, however, that in *Igbokwe*, counsel for the plaintiff sought and obtained confirmation that prejudgment interest would be payable on the entire amount offered for damages at the rate of 5% per year. In the case before me, there is no evidence the parties had any discussion with respect to the contents of the Defendants' Offer to Settle dated February 9, 2012. In any event, the result in *Igbokwe* turned on whether the defendant's offer to settle was capable of acceptance at least seven days before the commencement of trial, because the exchange of correspondence between counsel with respect to the prejudgment interest was delivered less than seven days before the commencement of trial.

[30] The submissions of the Defendants raise several concerns, as follows:

1. First, the Defendants' submissions seem to lose sight of the general rule that a party who succeeds in recovery is entitled to its partial indemnity costs, subject to the discretion of the trial judge under s. 131 of the *Courts of Justice Act*, having regard to the factors in Rule 57 and related jurisprudence. See: *Norton v. Kerrigan*, [2004] O.T.C. 559 (S.C.) at paras 15-16 with reference to *Joncas v. Spruce Falls Power and Paper Co.*, [2001] O. J. No. 1939 (C.A.), and *Foulis v. Robinson* (1979), 21 O. R. (2d) 769 (C.A.) at 776. To suggest that the verdict in this case was closer to the Defendants' Offers than the Plaintiffs' Offer does not determine the result under to Rule 49.10 (2), nor does it address the burden imposed on the Defendants under Rule 49.10 (3).

2. It is a reviewable error for a trial judge to take into account the effect of statutory deductibles applicable under the *Insurance Act* upon an award of damages in arriving at a decision on costs. In my view, any consideration of the "net" award obtained by the Plaintiffs in this case would run contrary to the clear and unequivocal language contained in the *Insurance Act*, as interpreted by the Ontario Court of Appeal in *Ryder v. Dydyk* (2007), 87 O.R. (3d) 507 (C.A.) at para. 1, and see also, *McLean v. Knox*, 2012 ONSC 1069; 109 O.R. (3d) 690.

3. If the language of the Defendants' Offer may give rise to payment to the Plaintiffs, based on the different rates of interest in s. 128 of the *Courts of Justice Act*, of an amount which falls short of the jury's verdict at trial, the Defendants cannot meet the burden under Rule 49.10 (3). Moreover, to rely on the Defendants' stated intention to pay prejudgment interest on its Offer at 5% on all damages in accordance with an alleged industry practice, without evidence of the uniform application of this practice, and without other support in the case law, would be to shift the burden of proof to the Plaintiffs in this case. In my opinion, even if the Plaintiffs' award is only slightly better than the most modest award of prejudgment interest arising from the Defendants' Offer, the Plaintiffs are still presumptively entitled to costs, subject to the Court's discretion to order otherwise. As previously noted, the result in *Igbokwe* does not stand for the proposition that where a defendant's offer to settle proposes payment of prejudgment interest on a lump sum for differing heads of damages, an industry practice of 5% per year on the entire amount should be implied so as to provide greater certainty to the offer.

[31] In evaluating a Rule 49 offer, I must be satisfied that the terms of the offer are fixed, certain and capable of clear calculation in order to attract potentially severe costs consequences under Rule 49. Uncertainty or lack of clarity in any aspect of an offer may prevent a party from showing that the judgment obtained was "as favourable as the terms of the offer to settle, or more or less favourable" as the case may be, under Rule 49.10 (3): See *Rooney (Litigation Guardian of) v. Graham*, (2001), 53 O.R. (3d) 685 (C.A.) at para. 44.

[32] Where a plaintiff's claim is a mixed one, as is the case before me, or involves different heads of damages and an offer is presented as a lump sum, a court is unable to calculate a fixed dollar amount in prejudgment interest without a breakdown of the differing heads of damages that attract different rates of interest. The Defendants' submissions fail to fully consider the differing circumstances in *Rooney v. Graham, supra*, and the reasoning of Carthy J. A. at para. 30, as follows:

> The inclusion of a general claim for prejudgment interest in an offer presents no problems to the trial judge because it appears as the same amount in both the offer and the judgment. *However, if presented as a general claim (in the present case it was fixed at 10% of $225,000) it does provide problems to the offeree. Section 128 of the Courts of Justice Act, R.S.O. 1990, c. 43, provides for different rates*

> *for different types of claims and, thus, whenever the claim is a mixed one there would be no means whereby the offeree would know the current amount being offered.*

[33] I would note that similar reasoning was applied by Stinson J. in *Wicken (Litigation Guardian of) v. Harssar,* [2002] O.T.C. 1067 (S.C.) where he found uncertainty in the defendant's offer to pay party and party costs on "an amount" set out in an offer which alluded to both the gross amount of damages and the net amount of damages after subtracting the statutory deductible under the *Insurance Act.*

[34] Having regard to the content of the Defendants' Offer of February 9, 2012, I conclude that the Plaintiffs should not be deprived of partial indemnity costs throughout these proceedings unless considerations arising under Rule 57 justify an order otherwise.

Application of the General Principles in Rule 57

[35] Although I do not agree with the Defendants' submission that the content of their second Offer conforms with the requirements of Rule 49.10 (2), I do agree that there are no circumstances pertinent to the factors in Rule 57 that would justify departure from application of the costs consequences of Rule 49 in this case. A court should only depart from the application of Rule 49.10 where, after giving proper weight to the policy of the general rule that costs follow the event, and the importance of reasonably predictable and even application of Rule 49, the interests of justice would justify doing so. See: *Niagara Structural Steel (St. Catherines) Ltd v. W.D. Laflamme Ltd.* (1987) 58 O.R. (2d) 773 (C.A.).

[36] The Defendants have not persuaded me that the result in *Pilon v. Janveaux* (2006), 211 O.A.C. 19 (C.A.) requires that a reasonable and predictable application of Rule 49.10 to this case would only be served by depriving the Plaintiffs of partial indemnity costs throughout and awarding the Defendants partial indemnity costs from the date of their second Offer. I have already found that the content of the Defendants' second Offer is capable of more than one interpretation, but had I found otherwise, the result in *Pilon* does not, as the Defendants suggest, stand for the general proposition that where a successful party's offer is only slightly better than the result achieved, there have to be consequences for putting the party to the extra expense of a

trial. In my opinion, that should only be the case where the party meets its burden under Rule 49.10 (2) and (3), subject to the court's jurisdiction to order otherwise.

[37] In any event, neither the Plaintiffs nor the Defendants clearly point to any factor in Rule 57.01, other than the result in the proceedings and the Offers to Settle, to guide me in the exercise of my discretion to award costs in this case. Both sides take no issue with respect to the rates charged and the hours spent by the lawyers in these proceedings. There is no suggestion that the amount of partial indemnity costs pursued throughout by the Plaintiffs would materially depart from the Defendants' partial indemnity costs and reasonable expectations.

The Amount Claimed and Received

[38] There is no doubt that the amount recovered by the Plaintiffs in the proceedings falls well short of the amount claimed. However, even in closing submissions before the jury, defence counsel acknowledged that if the jury did not accept that Amira Elbakhiet suffered minor injury in the accident, and believed that Amira Elbakhiet's complaints were caused by the accident, an appropriate range of general damages would fall between $70,000 and $90,000. In view of the verdict, it is apparent the jury preferred the Defendants' theory of the case. From the Plaintiffs' perspective, however, based on reputable and ample medical opinion, this case was potentially worth considerably more than the jury ultimately awarded. In light of the body of medical opinion supporting the Plaintiffs' cause, I would not exercise my discretion to penalize the Plaintiffs in costs for pursuing the case with the degree of care and attention it clearly demanded. To that extent, I echo similar sentiments expressed by Stinson J. in *Wicken v. Harsar, supra*, at paras. 14-15.

Complexity of the Proceeding, and Importance of the Issues

[39] The parties agree that the proceedings involved complex issues of causation and issues of significant importance for all concerned.

Conduct Tending to Impact on Duration of Proceedings

[40] Although the Defendants argue that the Plaintiffs called seven witnesses not on their witness list, and filed three experts reports after an October 31, 2011 deadline ordered by Master McLeod in trial management, in my opinion, the Defendants' remedy was an adjournment of the

trial which was offered but declined by the Defendants. No suggestion was made by the Defendants that any of the additional witnesses called by the Plaintiffs were unnecessary in advancing the Plaintiffs' case. Finally, there was no obvious prejudice to the Defendants in that the Defendants filed two experts reports in reply to those from the Plaintiffs.

Improper, Vexatious or Unnecessary Steps

[41] There was no step in the proceeding that could be considered as improper, vexatious or unnecessary in all of the circumstances.

Failure or Refusal to Admit what should have been Admitted

[42] Neither party may be faulted for denial of or refusal to admit anything that should have been admitted. Although the Defendants were not in a position to formally admit liability because the Plaintiffs' claims exceeded the Defendants' policy limits of one million dollars, liability for the accident was never an issue at trial.

Other Relevant Matters

[43] The only other matter relevant to the question of costs pertains to the undue hardship that would be caused by an award of costs to the Defendants in this matter. Although the Defendants' instructions are to seek sufficient costs so as to offset the amount of the judgment and the Plaintiffs' partial indemnity costs up to February 10, 2012, the verdict of the jury in this case makes it plain that the jury concluded physical and/or psychological injury sustained in the accident would continue to disrupt Amira Elbakhiet's ability to be gainfully employed, or to pursue her stated objective of upgrading her education before returning to the workforce. An amount of costs awarded to the Defendants that would have the effect of completely offsetting the judgment would deprive Amira Elbakhiet of funding for ongoing psychotherapy, and would have some bearing on her ability to complete her schooling due to the family's reliance on social assistance. I note that Browne J. deprived the defendants of an award of costs in *Kourtesis v. Joris*, [2007] O.J. No. 3606 (S.C.), in similar circumstances.

[44] Having regard to all of the circumstances in this case, including the result achieved, the Offers to Settle and the factors in Rule 57.01, I decline to exercise my discretion to deprive the Plaintiffs of their partial indemnity costs.

[45] In the result, the Defendants are ordered to pay the Plaintiffs' partial indemnity costs throughout these proceedings fixed in the amount of **$578,742.28** inclusive of disbursements and applicable taxes broken down as follows:

Fees:	$388,588.00
H.S.T. on Fees:	$ 50,516.44
Disbursements + H.S.T:	$ 89,281.98
Disbursements (H.S.T. exempt)	$ 50,355.86
Total :	**$578,742.28**

[46] I decline to award an amount to either party for their submissions on costs, having regard to the divided success on the issues pertaining to costs.

M. Toscano Roccamo J.

Toscano Roccamo J.

Released: June 21, 2012

CITATION: Elbakhiet v. Palmer, 2012 ONSC 3666
COURT FILE NO.: 09-45524
DATE: 20120621

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AMIRA KHALID MO ELBAKHIET, ABDELRHMAN ELKH AHMED and MAHA AHMED, a minor, and NIEM AHMED, a minor, by their Litigation Guardian, ABDELRHMAN ALKH AHMED

Plaintiffs

-and-

DEREK A. PALMER, ROCKIE PALMER, METCALFE REALTY COMPANY LIMITED and KINGSWAY GENERAL INSURANCE COMPANY

Defendants

DECISION ON COSTS

Madam Justice Toscano Roccamo

Released: June 21, 2012