Case Name:

Iannarella v. Corbett

RE: Andrea Iannarella and Giuseppina Iannarella, Plaintiffs, and Steve Corbett and St. Lawrence Cement Inc., Defendants

[2012] O.J. No. 5636

2012 ONSC 6536

Court File No. 09 CV 372221

Ontario Superior Court of Justice

J.P. Moore J.

Heard: November 16, 2012.
Judgment: November 19, 2012.

(42 paras.)

Counsel:

Joseph Villeneuve, for the Plaintiffs.

Martin Forget and Sarah Merredew, for the Defendants.

ENDORSEMENT

1 J.P. MOORE J.:-- The issue remaining in this matter is costs. The plaintiffs' claims were dismissed following a jury trial which continued over four weeks in the Spring of 2012. Thereafter, the court received written submissions on costs issues and, by Endorsement issued on 18 June 2012, fixed the costs payable by Giuseppina Iannarella at zero and reserved a decision on Andrea Iannarella's costs liability to permit him time to provide evidence of his ability to pay a costs award, he having submitted that he could not afford to.

2 Specifically, the plaintiffs submitted that a significant costs award will only result in undue hardship to the plaintiffs who are both reaching retirement age at a time where the economy is unstable and this militates against the award of costs in the unique circumstances of this particular case.

3 The plaintiffs relied upon cases in which the ability to pay costs was weighed among the factors to be considered in awarding costs.[1] As the evidence at trial regarding Mr. Iannarella's financial ability to pay any costs award was scant, I borrowed from the words of Lane J.[2] in concluding that there may be matters unknown to me which ought to influence my decisions in fixing costs and invited further evidence.

4 In response, Mr. Iannarella submitted a brief of information and documents in support of his assertion of impecuniosity.

5 The defendants countered by filing a brief that included affidavit evidence from a registered real estate sales representative who opined that the plaintiffs' appear to have equity in their home of between $490,000 and $535,000.

6 The defendants correctly submit that the plaintiffs have not provided sworn affidavit evidence showing their impecuniosity or demonstrating Mr. Iannarella's claimed inability to pay an award of costs.

7 Arguing by analogy to cases involving impecuniosity in motions for security for costs, the defendants submit that the onus is on the party claiming to be impecunious to substantiate the claim by way of evidence and the failure to adduce adequate evidence will be fatal to that position,

8 In *Shuter*,[3] Master Haberman noted that:

> ... in *Uribe v. Sanchez* [2006] O.J. No. 2370, the court held that as the plaintiffs financial capabilities are solely within his knowledge, it is incumbent on him to "provide evidence **with supporting documentation as to his income, expenses, assets and liabilities**" (emphasis added), and that assets should be described with particularity. Here, the master cited Quinn J's decision in *Morton v. HMQ Canada* 75 O.R. (3rd) 63, where the learned judge stated that "the financial evidence of the plaintiff must be set out with robust particularity", leaving "no one answered questions." He went on to list what should be included:
>
> > *full financial disclosure is required and should include the following: the amount and source of all income; a description of all assets (including value); a list of all liabilities and other significant expenses; and indication of the extent of the ability of the plaintiffs to borrow funds; and details of any assets disposed of or encumbered since the action arose.*

> It appears from these passages that there is a high evidentiary threshold that must be met before a court can find that a plaintiff is impecunious and that this threshold can only be reached by tendering complete and accurate disclosure of the plaintiffs income, assets, expenses, liabilities and forwarding ability with full supporting documentation for each category where available or an explanation where not available. At the very least, this would require an individual plaintiff to submit his most recent tax return, complete banking records and records attesting to income and expenses

9 Quite apart from the my concern that the unsworn information before me at best paints an incomplete picture of Mr. Iannarella's financial position, I am not persuaded that he has met a reasonable onus of establishing that he is financially unable to pay an award of costs. Nor has he established the size of award that he would be able to pay.

10 Accordingly, costs are fixed without further consideration of impecuniosity as a factor of relevance in this case.

11 In *Agius*,[4] Ricchetti J. well summarized this court's concerns in fixing costs:

> Fixing costs is not merely a mechanical exercise in reviewing the receiving party's Costs Outline. In *Anderson v, St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557, the Divisional Court set out several principles to be considered in making an award of costs:
>
> 1. the discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher, Moon,* [2004] O.J. No. 4651, and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (C.A.).
> 2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher.* The quantum should reflect an amount court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 118 A.C.W.S. (3d) 341 (Ont.C.A.), at para. 4.
> 3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
> 4. The court should seek to avoid inconsistency with comparable

awards in other cases. "Like cases, [if they can be found], should conclude with like substantial results": *Murano v. Bank of Montréal* (1998), 41 O.R. (3d) 222 (C.A.), at p. 249.

5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher.*

The Court of Appeal has identified the overriding principle to be that the amount of costs awarded be reasonable in the circumstances. In *Davies v.* Clarington (Municipality) (2009), 100 O.R. (3d) 66 Epstein J.A. stated at paras. 52:

> As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigants. In *Boucher [Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.)], this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceedings at para. 37, where Armstrong J.A. Said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice.

12 I also adopt the reasoning and conclusions of Perell J. in the *Doe* case.[5] At paragraphs 10 and 11, he addressed the purpose of awards of costs in circumstances such as those that present in the instant case as follows:

> [10] The court's discretion to award costs is designed to further three fundamental purposes in the administration of justice: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (CanLII), [2003] 3 S.C.R. 371; *Fong v. Chan* (1999) 46 O.R. (3d) 330 (C.A.);

Fellowes, McNeil v. Kansa General International Insurance Co. 1997 CanLII 12208 (ON SC), (1997), 37 O.R. (3d) 464.

[11] Costs are designed as to be a tool to administer justice and to control access to justice. In *British Columbia (Minister of Forests) v. Okanagan Indian Band, supra*, LeBel J. for a majority of the Supreme Court of Canada stated in para. 26:

> Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

13 Before this trial began, I directed counsel to exchange costs demands current to the commencement of the trial and to include demands for fees (on a partial indemnity basis) and disbursements, with supporting particulars. I then met with counsel for the purpose of conducting a trial management conference. At that time, I learned that both liability and damages were in issue and I again directed counsel to exchange costs demands, in order that the parties may have current and relatively precise information about the size and shape of their opponents' expectations for fee, disbursements and tax components of costs, in the event that the opponents were ultimately entitled to recover costs.

14 In my view, requiring parties to exchange costs demands provides an important opportunity for parties to make an informed business decision on whether to court the cost and uncertainty of outcome that a trial necessarily presents. In the words of Armstrong J.A. in *Boucher*, there are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation.[6]

15 I did not require counsel to file their respective costs demands with the court before or during trial but I was assured that counsel did indeed exchange their demands with particulars. It is asserted in the Costs Submissions of the Defendants that plaintiff counsel advised his fees were over

$60,000 by the time of the pre-trial and his disbursements were $32,687.19. To that point, the defendants had incurred $51,188.50 in fees and $8,155.90 in disbursements. The fees incurred by plaintiffs and defendants appear to have been of similar magnitude.

16 There is no demonstrated access to justice issue here. There is no suggestion in this case that plaintiffs' counsel or other capable counsel would not have taken the case on or have seen it through to the time of the trial management conference or indeed through the trial.

17 Mr. Iannarella had the benefit of the advice of counsel throughout and, armed with that advice and whatever input he may have received from the pre-trial judge and assisted by the information gleaned from the costs demands he received from the defendants, he was well able to make informed decisions upon the risks and rewards he faced when he decided to require that the trial go forward. He invited the jury to assess and award his damages in amounts totaling between $571,000 and $706,000.

18 Mr. Iannarella was offered a substantial sum of money to settle before trial; he made no counter offer and the result was a long and complex trial which resulted in damages assessments well below his requests of the jury on almost every head of damages at issue and resulted in his action being dismissed. He now faces an award of costs against him but asks for relief from the financial consequences that the defendants' demands might produce.

19 From the defendants' perspective, Mr. Iannarella full well knew, or ought to have known, the potential financial consequences of requiring a trial to the finish on all issues; he took his shot, miscalculated and missed the intended target. The defendants offered an alternative but it was rejected outright. Court and jury time was necessarily engaged over parts of four weeks. Did Mr. Iannarella act reasonably? They think not and I agree. I cannot liken this case to the *Walsh*[7] case in that other plaintiffs with better cases than Mr. Iannarella's need not fear a burdensome costs award if they act reasonably in assessing their chances of success at trial relative to a settlement alternative presented to them.

20 In my view, the defendants are entitled to their costs on a partial indemnity basis to the time of their offer to settle on 12 March 2012. I see no reason to award a bonus to the defendants by increasing the scale of costs applicable to the date of that offer.

21 Applying the logic of Carthy J.A. in *Strasser*[8] and that of judges in subsequent cases[9], I choose to exercise my jurisdiction to award substantial indemnity costs from 13 March 2012 onward, as the defendants' offer was reasonable and it encouraged and allowed Mr. Iannarella to settle his claims and avoid the trial. Given my findings on credibility and on the accuracy and completeness deficiencies in the plaintiffs' case that were plentiful, glaring and substantial,[10] Mr. Iannarella should not have courted the consequences that befell him at this trial.

22 In determining a fair amount to award the defendants for costs up to the time of their settlement offer of 12 March 2012, I am alert to the factors I have referred to above. I am content

that the time spent as claimed by counsel was actually spent and that the rates claimed for the respective timekeepers are reasonable, in keeping with their positions and experience in the Forget law firm.

23 The plaintiffs assert that changes in the staff assigned to this matter within the Forget firm may have lead to duplication of effort that should not be visited upon the plaintiffs. I agree with that concern, in principle, but cannot and will not undertake a line by line analysis of the defendants' costs outline to quantify any potential overlap. I note that substantially all of the docketed lawyers' time on the file was docketed by Mr. Forget, who had carriage of the matter from the outset, and by his associate, Ms. Merredew. A modest discount is incorporated into my award to reflect this concern.

24 I am not persuaded that the cost of the attendance of junior counsel at the pre-trial should be borne by Mr. Iannarella. There is no suggestion that Ms. Merredew's attendance there was reasonable or necessary and the counsel fee claim will be discounted to reflect that.

25 This was a complicated personal injury case from a medical perspective. Eleven experts were called to testify at trial. The jury heard from twenty five witnesses in all over the course of four weeks. As noted above, Mr. Iannarella asked the jury to award many hundreds of thousands of dollars in damages. The defendants had no choice to marshal the evidence necessary to meet his claims and to defend on every issue.

26 I am satisfied that defence counsel did nothing to unnecessarily lengthen the litigation or the trial. Mr. Iannarella's testimony was suspect and cried out for close scrutiny throughout the preparation for trial and trial phases of the matter. That the defendants enjoyed the success they did at trial is a testament to the hard work necessarily undertaken by counsel. Mr. Iannarella should reasonably have expected nothing less.

27 Stepping back from my consideration of particular factors and considering the overall reasonableness of the defendants' claims for fee items of costs on a partial indemnity basis to the date of the offer on 12 March 2012, I award $50,000.00.

28 Turning now to the assessment of substantial indemnity fees, in the interval between the offer and the start of the trial, it was reasonable and necessary that the defendants prepare as they did for the trial. That both Mr. Forget and Ms. Merredew prepared to assume carriage of the defence in the event one of them was unavailable for any reason was appropriate and would allow of the trial continuing on schedule regardless.

29 I am not persuaded however that Ms. Merredew's presence as junior counsel at trial was necessary after the first day of trial. She did not participate in the examination or cross examination of witnesses or otherwise as counsel at trial. She did not step in when Mr. Forget could not appear on one trial day and the trial was adjourned to await his return. The counsel fee for trial claim will be reduced accordingly.

30 Considering the many factors informing the exercise of my discretion and considering the overall fairness of the award of substantial indemnity costs for the interval between 13 March 2012 and 18 March 2012 and at trial, the former are fixed and awarded at $30,000.00 and counsel fee at trial is fixed and awarded at $100,000.00.

31 All awards of Fee items of costs have been made without reference to applicable HST but I award HST at 13% in addition to those awards. By my calculations, fee item awards attract HST of $23,400.

32 The defendants' claim for Disbursements totals $53,001.07, plus applicable taxes. Mr. Iannarella contests only some of these claims. The question for me is what portion of the contested claims are fair and reasonable?

33 He contests the entirety of the claim for photocopy expenses on the basis that it should be absorbed by counsel as part of his firm's overhead. I disagree and allow that claim in its entirety.

34 As for the cost of Dr. Axelrod's attendance as an expert witness at trial, this plaintiff asserts that this cost is prohibitive at $7,500.00. It is higher by at least one third than any of the costs incurred by the plaintiffs to bring their witnesses to trial. That alone, however is not the test.

35 I consider Dr. Axelrod to have been a necessary and very important witness. He saw and examined Mr. Iannarella on two occasions and wrote reports in 2010 and 2011. His evidence was important for his description of the nature and extent of the shoulder injury complained of and the course of recovery following surgical repair. It also went to the accuracy and completeness of Mr. Iannarella's evidence as a witness before the jury, to Mr. Iannarella's ability to speak English to his credibility and to his ability to return to work.

36 Dr. Axelrod is an orthopedic surgeon with a particular focus on upper limb injuries. He made an important contribution to the case and his evidence was certainly relevant to the issues. I believe his evidence was crucial to the outcome of the case. Its cost was not disproportional to the economic value of the case. It was not duplicated by the evidence of other witnesses. It was by no means overkill and it was of considerable assistance to the court.

37 This said, however, I am left to wonder how Dr. Axelrod arrived at the amount of the fee he charged the defendants. Accordingly, I will reduce it to $5,000.00, an amount approximately equal to the fee charge Mr. Iannarella by Dr. Cantarutti.

38 Mr. Iannarella contests the disbursements claimed for Drs. Soon-Shiong and Bhargava but in comparing the amount of these claims to those incurred by Mr. Iannarella and in considering the value of the evidence of these experts and the overall fairness of these disbursement claims I am content to allow them to stand

39 I am not moved to accept the submission that the disbursement incurred for surveillance

should be reduced. Mr. Iannarella's credibility and his evidence of his functional capacities and limitations was measured in a significant fashion by reference to the surveillance evidence. It was very relevant and important evidence. That disbursement claim is allowed in full.

40 Mr. Iannarella's concern over the cost claimed for an interpreter that he did not ask the defendants to retain and did not use is fair. That claim of $923.54 is disallowed. So too are his submissions that the disbursements claimed for Hotel, Transportation and court interview room (which he totals at $3,715.42) are unreasonable; those items are disallowed.

41 The disbursement claims are otherwise fair, reasonable and allowed. As such, by my calculations, the defendants' disbursements are fixed and awarded at $51,554.18, including HST less GST exempt items.

42 In the result, Fee items of costs are awarded in the total sum of $180,000.00 plus HST thereon of $23,400. Disbursements are awarded in the sum of $51,554.18, inclusive of relevant taxes.

J.P. MOORE J.

1 *Courst of Justice Act*, R.S.O. 1990, c.43, Section 131 and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 57.01.

2 *Walsh v. 1124660 Ontario Inc.*, 2007 CanLII 4789 (ONSC) at para. 41.

3 *Shuter v. Toronto Dominion Bank*, [2007] O.J. No. 3435, at paras. 75 and 76.

4 *Agius v. Home Depot Holdings Inc.* [2011] O.J. No. 4424, at paras. 11 and 12.

5 *John Doe v. Her majesty the Queen In Right of Ontario and Attorney General of Canada*, 2007 CanLII 50279 (ON SC).

6 *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (O.C.A.) , at para. 37.

7 *Walsh v. 1124660 Ontario Inc.*, [2007] O.J. No. 2773, 2007 CanLII 27588 (ONSC), at para. 25.

8 *S & A Strasser Ltd. v. Richmond Hill (Town)*, [1990] O.J. No. 2321 (C.A.).

9 *Tilker v. Canada Life Casualty Insurance Corp.*, [2002] O.J. No. 2873; *Ragimov v.*

Bercznyski, [2001] O.J. No. 472; *Coldmatic Refrigeration of Canada Ltd. v. Kenaidan Contracting Ltd.*, [2005] O.J. No. 6195; *3726843 Canada Inc. v. 879115 Ontario Ltd.*, [2005] O.J. No. 2305; and *Barr v. Zahavy*.

10 Per Grace J in *Barr*, *Supra, para 9.*.