Case Name:

Laudon v. Roberts

Between
Rick Laudon, Plaintiff, and
Will Roberts and Keith Sullivan, Defendants

[2008] O.J. No. 5067

Barrie Court File No. 02-B5188

Ontario Superior Court of Justice

G.P. DiTomaso J.

Heard: December 2 and 3, 2008.
Judgment: December 11, 2008.

(80 paras.)

Civil litigation -- Civil procedure -- Costs -- Assessment or fixing of costs -- Considerations -- Whether amount fair and reasonable -- Particular orders -- Party and party or partial indemnity -- Particular items -- Disbursements -- Offers to settle -- Amount of offer v. award -- Jurisdiction -- Ontario -- Application by the parties for the determination of costs after a lengthy personal action trial -- Plaintiff claimed partial indemnity costs of $819,776 plus disbursements of $157,909 for a total of $977,685 -- He was awarded partial indemnity fees of $400,000 plus disbursements of $90,000, all inclusive of GST, from one of the defendants -- Court considered that the plaintiff did better than the defendant's offers to settle -- It also considered what was fair and reasonable for the defendant to pay.

Tort law -- Practice and procedure -- Costs -- Jurisdiction -- Ontario -- Application by the parties for the determination of costs after a lengthy personal action trial -- Plaintiff claimed partial indemnity costs of $819,776 plus disbursements of $157,909 for a total of $977,685 -- He was awarded partial indemnity fees of $400,000 plus disbursements of $90,000, all inclusive of GST, from one of the defendants -- Court considered that the plaintiff did better than the defendant's offers to settle -- It also considered what was fair and reasonable for the defendant to pay.

Application by the parties to an action for the determination of costs. Laudon sustained personal injuries as a result of a boating accident. He was a passenger in a boat operated by the defendant Sullivan. That boat collided with a boat operated by the defendant Roberts. Laudon sued for $2 mil-

lion. The duration of the trial, including motions, was 54 days. Two additional days were devoted to a motion for judgment and two days were devoted to the costs hearing. The trial was not only exceedingly long but it was also exceedingly bitter. Laudon and Roberts entered into a Mary Carter agreement. Laudon recovered $438,000 pursuant to that agreement. The agreement was premised on the fact that liability for the collision would be allocated equally between Sullivan and Roberts and that Laudon would not be contributorily negligent. The jury found Sullivan to be 39 per cent at fault, Roberts to be 50 per cent at fault and Laudon to be 11 per cent at fault. Laudon was awarded general damages of $200,000. Total damages plus interest were $331,033. Sullivan had to pay $144,464 of this amount. Laudon claimed partial indemnity costs of $819,776 plus disbursements of $157,909 for a total of $977,685. Sullivan claimed he served four offers to settle that were more favourable to Laudon than the judgment he obtained. He claimed partial indemnity costs of $530,554. Roberts claimed costs of $83,627. He delivered an offer to settle and offers to contribute.

HELD: Laudon was awarded costs of $490,000 inclusive of GST. This consisted of partial indemnity fees of $400,000 and disbursements of $90,000. Such costs were payable by Sullivan within 30 days. Upon consideration of the various offers Rule 49.10(2) applied. It provided that when the defendant made an offer to settle and the plaintiff obtained a judgment as favourable or less favourable than the offer, the plaintiff was entitled to partial indemnity costs to the date the offer was served and the defendant was entitled to partial indemnity costs thereafter, unless the court ordered otherwise. Laudon's trial recovery was more than Sullivan's all inclusive offers. He was therefore entitled to receive partial indemnity costs throughout the action. Sullivan was not entitled to costs. Roberts was not entitled to costs from Sullivan. He was also not entitled to costs from Laudon. Roberts overpaid Laudon under the agreement, based on the outcome of the trial. He was bound by the agreement with the result that Laudon's claims against him were resolved. Roberts' counsel attended trial as a consequence of the agreement and not because of Sullivan's actions. Based on the amount of the judgment Laudon's claim was almost three times greater. On any analysis or comparison it was clear that his claim was totally disproportionate. The case was not overly complex, as asserted by Laudon, but it was also not a simple personal injury action. The amount of costs that were awarded represented what was a fair and reasonable amount that should be paid by Sullivan. The same principles were applied to reduce the claimed disbursements from $157,909 to $90,000.

Statutes, Regulations and Rules Cited:

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

Rules of Civil Procedure, Rule 49, Rule 49.10, Rule 49.10(2), Rule 49.10(3), Rule 49.13, Rule 57.01, Rule 57.01(3)

Counsel:

J. Ralston and B. Keating, for the Plaintiff.

E. Chadderton, for the Defendant Roberts.

M. Forget and L. Matthews, for the Defendant Sullivan.

REASONS FOR DECISION ON COSTS

G.P. DiTOMASO J.:--

INTRODUCTION

1 The Plaintiff Rick Laudon sustained personal injuries as a result of a boating accident which occurred on August 2, 2002 on Bolger Lake at night. He was a passenger in a boat operated by the defendant Sullivan. The "Sullivan boat" came into collision with the "Roberts boat" operated by the defendant Will Roberts. As a result of this accident, Mr. Laudon sued both defendants in negligence and advanced a general damages claim for pain, injury, suffering and loss of enjoyment of life. He also advanced claims for pecuniary damages consisting past and future loss of income, past out of pocket expenses, future care costs, future housekeeping/home 0maintenance costs together with past and future OHIP costs. The claims approximated $2,000,000. These claims were vigorously prosecuted and, equally, vigorously defended.

THE TRIAL

2 The trial was long, hard fought and at times, acrimonious. Before the case came before me for trial with a jury, the parties selected a jury before Stong, J. on March 27, 2006. During the course of his opening address to the jury, Mr. Laudon's counsel inadvertently revealed the amount paid by Mr. Roberts to the plaintiff pursuant to a Mary Carter Agreement. This disclosure prompted a mistrial.

3 The matter first came before me at the Fall Sittings of 2006 at which time six days were consumed with a variety of motions. No evidence was heard at that time. Rather, the trial proceeded during the April and Fall Sittings of 2007 resulting in the jury's verdict dated November 21, 2007.

4 The total time spent at trial including the October 2006 motions was 54 days. Added to the 54 days were additional days devoted to a motion for judgment and, most recently, two days devoted to the costs hearing.

5 The trial was not only exceedingly long but also exceedingly bitter. The reason for both can be attributed to the numerous procedural and substantive motions brought prior to and during the course of the trial some of which were brought by plaintiff's counsel and some of which were brought by the defence. Also contributing to the length of the trial was Mr. Laudon's inability to complete his evidence during cross-examination on numerous days. On those days, he claimed that he suffered from debilitating headaches and pain which necessitated his leaving the courthouse. This caused the trial to virtually grind to a halt.

6 At trial, counsel for the plaintiff submitted that as a result of this boating accident, Mr. Laudon sustained personal injuries which were serious and permanently disabling so that he could no longer work.

7 The defence for Sullivan submitted that Mr. Laudon was a long-time substance abuser and addict who was not a credible person. He had lied on a number of occasions to various health care providers to obtain drugs and lied to various social agencies to obtain benefits. This conduct was not accident related. The defence for Sullivan denied liability, pointed the finger at the defendant Roberts for causing this accident and alleged contributory negligence on the part of Mr. Laudon for his conduct leading up to and while he was sitting in the Sullivan boat operating a flashlight.

8 In addition, the defence for Sullivan advanced a *volenti* defence which was also squarely put before the jury.

9 This trial featured an added twist in that the plaintiff and the defendant Roberts entered into a Mary Carter Agreement on March 20, 2006, the full text of which can be found at Tab 4 of the submission on costs presented by the defendant Sullivan. The total recovery by Mr. Laudon from the defendant Roberts through the Mary Carter Agreement was $438,000. The Agreement also spoke to their respective positions on liability, namely, that liability for the collision ought to be found on a 50 percent basis as against each of the defendant Roberts and Sullivan, and that there was no contributory negligence on the part of the plaintiff. The Agreement also spoke to issues regarding Mr. Roberts' involvement in the trial and costs.

10 On October 21, 2007 the jury returned its verdict. The jury completed Questions for the Jury filed as exhibit #56 at trial.

11 In respect of liability, the jury found negligence on the part of the defendant Keith Sullivan, the defendant Will Roberts and contributory negligence on the part of Richard Laudon. The jury rejected the *volenti* defence asserted by the defendant Sullivan. The jury allocated, in percentage terms, the degrees of fault or negligence attributable to the parties as follows:

Keith Sullivan	39%
Will Roberts	50%
Richard Laudon	11%

12 In respect of damages, the jury awarded general damages to the plaintiff Laudon in the amount of $200,000. Past loss of income from the date of the accident until the commencement of trial was found to be $35,000. Past out of pocket expenses were found by the jury as follows:

Prescription medication	$13,666.70
Massage therapy	489.51
Acupuncture	106.56

13 In respect of future losses from the commencement of trial forward, the jury found future loss of income in the amount of $30,000, future care costs in the amount of $20,000 and nil for future housekeeping/home maintenance. As for OHIP costs, the jury found past OHIP costs in the amount of $12,759 and nil for future OHIP costs. The total amount for damages assessed by the jury and reflected in the jury's verdict was the sum of $312,021.

14 In accordance with the jury's findings on liability and allocations of negligence attributable to the defendant Keith Sullivan at 39 percent, he was liable to pay Mr. Laudon the sum of $121,688.49 in damages plus prejudgment interest. Further, the defendant Sullivan was ordered to pay prejudgment interest on general damages and past pecuniary damages in the amount of $22,775.51 for a total award of $144,464 against this defendant. A motion was brought on behalf of the plaintiff for judgment in accordance with the jury's verdict. The defendant Sullivan opposed that motion. Submissions were heard and my ruling was delivered on March 17, 2008. As a result of my ruling, judgment was issued dated March 17, 2008 in accordance with the jury's verdict. Further, it was ordered that the issue of costs would be argued on a date to be fixed by the trial co-ordinator. After at least two abortive attendances, the costs hearing eventually took place on December 2 and 3, 2008. A copy of the judgment can be found in the submissions of costs brief submitted by the defendant Roberts at Tab 2.

THE COSTS HEARING

15 Pursuant to my direction, all parties provided written submissions on costs. These written submissions were followed by oral submissions made on behalf of the parties on December 2 and 3, 2008.

Positions Of The Parties

16 The Plaintiff Richard Laudon submits that since the jury found in his favour, he was successful in this action and therefore is entitled to his costs throughout. The defendant Sullivan did not make a valid Rule 49 Offer to Settle. Although several Offers were advanced by this defendant, none met the requirements of Rule 49. In any event, the damages awarded by the jury exceeded all Offers made by the defendant Sullivan. The Plaintiff Laudon initially had claimed costs on a substantial indemnity scale in the amount of $1,355,736.38. This claim was later abandoned. Rather, the Plaintiff claims costs on a partial indemnity scale in the amount of $819,775.95 plus disbursements in the amount of $157,909.50 for a total sum of $977,685.45.

17 The defendant Sullivan submits that he served three Offers to settle which were as favourable as or more than the judgment obtained by Mr. Laudon. The first Offer dated March 16, 2006 was for $120,000 inclusive of prejudgment interest plus Sullivan's proportionate share of costs on a partial indemnity scale to be agreed upon or assessed. The second Offer dated March 20, 2006 was for $200,000 inclusive of prejudgment interest and GST plus costs on a partial indemnity scale to be agreed upon or assessed. On April 4, 2006 Sullivan revoked this Offer. The third Offer dated March 20, 2006 was for $210,000 plus disbursements of $15,000. (See Tabs 1, 2 and 3 Costs Submissions on behalf of the Defendant Keith Sullivan). The Defendant Sullivan asserts that the judgment obtained by the Plaintiff is less favourable than all three of these Offers.

18 The Defendant Sullivan further asserts that before the issue of costs thrown away was heard by Stong, J., on October 2, 2006 Sullivan offered to settle the entire action for a payment of

$170,000, all inclusive, thereby foregoing the costs thrown away to which Sullivan was entitled. (See Tab 5 Submissions on Costs the Defendant Keith Sullivan). This Offer was revoked the following day. Sullivan then made a second Offer on October 2, 2006 for $100,000 plus applicable prejudgment interest and costs on a partial indemnity scale less the portion of costs paid by Mr. Roberts under the Mary Carter Agreement and less costs thrown away by the mistrial to be agreed upon, fixed or assessed. (See Tab 5A Costs Submissions of the Defendant Keith Sullivan). On April 5, 2007, Stong, J. ordered the Plaintiff to pay Sullivan costs in the amount of $20,000 leaving the remaining claim for costs thrown away to be determined by the trial judge (see Tab 6 Costs Submissions of the Defendant Keith Sullivan, Endorsement of Stong, J. dated April 5, 2007).

19 Sullivan claims his costs on a partial indemnity scale from March 16, 2006 on the basis that the judgment was less favourable than all four Offers. He claims partial indemnity costs in the amount of $530,554.53 from March 16, 2006 to the date of judgment in accordance with his Costs Outline filed.

20 The Defendant Roberts submitted that he should be awarded his costs of the action and of defending the cross-claim of the defendant Sullivan, payable by the defendant Sullivan to Roberts on a partial indemnity scale. Counsel for Roberts abandoned a claim for substantial indemnity costs. Rather, the claim for costs on a partial indemnity scale is sought in the amount of $83,627.27.

21 The defendant Roberts delivered an Offer to Settle and an Offer to Contribute in the amount of $270,000 plus costs and interest on February 1, 2006. The defendant Roberts delivered a further Offer to Contribute in the amount of $353,256 plus costs and interest, dated March 20, 2006. The Offers to Contribute included a liability apportionment based on Roberts accepting 50 percent of liability and offering to pay damages, plus costs and disbursements on that basis. Neither Offer to Contribute was accepted, nor was the March 20, 2006 Offer to Contribute withdrawn prior to the commencement of trial. The Defendant Roberts claims entitlement to an award of costs on a partial indemnity scale from February 2006 onward. The Defendant Sullivan denies that the Defendant Roberts is entitled to any costs based on the Mary Carter Agreement and representations made by counsel on behalf of Roberts to the court.

Offers to Settle and Offers to Contribute

22 Each party claims to be the successful party at trial with each party claiming partial indemnity costs.

23 The Plaintiff Laudon submits that the Defendant Sullivan did not make any valid Rule 49 Offers to Settle. The several Offers advanced by this defendant did not meet the requirements of Rule 49. In any event, Mr. Laudon submits that the damages awarded by the jury exceeded all offers made by the Defendant Sullivan.

24 Mr. Laudon submits that to meet the criteria set out in Rule 49, an Offer to Settle must be fixed, certain and understandable. "All inclusive" Offers do not comply with Rule 49.

25 The Defendant Sullivan submits that not only Offers to Settle but Offers to Contribute should be considered in determining the question of costs together with any revoked Offers and any combined Offers in order to determine what total sum was placed before the Plaintiff for acceptance.

26 I have reviewed the Offers to Settle and Offers to Contribute made by the Defendant Keith Sullivan. They were summarized and contained in a supplementary brief prepared by counsel for Mr. Laudon. The Offers are summarized as follows:

27

Date	Type of Offer	Amount	Date Withdrawn
March 7, 2006	Offer to Contribute	$75,000 inclusive of all claims, interest and costs	Remained open until trial
March 16, 2006	Offer to Contribute	$120,000 inclusive pre-judgment interest plus proportionate share of costs on a partial indemnity scale	April 4, 2006
March 20, 2006	Offer to Contribute	$200,000 inclusive of prejudgment interest, and GST plus costs on a partial indemnity scale	Offer not served on Plaintiff
October 2, 2006	Offer to Settle	$100,000 plus PJI, costs on a partial indemnity scale, less portion of costs paid by Roberts under Mary Carter Agreement, less costs thrown away at mistrial.	Remained open until trial.
October 2, 2006	Offer to Settle	$170,000 inclusive of damages, interest, and costs.	October 3, 2006
April 3, 2007	Offer to Settle	$75,000 inclusive of costs and	Remained open until Trial

		interest. Waive costs awarded by Stong, J.	
May 9, 2007	Offer to Settle	$75,000 inclusive of all claims, interest and costs.	May 9, 2007 at 5:00 p.m.

28 In addition, I have reviewed the Offer to Settle dated February 1, 2006, Offer to Contribute dated February 1, 2006 and Offer to Contribute dated March 20, 2006 delivered on behalf of the Defendant Roberts. They can be found in the submissions for costs by the Defendant Roberts at Tabs 3, 4 and 5.

29 Further, I have considered the Offer to Settle delivered by the Plaintiff on March 20, 2006 to the Defendant Sullivan after Roberts and Laudon entered into the Mary Carter Agreement. The Plaintiff's Offer was in the amount of $375,000 plus GST and prejudgment interest. Said Offer can be found in the submissions on costs of the Defendant Keith Sullivan.

30 The Plaintiff Laudon submits that Rule 49 is not engaged as the Defendant Sullivan did not make a valid Offer. What Sullivan presented were Offers to Contribute, not Offers to Settle which by their nature involved the interests of each Defendant and were not capable of being accepted by the Plaintiff. As well, the Offers were not fixed, certain and understandable. See *Yepremian v. Weisz* (1993), 16 O.R. (3d) 121. I do not agree. The Offers whether Offers to Settle or Offers to Contribute are fixed, clear and in my view, quite capable of being understood by the Plaintiff. The Plaintiff understood quite clearly the dynamics in play in respect of settlement as evidenced by his Offer to Settle dated March 20, 2006 sent to Sullivan's counsel after the Mary Carter Agreement had been entered into. The faxed copy of that Offer is dated March 20, 2006 at 1:42 p.m. The Defendant Sullivan responded with the March 20, 2006 Offer to Contribute in the amount of $200,000 inclusive of prejudgment interest and GST plus costs on a partial indemnity scale which Offer was revoked on April 4, 2006.

31 Upon considering all of the Offers, both Offers to Contribute and Offers to Settle, made by all of the parties in this case, it is clear that those Offers, however described, are Offers made in accordance with Rule 49 of the *Rules of Civil Procedure* and as such, trigger cost consequences.

32 I accept the submissions made on behalf of the Defendant Sullivan and the authorities cited to support the proposition that Offers to Settle, Offers to Contribute and even revoked Offers can be considered by the court in determining whether or not Rule 49 cost consequences are triggered.

33 I also accept the submission made on behalf of Sullivan that "all inclusive" Offers fall within Rule 49 and trigger cost consequences if not accepted.[1]

34 The Defendant Sullivan also submits that in this case we have multiple Offers from two Defendants to one Plaintiff and that these Offers should be combined in order to determine what the Plaintiff had on the table from the two Defendants as of March 16, 2006. It was also submitted that even Offers formally revoked can be considered and taken into account as they are within the residual discretion of the trial judge.[2]

35 I have considered the chart comparing Offers to the judgment found at Tab 27(b) of the submissions on costs of the Defendant Keith Sullivan. Said chart offers a comparison of Offers bearing various dates to the judgment as of the date of the Offer and also taking into account with Roberts contributed to the overall settlement package on both an individual and combined approach.

36 Upon review and consideration of these various Offers, both Offers to Settle, Offers to Contribute and revoked Offers I conclude that Rule 49.10(2) is engaged. Rule 49.10 provides:

> 49.10 PLAINTIFF'S OFFER - (1) Where an offer to settle,
>
> (a) is made by a plaintiff 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 defendant,
>
> and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date of the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.
>
> (2) DEFENDANT'S OFFER - 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 form that date, unless the court orders otherwise.
>
> (3) BURDEN OF PROOF - 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).

37 The purpose of Rule 49 is to encourage parties to make reasonable Offers to Settle and to facilitate the early settlement of litigation. The Offer to Settle rules are result, not issue oriented. Not

only do the Offer to Settle rules encourage early settlement but such rules also provide a framework for the eventual disposition of costs in the proceeding.[3]

38 I find that in this case, Rule 49.10(2) is applicable. A number of Offers were made by the Defendant Sullivan. These Offers ranged anywhere from $75,000 inclusive of all claims, interest and costs to $200,000 inclusive of prejudgment interest, and GST plus costs on a partial indemnity scale.

39 The summary prepared by the Plaintiff demonstrates that four Offers remained open until trial as follows:

> March 7, 2006 - Offer to Contribute $75,000 inclusive of all claims, interest and costs.
>
> March 16, 2006 - Offer to Contribute $120,000 inclusive of prejudgment interest plus proportionate share of costs on a partial indemnity scale
>
> October 2, 2006 - Offer to Settle $100,000 plus prejudgment interest, costs on a partial indemnity scale less portion of costs paid by Roberts under Mary Carter Agreement, less costs thrown away at this trial.
>
> April 3, 200 - Offer to Settle $75,000 inclusive of costs and interest. Costs awarded by Stong, J. waived.

40 The Offers open until trial have been considered as well as Offers to Contribute and revoked Offers to determine whether Mr. Laudon has obtained a judgment as favourable as or less favourable than the terms of the Offer to Settle made by the Defendant Sullivan. If the Plaintiff's recovery is equal to or less than a Defendant's offer, the Plaintiff should usually receive partial indemnity costs only up to the date of the service of the Offer and the Defendant should usually receive partial indemnity costs after that date. The Defendant Sullivan asserts that Mr. Laudon's recovery is less than Sullivan's Offer with result that Sullivan should receive partial indemnity costs from March 16, 2006 to the conclusion of trial.

41 However, as a general proposition, if the Plaintiff's recovery is more than the Defendant's Offer but less than any Plaintiff's Offer, the Plaintiff should usually receive partial indemnity costs throughout the action. The Plaintiff Laudon asserts that he has recovered at trial more than Sullivan's Offer and therefore should be entitled to partial indemnity costs throughout the action.

Comparison of Offers and Judgment

42 In determining whether or not a judgment is as favourable or more favourable than an Offer to Settle, which was stated to be inclusive of costs and interest, the proper test is to compare the amount offered to the amount recovered plus interest and costs up to the date of the Offer.[4]

43 Where an Offer provides a lump sum for damages including prejudgment interest, the court will compare the damages awarded at trial plus prejudgment interest as of the date of the Offer to the lump sum in order to determine whether the judgment is as favourable as the Offer.[5]

44 If an Offer is inclusive of costs, the approach is to examine the Offer amount compared to the judgment recovered with the costs of the action calculated, like prejudgment interest, up to the date of the offer.[6]

45 Where a Settlement Offer was exclusive of costs which were to be assessed on a partial indemnity scale, the court did not consider costs in comparing the Offer to the judgment since partial indemnity costs would be the same whether under the judgment or the Offer.[7]

46 A review of the Offers in the case at bar indicates that some of the Offers are of the "all inclusive" variety and some are not. For example, the March 7, 2006 Offer remaining open until trial is for $75,000 inclusive all claims, interest and costs. The same can be said for the May 9, 2007 Offer which is exactly the same. However, the March 16, 2006 Offer is for $120,000 inclusive of prejudgment interest plus a proportionate share of costs on a partial indemnity scale. The October 2, 2006 Offer is for $100,000 plus prejudgment interest and costs on a partial indemnity scale, less a portion of costs paid by Roberts under the Mary Carter Agreement, less costs thrown away at the mistrial.

47 The judgment in favour of the Plaintiff against the Defendant Sullivan is in the amount of $121,688.49 plus prejudgment interest. Upon considering the "all inclusive" Offers, I find that the Plaintiff Laudon's recovery at trial is more than the Defendant Sullivan's all inclusive Offers but less than the Plaintiff's Offer of March 20, 2006. Clearly, the "all inclusive" Offers were less than the Plaintiff's recovery at trial.

48 In respect of the March 16, 2006 Offer of $120,000 inclusive of prejudgment interest plus a proportionate share of costs on a partial indemnity scale to be agreed upon or assessed, I would adopt the approach set out in *Mathur* and *Merrill Lynch*. Inclusive of prejudgment interest, the March 16, 2006 Offer was $120,000. At trial, the Plaintiff recovered $121,688.49 plus prejudgment interest. On its face, the Plaintiff's judgment was $1,688.49 better than the Defendant Sullivan's "all inclusive" Offer. When prejudgment interest is factored in as of the date of the Offer, prejudgment on general damages is $13,018.20. Prejudgment on special damages is the sum of $1,156.16. These two figures added to the damages recovered by Mr. Laudon totals the sum of $135,862.85. When comparing the $120,000 Offer inclusive of prejudgment interest and the judgment recovered by the Plaintiff Laudon with prejudgment interest calculated to the date of the Offer, the Plaintiff's recovery is more than the Defendant Sullivan's Offer by the sum of $15,862.85. The costs are not inclusive and are therefore given neutral treatment.

49 I find that the Offer to Contribute dated March 20, 2006 in the amount of $210,000 inclusive of prejudgment interest plus $15,000 in disbursement was not served on the Plaintiff. Unlike all the other Offers contained in the Sullivan brief, this Offer to Contribute found at Tab 3 is not contained in a letter signed by Mr. Forget. Further, there is no fax confirmation which accompanies this Offer unlike some of the other Offers. Therefore, I have disregarded this particular Offer to Contribute.

50 There remains for consideration the October 2, 2006 Offer to Settle in the amount of $100,000 plus prejudgment interest and costs on a partial indemnity scale less the portion of costs paid by Mr. Roberts under the Mary Carter Agreement and less the costs thrown away by the mistrial to be agreed upon fixed or assessed. Again, on its face, the recovery of the Plaintiff at trial is more than this Offer. Once more, the costs are not inclusive in the Offer and are given neutral treatment.

51 I find the above approach more reliable than the various comparisons set out by the Defendant Sullivan at Tab 27(b) of his materials. Those comparisons adopt various assumptions and set out

various scenarios i.e. consideration of combined or individual offers which I do not accept. Rather, Mr. Laudon's recovery is more than any of the Offers advanced by the Defendant Sullivan and accordingly I find that Mr. Laudon is entitled to receive partial indemnity costs throughout the action. He has satisfied the burden of proof regarding entitlement: see Rule 49.10(3). I reject in total Sullivan's claim for partial indemnity costs.

52 I will now consider whether the defendant Roberts is entitled to partial indemnity costs against the defendant Sullivan. I find that the defendant Roberts is not entitled to costs from the defendant Sullivan. His counsel advised the court that he had no financial interest in this action and would not pursue Sullivan for any recovery save the sum of $14,820 which has been paid by Sullivan to Roberts.[8]

53 Roberts was the signatory to the Mary Carter Agreement and was desirous of complying with his contractual obligations. Roberts' cross-claim was dismissed. Roberts was obliged to attend the trial in order to fulfil his contractual obligations with Sullivan. At paragraph 14 of the Agreement, Mr. Laudon and Mr. Roberts agreed to jointly advocate that the Plaintiff's trial costs ought to be paid solely by Keith Sullivan. The Agreement says nothing about Roberts being able to contend for his trial costs payable by Sullivan. It was clear from submissions made by Mr. Roberts' counsel as indicated in my October 18, 2006 ruling, Roberts had no financial interest in the outcome of this trial, save for the payment of some proportionate share of disbursements which has been paid. I should note that the Agreement between Laudon and Roberts contained no reimbursement clause in favour of Mr. Sullivan enabling him to recoup after trial any portion of any monies paid to Mr. Laudon including costs by Mr. Sullivan.

54 Given the outcome of the trial, it appears that the defendant Roberts overpaid the Plaintiff. I do not agree with Roberts' counsel when he submits that Mr. Roberts was successful in beating the Plaintiff's Offer. The Mary Carter Agreement pre-empts any consideration in respect of Mr. Roberts' Offers. He was bound by a Mary Carter Agreement with the result that the Plaintiff's claims against Roberts were resolved. Counsel for Mr. Roberts attended at trial as a direct consequence entering into the Mary Carter Agreement and not as a result of anything that Mr. Sullivan did or did not do. I would therefore dismiss Mr. Roberts' claim for costs in their entirety.

QUANTUM

55 The general rule is that a successful party is entitled to his or her costs. There should not be a departure from this rule except for very good reasons. Section 131 of the *Courts of Justice Act* provides a statutory basis for the exercise of discretion in awarding costs. In addition to the result in the proceeding and any Offer to Settle to Contribute made in writing, the court may also consider those factors set out in rule 57.01.

56 Rule 57.01(3) provides that a court should fix the costs.

57 The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes it clear that the fixing of costs does not begin and end with a calculation of hours times rates. Overall, the objective is to fix an amount that is fair and reasonable and in the expectation of the parties for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.[9]

58 The fixing of costs by a judge is not an assessment. It is not the role of the judge to minutely examine and dissect docket entries, computer printouts or to second guess the utilization of person-

nel and resources by counsel.[10] The costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs to the successful litigant.[11],[12]

Partial Indemnity Fees

59 The Plaintiff Laudon submitted a Costs Outline at Tab 9 claiming total fees and GST on a partial indemnity basis in the amount of $819,775.95. In addition, Laudon claims disbursements in the amount of $157,909.50. The total claim for costs on a partial indemnity scale sought by the Plaintiff is $977,685.45. It is important to keep in mind that the total amount claimed in the statement of claim was $2,000,000. The Plaintiff was awarded the overall sum of $312,021 by the jury plus prejudgment interest. As against the Defendant Sullivan and in accordance with the 39 percent allocation of negligence, the Plaintiff recovered the sum of $121,688.49 plus prejudgment interest in the amount of $22,775.51 for a total of $144,464 against this defendant.

60 The Plaintiff now seeks an award of partial indemnity costs just under seven times the amount that Mr. Laudon recovered at trial for his damages plus prejudgment interest as against the Defendant Sullivan. Pursuant to the judgment, the total award against the Defendant Roberts inclusive of prejudgment interest was the sum of $186,569.64. The total amount of the judgment including prejudgment interest is the sum of $331,033.64. In relation to the overall judgment, the Plaintiff Laudon's claim for partial indemnity costs is almost three times greater than the total judgment. On any analysis or comparison, it is clear the Plaintiff's claim for partial indemnity costs is totally disproportionate.

61 Counsel for the Plaintiff asserted that this was a complex and contentious case. An hourly rate of $300 each was claimed by Mr. Ralston and Mr. Keating on a partial indemnity basis. They practice exclusively in the area of Plaintiffs personal injury litigation and they have 18 and 13 years of experience respectively. In addition, clerk time was claimed in the amount of $80 per hour with hourly rates for Mr. Harris-Lowe at $225 per hour, Mr. Kemp at $300 per hour and Ms. Murray at $300 per hour, all on a partial indemnity scale.

62 Counsel for the Plaintiff Laudon submit that the amount of time noted in the Bill of Costs is not "so grossly excessive as to amount to over-kill"[13]

63 On a partial indemnity scale, the fees claimed by counsel are set out in the Costs Outline found at Tab 9 of the Defendant Sullivan's Brief as follows:

K.J. Ralston	$550,800.00
Bernard P. Keating	155,880.00
David Harris-Lowe	18,135.00

Kevin Kemp	2,500.00
Christine Murray	3,360.00
Lisa Anglin (Law Clerk)	23,992.00
Tonya O'Brien (Law Clerk)	26,072.00
Total Fees on Partial Indemnity Basis	$786,739.00
GST	39,036.95
Total Fees and GST	819,775.95

The Costs Outline sets out the number of hours spent by the Plaintiff's team both in pretrial proceedings and at trial. Insofar as pretrial proceedings were concerned, the Plaintiff's team expended 1,118.9 hours. In respect of trial attendance, altogether the Plaintiff's team expended 1,964.3 hours for a grand total of 3,083.2.

64 On behalf of the Plaintiff it is submitted that it was reasonable and necessary to expend this amount of time on this case where every aspect of the Plaintiff's claim was hotly contested by the Defendant Sullivan.

65 Not surprisingly, the defence for Sullivan takes a totally contrary view of the nature of this case. It is submitted that it was not a complex case and that the hours devoted to the case by the Plaintiff's counsel indeed was grossly excessive in the nature of overkill. With Mr. Laudon and other witnesses called out of order, it was necessary for the defence to lay the foundation of its case through other witnesses. This took additional time. Further, Mr. Laudon during his cross-examination could not continue on various days claiming that he suffered from debilitating headaches and pain. This also slowed the trial down and increased legal fees.

66 The quantum claimed by the Plaintiff was attacked on a number of grounds.

67 In addressing the rule 57.01 factors, the defence for Sullivan claimed that the defendant Sullivan was largely successful at trial being found 39 percent liable. The issues were important to both parties. The proceeding was lengthened by the sheer number of witnesses and Mr. Laudon's inability to continue on a number of days. Most of the trial time was devoted to the Plaintiff's case. When one considers the judgment and what the Plaintiff would have actually achieved, the amount of effort was simply not worth it. The Plaintiff's recovery was not worth the costs incurred.

68 Insofar as the Plaintiff's supporting material is concerned, the defence took the position that the Plaintiff bears the onus and he has failed to prove reasonable costs. The dockets produced are completely useless in support of the Plaintiff's claim. The partial indemnity rates are too high and should be the $150 to $180 range. There are double entries which produced discrepancies in the Costs Outline. It is submitted that the Plaintiff has not produced a reliable record to support his claim.

69 Insofar as Mr. Harris-Lowe's hourly rate is concerned, his hourly rate was billed to Mr. Ralston in the amount of $150 per hour. However, on a partial indemnity scale his time is claimed at $225. This is totally wrong. It is further submitted that Mr. Kemp's involvement and time does not square with what is reflected in the Costs Outline. As between the two Clerks, $50 per hour would be a more reasonable rate and again, there was a claim of overlap. It is submitted that the fees ought to be considerably discounted because of all of the above factors.

70 It is clear that rule 57.01 as a starting point refers to the result in the proceeding (my emphasis) as well as any Offers to Settle to contribute made in writing. In my view, the Plaintiff's claim for partial indemnity fees of almost $820,000 in this case is both unsupportable and unacceptable. When the amount claimed is compared to the results achieved, there is no doubt that the amount of time expended certainly exceeded the value of the results obtained many times over. Each side has its own view as to why the trial took as long as it did. There are factors that can be identified throughout the course of the trial by both sides that did have the effect of lengthening the trial proceedings. Although each side blames the other, they both bear responsibility for lengthening this trial. I do not accept that the case was overly complex as asserted by the Plaintiff. Neither do I accept that this case was a simple "garden-variety" personal injury action. The case took as long as it did to reach conclusion because of the nature of the claims being advanced, the presentation of the evidence for the Plaintiff and Defence, Mr. Laudon's inability to continue during his cross-examination and the various motions arising from contentious procedural, substantive and evidentiary matters arising throughout the trial and after.

71 All of this having been said, the overall result obtained by the Plaintiff must be examined against the backdrop of the time, energy and resources devoted to this case. My approach has been to view the overall result obtained by the Plaintiff and not to engage in score keeping on an issue by issue basis regarding the events at trial.

72 Counsel on behalf of the Plaintiff candidly agreed that there were some irregularities in respect of the Costs Outline regarding Mr. Harris-Lowe's hours and certain duplication in respect of the Clerks and time spent by Mr. Ralston. I agree that there are problems with the Plaintiff providing a totally accurate record. I also note that insofar as the Bill of Costs is concerned, no true draft Bill of Costs was produced. Rather, the Bill of Costs took the form of listing of the Plaintiff's legal team and their applicable hourly rates. Thereafter, the Plaintiff's brief contained page after page of computer summary and invoices relating to the time spent on this case and disbursements.

73 When all is said and done, I must turn to the overarching principles of what is fair and reasonable. The costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the successful party rather than any exact measure of the actual costs to the successful litigant.

74 In this case, the defence for Sullivan claimed partial indemnity costs in the amount of $530,554.53. It was submitted that these costs were "rock solid". In my view, it was certainly within

the expectation of the defence for Sullivan that costs of this magnitude were being generated regarding this case and if unsuccessful, the Defendant Sullivan would be exposed to hundreds of thousands of dollars in partial indemnity costs.

75 This is a case where I exercise my discretion in the fixing of costs in accordance with rule 57.01(3). In fixing those partial indemnity fees, I have considered the time spent at trial of 54 days including pretrial motions, together with additional days devoted to the motion for judgment and costs hearing. I have considered both the claims and result achieved by the Plaintiff in the overall judgment and in particular, as against the defendant Sullivan. I have considered the overarching principles of what is fair and reasonable in these circumstances with the fixing of costs not being a pure mechanical exercise of hours times rates. I have considered what fair and reasonable amount should be paid by the unsuccessful party Mr. Sullivan, rather than any exact measure of the actual costs to the successful Plaintiff. Accordingly, I fix partial indemnity fees in the amount of $400,000 inclusive of GST payable by the Defendant Sullivan to the Plaintiff Laudon within 30 days.

Disbursements

76 The schedule of assessable disbursements can be found at Tab 10(g) of the Plaintiff's Costs Brief. The total the sum of $157,909.50. Again, the defence challenges the disbursements as being extraordinarily high. The experts fees are excessive particularly in respect of Dr. Charendoff whose account is $4,500 and Dr. Crohn whose account is $8,985. Neither doctor attended to give evidence at trial. The defence asserted that in respect of experts fees, such fees ought to be reasonable. The Jacobs Pain Centre account is $20,750. It was submitted this account was unreasonable. Under Miscellaneous Expenses there is the account of Taran Virtual Associates in the amount of $15,619.80. This is not a disbursement. Rather, this is an account from another law firm providing the services of an associate lawyer. There is an account from Artery Studios Inc. in the amount of $13,356.92 and an account from Signznn Designz Inc. in the amount of $2,518.56 and an account from King-Reid and Associates Inc. in the amount of $1,229.05. These are all "large ticket" items which ought to be reduced substantially. In addition, the total disbursements when viewed against the Plaintiff's recovery, far exceed what was obtained and ought to be significantly discounted.

77 In all the circumstances, I have reviewed the schedule of assessable disbursements. I find the Taran Virtual Associates account not an assessable disbursement. There are other disbursements that do not give me difficulty such as the disbursements for Dr. Zajc and Dr. Henderson.

78 I do have difficulty with the high amounts of the experts reports and trial attendance for Dr. Tator, S. Brown & Associates, Dr. Murphy, The Jacobs Pain Centre, Dr. Crohn and Townsend & Kavanaugh. The account from Marine Accident Services in the amount of $9,665.40 is not allowed given my ruling at trial regarding the proposed evidence of Mr. Blanchett.

79 I have exercised my discretion in respect of fixing disbursements using the same approach and applying the same principles as I did regarding fees. I have discounted amounts for experts reports and trial attendance as well as discounting miscellaneous expenses. I fix disbursements inclusive of GST in the amount of $90,000. I consider these disbursements to be fair and reasonable within the expectation of the unsuccessful Defendant Sullivan to pay to the successful Plaintiff Laudon. Disbursements in the amount of $90,000 shall be paid by the defendant Sullivan to the Plaintiff Laudon within 30 days together with the partial indemnity fees fixed in the amount of $400,000.

DISPOSITION

80 I have determined the issues of entitlement and quantum in accordance with my reasons above. The partial indemnity fees are fixed in the amount of $400,000, (inclusive of GST) together with disbursements in the amount of $90,000 (inclusive of GST). Total costs fixed in the amount of $490,000 all inclusive are to be paid by the Defendant Sullivan to the Plaintiff Laudon within 30 days of this Order.

G.P. DiTOMASO J.

cp/e/qlaxs/qlmxb

1 *Stewart v. Canadian Broadcasting Corp.*, [1997] O.J. No. 4077; *Adatia v. Dhamji*, [2005] O.J. No. 790; *Amaral v. Canadian Musical Reproduction Rights Agency Ltd.*, [2007] O.J. No. 3512; *MacMillan v. White*, [1991] O.J. No. 2720.

2 See Rule 49.13 *Thomas v. Bell Helmets*, [1999] O.J. No. 4293 paras. 76-80.

3 *Skye v. Matthews*, [1996] O.J. No. 44.

4 *Merrill Lynch Canada Inc. v. Cassina* (1992), 15 C.P.C. (3d) 264.

5 *Mathur v. Commercial Union Assurance Company of Canada*, [1988] O.J. No. 144.

6 *Merrill Lynch Canada Inc.* (supra).

7 *Peter Lombardi Construction Inc. v. Colonnade Investments Inc.* (2000), 51 O.R. (3d) 551.

8 Ruling DiTomaso, J. October 18, 2006.

9 *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (Ont. C.A.).

10 *Canadian National Railway Corp. v. Royal and SunAlliance Insurance Company of Canada*, [2005] O.J. No. 3931.

11 *Moon v. Sher*, [2004] O.J. No. 4651 (Ont. C.A.).

12 *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495 (Ont. C.A.).

13 *Tri-S Investments v. Vong*, [1991] O.J. No. 2292.