Case Name:

Laudon v. Roberts

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

[2010] O.J. No. 315

2010 ONSC 433

Court File No. 02-B5188

Ontario Superior Court of Justice

G.P. DiTomaso J.

Heard: January 6, 2010.
Judgment: January 15, 2010.

(86 paras.)

Counsel:

B. Keating, for the Plaintiff.

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

REASONS FOR DECISION ON COSTS (2)

G.P. DiTOMASO J.:--

BACKGROUND

1 This action arose out of a boating accident that occurred on August 2, 2002, in which the plaintiff Rick Laudon ("Laudon") sustained various personal injuries ("the accident"). At the time of the accident, the plaintiff was a passenger in a boat operated by the defendant Keith Sullivan ("Sullivan"), and Sullivan's boat was struck by a second boat operated by the co-defendant, Will Roberts ("Roberts").

2 The action was commenced on November 12, 2002.

3 In the Amended Statement of Claim, Laudon sought $2,000,000 in general and special damages against Roberts and Sullivan.

4 Roberts and Sullivan separately defended the action, and each delivered a Statement of Defence and Cross-claim.

5 On March 7, 2006, Sullivan offered to contribute $75,000 inclusive of interest, costs and disbursements towards the settlement of the action. That offer remained open for acceptance until trial.

6 Sullivan subsequently served five additional offers, three of which remained open for acceptance until the commencement of trial.

7 On March 20, 2006, Laudon settled his claim against Roberts for the amount of $365,000 inclusive of interest, costs of $35,000, and disbursements of $38,000, resulting in a total recovery of $438,000 from Roberts (the "Mary Carter Agreement"). The terms of the Mary Carter Agreement specifically provided that Laudon would repay any portion of the disbursements adjudged to be payable by Sullivan. In fact, Sullivan did pay his proportionate share of the disbursements to Roberts.

8 The action was originally tried before Stong J. sitting with a jury on March 27, 2006. During the preliminary submissions, Laudon's counsel inadvertently revealed the amount paid by Roberts to the plaintiff pursuant to the Mary Carter agreement. That disclosure prompted a mistrial.

9 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.

10 The matter proceeded before me at the Fall Sittings of 2006, at which time six days were consumed with a variety of motions.

11 The action was then tried by me sitting with a jury during the April and Fall Sittings of 2007. On November 21, 2007, the jury found negligence on the part of both Roberts and Sullivan, and further found contributory negligence on the part of Laudon. The jury allocated degrees of fault or negligence as follows:

Roberts	50 %
Sullivan	39 %
Laudon	11 %

12 On March 17, 2008, I granted judgment to Laudon in accordance with the jury's verdict. In respect of damages, the jury awarded general damages to 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 finding on liability and allocations of negligence attributable to Sullivan at 39%, he was liable to pay Laudon the sum of $121,688.49 in damages plus pre-judgment interest. Further, Sullivan was ordered to pay pre-judgment 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.

15 A costs hearing was conducted before me on December 2 and 3, 2008.

16 The total time spent at trial, including the motions in October 2006, was 54 days. Added to the 54 days was one additional day devoted to a motion for judgment on March 14, 2008, and the two days devoted to the costs hearing in December 2008.

17 On December 11, 2008, I fixed the plaintiff's costs on a partial indemnity scale at $400,000 and awarded $90,000 in disbursements.

18 On May 7, 2009, the Court of Appeal allowed Sullivan's appeal, set aside the judgment and dismissed the action against Sullivan and ordered Laudon to pay Sullivan's costs of the action.

19 On September 23, 2009, the appeal panel confirmed that the judgment having been set aside the costs order was automatically set aside as well. It directed me to fix Sullivan's costs.

20 On November 5, 2009, the Supreme Court of Canada dismissed the plaintiffs Application for Leave to Appeal. Sullivan was entirely successful in his defence of the action.

THE COSTS HEARING

21 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 January 6, 2010.

POSITIONS OF THE PARTIES

Position of the Successful Defendant, Sullivan

22 The successful defendant, Sullivan submits that he is entitled to his costs of the action as against the plaintiff, fixed on a partial indemnity scale up to March 7, 2006, and substantial indemnity scale thereafter from March 8, 2006 to April 2, 2008, in the total amount of $886,543.92. Sullivan further requests that the Ministry of Health and Long-Term Care ("OHIP") be ordered to pay a 4% share of those costs.

23 The costs sought by Sullivan are fair and reasonable, and well supported by the documentation. No issue was raised by Laudon in respect of quantum. It is well known that Laudon had previously sought costs on a partial indemnity basis the amount of $997,085. Laudon cannot now argue that Sullivan's costs are unreasonable when, on a partial indemnity scale, the plaintiff contended for even higher costs.

24 Sullivan submits that a number of offers were made on his behalf throughout the course of the proceedings, both before trial and even during trial, consistent with the spirit of the Rules of Civil Procedure. However, none of these offers were accepted by Laudon. Laudon's refusals to settle this

case cannot be ignored. Virtually 90% of the trial time of some 54 days was consumed with Laudon's case. Sullivan was compelled to meet Laudon's case which included calling a number of witnesses whose evidence was unnecessary. Further, expert evidence was called on issues where Laudon was unsuccessful as evidenced by the jury's verdict. In the end, Sullivan could do nothing more than to oppose Laudon's case in which a claim for $2,000,000 was being advanced by way of damages.

25 The case is not a novel one. Laudon's arguments in respect of miscarriage of proceedings and/or financial hardship/impecuniosity on his behalf are without foundation and ought to be rejected.

26 Sullivan submits the jury assessed damages at $312,021.77, including OHIP's subrogated claim of $12,759. OHIP's subrogated claim represented 4% of the assessed damages and therefore Sullivan asserts that OHIP is liable for 4% of the costs.

Position of the Unsuccessful Plaintiff, Laudon

27 Laudon admits that Sullivan obtained a result at trial that was more favourable than the Offer to Settle dated March 7, 2006. Laudon submits that the court in its discretion may determine by whom and to what extent costs shall be paid. Factors to be considered in the exercise of discretion by the court are set out in Rule 57 of the Rules of Civil Procedure.

28 Laudon seeks an order for his costs of the action in accordance with my previous order dated December 11, 2008, set aside by the Court of Appeal. In the alternative, Laudon seeks an order denying Sullivan the costs of this proceeding, also contrary to the decision of the Court of Appeal. In the further alternative, Laudon seeks an order of costs that will not impose undue hardship or an unjust penalty upon him.

29 Laudon has advanced three arguments in support of his position:

(a) the court ought to decline an award of costs on the basis that the issue is novel;

(b) a miscarriage in procedure lies at the feet of Sullivan who elected to proceed with this lengthy trial rather than appeal my decision regarding deductibility at first instance to the Ontario Court of Appeal. It is submitted that the costs of the trial was therefore unnecessarily incurred. Laudon should not be penalized for Sullivan's decision to proceed with the trial rather than challenge the decision of deductibility at the Court of Appeal at the initial stage; and

(c) a successful party may be denied costs where to do so would work an unjust hardship on the unsuccessful party. This argument is based on special circumstances and financial hardship considerations as they relate to Laudon.

30 Laudon submits that the quantum of costs should reflect a benchmark of $400,000 and, thereafter, reflect an appropriate deduction having consideration to the arguments raised by him. Ultimately, the costs that are to be fixed should be fair and reasonable.

ISSUE

31 The issue to be determined is what fair and reasonable costs are to be paid by Laudon to Sullivan?

ANALYSIS

32 Laudon sustained personal injuries as a result of a boating accident which occurred on August 2, 2002. He was a passenger in a boat operated by Sullivan. The Sullivan boat came into collision with a boat operated by Roberts. As a result of the accident, 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 of past and future loss of income, past out-of-pocket expenses, future care costs, future housekeeping/home maintenance 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 was long, hard-fought, and at times, acrimonious.

33 The trial featured an added twist in that Laudon and Roberts entered into a Mary Carter agreement by which Laudon was paid $438,000 by Roberts prior to trial.

34 An important ruling in respect of this case related to the deductibility of the monies paid by Roberts pursuant to the Mary Carter agreement from any judgment award made against the non-settling defendant Sullivan. This was the primary issue decided by the Court of Appeal. Incidentally, the Court of Appeal also decided that such a motion in respect of deductibility ought to be made at the conclusion of the trial. Sullivan was successful on appeal. The judgment was set aside and, significantly, Laudon's action against Sullivan was dismissed with the Court of Appeal ordering Laudon to pay Sullivan's costs of the action. My previous ruling in respect of costs was automatically set aside with the Court of Appeal directing that I fix Sullivan's costs.

35 The matter has now returned to me as the trial judge to fix the costs which Laudon must pay to Sullivan.

36 There is no question that the Court of Appeal ordered Laudon's action dismissed against Sullivan with costs payable by Laudon to Sullivan.

37 I find that Sullivan is entitled to his costs fixed on a partial indemnity scale up to the date of his offer of March 7, 2006, and on a substantial indemnity scale thereafter from March 8, 2006 to April 2, 2008. I make this finding on the basis that Sullivan was entirely successful in the defence of the action as reflected in the decision of the Court of Appeal and subsequent order dated May 7, 2009.

38 I have my previous decision on costs, I had found that upon considering all of the offers, both offers to contribute and offers to settle made by all of the parties and in particular, by Sullivan, those offers triggered costs consequences per Rule 49 of the Rules of Civil Procedure. The offers, whether offers to settle or offers to contribute were fixed, clear, and in my view, quite capable of being understood by Laudon. Laudon understood clearly the dynamics in play regarding those offers. My view remains unchanged.

39 It is also important to note that Sullivan not only delivered an offer dated March 7, 2006, which remained open until trial, but also there were numerous offers before trial and even during trial advanced by Sullivan in the spirit of the Rules of Civil Procedure to reach resolution short of judgment after a lengthy trial. None of those offers were accepted by Laudon. As a result, this ac-

tion ground its way, slowly but surely, to the jury's verdict which, ultimately, was not favourable to Laudon.

40 I find that if Laudon had accepted any of the offers advanced by Sullivan, Laudon would have had money in hand over and above what he had received from Roberts through the Mary Carter agreement, would have been spared the expense of a lengthy trial, and, most importantly, would not have been exposed to the risk of paying costs commensurate with a 54-day jury trial.

41 The authorities are well established that where the plaintiff rejects an offer to settle by the defendant and his action is subsequently dismissed, the defendant is entitled to his costs on a partial indemnity scale up to the date of the offer and on a substantial indemnity scale thereafter.[1]

42 The issue of entitlement has been decided by the Court of Appeal and Sullivan's costs are to be fixed as I have previously found amply supported by the authorities and the evidence.

QUANTUM

43 We come now to the issue of quantum. Section 131 of the Courts of Justice Act provides a statutory basis for the exercise of judicial discretion in awarding costs. In addition to the result in the proceeding and any offer to settle or to contribute made in writing, the court may also considers those factors set out in Rule 57.01 of the Rules of Civil Procedure.

44 Rule 57.01(3) provides that a court should fix the costs. In this case, I am directed by the Court of Appeal to fix the costs of the action of Sullivan, which costs are to be paid by Laudon.

45 The 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.[2]

46 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 personnel and resources by counsel.[3] 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 cost to the successful litigant.[4]

47 I find that Laudon sought $2,000,000 and ultimately recovered nothing from Sullivan. Rule 57.01(a) therefore weighs heavily in Sullivan's favour. The proceedings were lengthy and complex. The trial lasted 54 days over three Sittings and included many contested issues. There were numerous procedural and substantive motions brought prior to, during the course of, and at the end of trial. The issues were important and significant to the parties.

48 Laudon's case was lengthy and occupied approximately 90% of the trial time. There were numerous witnesses called which compelled Sullivan to cross-examine those witnesses. Expert witnesses were called in respect of the general damage aspect of the claim as well as expert witnesses called regarding the loss of past and future income and future care needs.

49 The trial was lengthened by 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 court house. This caused the trial to virtually grind to a halt. One of the key issues in the trial was the claim being advanced by Laudon that he

sustained personal injuries which were so serious and permanently disabling that he could no longer work.

50 Ultimately, the jury did not award the plaintiff $2,000,000, but rather, considerably less. From its verdict, clearly, the jury had rejected to a very large extent, Laudon's claims for past loss of income, future loss of income and future care needs.

51 I do not find that there was any improper or vexatious conduct on the part of Sullivan. I do not find that Sullivan denied or refused to admit anything that he should have admitted. In the end, he was entirely successful.

52 I find in all the circumstances of this case that it was perfectly reasonable for two counsel to have represented Sullivan at trial. It should be noted that two counsel represented Laudon at trial. Further, it is not unreasonable for other lawyers and clerks to have assisted counsel throughout the course of these proceedings.

53 The work conducted by counsel and law clerks on Sullivan's behalf is described and detailed in his two costs outlines. I accept Sullivan's submission that all of the time was reasonably incurred and certainly not "grossly excessive" or "obvious overkill". Counsel for Laudon does not take issue with respect to the hourly rates and time spent by counsel for Sullivan.

54 Further, Sullivan submits that the most important factor to consider in fixing his costs is the fact that previously Laudon had sought costs of $1,140,787.50 on a substantial indemnity scale, and $997,085 on a partial indemnity scale. It follows that Laudon would have reasonably expected Sullivan's costs to be approximately the same. Sullivan's claim for costs totals the sum of $886,543.92. Given Laudon sought more than what Sullivan now seeks, Laudon cannot claim that he could not reasonably have expected Sullivan's costs as claimed and therefore, Sullivan's costs should not be reduced. I am satisfied that there is no basis for any suggestion that Sullivan's insurer is attempting to recover more than what it actually paid in respect of costs.

55 As for the submissions made on behalf of Laudon, I reject the argument that a novel issue arose in this case which should result in an award of no costs. The Court of Appeal did not so find. To the contrary, in its Reasons, the Court of Appeal was of the view that the law in this area was well-settled. While the issue of deductibility was highly significant and important to the parties, this case was not about double-recovery. This case was a negligence case wherein the plaintiff was advancing a claim of $2,000,000 for damages which he alleged resulted from the negligence of two defendants in a boating case.

56 The issue of deductibility of settlement funds did not affect the course of the trial and may not have been an issue at all if the jury had found Sullivan not liable or, alternatively, assessed damages exceeding the amount paid. In either scenario, the double-recovery issue would not have come into play and therefore, it cannot be said that Laudon was taking a novel issue to trial. Further, the Court of Appeal did not consider the involvement of the Mary Carter agreement as a novel and complicating factor. Other appellate courts had decided the issue of deductibility of monies received from one tortfeasor from judgment against another tortfeasor.

57 I am not persuaded that this case was a novel one that should deprive Sullivan of his costs.

58 I further reject the argument that there has been a miscarriage in procedure. Laudon argued that Sullivan should be denied his costs due to his counsel's failure to submit the Ratych v. Bloomer decision, [1990] 1 S.C.R. 940, during the original argument on the double-recovery issue. Sullivan's

counsel owes no duty to Laudon. Laudon's counsel is under professional obligation to know the law, including Ratych and advise his client accordingly.

59 Although Ratych was not submitted during October 2006, other cases directly on point were submitted and fully argued. Laudon attempted to distinguish the cases and proceed to trial.

60 The issue was of deductibility and the decision in Ratych arose again in March of 2007 before jury selection and again in May of 2007, with the result that the trial proceeded and Laudon continued to assert that his case was distinguishable.

61 Laudon submits that Sullivan should have appealed this court's ruling of October 12, 2006, and somehow the failure to do so warrants a denial of costs. I disagree. The Court of Appeal ruled that the deductibility issue should have been dealt with at the end of trial. Further, the Court of Appeal stated that rulings made infra-trial do not become final for the purposes of appeal until judgment is entered. I find in accordance with the Court of Appeal's decision, Sullivan could not have appealed this court's ruling of October 12, 2006 until judgment was rendered and therefore Sullivan's failure to do so cannot be a basis to deny his claim for costs.

62 Lastly, I am asked to consider the special circumstances/financial hardship argument advanced by Laudon. Laudon received $438,000 from Roberts before the trial started. In fact, he recovered more than his assessed loss in the amount of $312,021. He was not left without recovery. Rather, he decided that he should contend for more by engaging in a lengthy and expensive trial. In the end, his decision amounted to a gamble which he lost. Any hardship to Laudon does not lie at the feet of Sullivan in these circumstances.

63 I am not persuaded that Laudon is impecunious. To the contrary, the evidence at trial established that he owned a home and a vehicle. His financial circumstances did not prevent him from pursuing a 54-day trial. The plaintiff made a choice to commence this action, engage in protracted litigation, and a failure to accept any number of reasonable offers to settle. He cannot make these choices with impunity. The reality of litigation is that it is expensive and fraught with risk. Parties should not engage in litigation either to gamble or for sport. Litigation is a serious business with serious choices. Decisions made by litigants are often informed by the risk of costs. The reality of litigation is that an unsuccessful party does not get a "free ride" at the end of the day. No doubt, if the shoe was on the other foot, that unsuccessful party would most certainly have contended for his or her costs from the other side.

64 Counsel for Sullivan cited a number of cases where the courts have rejected the plaintiff's request to deny a successful defendant cost based on financial hardship where the plaintiff's action was dismissed. Those cases are cited below.[5] In the circumstances of the case at bar, certainly costs and the effect of a possible adverse costs award must be considered by Laudon before he decides to bring the action and, after so doing, rejects a number of offers to settle, thereby compelling Sullivan to engage in a 54-day trial.

65 In my view, the law is clear that where a plaintiff gambles on a lawsuit and loses, he cannot use the financial hardship a costs award may cause to avoid the costs consequences of bringing the unsuccessful action.

66 In this case, I find that it would be unfair to the successful party Sullivan to bear his own costs when Laudon forced Sullivan to defend a 54-day trial which Laudon ultimately lost. It is ironic in this case that but for the result of judgment on appeal, Laudon, as the successful party, sought ap-

proximately $1,000,000 in costs. However, at this time, he complains when Sullivan seeks his costs of almost $900,000 as the successful party. For these reasons, I reject Laudon's submission based on special circumstances/financial hardship.

67 This analysis brings us to the ultimate question in fixing Sullivan's costs to be paid by Laudon.

68 In all the circumstances, what are those fair and reasonable costs?

69 In the costs outline for partial indemnity costs from December 8, 2002 to March 7, 2006, the amount of $61,718.22 is claimed. The costs outline is carefully prepared and supported by a detailed client ledger for that period together with documentation supporting disbursements.

70 I have also reviewed the costs outline regarding substantial indemnity costs from March 8, 2006 to April 2, 2008. The total costs claimed are in the amount of $824,825.70. Again, that costs outline has been prepared in detail supported by an extensive client ledger for the same period together with a disbursement summary with supporting documentation.

71 Sullivan claims that his costs in the amount of $886,543.92 are fair and reasonable, and ought to be paid by Laudon.

72 Laudon submits that as far as quantum is concerned, a benchmark of $400,000 should be struck against which further reductions ought to be made, resulting in a fair and reasonable amount to be fixed for Sullivan's costs.

73 I reject the approach suggested by counsel for Laudon. It is without evidentiary foundation and without the support of any of the submissions made on behalf Laudon, which submissions were rejected.

74 Rather, I turn to the quantum advanced by counsel for Sullivan.

75 In respect of disbursements, I would reduce the total amount by the sum of Sullivan's lost wages claimed in the amount of $13,478.64. This is not an assessable disbursement. I would also deduct the amount claimed for equipment (ELMO) the amount of $3,448.74. I am not satisfied that this equipment was ever used for the purposes of trial. The total amount deducted for these two items is rounded to $17,000. Counsel for Laudon did not specifically challenge any of the other disbursements set out in support of the two costs outlines. The total amount of the disbursements per both costs outlines is the sum of $136,599.39. After deducting the sum of $17,000, I would allow and fix disbursements in the amount of $119,000 rounded.

76 More problematic is the fixing of fair and reasonable fees.

77 The fees claimed on a partial indemnity scale for period December 8, 2002 to March 7, 2006, is the sum of $43,146.08. Based on all the evidence before me, I find these fees to be fair and reasonable. I have fixed these fees in the amount of $43,000 rounded.

78 The total fees claimed on a substantial indemnity scale from March 8, 2006 to April 2, 2008, is in the amount of $726,798.45 less costs thrown away for a total of $706,798.45. These fees are primarily those fees associated with the preparation and conduct of this trial.

79 In my view, it was certainly within the expectation of Laudon that costs of this magnitude were being generated regarding this case and if unsuccessful, Laudon would be exposed to hundreds of thousands of dollars in both partial indemnity and quite possibly as it turned out, substantial indemnity costs. A daunting prospect.

80 This is a case where I exercise my discretion in the fixing of costs in accordance with s. 131 of the Courts of Justice Act and in accordance with Rule 57.01 of the Rules of Civil Procedure. Laudon's reasonable expectation as to costs as the unsuccessful party was in the neighbourhood of what Sullivan now claims. Laudon was claiming partial indemnity costs even higher than the costs claimed by Sullivan or combined partial indemnity and substantial indemnity scales. Nevertheless, I was not prepared to award Laudon the amount of costs which he had claimed prior to the appeal, on the grounds that those costs were excessive and were not fair and reasonable in all the circumstances. I have come to the same conclusion in respect of the substantial indemnity fees claimed by Sullivan.

81 While I have no doubt that the time was spent at the applicable hourly rate for the described services, in all the circumstances, the amount claimed for substantial indemnity fees for a trial of 54 days, including pre-trial motions together with additional days devoted to the motion for judgment and costs hearing is too high. These fees in the range of $700,000 are excessive after the application of the overarching principles of what is fair and reasonable in these circumstances. I am guided by the principles in Boucher and related authorities. I have considered that the fixing of costs is not a pure mathematical exercise of hours times rate. I am mindful that the objective in awarding these costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

82 That having been said, I do not agree that the sum of $706,798.45 representing fees on substantial indemnity scale is fair and reasonable.

83 I have considered the result achieved by the successful party, Sullivan and have applied the overarching principles of what is fair and reasonable in all of the circumstances. I have considered the nature and length of the trial, its complexity and the impact of the offers to settle. I have considered and weighed what would be fair and reasonable for the unsuccessful party to pay in this particular proceeding, and I have concluded that those substantial indemnity fees would be less than the amount claimed. In exercising my discretion judicially, guided by the overarching principle of what is fair and reasonable in the circumstances, I would fix the substantial indemnity fees in the amount of $600,000 inclusive of GST.

DISPOSITION

84 I have determined the issue of quantum in accordance with my reasons above. I have fixed the total of partial indemnity and substantial indemnity fees and allowed same in the amount of $643,000 inclusive of GST together with disbursements fixed in the amount of $119,000 inclusive of GST. Total costs fixed are in the amount of $762,000, payable by Laudon to Sullivan.

85 Sullivan relies upon Regulation 552 under the Health Insurance Act, R.R.O. 1990, s. 39(6) which provides for the apportionment of liability for trial costs between the injured party and OHIP. In applying s. 552 of the Regulation, it is submitted that where OHIP asserts a subrogated claim, it bears the proportionate share of the costs. The jury assessed damages at $312,021.77, including OHIP 's subrogate claim of $12,759. OHIP's subrogated claim represented 4% of the assessed damages. It is submitted that OHIP is liable for 4% of the assessed costs, which total $762,000. On the submissions of Sullivan, this would mean that OHlP would be liable to pay the sum of $30,480.

86 Pursuant to the formula set out in s. 39(6) of Regulation 552 of the Health Insurance Act, the liability of OHIP is limited to its proportion of 4% of the total costs fixed fair and reasonable costs. Accordingly, OHIP shall be liable for 4% or the sum of $30,480 of the fixed costs, payable to Sulli-

van. If these costs are collected from OHIP, the amount recovered shall be deducted from Laudon's liability for costs.[6]

G.P. DiTOMASO J.

cp/s/qllxr/qljxr/qljyw

1 S&A Strausser Limited v. The Town of Richmond Hill, [1990] O.J. No. 2321 (C.A.); Tilker v. Canada Life Casually Insurance Corp., [2002] O.J. No. 2873; Coldmatic Refrigeration of Canada Ltd. v. Kenaidan Contracting Ltd., [2005] O.J. No 6195 (S.C.J.).

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

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

4 Zesta Engineering Ltd. v. Cloutier, [2002] O.J. No. 4495 (Ont. C.A.); Moon v. Sher, [2004] O.J. No. 4651 (Ont. C.A.).

5 Cugliari v. White, [1995] O.J. No. 4892 (S.C.J.); Lawyer's Profession Indemnity Co. v. Geto Investments Limited, [2002] O.J. No. 921 (S.C.J.); Matton v. Yorlasky, [2007] O.J. No. 5055 (S.C.J.); Westvervelt v. Frappier Estate, [1999] O.J. No. 267 (S.C.J.); Rogers-Rogers Inc. v. Pinehurst Woodworking Co., [2006] O.J. No. 85 (S.C.J.); Amaral v. Canadian Musical Reproduction Rights Agency Limited, [2007] O.J. No. 3512 (S.C.J.); Synod of the Diocese of Niagara v. Bails, [2009] O.J. No. 2174 (S.C.J.).

6 Marchand (Litigation Guardian) v. Public General Hospital of Chatham, [1997] O.J. No. 1990 (O.C.J. Gen. Div.); Holder (Litigation Guardian of) v. Greater Niagara General Hospital, [1998] O.J. No. 1523 (O.C.J. Gen. Div.).