

## ●●● Personal Injury Law: Cost proportionality not always kind to injured plaintiffs

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When it comes to legal costs, the proportionality concept is a welcome feature in civil litigation but it can serve to penalize personal injury plaintiffs with modest claims.

For example, in [Mayer v. 1474479 Ontario Inc.](#), a jury awarded the plaintiffs \$140,600 at trial but had their partial indemnity cost claim of \$422,055 denied by Justice Ian Leach of the Ontario Superior Court of Justice in his April 28 decision.

In his reasons denying costs to the plaintiffs, Leach reviewed all of the Rule 57.01 factors in relation to cost awards.

Leach highlighted the overriding principle of reasonableness when it comes to costs. He then proceeded to review in detail the conduct of the trial and raise various criticisms of the approach by plaintiffs' counsel. For example, he held plaintiffs' counsel largely responsible for the extended length of the trial.

The undercurrent of the court's reasoning in denying costs to the plaintiffs in Mayer appears to be the fact that plaintiffs' counsel believed the case was a sizeable one and pursued it as such when the defence and the jury felt otherwise. For example, in reference to the plaintiffs' unwillingness to compromise from their settlement position, Leach stated: "In contrast, the plaintiffs seem to have engaged in no meaningful risk-analysis whatsoever, nor any corresponding willingness to compromise their claims in any degree, for the purpose of resolving the parties' dispute without trial."



In Mayer, plaintiffs' counsel had made a formal offer to settle for \$1.5 million in damages after having successfully moved before trial to increase the quantum claimed. Defence counsel, on the other hand, made an all-inclusive offer of \$200,000 as well as one for damages totalling \$150,000 (broken down as \$115,000, \$15,000, and \$20,000 to each of the various plaintiffs), plus partial indemnity costs.

Despite a modest jury award, the plaintiffs claimed partial indemnity costs of \$265,393 for fees inclusive of tax and \$156,662 for disbursements, also inclusive of tax, for a total of \$422,055.

Claiming they beat their offer to settle, defence counsel claimed their partial indemnity costs in the amount of \$181,407.

In considering defence counsel's request for costs, Leach ruled defence counsel had failed to establish they beat their formal offer given that they had improperly framed their initial proposal as an all-inclusive one and their subsequent offer didn't state whether it was severable so as to allow each plaintiff to accept the amount on the table.

In the end, Leach denied costs to both sides.

Mayer must not be seen a precedent for denying cost claims of this magnitude in personal injury cases where the damages involved are far less than the amount claimed for costs.

Personal injury litigation is extremely expensive. Even the simplest case is expensive to properly present at trial. With recent court decisions challenging the admissibility of treatment reports that don't formally comply with the rules for expert reports, disbursement costs have increased drastically.

Access to justice requires personal injury claimants to be able to access the courts. For cases where the amounts involved are likely to be in the \$100,000 to \$250,000 range, the partial indemnity costs claimed will often fairly and properly exceed the amounts awarded.

The rules about offers to settle are there to keep litigants acting reasonably. Defence counsel and insurers know the costs of trial and shouldn't be surprised when cost claims exceed the amounts recovered. The solution is for defence counsel to make more reasonable offers and do so earlier.

While improvements to the Rules of Civil Procedure to help reduce the cost of trial are welcome, until they're in place the cost of a medium-size personal injury trial will continue to be out of proportion to the cost of the damages claimed and this reality must not serve to prejudice or constrain access to justice for personal injury claimants.

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