CITATION: Cadieux v. Saywell, 2016 ONSC 7604
COURT FILE NO.: 08-CV-42431
DATE: 2016/12/23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CHAD CADIEUX by his Litigation Guardian MICHAEL CADIEUX, MICHAEL CADIEUX and LANCE CADIEUX	Colleen Burn and Éliane Lachaîne, for the Plaintiffs
PLAINTIFFS	
– and –	
SUSAN CLOUTIER, PILOT INSURANCE COMPANY, ERIC SAYWELL and THE WAWANESA MUTUAL INSURANCE COMPANY	David A. Zuber, for the Defendants
DEFENDANTS	**HEARD:** October 26, 2016 (Ottawa)

POST TRIAL RULINGS[1]

C.T. HACKLAND J.

Overview

[1] Following a seven-week motor vehicle personal injury trial, the jury returned a verdict in the plaintiffs' favour in the total sum of $2,309,413.

[2] The plaintiff Chad Cadieux suffered a fractured skull, brain damage and orthopaedic injuries when run over by a truck in September of 2006. He and the defendant Eric Saywell were pedestrians, engaged in a confrontation on or near the shoulder of the road when Mr. Saywell

[1] These Reasons have been amended to address calculation issues raised by the parties.

pushed Mr. Cadieux in the direction of the road and Mr. Cadieux stumbled onto the road and was hit by an oncoming truck.

[3] The jury apportioned liability for the accident as follows: 1/3 against the plaintiff Mr. Cadieux by way of contributory negligence, 1/3 to the defendant Mr. Saywell, and 1/3 to the driver of the truck (with whom the plaintiff had settled three years before trial).

[4] This motion is brought to determine the necessary adjustments to the jury award in order to permit the Court to enter judgment for the plaintiffs in the correct amount, and to determine costs in accordance with Rule 57 and Rule 49 (settlement offers) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. It will be necessary to consider the following issues:

(1) Reduction of the jury award for statutory deductions;
(2) Application of pre-judgment interest;
(3) Reduction of the jury award for collateral benefits (specifically, statutory accident benefits) received;
(4) Management fee; and
(5) Costs of the action, including consideration of Rule 49 offers

Statutory Deductions

[5] The jury award for general and *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*") damages was as follows:

- General damages for Chad Cadieux – $225,000
- FLA damages, Chad's father – $80,000
- FLA damages, Chad's brother – $30,000

[6] The parties agree that the only required deduction is to the award of FLA damages to the plaintiff's brother in the sum of $30,000. This amount must be reduced by $18,270 (to $11,730), pursuant to amendments to the *Insurance Act*, R.S.O. 1990, c. I.8 which came into force August 1, 2015. These amendments, which increased the statutory deductibles, are properly characterized as procedural in nature and therefore apply retrospectively to all ongoing actions, see *Corbett v. Odorico*, 2016 ONSC 1964 and *Vickers v. Palacious*, 2015 ONSC 7647. The defendant Saywell's

responsibility for general and FLA damages, given the liability apportionment decided upon by the jury, is 1/3 of $316,730 or $105,576.

Pre-Judgment Interest

[7] The plaintiffs ask for pre-judgment interest to be awarded on the general and FLA damages at the rate of 5% annually. The defendants submit that pre-judgment interest should be awarded at the rate of 4.5%, in view of the recent amendments to the *Insurance Act* which, the defendants contend, are procedural in nature and therefore should apply retrospectively to all ongoing actions.

[8] On January 1, 2015, the Ontario Legislature passed *Insurance Act* s. 258.3(8.1), which ended the application of the interest rate in s. 128(2) of the *Courts of Justice Act*, R.S.O. 1990, C. C.43 with respect to general damages in motor vehicle cases. Sections 258.3(8) and (8.1) now reads:

> Prejudgment Interest
>
> 258.3(8) In an action for loss or damages from bodily injury or death arising directly or indirectly from the use or operation of an automobile, no prejudgment interest shall be awarded under section 128 of the *Courts of Justice Act* for any period of time before the plaintiff served the notice under clause (1)(b) [of section 258.3]
>
> 258.3(8.1) Subsection 128(2) of the *Courts of Justice Act* does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss in an action referred to in subsection (8)

[9] The defendants concede that entitlement to prejudgment interest is substantive in nature, just as the entitlement to general and FLA damages is substantive in nature. However, the defendants contend the real issue is whether the calculation of prejudgment interest is procedural in nature, just as applying the statutory deductibles is procedural in nature.

[10] I recognize that a cogent argument can be made that the statutory changes affect the procedure for calculating interest laid out in the *Rules of Civil Procedure*, as opposed to the entitlement to pre-judgment interest (which is a substantive right). Procedural changes take effect retrospectively and apply to all cases. Counsel advise that the issue of whether the amendment to the pre-judgment interest provision applies retrospectively is coming before the Court of Appeal in the near future in several cases.

[11] On balance, I think the proper approach, particularly in the interests of uniform practice and predictability, is to continue to utilize the 5% pre-judgment interest rate for accidents such as this occurring prior to the date of the amendments. This was the approach of my colleague Toscano Roccamo J. in *El-Khadr v. Lackie*, 2015 ONSC 4766 in which she interpreted the Court of Appeal's decision in *Somers v. Fournier* (2002) 60 O.R. (3d) 225.. Nearly all of the many subsequent reported cases have followed the *El-Khadr* judgment.

[12] Applying the 5% interest rate results in the following interest amounts on the general and FLA damages awards:

Plaintiff	General Damage Award	Net of contributory negligence (1/3)	Defendant Saywell's share	Prejudgment interest calculation	Prejudgment interest amount
Chad	$225,000	$150,000	$75,000	$75,000 x 5% for 9.83 years	$36,863
Father	$80,000	$53,333	$26,667	$26,667 x 5% for 9.83 years	$13,107
Brother	$30,000-$18,270 deductible = $11,730	$7,820	$3,910	$3,910 x 5% for 9.83 years	$1,922
TOTAL PREJUDGMENT INTEREST ON GENERAL AND FLA DAMAGES					$51,892

[13] The jury award for general and FLA damages, inclusive of pre-judgment interest is $157,468 ($75,000 + $26,667 + $3,910 + $51,892).

Accident Benefits Deductibility

[14] Approximately three years prior to this trial, the plaintiff entered into a settlement of his Statutory Accident Benefits ("SABs") claims for $900,000, most of which was used to purchase a structured settlement annuity for his benefit. At the same time, the plaintiff settled his tort claim against the driver of the vehicle involved in the accident, for the sum of $500,000, the proceeds of which were used to purchase a suitable house and for legal fees and other expenses. As the plaintiff is an incapable person, these settlements together with applicable legal fees were approved by Justice Toscano Roccamo by order dated August 6, 2013.

[15] The Statutory Settlement Disclosure Notice dated January 24, 2013 and signed by the plaintiff's father and guardian on February 21, 2013 outlines the breakdown of the $900,000 SABs settlement as follows:

- Offer to settle **income replacement benefits** (you have been offered $300,000 for all past and future income replacement benefits)
- Offer to settle **medical benefits** (you have been offered $250,000 for all past and future medical benefits)
- Offer to settle **attendant care benefits** (you have been offered $350,000 for all past and future attendant care benefits)
- **Total offer** $900,000.00

[16] The parties agree that the SABs settlement is properly categorized as set out in the Settlement Disclosure Notice and, as noted, court approval was subsequently obtained.

[17] The issue I must decide is what part of the $900,000 SABs settlement is to be deducted from the jury's tort award for loss of income and for future pecuniary damages.

[18] The jury's tort award for past and future loss of income totalled $1,104,741 broken down as follows:

- Past loss of income - $133,741
- Future loss of income - $971,000

Having regard to the jury finding of 1/3 contributory negligence and 1/3 responsibility to the vehicle driver, the defendant Saywell is responsible for $44,398 for past income loss and $323,667 for future income loss. These figures are subject to deductions based on the SABs settlement.

[19] However, the plaintiff argues that only one half of the SABs settlement should be deducted from the jury award for past and future income loss because the jury found Mr. Saywell and the vehicle driver equally responsible for the accident.

[20] The jury's tort award of damages for future costs of care was as follows:

- Physiotherapy - $23,073
- Occupational Therapy - $9,491
- Social work - $4,745
- Home gym equipment - $3,569
- Taxi fund - $49,992
- Bookkeeper - $31,380
- Acquired Brain Injury (ABI) support worker - $701,809

[21] In addition, the jury awarded $33,113 for future housekeeping costs and $12,500 for past expenses, plus applicable pre-judgment interest. The defendant Saywell's responsibility is $16,556 for these two items.

[22] The defendants' position is that the total SABs settlement of $600,000 for medical and attendant care benefits should be deducted from the jury's award for future costs of care, including $701,809 for the ABI support worker.

[23] The plaintiff's position is that because the jury found that the defendant Saywell and the vehicle driver were equally responsible for the accident, the result should be that the SABs settlement must be apportioned equally between them and, in addition, the SABs settlement, for deduction purposes, should be the net amount after subtracting the legal costs incurred to achieve the SABs settlement, which costs received court approval.

[24] Most importantly, the plaintiffs contend that the jury award of $701,809 for an ABI support worker is subject to set off only for the $250,000 Medical and Rehabilitation Benefits component of the SABs settlement and not the $350,000 Attendant Care Benefits component. In other words, the plaintiff's position is that the attendant care component of the SABs settlement should not to be deducted against the jury's award at all, because the jury did not make an award for attendant care. The defendants' counter that both components of the SABs settlement are properly classified as Health Care Benefits within the meaning of the *Insurance Act* and thus the total amount ($600,000) is deductible against the jury award for the ABI support worker, which would reduce the tort award for the ABI worker to $101,809.

Discussion

[25] I begin by recognizing that, in this case, the resolution of the deductibility issues will be determinative of whether the plaintiff has succeeded in recovering more than the defendants Rule 49 settlement offer, (made 13 months before the trial), to pay $500,000 plus partial indemnity fees and disbursements.

[26] The most important deductibility issue is whether the jury's award of $701,809 for an ABI support worker is to be reduced only by the $250,000 SABs settlement for "past and future medical benefits" or by that sum together with the $350,000 SABs settlement for "past and future attendant

care benefits". The parties appear to agree, or in any event, I find that the jury award for the ABI support worker is a medical/rehabilitation award, not an attendant care award. The plaintiffs say that only the medical benefits settlement should be considered for deduction purposes, not the settlement for attendant care benefits. They contend that deductions are only appropriate on a category by category basis, "apples to apples". The defence position is that all health care items as defined in the *Insurance Act* when paid out in a SABs settlement are to be deducted against future health care expenses and it matters not whether the jury award is for medical, rehabilitation or attendant care expenses because they are all health care items. In other words, the ABI worker is a health care expense whether or not his or her functions involve attendant care.

[27] The *Insurance Act* defines health care as follows:

> 224(1) "Health care" includes all goods and services for which payment is provided by the medical, rehabilitation and attendant care benefits provided for in the Statutory Accident Benefits Schedule

[28] Section 267.8(4) of the *Insurance Act* requires an award of tort damages for health care expenses to be reduced by the amount of SABs payments received for expenses for health care.

[29] Leaving aside for the moment the plaintiff's argument that any SABs deductions must be apportioned on a 50-50 basis between the defendant Saywell and the driver of the vehicle, the plaintiffs concede that the SABs settlement in this case of $300,000 for past and future income replacement benefits must be deducted from the jury award for past and future loss of income. This is required by section 267.8(1) of the *Insurance Act*. This deduction wipes out the claim for loss of income under this heading, whereas if only one half of the settlement amount were deducted, the jury award for income loss is reduced to $183 for past loss and $221,308 for future loss.

[30] The Divisional Court in *Mikolic v. Tanguay et al*, 2016 ONSC 71 recently ruled that a SABs settlement for past and future income replacement benefits must be deducted form a tort award for past and future income loss. Significantly, the Court also decided that a SABs settlement for past and future medical benefits must be deducted from a tort award for future care costs. It was held that there was no need for the defendant to prove what portion of the SABs settlement constituted payments for future (as opposed to past) benefits.

[31] The plaintiffs contend that *Mikolic* is not determinative of the deductibility issue before this Court because the tort award in *Mikolic* was for the costs of participation in a pain management program and did not involve the attendant care versus medical/rehabilitation deduction issues presented in the present case.

[32] In any event, the Divisional Court in *Mikolic* considered section 267.8(4) of the Insurance Act which provides:

> Collateral benefits
> …
> Health Care Expenses
>
> (4) In an action for loss of damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for expenses that have been incurred or will be incurred for health care shall be reduced by the following amounts:
>
> 1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the expenses for health care.
>
> (Underlining added)

[33] In *Mikolic*, the Court referred to the onus being "always on the defendant to prove that the payment clearly falls within the statutory definition and that deductibility will not result in under compensation of the plaintiff." The Court's further observation was that section 267.8(4) requires the Court to carry out "at least a limited matching when determining the deductibility of statutory benefits."

[34] In *Mikolic*, the Court's conclusion as to the deductibility of SABs payments against a tort award for future care costs was as follows:

> **44** The trial judge made similar errors of law in his reasoning with respect to the deductibility of medical rehabilitation and attendant care benefits.
>
> **45** The jury awarded the Plaintiff/Respondent $15,000 for future care costs in relation to his claim in relation to his participation in a pain management program to assist him in dealing with his chronic pain. These were expenses that would be incurred for health care. The SABS Settlement Disclosure Notice makes it clear that the Plaintiff/Appellant settled his claim for "all past and future medical benefits" for $37,500.00.
>
> **46** Subsection 267.8(4) of the *Insurance Act* provides that any statutory accident benefits that a plaintiff has received for health care shall be deducted from the jury's award in relation to damages for "expenses that have been incurred or will be incurred for health care."

> **47** Under the wording of this section, the $37,500 that the Plaintiff/Appellant received by way of statutory accident benefits for "all past and future medical benefits" was deductible from the jury award of $15,000 for future care costs in relation to health care.

[35] In my view, the Divisional Court in *Mikolic* held, in effect, that a SABs settlement of past and future health care amounts is to be deducted from a tort award for future care costs.

[36] The Court of Appeal recently addressed SABs Health Care deductibility issues in *Basandra v. Sforza*, 2016 ONCA 251. The Court spoke of "categories of deductibility", which must be taken "as silos" and health care expenses were identified as one such category. The Court stated:

> **4** Section 267.8 of the *Insurance Act*, provides that pecuniary damages awarded in a tort action "shall be reduced" by payments that the plaintiff received as collateral benefits, such as statutory accident benefits including payments for health care expenses and other pecuniary losses. Since the defendant would benefit, the onus is on the defence to show whether and how the reductions should be made: *Bannon v. McNeely* (1998), 38 O.R. (3d) 659, 159 D.L.R. (4th) 223 (C.A.), at para. 74.
>
> **5** An award can only be reduced by a corresponding statutory accident benefit, on a benefit-by-benefit basis, under s. 267.8 of the *Insurance Act*. This reflects the concept that "apples should be deducted from apples, and oranges from oranges": see *Bannon v. McNeely*, at paras. 49, 74; *Gilbert v. South*, 2015 ONCA 712, 127 O.R. (3d) 526, at para. 44. For example, an award for housekeeping can be reduced by a housekeeping benefit, but not by a medical rehabilitation benefit.
>
> **...**
>
> **21** Section 267.8 of the *Insurance Act* creates several categories of statutory accident benefits to be taken into account as possible reductions in a jury award: income loss and loss of earning capacity (s. 267.8(1)); health care expenses, which includes attendant care costs by definition under s. 224(1) of the Act (s. 267.8(4)); and other pecuniary losses such as housekeeping costs (s. 267.8(6)). In view of the benefit-by-benefit basis of the reductions, these categories must be taken as silos.
>
> (Underlining added)

[37] I recognize that the Court of Appeal in *Basandra* did not specifically hold that a SABs settlement for attendant care must be deducted from a tort award for medical rehabilitative expenses (such as the ABI worker jury award in the present case), but the Court specifically concluded that SABs health care costs are deductible from a tort award of future care costs. Attendant care and medical rehabilitative costs are both within the health care "silo" for deductibility purposes.

[38] The definition of "Health Care" in section 224(1) of the *Insurance Act* corresponds with Part III of the SABs: "Medical, Rehabilitation and Attendant Care Benefits" are outlined in sections 14 through 20, for example:

(i) Section 15 - Medical Benefits
(ii) Section 16 – Rehabilitation Benefits
(iii) Section 17 – Case Manager Services
(iv) Section 18 – Monetary Limits on Medical and Rehabilitation Benefits
(v) Section 19 – Attendant Care
(vi) Section 20 – Duration of Medical, Rehab., and Attendant Care Benefits

[39] In my view, the silos of deductibility approach used by the Court of Appeal in *Basandra* is consistent with the approach approved by the Divisional Court in *Mikolic* and in recent trial decisions such as *Siddiqui (Lit.Guar). v. Siddiqui*, 2015 ONSC 6260 and *Carroll v. McEwen*, 2016 ONSC 2075. I am bound by *Basandra* and *Mikolic* to hold that SABs health care benefits received by the plaintiff are to be deducted from a tort award for future costs of care.

[40] I therefore conclude that the SABs settlement in this case for medical benefits as well as for attendant care benefits (a total of $600,000), is available for reduction of the jury's tort award for the ABI support worker.

Non-Party Accident Benefits Deductibility

[41] The plaintiffs submit that because the jury found the defendant Saywell and the driver of the vehicle equally responsible for the accident, "it is only fair and logical" that the SABs settlement should be apportioned equally between them, and the 50-50 apportionment should be net of legal fees expended to obtain the settlement. The legal fees were $235,000 plus HST and disbursements of $30,999.36, as approved by the Court.

[42] The defendants conceded in argument that if the tort action had proceeded to trial against both the defendant Saywell and the driver of the vehicle, the accident benefits would be divided proportionate to liability and each defendant's tort damages would be reduced by the proportionate accident benefits. However, as part of the settlement reached with the driver, in February of 2013, the plaintiff dismissed his claims against the driver and proceeded only for the several negligence of the defendant Saywell. Accordingly, at the trial, the driver was no longer a party to the action. The title of proceedings was never amended to delete the driver.

[43] I would note that the driver did appear at trial as one of the plaintiff's witnesses and she testified as to her involvement in the accident. Her contention was that she could not have avoided hitting Mr. Cadieux. It was explained to the jury that the plaintiff had previously settled his claim against the driver. The jury charge and the jury questions invited the jury to apportion liability for the accident to the driver if and to the extent they considered appropriate and the reverse onus provision in the *Highway Traffic Act* was explained to the jury, as the plaintiff was a pedestrian in this accident.

[44] The defendant points out that there would appear to be no reported case in which accident benefit deductibility has been apportioned to a non-party to the action. Further, one cannot notionally apportion accident benefit deductibility before the jury verdict.

[45] Section 267.8(8) of the Insurance Act states that the determination of what AB's are to be deducted from tort damages is only to be made after any apportionment of damage is made by the jury;

> (8) The reductions required by subsections (1), (4) and (6) shall be made after any apportionment of damages required by section 3 of the *Negligence Act*. 1996, c. 21, s. 29.

[46] While I acknowledge this requirement, the plaintiff's request to apportion the SABs settlement is based on the jury verdict that found the driver and Mr. Saywell equally responsible for the plaintiff's injuries.

[47] The *Insurance Act* is silent with respect to how deductions are to be apportioned between two or more defendants found to be liable, both of whom are protected defendants pursuant to the legislation.

[48] The plaintiff has filed affidavit material which I accept which supports the argument that counsel for the defendant driver was aware of the amount of the accident benefits settlement when the tort claim against the driver was settled. The amount of accident benefits received by way of settlement was clearly taken into account by the driver's counsel in assessing the relative risks of proceeding to trial and the benefits of settlement.

[49] Moreover, the affidavit material establishes that the 2013 SABs settlement and the concurrent 2013 tort settlement with the driver of the vehicle was a package deal – it was not open to the plaintiff to accept one without the other.

[50] I respectfully agree with the plaintiff's argument that if Mr. Saywell, as the non-settling defendant, were allowed to deduct from his 1/3 share of the damages awarded the entire net accident benefit settlement amounts, it would unjustly enrich the non-settling defendant, and act as a disincentive to pre-trial settlements. Such a decision would imply that the defendant driver settled without taking into account the accident benefits settlement and the impact it would have on the damages awarded at a trial.

[51] In summary, I accept that equity and common sense should permit the Court, in the circumstances of this case, to apportion the SABs deductions as between the defendant Saywell and the vehicle driver (who previously settled with the plaintiff) on a 50-50, basis in accordance with the jury verdict.

[52] The plaintiff argues as well that the SABs settlement for deductibility purposes should be reduced by the legal fees expended to achieve the settlement, as to do otherwise, would unfairly penalize and potentially undercompensate the plaintiff. The fees and disbursements in this 2013 settlement were fixed and approved by this Court. The fees would need to be apportioned as between the SABs settlement and the concurrent tort settlement with the vehicle driver and the plaintiff has done so in his calculations presented to the Court. I note that there are at least two cases in which the collateral benefits deductible amount has been calculated after deducting legal fees expended to obtain the collateral benefits, see *Anand v. Belanger*, 2010 ONSC 5356 and *Siddiqui v. Siddiqui* 2015 ONSC 6260.

[53] Lastly, I must consider the deductibility against the jury award of SABs benefits paid to the plaintiff prior to the SABs settlement discussed previously. In particular, the plaintiff received income replacement benefits in the amount of $62,264 prior to settling his SABs claim, one-half of which should be deducted from the amount the jury required the defendant, Saywell to pay the plaintiff for past and future income loss, as is required in the case law discussed previously.

[54] There was also the sum of $130,325 paid out by the accident benefits insurer for past medical rehabilitation and $15,417 for past attendant care and some $11,103 for "other pecuniary expenses", all prior to the plaintiff settling his SABs in 2013. I find that these payments are not to be deducted from the jury's award against the defendant, Saywell, because I am not satisfied that the defendant has demonstrated that these amounts were actually received by the plaintiff, nor are they matched with any part of the jury's award so as to constitute double compensation.

[55] In summary, the portion of the jury award payable by the defendant, Saywell, for income loss and for future costs of care accruing to the plaintiff will be reduced by one-half of the net SABs settlement for income replacement benefits and one-half of the net SABs settlement for health care and by one-half of the pre-SABs settlement income replacement benefits received by the plaintiff.

[56] The jury award is adjusted in accordance with the foregoing, so that the amount owing by the defendant, Saywell, pursuant to the jury award is $435,577 broken down as indicated in the following chart.

DAMAGES	**Award after deductions and liability apportionment**
General damages for Chad	$75,000
Family Law Act damages for Father	$26,667
Family Law Act damages for Brother	$3,910
Pre-judgment interest on general damages	$51,891
Past loss of income	$13,448
Out of pocket expenses	$4,167
Pre-judgment interest on past losses	$5,714
Future loss of income	$205,447
Future costs of care	$38,295
House cleaning	$11,038
TOTAL	**$435,577**

Management Fee

[57] It was agreed that the Court would fix an appropriate management fee for the administration of the plaintiff's assets, which is the responsibility of the plaintiff's father. Having reviewed the case law provided by counsel, it would appear that a management fee of 5% of the assets under management is a conventional award and I propose to follow that guideline. In this case, the SABs settlement in 2013 was $900,000 and the jury's adjusted tort award, as noted, is $435,577, from which I would deduct the FLA award totalling $30,577. The management fee that I award is 5% of $1,305,000 ($900,000 + $435,577 - $30,577), or $65,250. This management fee will be added to the jury award, as adjusted, so that judgment will be entered for the plaintiff in the sum of $500,827. ($435,577 + $65,250)

Costs

[58] This trial began May 2, 2016 and the jury returned its verdict on June 28, 2016. This was a medically complex trial involving a brain injured plaintiff, with contested liability issues.

[59] On March 25, 2015, the plaintiff made a Rule 49 offer to accept in full settlement of his claims against the defendant Saywell, the sum of $900,000 plus costs, disbursements and HST. On March 30, 2015, the defendant made a Rule 49 offer to settle the plaintiffs' claims for $500,000 plus partial indemnity fees and disbursements. These offers remained open for acceptance to the commencement of trial. The plaintiffs' recovery in this trial is $435,577 (the jury award as adjusted in accordance with these reasons) and a management fee of $65,250.

[60] The plaintiff seeks his partial indemnity costs on the basis that his recovery, once the management fee is added to the adjusted jury award, exceeds the defendant's Rule 49 offer of settlement.

[61] The plaintiffs put forward a partial indemnity costs claim of $494,039 (fees) and $98,798 (disbursements) plus applicable HST. This is appropriate and reasonable for a complex seven-week jury trial such as this and indeed the defendant does not suggest otherwise.

[62] On the basis that his offer exceeded the jury verdict, the defendant, Saywell, claims partial indemnity costs from the date of his offer in the sum of $358,380 (fees) and $71,700 (disbursements). I view the defendant's costs claim as reasonable, in terms of quantum.

[63] The defendant asks the Court to proceed in accordance with Rule 49.10(2)(c) which provides:

> 2. Where an offer to settle,
>
> (c) is not accepted by the plaintiff,
>
> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

[64] It must be remembered that costs are discretionary with the Court and in addition to the goal of promoting settlement (Rule 49), there are the goals of fairness to the parties, promoting access to justice and, in the context of personal injury cases, ensuring that an injured plaintiff is not undercompensated (nor over-compensated).

[65] There are also considerations of proportionality in the award of costs, particularly in the "near miss" cases such as the present case. Here, whether the plaintiff recovered more than the defendant's Rule 49 offer depends on the amount of the management fee awarded. In a similar case, *Elbakhiet v. Palmer*, 2014 ONCA 544, that same question turned on the pre-judgment interest calculation. The defendant made a Rule 49 offer that was unclear as to how pre-judgment interest should be calculated, which prevented him from obtaining the benefit of the costs consequences of Rule 49.10. However, the Court of Appeal held that the defendant's "near miss" settlement offer should have been considered by the trial judge in fixing the amount of costs. Rosenberg J.A. stated (at paras. 32-33):

> **32** For the appellants to succeed they must show that the trial judge erred in principle in respect to other aspects of Rules 49 and 57. In my view, she did. First, the trial judge gave no consideration to rule 49.13 which provides that despite, among other things, rule 49.10, "the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer." The trial judge gave lengthy reasons in considering the factors set out in Rule 57. She dealt at length with rule 49.10. But she made no mention of rule 49.13. Given that the offer to settle was virtually the same as the Judgment, this was a case where the court had to consider the impact of rule 49.13.
>
> **33** As this court pointed out in *Lawson v. Viersen*, 2012 ONCA 25, at para. 46, rule 49.13 is not concerned with technical compliance with the requirements of rule 49.10. Rather, it "calls on the judge to take a more holistic approach." The appellants complied with the spirit of Rule 49 even if they failed for technical reasons to provide an offer that exceeded the Judgment. As held in *Lawson*, at para. 49, this was the type of offer that ought to have been given "considerable weight in arriving at a costs award."

[66] *Elbakhiet* was a nine week trial and the Court of Appeal awarded costs of $100,000 (inclusive of disbursements and HST), reducing the trial judge's costs award of $578,742.

[67] I will note that the plaintiff's bill of costs attributes fees of approximately $400,000 to matters prior to the trial (but no doubt including trial preparation). The defendant's fees for trial and the 15 months preceding the trial is, as noted, about $360,000. When the disbursements itemized by the defendant ($71,000) are added to that amount, the total is $431,000. That amount is similar in magnitude to the total of the costs incurred by the plaintiffs prior to the defendant's offer to settle.

[68] As the plaintiff's recovery exceeds the defendants Rule 49 offer, albeit only slightly, and having in mind the Court of Appeal's observations in *Elkakhiet* concerning "near miss" cases, I exercise my discretion to award costs to the plaintiff in the sum of $100,000 plus HST and the disbursements claimed, which are in the sum of $98,798.

[69] Judgment will be entered for the plaintiff in the total sum of $500,827 together with costs in the sum of $100,000 plus HST and disbursements in the sum of $98,798.

Mr. Justice Charles T. Hackland

Released: December 23, 2016

CITATION: Cadieux v. Saywell, 2016 ONSC 7604
COURT FILE NO.: 08-CV-42431
DATE: 2016/12/23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHAD CADIEUX by his Litigation Guardian MICHAEL CADIEUX, MICHAEL CADIEUX and LANCE CADIEUX

PlaintiffS

– and –

SUSAN CLOUTIER, PILOT INSURANCE COMPANY, ERIC SAYWELL and THE WAWANESA MUTUAL INSURANCE COMPANY

Defendants

POST TRIAL RULINGS

C.T. Hackland J.

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