

JURY QUESTIONS

GENERAL DAMAGES

1. At what amount do you assess Harold MacDonald's damages for pain, suffering, and loss of enjoyment of life: 92,500

LOSS OF INCOME

2. At what amount do you assess Harold MacDonald's full **past** loss of income: 46,000
3. At what amount do you assess Harold MacDonald's full **future** loss of income: 110,670.

LOSS OF HOME MAINTENANCE AND HANDYMAN SERVICES

4. At what amount do you assess the value of Harold MacDonald's full **past** loss of home maintenance services 7,500 and handyman services 5,000.
5. At what amount do you assess the value of Harold MacDonald's full **future** loss of home maintenance services 36,610 and handyman services 37,740.

+ cats

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CALEB MacDONALD et al. v. KAROUL TALABA, Executrix of the ESTATE OF KATHLEEN CHALMERS and JOHN CHALMERS, deceased et al.

BEFORE: The Honourable Mr. Justice M.F. Brown

COUNSEL: Timothy P. Boland, for the Plaintiff
Darcy Romaine, for the Plaintiff

Shelley Johnson, for the Defendants

ENDORSEMENT ON COSTS

[1] In this action the plaintiff Harold MacDonald claimed damages arising out of a motor vehicle accident which occurred on July 15, 1997 in the Town of East Gwillimbury.

[2] After a jury trial lasting 15 days, the jury awarded damages in favour of the plaintiff in the amount of \$356,020.00 before deduction of the statutory deductibles and amounts received by the plaintiff through his Accident Benefits insurer.

[3] Plaintiff's counsel delivered a Bill of Costs. I received written submissions from both sides and oral submissions were heard on January 19, 2007. I reserved judgment on the issue of costs until today's date.

[4] As Armstrong J.A. has explained in *Boucher v. Public Accountants Council for the Province of Ontario* [2004] O.J. No. 2634 (Ont. C.A.) the fixing of costs involves more than merely a calculation using the hours docketed and the costs grid. As Justice Armstrong put it at para. 24 of *Boucher*, "it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable." He reiterated what the court had said in *Zesta Engineering Ltd. v. Cloutier* 2002 CanLII 45084 (Ont. C.A.), (2002) 164 O.A.C. 234 (Ont. C.A.) at para. 4:

In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

[5] I have considered all of the criteria set out in rule 57.01 (1) as factors to guide the exercise of my discretion to award costs and also the hourly breakdown of services submitted by the plaintiff.

[6] It is the position of the plaintiff that his costs ought to be paid by the defendants on a full indemnity basis throughout. It is the further position of the plaintiff that post-judgment interest on costs should accrue from November 1, 2006.

[7] Before dealing with the issue of the quantum of costs, the issue of the scale of costs must be addressed. As noted previously, the plaintiff seeks costs on a full indemnity basis throughout. In my view, costs on a full indemnity basis are not appropriate in the circumstances of this case. While I acknowledge that I have the jurisdiction to award costs on a full indemnity basis throughout, the facts of this case do not justify such a costs order.

[8] There is no doubt that the results achieved by the plaintiff in this case were very good. That being said, this was not a complicated personal injury lawsuit. The only issue for the jury was one of damages resulting from soft tissue injuries to the plaintiff. Nor was there any conduct on the part of the defendants or defendants' counsel which would justify an award of costs on a full indemnity basis.

[9] In my view, it was reasonable for the defendants to proceed on the basis that 1) there existed some possibility of being successful on the "threshold motion" and, 2) that in any event, there existed some possibility that the jury award on the claims for damages, including pecuniary damages, might be negligible. Indeed, that was the position taken by counsel for the defendants before the jury. Although the defence position was not successful, it was not unreasonable for counsel for the defendants to have taken such a position.

[10] While it is true that I did make some unfavourable defence rulings on various issues during the course of the trial, I am satisfied that counsel for the defendants conducted herself at all times in a highly professional manner. Ms. Johnson defended her clients' interests firmly and fairly and was very reasonable in the positions she took with the court and the jury.

[11] In all the circumstances therefore, I am not persuaded that an award of costs on a full indemnity basis should be made in this case.

[12] That being said, I must still address whether the plaintiff is entitled to an award of costs on a substantial indemnity basis. Substantial indemnity costs may be awarded only when the terms of Rule 49 have been complied with, or in the alternative, where there has been reprehensible or egregious conduct on the part of an unsuccessful party sufficient to justify a departure from the usual award of partial indemnity costs. In my view, there was no such misconduct at all on the part of the defendants.

[13] A defendant is entitled to defend an action and put a plaintiff to the strict proof of his case. The defendants choice to defend the within action on the basis that it did, does not constitute egregious conduct which would expose the defendants to full indemnity costs or even substantial indemnity costs prior to the plaintiff's Offer to Settle of October 2, 2006.

[14] Although the plaintiff made an Offer to Settle on March 20, 2006, this offer was expressly withdrawn by the terms of the Offer to Settle of October 2, 2006 and in my view, thereby failed to satisfy the requirements of Rule 49.10(1)(b), which requires as a condition precedent for entitlement under Rule 49, to substantial indemnity costs that the offer not be withdrawn. A specific term in the Offer to Settle of October 2, 2006 was that all prior Offers to Settle were withdrawn. Accordingly, the operative offer in my view for the purposes of Rule 49, is the Offer to Settle of October 2, 2006.

[15] In my view, therefore, pursuant to Rule 49, the plaintiff is entitled to partial indemnity costs up to the time the Offer to Settle was made on October 2, 2006 and substantial indemnity costs thereafter.

[16] The plaintiff has also submitted that a verbal offer to settle was made following a pretrial conference held on September 25, 2006. The defendants deny that any offer, verbal or otherwise, was conveyed to them at the pretrial conference. While I acknowledge the jurisdiction in the court to consider verbal offers under Rule 57.01, in my view, there is not a sufficient evidentiary record before me to conclude whether such a verbal offer was made and accordingly, I decline to consider the fact of a verbal offer in reaching any conclusions about costs in this matter.

[17] Having determined the issues relating to the scale of costs, I now turn to the issues surrounding quantum of costs in this case.

[18] In considering rates for partial indemnity costs, the Costs Subcommittee of the Civil Rules Committee suggested maximum rates for partial indemnity costs. It is anticipated that these maximum rates would apply only to the more complicated matters and to the more experienced counsel within each category. As I indicated earlier, this case in my view was not a complicated matter. Having considered the relative experience of counsel in this matter, I would assess appropriate rates on a partial indemnity basis for Mr. Boland and Mr. Romaine at \$300.00 per hour and \$175.00 per hour respectively. I would assess law clerks fees at \$70.00 per hour on a partial indemnity basis. On a substantial indemnity basis, I would assess the appropriate rates for counsel and law clerks as follows:

Mr. Boland:	\$450.00 per hour
Mr. Romaine:	\$262.50 per hour
Ms. Erin Farrell:	\$325.00 per hour
Ms. Monica Farrell:	\$300.00 per hour
Law Clerks:	\$105.00 per hour

[19] In considering Part I of the Bill of Costs submitted by the plaintiff, I consider the hours billed as reasonable regarding items 1-7. With respect to item 8, "Preparation for Trial", I find the 202.2 hours billed by Mr. Boland and the 214 hours billed by Mr. Romaine to be excessive.

In essence, the plaintiff is claiming for two sets of preparation costs. This matter was originally scheduled to proceed to trial on March 28, 2006, however, due to the scheduling conflict on the part of the plaintiff's solicitors, the matter had to be adjourned to October 12, 2006. In my view, an appropriate amount of preparation time for Mr. Boland would be 100 hours and for Mr. Romaine 110 hours. The rest of the billed hours for item 8 are reasonable.

[20] With respect to item 9 of the Bill of Costs, "Jury Selection", I find the hours billed to be reasonable.

[21] With respect to item 10 of the Bill of Costs, "Trial", I find the hours billed to be excessive. Although the trial in this case lasted 15 days, effectively there were only 6 ½ days of evidence and a day for opening and closing submissions. A significant period of time was consumed by 2 motions brought by the plaintiff to strike the jury in this case. Both motions were unsuccessful. In my view, it would be unfair to the defendants to have to pay costs for the preparation and argument of motions in these circumstances where the plaintiff was ultimately unsuccessful. Accordingly, I have reduced the hours for Mr. Boland for trial from 94.8 to 70 and for Mr. Romaine from 82.8 to 58. The law clerks time is reasonable for this item.

[22] With respect to item 11 of the Bill of Costs, "Bill of Costs", I find the hours allotted to be excessive for the preparation of the Bill of Costs and Costs Submissions. I would reduce the amount of time allotted under item 11 to 6 hours for Mr. Boland and 12 hours for Mr. Romaine. I find the time allotted for law clerks to be reasonable for this item. Given the divided success of the parties regarding issues relating to both the scale and quantum of costs, I would award no costs to the plaintiff for the costs hearing on January 19, 2007. The parties should assume their own costs for the argument of this costs motion.

[23] I have reviewed the disbursements claimed by the plaintiff in Part II of its "Bill of Costs" and they are reasonable in my view.

[24] The plaintiff also submits that post-judgment interest on costs should be paid by the defendants from November 1, 2006. In my view, subject to any agreement to the contrary, post-judgment interest on costs is payable from the time that the defendants can ascertain the amount of money that is "properly payable". See *Hassen v. Anvari* [2002] O.J. No. 4096 (Ont. Sup. Ct. of Jus.). Although counsel for the plaintiff moved for an award of costs on November 1, 2006, no award of costs was made at that time. Accordingly, I do not think it appropriate to order that post-judgment interest be paid from November 1, 2006. Having said that, counsel have agreed that subject to my finding an earlier date for post-judgment interest to be awarded, post-judgment interest is to be calculated regarding costs as of January 19, 2007.

DISPOSITION

[25] In all the circumstances therefore, the defendants will pay to the plaintiff his costs pursuant to the Bill of Costs as taxed and allowed attached to these reasons as Schedule "A". Specifically the defendants will pay to the plaintiff his costs in the amount of \$160,376.50, plus the applicable GST, plus disbursements in the amount of \$30,724.74. Post-judgment interest on this costs award to run from January 19, 2007.

M.F. Brown J.

Dated: February 14, 2007

**Schedule A
Bill of Costs of the Plaintiff as Taxed and Allowed**

Task	Counsel/Law Clerks	Hours	Rate	Total
Partial Indemnity - August 15, 1997 to October 2, 2006				
Pleadings	Timothy P. Boland	7,2	\$300,00	\$2 160,00
	Law Clerks	4	\$70,00	\$280,00
				\$2 440,00
Discovery of Documents	Timothy P. Boland	22,9	\$300,00	\$6 870,00
	Law Clerks	36	\$70,00	\$2 520,00
				\$9 390,00
Examination for Discovery	Timothy P. Boland	19	\$300,00	\$5 700,00
	Law Clerks	2,7	\$70,00	\$189,00
				\$5 889,00
Setting Down for Trial	Timothy P. Boland	0,3	\$300,00	\$90,00
	Law Clerks	0,5	\$70,00	\$35,00
				\$125,00
Trial Scheduling Court	Timothy P. Boland	0,2	\$300,00	\$60,00
	Darcy Romaine	1	\$175,00	\$175,00
	Law Clerks	0,2	\$70,00	\$14,00
				\$249,00
Pre-trial Conference	Timothy P. Boland	9,9	\$300,00	\$2 970,00
	Law Clerks	0,2	\$70,00	\$14,00
				\$2 984,00
Offer to Settle	Timothy P. Boland	1,2	\$300,00	\$360,00
				\$360,00
Substantial Indemnity - October 2, 2006 to January 15, 2007				
Preparation for Trial	Timothy P. Boland	100	\$450,00	\$45 000,00
	Erin Farrell	3,5	\$325,00	\$1 137,50
	Darcy Romaine	110	\$262,50	\$28 875,00
	Monica Farrell	17,6	\$300,00	\$5 280,00
	Law Clerks	32,2	\$105,00	\$3 381,00
				\$83 673,50

Jury Selection	Timothy P. Boland	5	\$450,00	\$2 250,00
				\$2 250,00

Trial	Timothy P. Boland	70	\$450,00	\$31 500,00
	Darcy Romaine	58	\$262,50	\$15 225,00
	Law Clerks	1	\$105,00	\$105,00
				\$46 830,00

Bill of Costs	Timothy P. Boland	6	\$450,00	\$2 700,00
	Darcy Romaine	12	\$262,50	\$3 150,00
	Law Clerks	3,2	\$105,00	\$336,00
				\$6 186,00

Total Costs	<u>\$160 376,50</u>
Disbursements	<u>\$30 724,74</u>