COURT FILE NO.: 06-CV-33385

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
MAY CRETE Plaintiff	Laurie A. Tucker, for the Plaintiff
- and -	
CARLETON CONDOMINIUM CORPORTATION #47 (o/a CHATEAU VANIER TOWERS) and H.W. JAMIESON PROPERTY MANAGEMENT LTD. Defendants	Michael Raymond Switzer, Esq., for the Defendants, Carleton Condominium Corporation #47 (o/a Chateau Vanier Towers) and H.W. Jamieson Property Management Ltd.

COSTS ENDORSEMENT

Madam Justice Toscano Roccamo

Overview

[1] Eighty-Five (85) year old May Crete commenced an action in negligence and pursuant to the *Occupier's Liability Act* against Carleton Condominium Corporation #47 (CCC #47), as well the property management company responsible for maintenance of the lobby and common elements of Chateau Vanier Towers in Ottawa where she resided for a number of years before sustaining injuries in a trip and fall accident on November 24, 2004.

[2] Mrs. Crete claimed $200,000 in general damages, damages for loss of housekeeping capacity, plus special damages including medical and rehabilitation expenses and costs borne by the Ontario Ministry of Health and Long-Term Care for treatment rendered to Mrs. Crete following the accident.

[3] As in the case of many actions of this nature, liability was hotly contested and the evidence heard at trial included the conflicting opinion of experts.

[4] In addition to a forehead laceration, bruised knees, exacerbation of pre-existing low back complaints for which Mrs. Crete had surgery in September of 2004, Mrs. Crete's most significant complaints related to hip pain alleged to have resulted from the trip and fall. As was the case with liability, the cause of the hip pain was the subject of conflicting expert opinion at trial.

[5] On the part of Mrs. Crete, her family physician of over twenty years as well as a surgeon testified that the trip and fall caused injury to Mrs. Crete's right hip that accelerated the need for surgery in March of 2006. The expert who testified for the defence opined that pre-existing conditions, both congenital and osteoarthritic, were at the root of Mrs. Crete's mounting back complaints in the spring of 2004 and led to surgery in September of 2004, and were also at the root of hip complaints reported by Mrs. Crete within months of the trip and fall.

[6] In short, the claim of Mrs. Crete, although not devoid of merit, turned upon acceptance of the expert opinions she advanced at trial. At the end of a nine day trial, the jury dismissed her action with a finding of no liability against the defendants. In addition, the jury awarded damages in the amount of $2,533.83 which clearly reflected the defendants' position on causation.

Costs Incurred by the Parties

[7] The initial Costs Outline submitted by the defendants claimed fees of $123,558.90 plus disbursements of $28,333.47 for a total of $151,892.37 inclusive of GST. The defendants' Costs Outline did not disclose the actual fees charged to the client as required by Form 57A, and

instead attached a Bill of Costs which calculated fees on both a substantial indemnity and a partial indemnity basis.

[8] Similarly, the initial Costs Outline submitted by Mrs. Crete did not disclose the actual fees she incurred throughout the proceedings.

[9] In response to my first request for more costs data from both parties, I learned that the actual rates charged to the client by counsel for the defendants were, without exception, below the substantial indemnity rates claimed and were notably similar to the partial indemnity rates claimed in this case, as per the chart set out below.

Lawyer	Actual Rate	Substantial Indemnity	Partial Indemnity
DAB	$280	$360	$280
DO	$250	$315	$245
MES	$210	$250	$190
MRS	$160	$190	$150
TLL	$140	$145	$110
LC	$115	$125	$100

[10] As simple math revealed, the substantial indemnity rates initially claimed by the defendants ranged from 104% of the actual rate for junior counsel at trial, Ms. Lemke, to a high of 129% of actual rates claimed for the minor involvement of the firm's senior counsel, Mr. Bertschi. The substantial indemnity rate of lead counsel at trial, Mr. Switzer, was 119% of his actual rate charged to the client. When counsel for the defendants was subsequently asked for the sum total of actual fees charged to their clients, I was informed that the fees were manually recalculated due to software limitations in the office of defence counsel, and that the previous figures were slightly higher due to mathematical error. The most recent calculations made by

defence counsel claim partial indemnity fees of $89,061.35 reduced from $90,734.01; substantial indemnity fees of $114,485.70 down from $123,558.90 and actual fees of $127,195.00.

[11] A comparison of the fees incurred by each party in accordance with actual, substantial and partial indemnity rates including counsel fee at trial is summarized in the chart below, as follows:

Party	Actual Rate	Substantial Indemnity	Partial Indemnity
The Plaintiff	$147,997.00	$131,941.80	$87,961.20
The Defendants			
(1) Initial Claim	Not Provided	$123,558.90	$90,734.01
(2) Recalculated Claim	$127,195.00	$114,485.70	$89,061.35

[12] Having previously learned that the defendants' substantial indemnity rates were greater than the actual rates billed to their clients, which may well reflect a special fee arrangement with an insurer client, I conclude that the latest recalculation of actual fees charged to the clients does not compute.

[13] Short of ordering a reference to clear up the discrepancies among the various rates disclosed by defence counsel, which I do not consider an appropriate expenditure of resources by the parties, I accept the latest figures for the defendants' actual fees at $127,195 and substantial indemnity fees at $114,485.70 as the benchmarks against which to determine a partial indemnity fees. Substantial indemnity costs may be set at 1.5 times the partial indemnity costs claimed, but must have regard to the factors set out in Rule 57.01(1), including appropriate indemnity under Rule 57.01(1)(o.a.) in circumstances where counsel is subject to a fee arrangement with a client. In the circumstances of this case, I adopt the reasoning in *Mantella v. Mantella*, [2006] O.J. No.

2085 noting the actual amount charged to a client limits what may be claimed for partial indemnity fees, not the substantial indemnity costs. Therefore, I fix an appropriate gross partial indemnity fee to the defence in this matter at $82,400.48.

Application of Factors per Rule 57

[14] There is no doubt the defendants were entirely successful in defeating the plaintiff's claim, and the plaintiff quite properly concedes that the defendants are entitled to their reasonable costs in this matter. However, given the assessment of damages by the jury, the defendants argue that the action should have been commenced in or transferred to the Small Claims Court. On this basis, a request is made for costs on a full indemnity basis, or in the alternative on a substantial indemnity basis throughout, having regard for the Offers to Settle exchanged by the parties, and the factors listed in Rule 57.01 relevant to the exercise of my discretion under s. 131 of the *Courts of Justice Act*.

Offers to Settle

[15] On August 1, 2007 the defendants served one properly formulated Rule 49 Offer to Settle consenting to the dismissal of the plaintiff's claim without costs. The defendants made no other offer, formal or otherwise throughout the litigation.

[16] The defendants do not deny that the plaintiff made a series of offers, both formal and informal after first invited to do so by the defendants at the outset of the action in May of 2006.

[17] The plaintiff made the following Offers to Settle:

1) in May 2006 for $30,200 plus interest and costs;

2) on September 22, 2006, the plaintiff served an escalating Offer to Settle in Form 49 for $37,500 all inclusive, if accepted by October 6, 2006. This offer mounted to $50,000 all inclusive if not accepted by October 20, 2006; and

3) following a settlement conference in August 2007, for the all inclusive amount of $35,000.

[18] The defendants' solicitation of the plaintiff's offer in May 2006, and subsequent failure to make any offer other than one for dismissal of the claim without costs, arguably amounted to an invitation to the plaintiff to negotiate against herself, as it contained no element of compromise and sought nothing short of capitulation on the part of the plaintiff.

[19] As previously observed by other courts, most recently by Smith J. in *Dunstan v. Flying J Travel Plaza*, [2007] O.J. No. 4089 (S.C.J.), the drafters of Rule 49 did not provide for costs consequences in favour of a defendant that serves an offer in Form 49 for dismissal of the action without costs. Rule 49.10(2) only provides for partial indemnity costs to a defendant from the date of an offer in Form 49 where the plaintiff obtains judgment ***in some amount***, whether as favourable as or less so than the terms of the defendant's offer.

[20] Although nothing in Rule 57 curtails a court's discretion under s. 131 of the *Courts of Justice Act* to award costs representing full indemnity or costs in whole or in part on a substantial indemnity basis, substantial indemnity costs remain the exception and not the rule. Having concluded the plaintiff's action was not without merit and turned on expert testimony, I give no effect to the claim for full indemnity fees.

[21] The case law canvassed continues to support the view that substantial indemnity costs are more likely to be awarded in circumstances where there are unfounded allegations of improper conduct, or where allegations are made which are seriously prejudicial to the reputation of a party: see *1175777 Ontario Ltd. v. Magna International Inc.*, [2006] O.J. No. 4732 (S.C.J.); *Radke v. Mashel,* [2000] O.J. No. 4114 (SCJ); *Tilker v. Canada Life Casualty Insurance Corp*, [2002] O.J. No. 2873 (S.C.J.).

[22] Even after the Court of Appeal in *S. and A. Strasser Ltd. v. Richmond Hill* (Town of), 1991 O.R. (3d) 243 opened the door to an enriched award of costs to a defendant where a plaintiff's claim was dismissed at trial, the principle upon which such costs have been awarded to

a defendant continues to be construed narrowly: see *Andre v. Roque*, [2000] O.J. No. 1477 (S.C.J.) and *Robb v. Canadian Red Cross Society*, [2000] O.J. No. 702 (S.C.J.).

[23] In most cases, an offer of payment by the defendant to a plaintiff of some amount would appear to be an important consideration, according to our Court of Appeal in *Scapillati v. A. Potvin Construction Ltd.* (1999), 44 O.R. (3d) 373.

[24] Other courts have expressed the view that implicit in the application of the principle on which solicitor and client costs were awarded in *Strasser, supra,* is the requirement that one or more of the factors listed in Rule 57.01(1) should be present, as for instance where the conduct of a party tends to shorten or lengthen unnecessarily the duration of proceedings; see *Trans America Life Insurance Co. of Canada v. Hutton,* [2001] O.J. No. 16 (S.C.J.); and see *Whitby Landmark Development Inc. v. Mollenhauer Construction Ltd.,* [2002] O.J. No. 1360 (S.C.J.).

[25] Indeed, where a plaintiff's conduct has been on balance reasonable, even when a *bona fide* and possibly significant offer is made by a defendant, a court is not obliged according to the permissive language in Rule 57.01(1) to award a defendant cost on a substantial indemnity scale; see *AMG Campbell Inc. v. Cord Products Inc.,* [2003] O.J. No. 1569 (S.C.J.); and *Bero v. Mills*, [2006] O.J. No. 596 (S.C.J.).

[26] I prefer the view that, unless the circumstances of a case trigger consideration of a number of the factors in Rule 57, including conduct of the kind described in Rule 57.01(1) (e) or (f), a defendant will not be awarded enriched costs over and above partial indemnity fees in the absence of any reasonable offer to settle a plaintiff's claim by payment of some amount. Even then where the plaintiff's conduct has not been found to be on balance egregious, a court may decline to award costs sanctions throughout the proceedings or prior to the defendant's offer to settle; see *St. Louis-Lalonde v. Carleton Condominium Corporation No. 12*, [2005] O.J. No. 4164 (S.C.J.).

[27] In the case before me, the defendants raise a number of factors under Rule 57.01 in the pursuit of costs on at least a substantial indemnity basis against the plaintiff. The items which require comment are addressed in the sub-paragraphs below.

(a) Failure on the part of the plaintiff to accept an agreement sought by the defendants to fix damages at $35,000 inclusive of interest and costs would not have been consistent with the weight of opinion obtained from the plaintiff's experts. Without any additional incentive offered by the defendants, there was no reason for the plaintiff to adopt the view of the defendants' experts. Therefore, this is not a basis upon which I would award enriched costs against the plaintiff.

(b) Of five Requests to Admit Facts and Documents served by the defendants, the plaintiff served responses to only two. The defendants argue that the length of the trial would have been significantly shorter but for the plaintiff's refusal to admit a number of facts ultimately proven at trial. Only the first of the five Requests to Admit sets out the facts for which the defendants sought admissions. A detailed review of this Request to Admit reflects that at least forty eight out of ninety nine facts for which the defence sought admissions were not capable of admission without exploring the evidence at trial. A number related to matters which were the subject of competing expert opinion on liability and damages. Others described the properties and maintenance of the mat upon which the plaintiff is alleged to have fallen, although the particular mat was never located at any point after the accident. Other admissions sought related to the statement of witnesses whose testimony required cross-examination at trial. As such, the first and only Request to Admit Facts would not have resulted in admissions which could have appreciably curtailed the trial. The last four Requests to Admit related to the authenticity of documents whose admission was the subject of agreement at trial and did not cause any delay at trial. In any event, a number of the latter four Requests to Admit were served out of time.

(c) The defendants argue that the length of the trial was significantly increased by the fact that the plaintiff had an actuary who was not called to testify. This can hardly be said to have lengthened the trial. In addition, they argue that the involvement of the only expert on liability called by the plaintiff was unnecessary and resulted in the need to call the defendants' responding engineer on liability. I cannot give effect to this argument: both experts were required to guide the court in relation to the evidence on industry standards and other information which was not within the knowledge of the jurors and would not have been easily conveyed by a written summary of the expert opinions. Finally, I reject outright the submission that the evidence heard from the plaintiff's family physician was merely repetitive of or shored up the evidence of the plaintiff's surgeon. By comparison to the family physicians' twenty year involvement in the plaintiff's care, her surgeon had minimal involvement.

(d) The defendants seek costs in relation to a motion concerning the examination for discovery of the plaintiff who sought directions from case management Master Beaudoin when the defendants refused to allow Mrs. Crete's daughter to be present during her examination for discovery. Mrs. Crete, who is quite elderly and frail, suffered from a pre-existing anxiety disorder and sought only to have her daughter present for comfort, and morale support, and for no other purpose. The Master's endorsement clearly assisted the plaintiff, who otherwise requested that her discovery be carried out in writing. Although the Master's endorsement awards costs of the motion "in the cause", which is ordinarily synonymous with "costs to the successful party in the cause", this does not automatically award costs to a party who succeeds in an action, as it is not an order which finally disposes of such costs. An award of "costs in the cause" is always subject to the discretion of a trial judge as confirmed by statute and the rules: see ***Bikerson v. Radcliffe*** (1900) 19 P.R. (Ont.) 223. The defendants have not denied that at settlement conference before Master Beaudoin on September 18, 2006, he confirmed that the plaintiff was entitled to her costs on the motion, regardless of

the outcome at trial. Per Rule 57.01(4)(a) I, therefore, exercise my discretion to award costs on a partial indemnity basis to the plaintiff in relation to this particular motion.

(e) The parties brought a series of motions on the eve of trial, as follows: a motion by the defendants to adjourn the trial to carry-out further discovery of the plaintiff in relation to delivery of medical and other documents; a motion by the plaintiff for leave to call more than three experts and to amend her statement of claim to detail the prayer for relief in relation to the claim for loss of housekeeping capacity, a claim otherwise referred to in the pleading and which was the subject of previous examination for discovery of the plaintiff. The defendants refused to consent to these motions which are housekeeping matters ordinarily proceeding on consent and without the need for formal motions. In addition, the defendants moved to redact reference to insurance limits in any documents tendered by the plaintiff at trial. I disposed of all of these motions in the plaintiff's favour in the course of a trial management conference. I did so after asking counsel whether they wished to save the costs of full argument of the matters at the outset of trial by receiving the court's direction in chambers. I specifically advised defence counsel that their position on these motions was ill-fated and that partial indemnity costs for preparation of these motions would go to the plaintiff. I cannot comprehend how the defendants would thereby conclude that there should be no order as to costs in respect of these motions, since they were disposed of at the trial management conference. I, therefore, award costs to the plaintiff on a partial indemnity basis for these motions.

Calculation of Costs to the Defendants on a Partial Indemnity Basis, with Adjustments

[28] The defendants shall have their costs fixed on a partial indemnity basis throughout the proceedings and at trial in accordance with the adjustments set out below:

(a) Having regard to the defendants' latest claim for actual fees at $127,195, and substantial indemnity fees at $114,485.75, and the factors under Rule 57.01, gross partial indemnity fees are set at $82,400.48.

(b) There shall be an offset of $2,216 for hours posted by the defendants' law clerk at $100 per hour, which exceeds by $20 per hour the maximum rate recommended in the guidelines for law clerks. The partial indemnity rates of the remaining timekeepers fall within the recommended range and therefore do not require adjustment.

(c) I adopt the observations at Tab 3 of the plaintiff's Supplementary Costs Submissions that the time posted by the defence for certain steps in the proceedings are excessive and reflects the duplication of effort of timekeepers. Accordingly, there shall be further reduction of the gross partial indemnity fees payable to the defendants, estimated as the difference between the partial indemnity fees proposed in the defendants' latest Costs Outline and the time for the same service proposed by the plaintiff.

(i) Preparation and attendance at Examination for Discovery of the defendants allowed at 5 hours:

$851.20 - $750.00 = $101.20

(ii) Preparation and attendance at Examination for Discovery of the plaintiff allowed at 15 hours:

$2,835.00 - $2,250.00 = $585.00

(iii) Second Settlement Conference allowed for MRS' hours only:

$1,087.05 - $702.05 = $385.00

(iv) Pre-trial preparation is allowed as follows:

MRS - $21,884 - $18,134 = $3,750.00

TLL - $11,456 - $$8,706 = $2,750.00

(v) Mid-trial preparation (in excess of counsel fee at trial) reduced by $25%:

MRS - $1,895.60

TLL - $1,477.35

(vi) Trial (at 6 hours per day):

MRS - $10,080 - $8,100 = $1,980.00

TLL - $8,820 - $5,940 = $2,880.00

(vii) Costs submissions:

Having regard for the divided success on issues raised by the parties on costs, and the need for the plaintiff to present Supplementary Costs Submissions in response to the defendants' recalculation of costs, there shall be a reduction by 25% for the defendants' preparation of costs submissions:

MRS - $2,800 - $2,100	=	$ 700.00
TLL - $980 - $735	=	$ 245.00
Total Adjustments:		$18,965.15

[29] The net amount in partial indemnity fees payable to the defendants in this matter after adjustments is $63,435.33 ($82,400.48 - $18,965.15) inclusive of GST.

Disbursements

[30] The defendants' claim for a meal expense is disallowed. The defendants' claim for couriers, copies, printing, photographs and binding is excessive and therefore reduced by ⅓. The amount due and payable for disbursements inclusive of GST after the noted adjustments is fixed at $24,932.92.

[31] In summary, the defendants are entitled to an award of costs in the amount:

- $63,435.33 for net partial indemnity fees inclusive of GST plus;
- $24,934.92 for disbursements inclusive of GST;
- Total: $88,370.25

[32] Of the sum total in the amount of $88,370.25 and as agreed by the parties, the Ministry of Health and Long-term Care shall be responsible for 16.72685% of the total costs fixed at **$14,781.56** which is due and payable by the Ministry within 30 days.

Off-sets to Plaintiff

[33] Of the balance owing to the defendants by the Plaintiff in the amount of $73,588.69, the plaintiff shall be entitled to set-off costs assessed to her for the motion related to her examination for discovery, and the motions disposed of at the trial management conference in her favour. These costs are all assessed on a partial indemnity scale using the plaintiff's Bill of Costs as a guideline only and are set out below:

(a) Motion re: plaintiff's discovery and defendants related cross-motion:

Fees:	$4,000.00
GST:	$ 240.00
Disbursements:	$ 244.15
GST:	$ 14.65

Total: $4,498.70

(b) Trial Management Motions:

(i) Motion to amend pleading:

Fees: (less counsel fees)	$ 615.00
GST:	$ 36.90
Disbursement:	$ 427.00
Total:	$1,078.90

(ii) Motion to call more than three experts:

Fees: (less counsel fee)	$1,106.00
GST:	$ 66.36
Disbursements:	$ 427.00
Total:	$1,599.36

(iii) Motion to Adjourn the Trial:

I did not receive a Costs Outline setting out calculations of the partial indemnity fees for this motion. By using the partial indemnity rates set out in the plaintiff's Supplementary Costs Submissions for timekeepers posted and applying the rate for a law clerk or student to NH, I estimate the fees claimed for this motion on a partial indemnity basis would be $4,346.50. However, the time posted for research by the student is excessive and is therefore reduced by 50%.

Therefore, I fix costs on this motion as follows:

Fees:	$3,600.00
GST:	$ 216.00
Disbursements:	$ 350.00
Total:	$4,166.00

The total costs payable by the defendants to the plaintiff on the above motions are fixed on a partial indemnity basis at $11,342.96 inclusive of fees, disbursements and GST. This amount may be set-off by the plaintiff against the costs she is ordered to pay the defendants, leaving the net amount payable by her to the defendants to be the sum of **$62,245.73**. She shall have 30 days to pay this amount.

Conclusion

[34] On a final note, although it has been submitted that Mrs. Crete is a woman of modest means, and therefore deserving of the Court's empathy in the assessment of costs, I must respectfully observe that this was not in evidence received at trial. Moreover, she was ably and vigorously represented throughout these proceedings by experienced counsel who appreciated the risks involved in a claim of this nature.

[35] I do not lose sight of the necessity to ensure that similarly situated plaintiffs have access to justice including by way of contingency fee arrangements where unfortunately counsel may stand to lose all their time invested, if met with defeat at trial; however, where claims are successfully advanced in such cases, the reality is that plaintiff's counsel are often buffered by contingency fee arrangements which recognize the risk taken and carrying costs assumed by plaintiff's counsel. With experienced counsel, the risks and gains of loss and success can balance out over time.

[36] Defendants are equally entitled to experienced and vigorous representation, and should be appropriately indemnified when successful at trial. I add that even considering the additional costs possibly associated with the plaintiff having the burden of proof in this case, the partial indemnity costs which would ultimately have been sought by the plaintiff if she had been successful approached $88,000.00 before disbursements and GST. I am, therefore, satisfied that the costs assessed and payable by her are well in-line with the overriding principle of proportionality articulated by the Court of Appeal in *Boucher v. Public Accountants Council* (Ontario) (2003), 71 O.R. (3d) 291, and would represent what is fair and reasonable for an unsuccessful party to pay.

Madam Justice Toscano Roccamo

Released: January 10, 2008

COURT FILE NO.: 06-CV-33385

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Plaintiff

- and –

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COSTS ENDORSEMENT

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