Civil Procedure
Fall Term 2024

Lecture Notes No. 3

II. WHO PAYS FOR THE LITIGATION?

2. "The Costs Rules"

- **Costs** = money paid by the unsuccessful party to the successful party in litigation, adjusted for offers to settle, bad behaviour, and proportionality.

- **Goal =** compensation for the costs of litigation; encourage settlement.

- **Scale =** 'Partial indemnity' is the norm (expect 60% of reasonable costs at best), 'substantial indemnity' (90% of reasonable costs) are exceptional and usually based on offers to settle, and 'full indemnity costs' are rare.

The ***Courts of Justice Act*** provides the Court's substantive jurisdiction to order costs:

> **131 (1)** Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding **are in the discretion of the court**, and the court may determine by whom and to what extent the costs shall be paid.
>
> (2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

It is important to note the **discretionary nature** of costs, which makes anticipating an award of costs really difficult.

Procedurally, two Rules are important: **Rule 49** (dealing with the costs consequences attached to settlement offers) and **Rule 57** (costs generally). **Please read these two rules carefully.**

> **Plaintiff's Offer**
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> **49.10 (1) Where an offer to settle,**
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> **(a) is made by a plaintiff** at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the defendant,

and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

Defendant's Offer

(2) Where an offer to settle,

(a) is made by a defendant at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(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.

...

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or
(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(iii) any other matter relevant to the question of costs.

Barlow v Citadel General Assurance Co.
2008 CanLII 3215 (Ont. S.C.J.)

Here the plaintiff was awarded $100,000 in damages and sought $250,000 in costs; costs in the amount of $90,000 were awarded (the trial judge held that the claim was 'outlandish' and seemed to have been made under the assumption that the defendant insurer should be punished for vigorously defending the claim).

Aside from illustrating the general method by which costs are assessed, this case considers whether a lawyer may seek a premium from the losing party to assure that the lawyer's bill is paid fully (that is; that the shortfall between actual costs and the costs ordered are paid by the losing party where the winning party has insufficient funds).

Lalonde J.:

4 **Counsel for the plaintiff seeks a $50,000.00 premium on the basis that he took on the plaintiff's case on the basis that he would not recover any fees or disbursement unless the plaintiff was successful in a**

settlement or at trial. He states that his client had no financial ability to retain his services.

...

10 It is not my role in fixing costs to engage in another piece of litigation. I find that the argumentative supplementary costs submissions of plaintiff's counsel were not helpful. Counsel can find any number of costs decisions that, if improperly applied, can support outlandish positions.

11 The plaintiff claimed a premium of $50,000.00 basically because she did not have the financial means to retain counsel (paragraph 3 of the plaintiff's submissions on costs)... In.. Ward v. Manufacturers Life Insurance Co., [2007] O.J. No. 4882 (Ont. C.A.)... In that case, Manufacturers Life froze Mr. Ward's vested commission account. Weiler J.A... states at paras. 69-71 that:

¶ 69 The concerns underlying the decision in Walker apply equally to the new language of Rule 57.01. **First, the new factors, like the old ones, are neutral in character and can apply equally to plaintiffs or defendants. Second, although the new factors do not specifically relate to the nature of the case or the conduct of the parties, they serve to uphold the principles of transparency and predictability that should govern costs awards. The two new factors merely make explicit the fact that, in the absence of a costs grid, there should be fairness and consistency in the amount that can be charged for lawyers' time across similar pieces of litigation involving similar conduct and counsel.**

¶ 70 I would note that the phrase "the principle of indemnity" in the new legislation is qualified. The listed considerations are the experience of the lawyer, the rates charged, and the hours spent. While the clause is phrased inclusively, a risk premium is not of like kind to these considerations.

¶ 71 **Clause (0.b) confirms this interpretation by insisting that costs be what the unsuccessful party could "reasonably expect to pay." This engages the other concern about risk premiums explicit in Walker: that the defendant is not aware of his potential cost exposure because the premium is a private agreement between the plaintiff and his counsel.** As noted in Walker, this is particularly important where, as here, a Rule 49 offer to settle has been made, and the defendant must be aware of the risk of refusing the plaintiff's offer.

12 Weiler J.A. cancelled the $50,000.00 premium award. For the same reasons, I dismiss the plaintiff's claim for a $50,000.00 costs premium in this case.

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Clarington (Municipality) v. Blue Circle Canada Inc.
2009 ONCA 722 (Ont. C.A.)

Epstein J.A. held:

> [30] The same principle was expanded upon in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), at p.23, where Robins J. A., speaking for the court, set out the restricted circumstances in which a higher costs scale is appropriate with reference to *Orkin* at para. 219.
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> **An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:**
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> **[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement.**
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> [31] The narrow grounds justifying a higher costs scale were further reinforced by Abella J.A. in *McBride Metal Fabricating Corp. v. H. & W. Sales Co.* (2002), 59 O.R. (3d) 97 where, at para. 39, she said:
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> Apart from the operation of Rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor-and-client costs. In the cases in which they were awarded there were **specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.**
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> …
>
> [45] Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In *Apotex v. Egis Pharmaceuticals* substantial indemnity costs were justified as a means "to discourage harassment of another party by the pursuit of fruitless litigation...particularly where a party has conducted itself improperly in the view of this court." For other examples of abuses of process leading to elevated costs, see *Dyer* at pp.184 - 85.
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> [46] Here, there is no finding or evidence in the record of "harassment…by the pursuit of fruitless litigation". The settling defendants were entitled to advance their position; they were not required to settle. **In**

> **the end, the trial judge did not agree with their position but the settling defendants did nothing to abuse the process of the court.** In short, there was no wrongdoing on the part of the settling defendants that warranted a rebuke from the court.

Clarington is difficult in that the Court does not provide much insight into the level of fault that is required other than to repeat certain traditional characterizations of conduct (such as ‘reprehensibility’) that are not related to values, except for one: abuse of process. and the administration of justice is prejudiced by vexatious or oppressive conduct.