CITATION: Gardner v. Hann, 2012 ONSC 2006
COURT FILE NO.: 05-CV-291805PD2
DATE: 20120330

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Amanda Gardner and Christine Pohl , Plaintiffs

AND:

Clint Hann, Clint W. Hann, and Gordon Albright, Defendants

BEFORE: Madam Justice Darla A. Wilson

COUNSEL: *Richard Shekter and Tamara Ticoll*, Counsel for the Plaintiffs

N.E. Kostyniuk, Counsel for the Defendants Hann

Lawrence Foy, Counsel for the Defendant Albright

Mark M. O'Donnell, Counsel for the Non-Party Royal & SunAlliance Company of Canada

HEARD: October 12 and 13, 2011

ENDORSEMENT

[1] The trial of this action commenced May 9, 2011 and concluded when the jury rendered its verdict on June 27, 2011. It was agreed by counsel that I would deal with certain issues as well as costs. Counsel delivered written submissions and I heard oral argument on October 12 and 13, 2011.

[2] Prior to the date set aside for the argument, the solicitor for the Plaintiffs served a Notice of Motion setting out the issues to be addressed. They were: the determination of the entitlement of the Plaintiff Christine Pohl to the *Family Law Act* damages as determined by the Jury's Verdict; calculation of pre-judgment interest; application of the applicable statutory deductibles; the determination of the available policy limits of the Royal & SunAlliance Insurance Company of Canada ["RSA"] policy; the determination of the costs of the proceedings including the scale and quantum of costs of the Plaintiffs and of the defendant Albright and who is responsible for payment.

Background

[3] In this action, the Plaintiff, Amanda Gardner ["Gardner"], claimed damages arising from a motor vehicle accident that occurred June 21, 2003. Gardner was a passenger in a vehicle operated by the Defendant Clint Hann ["Hann"], owned by the Defendant Clint W. Hann ["Hann

Senior"], which collided with the vehicle operated by the Defendant, Gordon Albright ["Albright"]. Liability and damages were both in dispute. The Hann vehicle was insured through a policy of insurance issued by RSA.

[4] The Jury was asked to answer 26 questions. They found the Defendant Hann fully liable for the accident, with no negligence attributable to Albright. The Jury assessed Gardner's damages as follows: future loss of income, $1,532,243.18; future cost of financial management fees, $87,338.72; future loss of housekeeping/handyman services, $147,775.68; future loss of interdependent relationship, $66,755.50; general damages for pain and suffering, $150,000. For her mother, Christine Pohl ["Pohl"], they awarded the sum of $21,840.00 for "on-demand guidance" as a loss of other services up to the date of trial and a loss of the future value of other services identified as "on-demand guidance" in the sum of $85,200.75.

Issues

The Available Policy Limits of the Royal & SunAlliance Policy

[5] I will refer only briefly to this issue as I gave an oral ruling after hearing submissions and found that the motion was premature.

[6] This issue arose as a result of the verdict exceeding the $1,000,000 policy limit under the Hann policy. There was another claim brought by Albright in a companion action which was settled by RSA for $150,000 plus costs, allegedly without the consent or knowledge of the solicitor for the Plaintiffs. The position taken by the Hann Defendants is that there is only $850,000 remaining on the policy to respond to the Gardner claims. The Plaintiffs take the view that the full $1,000,000 is available.

[7] In my view, the Plaintiffs' motion is clearly premature as the proper procedural steps have not been followed. Section 258.(1) of the *Insurance Act,* R.S.O., 1990, c.I.8 requires a person to recover a judgment against the insured, have insurance money under the contract paid towards the judgment and then issue an action against the insurer for the balance. In other words, the Plaintiffs are obligated to institute a formal action against the insurer in order to proceed under section 258 and this has not been done. Consequently, at this time, the Plaintiffs are not entitled to the relief sought against RSA.

[8] I agreed that there was no need for RSA to attend and consequently, I ordered costs to the insurer fixed at $3,500 payable by the Plaintiffs in 30 days.

The Costs of Albright

[9] No liability was found against Albright. This defendant made an offer to settle of $25,000 inclusive of interest plus costs by way of an Offer to Contribute dated February 18, 2011. Subsequently, on April 25, 2011, the defendants made a joint offer to settle of $500,000 plus costs of which Albright's contribution was $100,000. Counsel for Albright argues that pursuant to Rule 49.11(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, he is entitled to partial indemnity costs to the time of his first offer in February 2011 and substantial indemnity

costs from that time forward. Mr. Foy submits that the Court ought to take into account the fact that his client behaved reasonably throughout and attempted to extricate itself from the litigation, despite the belief that there was no liability on the part of Albright. Counsel asks for payment of his costs from the Plaintiffs who sued him and, alternatively, from Hann in the form of a *Sanderson* order.

[10] Counsel for the Plaintiffs takes the position that he requested Hann's counsel admit liability which would enable the Plaintiffs to dismiss the action against Albright. Counsel for Hann refused to do this unless the Plaintiffs restricted their claims to the policy limits of Hann. Mr. Shekter submits that the Plaintiffs delivered several offers within the policy limits of Hann but, in response, the offers from Hann were never realistic attempts to resolve the case, so the Plaintiffs had no option but to continue on against Albright. In the circumstances, Mr. Shekter argues that a *Sanderson* order ought to be imposed. The Plaintiffs submit that Albright's Offer to Contribute does not constitute an Offer to Settle as contemplated by Rule 49.10 and does not attract the same cost consequences so there is only entitlement to partial indemnity costs. Counsel for the Plaintiffs does not dispute the reasonableness of the quantum of Mr. Foy's fees.

[11] Counsel for Hann takes the position that it was the Plaintiffs who kept Albright involved in the litigation. The evidence was clear, it is submitted, that it was Hann who was negligent but because the Plaintiffs would not reduce their claim to a number within the policy limits of Hann, liability could not be admitted. It is Mr. Kostyniuk's position that Albright's costs ought to be paid by the Plaintiffs on a partial indemnity basis and he suggests that the costs ought to be fixed at $100,000 plus disbursements.

Should a Sanderson/Bullock Order be imposed?

[12] The general rule in multi-defendant litigation is that the Plaintiff is entitled to costs from the unsuccessful Defendant and the successful Defendant is entitled to costs from the Plaintiff.[1] However, this rule can sometimes lead to unjust results. *Bullock* and *Sanderson* orders offer relief from these unjust results. Ontario courts have the jurisdiction to grant such awards by virtue of s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, which grants the courts discretion over cost awards: *Susin v. Goodreau* (2005) 204 O.A.C. 180 (C.A.) at para. 51.

[13] A *Bullock* order still requires the Plaintiff to pay the costs of the successful Defendant(s). However, it then requires, in turn, the unsuccessful Defendant(s) to reimburse the Plaintiff for costs that the Plaintiff has paid to the successful Defendant(s): *Rooney (Litigation Guardian Of) v. Graham* (2001), 53 O.R. (3d) 685 (C.A.) at para. 6 [*Rooney v. Graham*].

[14] A *Sanderson* order is a more direct solution; it requires the unsuccessful Defendant(s) to pay the costs of the successful Defendant(s), leaving the Plaintiff out of the process entirely: *Rooney v. Graham* at para. 6.

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[1] Mark Orkin, *The Law Of Costs*, 2d ed. loose-leaf (Aurora, Ontario: Canada Law Book 2003) at para. 209.1.

[15] In *Rooney v. Graham*, Carthy J.A. explained at para. 6 that *Bullock* and *Sanderson* cost orders are appropriate in situations where it is unclear who is responsible for the Plaintiff's loss:

> The rational [sic] behind both orders is the same. Where the allocation of responsibility is uncertain, usually because of interwoven facts, it is often reasonable to proceed through trial against more than one defendant. In these cases, a Bullock or Sanderson order provides a plaintiff with an appropriate form of relief.

[16] In *Moore v. Wienecke* 2008 ONCA 162 at para. 41, the Ontario Court of Appeal set out a two-part test for determining whether a *Sanderson* order is appropriate. This test also applies to *Bullock* orders.

a. Whether it was reasonable to join the several Defendants together in one action.

b. If so, whether courts should exercise their discretion to award such an order, i.e. would it be just and fair in the circumstances.

[17] As part of the second consideration, the Court in *Moore v. Wienecke* set out four factors that are "relevant" to determine whether it is appropriate for the Court to exercise its discretion. However, the Court noted at para. 45 that they "need not be applied mechanically in every case" since a determination of costs is discretionary.

The Four Factors:

(a) Did the unsuccessful Defendant try to shift responsibility on the successful Defendant?

(b) Did the unsuccessful Defendant cause the successful Defendant to be added as a party?

(c) Are the causes of action independent of each other?

(d) Who has the ability to pay costs?

[18] The question of whether to award a *Bullock* or *Sanderson* order is one of allocation of risk. A *Bullock* order places the risk on the Plaintiff of not recovering its costs from an impecunious unsuccessful Defendant and a *Sanderson* order places the risk on the successful Defendant of not recovering its costs from the impecunious unsuccessful Defendant.[2]

[2] Ibid. at para. 209.

[19] In considering in the case before me whether it is appropriate to make a *Sanderson* or *Bullock* order, the overarching concern is that of fairness and whether the Court ought to depart from the usual costs order that a Plaintiff will pay the costs of a Defendant against whom they were unsuccessful at trial and receive payment of their own costs from the at-fault Defendant. Should the costs burden be shifted from the Plaintiffs to the unsuccessful Defendant?

[20] I will consider the two part test set out in *Times Square Holdings Ltd. v. Shimzu,* 2001 BCCA 667, at para. 9 and cited with approval in *Moore v. Wienecke, supra* at para. 41:

a. Was it reasonable for the Plaintiffs to join Hann and Albright together in one action? In my view it was. While it was clear that the lion's share of the negligence for the motor vehicle accident rested with Hann, it was not clear that Albright would escape a finding of liability. Both Defendants denied liability in their pleadings and each cross-claimed against the other.

b. Should the Court exercise its discretion to make such an order in all of the circumstances of the case? This question involves consideration of whether it was reasonable to continue to keep Albright in the action.

[21] Commencing in September, 2008, after the mediation of the action, the Plaintiffs delivered three offers to settle. The most recent one was three months prior to the commencement of trial and was in the amount of $675,000 plus costs. The solicitor for the Plaintiffs, by letter of January 18, 2007, advised counsel that he was agreeable to dismissing the action against Albright on the condition that Hann agree to dismiss his cross claim and not raise any allegations of negligence against Albright at trial. In response, Mr. Kostyniuk advised that unless it was agreed that the Gardner claim and the personal injury claim of Albright together be limited to the policy limits of Hann, he would not release Albright from the action. In response, Mr Shekter advised that he would not agree to limit Gardner's claim to $500,000 and in my view, given the nature of the Plaintiff's case, he cannot be criticized for this.

[22] This issue was raised again in late 2009 when Mr. Kostyniuk wrote and requested that Mr. Shekter restrict the Gardner claim to the balance of the Hann limits, which he stated were $850,000, in exchange for an admission of liability. At that point, it appears Albright was prepared to exit the action without payment of costs. Mr. Shekter responded that he would not recommend the Plaintiffs restrict the claim to the balance of the limits of Hann. Again, given the nature of the claim of Amanda Gardner, I do not view this position as being unreasonable.

[23] In an attempt to extricate himself from the litigation, Albright brought a motion for summary judgment in 2010. The Plaintiffs served an Offer to Settle the motion on the terms that judgment would be granted dismissing the action against Albright on the condition that Hann admitted Albright was not negligent or in any way responsible for the motor vehicle accident. That motion was opposed by Hann and was dismissed. There was no change in the positions of the parties on the liability issue prior to the trial.

[24] The solicitor for Hann, in his written submissions, argues that it was the Plaintiffs who brought Albright into the lawsuit and they could have discontinued against him prior to trial. It is

also submitted by Hann that he did not attempt to shift liability for the accident to Albright. I do not accept these arguments. This was not a case where there was no possibility of obtaining a finding of some small percentage of liability on Albright. Given that the claims of Gardner could well have exceeded the policy limits of Hann, as the jury verdict attested to, I do not find that the solicitor for the Plaintiffs ought to have dismissed the claim against Albright prior to trial. Furthermore, it is not accurate to say that Hann did not attempt to cast liability on Albright during the trial. Mr. Kostyniuk cross-examined Officer Jones about the sight lines of Albright and the obligation on a driver proceeding through an intersection with a flashing amber light to look for cross traffic.

[25] Mr. Kostyniuk argues that because Mr. Shekter would not agree to confine the Plaintiffs' claims to his insured's policy limits, there was nothing he could do and it was the solicitor for the Plaintiffs who forced the matter on to trial. I do not agree. In considering whether a *Sanderson* or *Bullock* order is appropriate in a particular case, the second part of the test once the Court is satisfied it was reasonable to join the two or more Defendants together, is whether it would be just and fair in all of the circumstances to make such an order. I have determined that this is such a case. A review of the history of this action, particularly since the time of the mediation in 2008, makes it clear that from the outset, the Defendant Hann had a very different view of the nature of the Plaintiff's injuries than that put forward by Plaintiff's counsel. The Defendant Hann did not view the claims as significant and this is abundantly clear from the Offers to Settle that were made. In 2008, in response to the Plaintiffs' offer of $850,000 plus costs, Hann offered $177,500 plus costs. In 2010, the Plaintiffs' offer was $775,000 plus costs and Hann countered with $350,000 plus costs. In February, 2011 the Plaintiffs offered to settle for $675,000 plus costs and Hann offered $425,000 plus costs. The final offer of the Defendants was $500,000 plus costs delivered April 25, 2011. Albright was contributing $100,000 towards this offer.

[26] While counsel for Hann argues that the refusal of the solicitor for the Plaintiffs to limit the claims to the available policy limits of Hann is what effectively precluded him from agreeing to let Albright out of the action prior to trial, this argument is inconsistent with his decision to settle Albright's own personal injury action without the agreement of counsel for Gardner. It was only through a letter in 2009 that Mr. Shekter learned that the companion action of Albright had been settled by Mr. Kostyniuk for $150,000 and that the position being taken by Hann was that the limits of the Hann policy available to respond to the Gardner claim had therefore been reduced to $850,000.

[27] It was clear throughout the trial that the defence took a very different view of the nature of the injuries sustained by Gardner in the motor vehicle accident and on the impact of these injuries on Gardner's future. Certainly, they were entitled to take the approach that they did and force the Plaintiffs to prove all aspects of the claims. I note, however, that this was not a case of soft tissue injuries arising from an accident; nor was it a chronic pain type of case where there is little objective evidence of injury. There was no dispute that Gardner suffered a head injury in the accident; the disagreement was over the severity of that head injury and its impact on the Plaintiff's future endeavours. This was a case that had significant risk for the defence, given the nature of the injury and the age of the Plaintiff. There were numerous opportunities for Hann to resolve the claim within policy limits without the necessity of a long trial and Hann chose not to

avail himself of those opportunities. I say this not in a critical fashion, as any litigant is entitled to have a claim proceed through trial, but if the outcome is not what was hoped for or anticipated, they cannot later be heard to say that they are not prepared to pay the consequences of their refusal to settle the case.

[28] In determining whether it is an appropriate case for the Court to exercise its discretion to grant a *Sanderson* order, the Court may consider the various factors set out in *Moore v. Wienecke*, *supra*. As I have indicated, it was not unreasonable for the Plaintiffs to sue Albright, nor to continue on against him. Hann had a crossclaim against Albright which was not abandoned prior to trial. Although I agree Hann did not aggressively pursue Albright at trial on the liability issue, he did lead evidence at trial about the amber light and the sight lines available to Albright and he was adverse in interest. While Hann did not cause Albright to be added as a party, the claims against these Defendants were inextricably linked, arising from the same set of circumstances—they were not independent of each other. On the issue of ability of the unsuccessful party to pay costs, this will not cause a hardship on Hann. This Defendant was well aware of the cost consequences of not accepting the Offers to Settle made by the Plaintiffs, particularly in light of the numerous experts retained and the length of the trial. It was the position of the Defendant Hann that forced this matter on to a long trial and, in this case, fairness dictates that Hann must bear the responsibility of the costs of this action.

[29] In my view, considering all of the circumstances, in the interests of achieving a just and fair result, it is appropriate in this case to shift the costs burden to the unsuccessful Defendant and make a *Sanderson* order. Hann shall pay the costs of Albright pursuant to a *Sanderson* type of order.

The Quantum of Costs of Albright

[30] I turn now to the issue of quantum of the costs of Albright. Costs on a partial indemnity basis are sought to the date of Albright's first offer to contribute [February 2011] and either on a substantial indemnity basis or on a full indemnity basis thereafter. On the former scale, the fees sought are $220,951.18 and on the latter, $284,295.47. A further sum of $7,509.98 is sought from July 26, 2011 to the conclusion of the costs submissions.

[31] Both the solicitor for the Plaintiffs and counsel for Hann object to the demand for costs on a higher scale, arguing that the Offer to Contribute is not an Offer to Settle within the meaning of Rule 49 and therefore does not attract the higher level of costs: *Wright v. Wal-Mart Canada Corp.* 2010 ONSC 2936.

[32] Rule 57.01 sets out the various factors that the Court may take into consideration when fixing costs. I agree that on a plain reading of Rule 49.10, an Offer to Contribute does not attract the same costs consequences as an Offer to Settle. This point was considered in *Wright v. Wal-Mart Canada Corp., supra*, where Price J. said at para. 231, "…[A]n Offer to Contribute does not `fit squarely within the requirements of Rule 49.10'. It therefore does not entitle Paragon to the costs consequences of that Rule."

[33] While Rule 49.10 does not provide for the award of substantial indemnity costs to a successful Defendant, in my opinion, the Court has the discretion to make such an award under Rule 57.01 if the Defendant made an Offer to Settle and was ultimately found not to be liable. However, I am not persuaded that the Offer to Contribute delivered by Mr. Foy entitles Albright to costs on a substantial indemnity scale. Clearly, Albright was successful at trial and, in my view, Albright is entitled to his costs on a partial indemnity scale. I have reviewed the time of Mr. Foy and it is eminently reasonable. Using a partial indemnity rate of $250.00 per hour, I fix the costs of Albright at $125,000 plus HST plus the disbursements of $8,117.27. For the time period after July 26, 2011, I fix the costs at $3,500 plus HST. As I have indicated, these costs are to be paid by Hann.

Costs of the Plaintiffs

[34] The Plaintiffs seek an order requiring the Hann Defendants to pay fees on a partial indemnity scale to the date of the first offer [September 17, 2008] in the sum of $54,464.70 and costs on a *full indemnity* basis thereafter including the costs submissions for a further $938,030.06 inclusive of taxes. The disbursements total $153,559.51 inclusive of taxes. These amounts are based on the time of Mr. Shekter, a solicitor with 35 years of experience, calculated at $650.00 per hour and his associate who attended the trial with him at $200.00 per hour. The total sum claimed on a full indemnity basis is $1,091,589.57. On a *substantial indemnity* basis, the fees sought post September 2008 are $850,047.37 for a total amount claimed of $1,003,606.88.

[35] The solicitor for the Plaintiffs submits that after the failed mediation in 2008, he continued to prepare the case until the time of the first pre-trial in October 2010. At that time the disbursements were under $30,000 and he made an Offer to Settle in accordance with the assessment of the pre-trial judge. When this was not accepted and the offer of the Defendants Hann was less than half of the pre-trial judge's recommended figure, he had to retain other experts and spent significant amounts of time preparing the case for trial. It is submitted that attempts to shorten the trial were unsuccessful and the defence refused to allow medical evidence to be filed and this resulted in additional time and expense. Given the jury verdict, it is submitted the Plaintiffs were entirely successful.

[36] The solicitor for the Defendants Hann argues that the costs must be fair and reasonable. It is submitted the time spent by Mr. Shekter was excessive and the appropriate rate is $400/hour on a substantial indemnity scale. Mr. Kostyniuk points out that the number of hours spent by Mr. Shekter is triple that of either of the defence counsel. It is submitted that fees in the range of $450,000-$500,000 ought to be awarded plus HST of $46,500.

[37] With respect to the disbursements, Mr. Kostyniuk submits that many of the fees charged by the experts for reports are far too high. There is an obligation on Plaintiffs' counsel to ensure the disbursements are kept under control. It is submitted that disbursements of $95,000 are reasonable in all of the circumstances, so costs fixed at $591,500 would be fair.

[38] The Plaintiffs were successful at trial and I see no reason why costs should not follow the event. While Mr. Shekter argues that it is necessary the Plaintiffs be awarded full indemnity costs in order to ensure that justice is done, I am not persuaded by this argument. In my view, this case can be distinguished from *Dube v Penlon*[3] relied on by the Plaintiffs. That case was a medical negligence action in which the Plaintiff was successful. In awarding full indemnity costs, Justice Zuber stated at p. 191, "[I]n my respectful view, this is one of those cases in which justice can only be done by complete indemnification for costs… It was or should have been obvious within a short time after the occurrence that the plaintiff was blameless…" Justice Zuber noted there were "exceptional circumstances" in the case which required full indemnification for costs. In the case before me, I do not see any similar "exceptional circumstances". The Defendants Hann made an Offer to Settle prior to trial which was approximately $175,000 less than the Plaintiffs' offer. This was based on a different view of the nature of the injuries sustained by the main Plaintiff, which ultimately was not accepted by the jury.

[39] Pursuant to delivery of their Offer to Settle, the Plaintiffs are entitled to costs on a partial indemnity scale to September 2008 and on a substantial indemnity basis thereafter. I see no basis for departing from the usual costs consequences set out in Rule 49.10

[40] Mr. Shekter uses a partial indemnity amount of $300.00 per hour and a substantial indemnity amount of $585.00 per hour. He has 75.7 hours to September 2008, when the Plaintiffs' first Offer to Settle was delivered. He has a further 741.30 hours to the delivery of the jury verdict and another 30 hours for the costs submissions and argument. The solicitor for the Defendant Hann complains that both the hourly rates and the hours are excessive. Mr. Shekter is a 1976 call and I accept that he is an expert in the area of personal injury lawsuits. I agree with the comments of my colleague Justice David Brown in *Forbes & Manhattan, Inc. v. URSA Major Minerals Inc.*[4] where he noted at para. 29, "Rule 57 does not cap lawyers' hourly rates. The old grid no longer is in force. [A] court must assess the reasonableness of claimed legal fees on a case-by-case basis, not in accordance with some notional grid."

[41] The Court must look to the principles of reasonableness and fairness when determining the appropriateness of rates claimed by a party. Mr. Shekter indicates that he bills his time at $650 per hour. In my view, a partial indemnity rate of $300 and a substantial indemnity rate of $450 are appropriate. Ms. Ticoll, a 2010 call, has an hourly rate of $200 per hour. In my view, a fair and reasonable hourly rate for a lawyer with one year experience on a partial indemnity basis is $100 an hour and on a substantial indemnity basis is $150 per hour. The law clerk's time on a partial indemnity basis ought to be $80 per hour and on a substantial indemnity scale, it should be $100 per hour.

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[3] *Dube v. Penlon,*(1992), 10 O.R. (3d) 190 (Gen. Div.)

[4] *Forbes & Manhattan, Inc. v. URSA Major Minerals Inc.* 2011 ONSC 3911

[42] I have reviewed the time spent on the file. I am not persuaded that the fact that the Plaintiffs' solicitor spent double the time that the defence counsel spent on the file is of any assistance to me in my determination of what the proper fees that should be fixed for the Plaintiffs' costs. I agree with Mr. Shekter's submission that after the mediation when it was clear that the defence did not view the value of the claim as being serious and therefore worth significant compensation, he had to invest time and money preparing the case for trial. Given the nature of the head injury and the fact that it was a case to be tried by a jury, the proper experts had to be retained and reports secured. While Mr. Shekter does have significant hours in the file, I note that up until the delivery of the first Offer in September 2008, he had approximately 75 hours of time. The vast majority of the time now claimed expended was done so from February 2011 onwards. This was a long trial, with 26 days of trial time. Mr. Shekter was extremely well-prepared throughout the trial and the success of his work is reflected in the jury verdict. I do not find the hours excessive, given the nature of the claims and the view of the defence.

[43] I find that Mr. Shekter attempted to settle the case prior to trial but was unsuccessful, apparently because the defence did not accept that the injuries of the Plaintiff Gardner would have a significant impact on her future. After the first pre-trial in October 2010, the Defendants offered less than half of what the pre-trial judge had recommended for settlement. At that point, the chances of the case settling short of trial were remote and Mr. Shekter had no other option but to prepare the case for trial, with all of the costs that are involved.

[44] Under these circumstances, I do not find that the defence can argue that the costs of the Plaintiffs in trying the case were unanticipated or beyond what they reasonably thought they would face if unsuccessful at trial. The defence was kept apprised of the mounting costs, as is clear from the correspondence from the solicitor for the Plaintiffs advising of the amount of the fees and disbursements as trial preparation continued.

[45] This is a case where the parties had disparate views of the nature of the injuries suffered in the car accident and their effects on the Plaintiffs' future. If the Plaintiffs' view prevailed, there clearly was a risk that the assessment would exceed the policy limits of Hann. The defence was certainly entitled to maintain its view of the case and to put the Plaintiffs to the test of proceeding through trial, but they were aware there was a price that would be attached if ultimately the defence theory of the case was not accepted by the jury. The price is to pay the costs incurred by the Plaintiffs, including those made necessary by a long trial before a jury.

[46] Using the rates I have indicated are appropriate on a substantial indemnity basis for Mr. Shekter, Ms. Ticoll and the various law clerks who worked on the file, I fix the fees up to the time of the first Offer to Settle in September 2008 at $52,000. For the time from September 2008 onwards in my view, reasonable fees are $650,000. The appropriate taxes are to be applied to these costs.

[47] I turn now to the issue of disbursements which total $153,559.51. I have reviewed the list. I do not dispute that these amounts were paid by the Plaintiffs but that does not equate with full reimbursement by the unsuccessful party. To put it another way, experts retained by a party

cannot charge whatever amount they wish to regardless of whether or not it is a reasonable amount with the expectation that this amount will be paid by opposing counsel.

[48] The disbursements excluding the medical notes/reports (schedule B) and witness preparation/attendance (schedule C) and photocopying/binding (schedule D) total approximately $22,275. The largest item in this group is the fee from Artery Studios for Medical Illustrations in the sum of $6,870.40. This, in my view, is high given the illustrations that were done and it shall be reduced to $5,000. Professor Carr's reports total $17,214.60. While Professor Carr's evidence was most helpful, I find that the cost of his reports is very high. His accounts shall be reduced to $12,000 and his fee for attending trial shall be reduced to $7,500. Dr van Reekum charged $13,982 for his reports and $10,344 for preparation and attendance at trial. In my view, while a well-qualified expert, he was an advocate for his own opinions and far from impartial, which is what the Court expects and demands of expert witnesses. Instead of assisting the Court, he preferred to engage in arguments with opposing counsel and used the witness box as a forum to expound on why his opinions were the correct ones. The cost of his reports shall be fixed at $7,500 and his attendance at trial $7,500. The disbursements, therefore, shall be fixed at $132,167.66.

Issue re: entitlement of Plaintiff Christine Pohl to Family Law Act damages and pre-judgment interest

[49] The Plaintiff Pohl is the mother of Gardner who sustained a head injury in the motor vehicle accident. Pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3, certain relatives can claim damages for services provided to a person injured in an accident. Section 61(2)(d) stipulates that recovery of damages may include "nursing, housekeeping or other services provided". In their answers to the jury questions, the jury awarded Pohl damages of $21,840.00 for past services and $85,200.75 for future services which they identified as on-demand guidance for Gardner.

[50] The Defendants Hann argue that this amount is not recoverable because it is in the nature of attendant care. Since Gardner was not designated "catastrophic" and she cannot claim health care expenses, her mother is not entitled to maintain such a claim.

[51] The solicitor for the Plaintiffs argues that Pohl is entitled to compensation for these "other services", which are not health care expenses. It is submitted that due to her brain injury, Gardner is unable to make decisions and respond to situations. Evidence was called to illustrate that Pohl must be available to her daughter virtually all of the time in order to assist her with decision making and to provide emotional support. To put it another way, Pohl must constantly be "on call" for Gardner. Mr. Shekter argued that the type of service provided by Pohl is not attendant care, which would be paid for by the no fault insurer. The type of assistance Pohl provides is not something that can be purchased under the Statutory Accident Benefits Schedule ("SABS"), and it is not included in the services listed in a Form 1.

[52] I agree with Mr. Kostyniuk's submission that the Plaintiffs cannot claim attendant care or medical rehabilitation benefits because Gardner has not been deemed "catastrophic" as defined

in the *Regulations*. Question 21 asks whether Pohl suffered a loss of other services up to the date of trial and if answered yes, the jury was asked to assess the loss. Question 23 asked the same question for the future and if answered affirmatively, question 24 required the jury to assess the loss. Question 25 asked whether Pohl suffered a loss of guidance, care and companionship under the *Family Law Act*, which is the standard type of claim advanced in personal injury actions. I note that Mr. Kostyniuk did not object to these questions being put to the jury for determination. In my opinion, if counsel's view was that there was no entitlement to compensation for Pohl for the claims for services she advanced under the *Family Law Act*, counsel ought to have objected at the time so a determination could have been made as to the propriety of the questions. In any event, the question for my determination, given the jury verdict, is how the services provided by Pohl ought to be characterized.

[53] Section 61 of the *Family Law Act* contemplates recovery for damages for services apart from nursing or housekeeping services that an individual provides as a result of injuries sustained by an individual related to them. There was evidence at the trial that Pohl must be available to Gardner at any time during the day or night in order to answer questions or provide guidance to her as a result of Gardner's impaired executive functions. The occupational therapist, Tenley Kelly, testified that as a result of her brain injury, Gardner needed her mother to be available throughout the day to assist her and calm her down. She stated that this type of service is not one that can be purchased. Pohl testified that as a result of her daughter's needs, she has not taken a vacation in years.

[54] I am unaware of any case directly on point; however, the issue of compensation for "other services" has been considered by the Court in other cases. In *Bannon v. McNeely* (1995), 22 O.R.(3d) 396 (Gen. Div.) at p. 412, Justice Binks awarded the husband of an injured Plaintiff $30,000 in addition to his claim for loss of care, guidance and companionship to compensate him for attending at the hospital on a daily basis and "feeding his wife and assisting her in every conceivable way knowing that the nursing staff however excellent, could not achieve this and this was a major contribution in terms of nursing."

[55] I find the comments of Justice Ground in *Till v. Walker*, [2000] O.T.C. 51 (S.C.) provided by Mr. Shekter, to be of assistance to my analysis. In considering whether care provided by relatives in hospital falls under "other services" or the general loss of care, guidance, or companionship, Justice Ground noted at para. 34:

> The more compelling authorities do, however, in my view support the proposition that parents or relatives should be compensated for care given to a patient in hospital in that the courts seem to acknowledge that the intimate care and support provided is a crucial part of recovery, separate from the standard hospital care…and provide compensation for the support, care and assistance provided by the parent or relative. Although in the final analysis it may make no difference, it seems to me that such compensation should be regarded as coming within the value for services performed under clause (d) of subsection 61(2) of the F.L.A. rather than loss of care, guidance and companionship under clause (e) of subsection 61(2).

[56] Attendant care as defined in the SABS provides for payment for services provided by an aide or attendant. In my view, this does not contemplate the type of assistance that Pohl provides to Gardner. Pohl is not providing nursing care, nor is she providing other types of care contemplated by attendant care. The need for Pohl to be available for Gardner is not a specific function that can be identified and therefore purchased, for example, assisting with meal preparation. In my opinion, this type of support clearly is not a medical or rehabilitation expense nor is it attendant care as set out in the SABS. I find that it is the sort of care that is contemplated by the general phrase "other services" under the *Family Law Act*. In my view, the type of support provided on an ongoing, daily basis by Pohl to her daughter as a result of her brain injury is properly compensable under s. 61(1)(d) of the *Family Law Act* and is not a health care expense which would be precluded under the *Insurance Act*, nor is it recoverable under the SABS. The Plaintiff Pohl is entitled to recover judgment in accordance with the jury verdict on questions 21, 22, 23, and 24.

[57] With respect to the pre-judgment interest calculation, counsel for the Defendants Hann submits that the services provided by Pohl only arose after the birth of Gardner's baby and the pre-judgment interest starts to run after that event. Mr. Shekter disagrees arguing that the on-demand guidance commenced after the accident and interest should start running in February 2005, when notice was given.

[58] The evidence from numerous experts, including Dr. Rowden, Dr. van Reekum and Tenley Kelly, was consistent that Gardner needed the on-going, daily support from her mother following the accident and her needs increased after the birth of Kailey. The need for her mother's constant assistance stems from the nature of her brain injury. The additional responsibilities imposed by motherhood obviously increased Gardner's need for her mother's guidance and support, but in my view, the evidence was clear that the need arose after the accident, not after the birth of her daughter. The pre-judgment interest on the damages awarded by the jury for Pohl's claims shall run from February 2005.

[59] Counsel may submit the costs order and the judgment to me for my signature.

D.A. Wilson J.

Date: 20120330