

Court orders defendant to pay costs of \$300,000 for refusing to settle claim (Barry v Anantharajah)

Litigation | Litigation & Dispute Resolution | Motor vehicles | Rules of Civil Procedure

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In Ontario, the Superior Court of Justice has broad discretion when it comes to awarding costs following a hearing. Section 131(1) of the Ontario *Courts of Justice Act* provides that “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.”

Rule 57.01(1) of the *Rules of Civil Procedure* outlines a number of factors that a court “may” consider in addition to the result, including offers to settle, the principle of indemnity, the amount that the unsuccessful party could reasonably expect to pay, the complexity and importance of the matter, the conduct of any party during the litigation, and any other relevant matters.

The effect of these general principles is that an award of costs usually follows the event, meaning that the successful party is usually entitled to an award of costs payable by the losing party. In some cases, however, the court’s discretion may lead to results that deviate from the usual result.

In *Barry v Anantharajah*, 2024 ONSC 1267 (CanLII), following a three-week jury trial concerning alleged personal injuries arising from a motor vehicle accident, the plaintiff succeeded in proving damages of \$16,160.50. It may have been surprising, therefore, that the court then awarded costs to the plaintiff of \$300,000.

The action arose from a motor vehicle accident in which the defendant struck the plaintiff, who was walking across the street within a crosswalk. Both liability and damages were in issue. The plaintiff sought over \$1,000,000 in general damages, past and future income loss, future housekeeping, home maintenance, and future health care expenses. The defendant opposed the claim.

In December 2023, shortly before trial, the plaintiff made an offer for \$500,000 in damages, plus costs and disbursements. The defendant responded the same day and counter-offered that the action be dismissed without costs. The defendant never made a monetary offer before or during the trial.

The three-week jury trial began on 15 January 2024. The plaintiff was represented by two senior counsel and one junior counsel, while the defendant was represented by one senior and one junior counsel from her insurance company.

At the conclusion of the trial, the jury deliberated for over six hours before returning a verdict that awarded the plaintiff \$21,166 in general damages, and \$26,000 in special damages for past income loss. The jury also found the plaintiff contributorily negligent by 15%. After accounting for contributory negligence and the statutory deductible for general damages, the parties agreed that the plaintiff would receive a modest \$16,160.50 in damages.

Further, the trial judge found that the plaintiff’s injuries did not meet the statutory threshold since she had failed to establish that she sustained a permanent, serious impairment of an important physical, mental, or psychological function because of the accident, pursuant to section 267.5 of the Ontario *Insurance Act*.

The plaintiff then sought costs totalling \$404,809 (including \$114,512 in disbursements), on the basis that she was successful at trial. The plaintiff conceded that she did not meet her offer at trial such that she was not entitled to substantial indemnity costs under Rule 49.10 of the *Rules of Civil Procedure*.

Counsel for the defendants argued that no costs should be awarded to either party since neither party was truly successful. The defendant further argued that, given the small amount awarded by the jury, the trial should have been commenced in Small Claims Court.

Notwithstanding the result, the trial judge was critical of the defence for requiring a trial. In the judge's view, this was simply a "clear tactic" of the defendant to force the matter to trial in the hopes that the plaintiff would either withdraw or settle her claim for no monetary compensation. It was therefore fair and reasonable that the defendant bear the costs of this "aggressive litigation strategy".

In the trial judge's view, there was no doubt that the judges presiding over two pre-trial conferences would have encouraged both parties to present a monetary settlement prior to trial. There was also no doubt, in the trial judge's view, that had the defendant made "a reasonable offer to settle," the trial could have been avoided. The decision does not identify what a reasonable offer to settle would have been.

Based on this assessment of the defendant's position, the trial judge found that the proportionality of the damages result was not determinative of the ultimate decision on the quantum of costs because it was the defendant's "unreasonable decision not to make any pre-trial offers" that effectively necessitated the matter going to trial. The trial judge pointed to other decisions where the court had concluded that significantly decreasing a plaintiff's claim for costs risks rewarding defendants who engage in such bully tactics: *Persampieri v. Hobbs*, 2018 ONSC 368, at paragraphs 93-108 (where the same defence insurer was involved); *Corbett v. Odorico*, 2016 ONSC 2961, at paragraphs 19-20.

The trial judge noted that the case at hand was similar to the situation in *Wray v. Pereira*, 2019 ONSC 3354 (CanLII), where proportionality was found to be an important factor despite the defendant's refusal to make a pre-trial offer since the plaintiff had made a substantial claim that was rejected by the jury and received what could be described as "a token award". In *Wray*, the plaintiff sought costs of over \$250,000 but received an award of \$40,000.

In the trial judge's view, however, the defendant's decision not to make a monetary offer before trial was unreasonable. At trial, the defence's expert psychiatrist admitted that the accident caused or contributed to the plaintiff's psychological injuries and since the defendant knew that the plaintiff was on her way to work at the time of the accident, it should have been foreseeable that the jury would award some amount for past income loss:

In short, the Defendant's decision not to make an offer makes no sense in light of the evidence at trial and which the jury clearly accepted. The Defence would have been aware of this evidence well before the trial. We will simply never know if that trial could have been avoided had the Defence made even a modest offer early on in the litigation.

The trial judge was therefore critical that the defendant offered the plaintiff nothing and forced the matter to a jury trial, which was "highly wasteful of court and public resources." The trial judge found that it was unreasonable for the defendant not to factor in the cost to the public when deciding how to conduct the litigation with the plaintiff.

As a result of the defendant's aggressive litigation strategy, the court awarded costs to the plaintiff of \$300,000, which approximated the amount sought by her counsel but reduced by \$100,000 on the basis of proportionality and the higher legal fees necessitated by the plaintiff's use of two senior trial lawyers.

The amount ordered for costs would be devastating to an uninsured defendant. The decision may therefore give some defendants pause and result in what could be viewed as a "token" or nuisance offer to pay *something* to a plaintiff, notwithstanding that the plaintiff's claim and settlement position may vastly exceed such an offer. As noted by the trial judge, it is not clear in the circumstances of this case that an offer by the defendant in the range of what the plaintiff ultimately obtained for damages would have obviated the three-week trial. However, the failure to make any monetary offer to settle led the court to conclude that the defendant's approach to the matter amounted to bully litigation tactics. A PDF version is available for download [here](#).

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