CITATION: El-Khodr v. Lackie, 2015 ONSC 4766
COURT FILE NO.: 09-CV-43686
DATE: 20150728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KOSSAY EL-KHODR Plaintiff	Joseph Y. Obagi and Elizabeth A. Quigley, for the Plaintiff
– and –	
RAYMOND C. LACKIE, JOHN MCPHAIL, ATS ANDLAUER TRANSPORTAITION SERVICES GP INC., AND TRAILCON LEASING INC. Defendants	Barry A. Percival, Q.C., for the Defendants
	HEARD: By Written Submissions

REASONS FOR DECISION ON PREJUDGMENT INTEREST, APPLICATION OF TRUST AND ASSIGNMENT PROVISIONS OF THE INSURANCE ACT, AND COSTS

TOSCANO ROCCAMO J.

[1] The Plaintiff, Kossay El-Khodr, brought an action seeking damages for catastrophic injuries sustained in a motor vehicle accident against Raymond Lackie, the driver of the vehicle that rear-ended Mr. El-Khodr's vehicle, and John McPhail, the owner of the vehicle driven by Mr. Lackie. On April 29, 2015, after four weeks of trial, the jury awarded the Plaintiff the sum of $**2,931,006**, broken down as follows:

1. Past Loss of Income	$220,434
2. General Damages for Pain and	$225,000

	Suffering and Loss of Enjoyment of Life	
3.	Future Loss of Income	$395,593
4.	Future Care Costs	
	a) Future Attendant Care Costs/Assisted Living	$1,450,000
	b) Future Professional Services (Physiotherapy, Psychology, etc.)	$424,550
	c) Future Housekeeping and Home Maintenance	$133,000
	d) Future Medication and Assistive Devices	$82,429

A copy of the verdict sheet is appended to these Reasons.

[2] My Endorsement of April 29, 2015 granted judgment to the Plaintiff in accordance with the verdict, and directed the parties to provide me with written submissions in respect of the assignment of past and future collateral benefits, prejudgment interest and costs by June 30, 2015. I have since received additional reply submissions on behalf of the Plaintiff.

Issues

[3] Noting the concessions made in the parties' submissions, the parties seek direction on the following outstanding issues:

1. On what date should prejudgment interest on the amount awarded for past income loss cease to accrue?

2. What is the applicable rate for prejudgment interest on the jury's award for non-pecuniary damages?

3. Does the Court have jurisdiction to make an order pursuant to the trust and assignment provisions of the *Insurance Act* in the absence of a notice of motion?

4. To what amount of costs is the Plaintiff entitled?

Analysis

1. On what date should interest on the award for past income loss cease to accrue?

The Law

[4] Section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the *CJA*), provides:

> 128. (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose **to the date of the order**. [emphasis added]

[5] Section 258.3(8) of the *Insurance Act*, R.S.O. 1990, c. I.8, modifies s. 128 in relation to motor vehicle accident cases:

> 258.3 (8) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, no prejudgment interest shall be awarded under section 128 of the Courts of Justice Act for any period of time before the plaintiff served the notice under clause (1) (b).

The Positions of the Parties

[6] The Plaintiff concedes that the Defendants are entitled, by reason of income loss replacement payments made to the Plaintiff by his insurer, to a credit of $173,814.82 against the damages awarded for past income loss, resulting in a net income loss payable to the Plaintiff of $46,619.19.

[7] The Plaintiff further concedes that the prejudgment interest on the net past income loss should be calculated at a rate of 1.25% (i.e. half the applicable rate of 2.5%).

[8] The Plaintiff and the Defendants agree that interest should begin to accrue as of May 29, 2007, the date on which the Plaintiff provided his first written notice of claim. The parties differ on when that interest should cease accruing.

[9] The Defendants argue that interest should cease accruing as of March 30, 2015, as the evidence of the accountant who testified for the plaintiff at trial was based on past loss of income to March 30, 2015. This would result in prejudgment interest in the amount of $4,567.72 payable on past income loss.

[10] The Plaintiff, by contrast, argues that interest should cease accruing as of the judgment date, being April 30, 2015. This would result in prejudgment interest in the amount of $4,618.81 payable on the award for past income loss.

Analysis and Conclusion

[11] Counsel for the Defendants did not provide, and I cannot find, any basis in law for the proposition that the interest should cease accruing on the date on which the expert accountant based his assessment of past loss of income. Section 128(1) of the *CJA* clearly provides that the relevant date is the date of the order. This is also logical given that, at the date of the order, the Plaintiff continued to be deprived of the money to which he was entitled as at March 30, 2015 and thus should be entitled to interest up until the date of the order, regardless of the time period used to calculate past loss of income.

[12] As such, the Plaintiff is entitled to $4,618.81 in prejudgment interest with respect to the award for past income loss.

2. What is the applicable rate for prejudgment interest on the jury's award for non-pecuniary damages?

The Law

[13] As noted above, s. 128(1) of the *CJA* creates a presumptive entitlement to prejudgment interest.

[14] The rate of prejudgment interest is determined according to s. 127(1) of the *CJA*:

> 127. (1) "prejudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point.

[15] However, s. 128(2) sets out an exception for non-pecuniary losses:

> 128. (2) Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66 (2) (w).

[16] Rule 53.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [the *Rules*], provides for an interest rate of 5% per year.

[17] On January 1, 2015, the *Insurance Act* was amended through the inclusion of a new provision, s. 258.3(8.1), which provides that "[s]ubsection 128 (2) of the *Courts of Justice Act* does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss" in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile. Thus, the 5% interest rate under Rule 53.10 no longer applies to amounts awarded for non-pecuniary damages for bodily injury or death caused by motor vehicle accidents. Rather, prejudgment interest for such amounts would be calculated the "usual" way pursuant to s. 127(1) of the *CJA*, i.e., the bank rate.

[18] Section 52(4) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, codifies the common law presumption that procedural legislation applies immediately, not only to future proceedings, but to on-going or pending proceedings that relate to events that took place prior to the amendments.

> 52(4) The procedure established by the new or amended Act or regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment.

The Defendants' Position

[19] The parties differ on the prejudgment interest rate applicable to the award for non-pecuniary damages. The Defendants argue that s. 258.3 (8.1) of the *Insurance Act* is retrospective in its application. The interest rate applicable to the calculation of prejudgment interest in this case would be 2.5% under this new provision, rather than 5%. Given that the statement of claim was issued on January 7, 2009, whether or not the new prejudgment interest rate rule applies retrospectively has a significant impact on the amount of interest payable – approximately $45,000 if I accept the Defendants' position versus $90,000 if I accept the Plaintiff's position.

[20] The Defendants rely on *Cirillo v. Rizzo*, 2015 ONSC 2440, [2015] O.J. No. 1881 [*Cirillo*], in which the motion judge held that s. 258.3 (8.1) is procedural and thus applies

retrospectively. *Cirillo* has not yet been cited in any other case law I could find. The Plaintiff in that case appealed the decision, but subsequently abandoned the appeal.

[21] The Defendants further rely on *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (Ont. C.A.), (which is also relied in *Cirillo*), for the proposition that there is a distinction between laws that grant or deny a remedy, which are substantive, and laws which affect the quantification of a particular head of damages. Counsel for the Defendants argues that this principle (which applies to damages awarded in tort) should apply by analogy to prejudgment interest. In other words, counsel for the Defendants argues that entitlement to prejudgment interest is substantive law, whereas the measure of the amount (which would include the rate of interest) is procedural.

[22] The Defendants also argue that the new provision is procedural because it bears no relation to actual market interest rates, although counsel did not provide any support in law for the proposition that the arbitrariness of the rate renders the provision procedural rather than substantive.

[23] In addition, the Defendants point to the October 1989 enactment of the 5% rate for prejudgment interest, wherein the Legislature specifically indicated that the rate was only applicable on or after a specific date in October 1989. According to the Defendants, if the Legislature had not intended for the new provision to apply retrospectively, it would have included language to that effect.

[24] Finally, the Defendants argue that the new legislation does not penalize plaintiffs as the 5% prejudgment interest rate applicable before the amendment was at times excessive when compared to the bank rates for the past 10 years.

The Plaintiff's Position

[25] The Plaintiff submits that the general rule of statutory interpretation is that statutes do not apply retrospectively unless a legislative intention for retrospective application is express or required by implication. The Plaintiff observes that such an intention is neither express nor implied with respect to the amendment to the *Insurance Act*.

[26] The Plaintiff cites a number of cases confirming that the right to prejudgment interest is substantive (*Consolidated Distilleries Ltd. v. Canada*, [1932] S.C.R. 419 at 421; *Northern & Central Gas Corp, Ltd. v. Kidd Creek Mines Ltd.* (1988), 66 O.R. (2d) 11 (C.A.) at para. 17).

[27] In addition, the Plaintiff cites a number of Ontario Court of Appeal cases supporting its position that entitlement to a particular rate of prejudgment interest is substantive (*306793 Ontario Ltd. v. Rimes* (1980), 30 O.R. (2d) 158 (C.A.) [*Rimes*] at para. 14; *Sidhu v. State Farm Mutual Automobile Insurance Company*, 2014 ONCA 920 (CanLII) [*Sidhu*] at para. 10; and *Brown v. Flaharty*, [2004] O.J. No. 5278 [*Flaharty*] at para. 9-10).

[28] Further, the Plaintiff argues that the Ontario Court of Appeal's *obiter* statements in *Pilon v. Janveaux* (2006), 211 O.A.C. 19 (C.A.) [*Pilon*] at para. 21 suggest that even the Court's discretion to vary the amount of interest payable under s. 130 of the *Courts of Justice Act* is substantive. The Court in *Pilon* stated that the issue of interest dealt with in s. 4 of the *Victims' Bill of Rights* is substantive. Section 4 of the *Victims' Bill of Rights* only relates to a Court's ability to vary interest, and *not* to entitlement. Thus, the Plaintiff argues that *Pilon* supports the proposition that ***both***, *entitlement* to interest and *measurement* of the amount of interest to be awarded are substantive.

[29] Lastly, the Plaintiff submits that *Cirillo* was wrongly decided because the motion judge (1) misinterpreted *Somers*; (2) ignored the line of cases holding that the substantive right to interest includes the applicable interest rate; and (3) failed to apply the presumption that legislation does not apply retrospectively, absent an express or implied legislative intention that it should do so.

Analysis and Conclusion

[30] The question to be answered in deciding this issue boils down to whether or not s. 258.3(8.1) is substantive or procedural law, as this will determine the issue of retrospective application. This was the precise issue recently dealt with in *Cirillo*. Essentially, the motion judge in that case decided that the amendment was procedural law.

[31] With respect, I agree with the Plaintiffs that *Cirillo* is wrongly decided. I conclude that the error stems from a misreading of *Somers*. In summarizing the defendant's position in that case, the motion judge stated as follows at para. 22:

> Counsel contends the Somers case drew a distinction between entitlement and quantification of heads of damages and held the former (entitlement) to be substantive in nature and the latter (quantification) to be procedural in nature. The court in Somers held that entitlement to prejudgment interest is a substantive right whereas a cap on prejudgment interest relating to the quantification of prejudgment interest is a procedural right in nature.

[32] Based largely on this understanding of the holding of *Somers*, the motion judge held that the mechanism for quantifying an entitlement to prejudgment interest is procedural and thus applies retrospectively (at para. 31). In my view, this understanding of the holding in *Somers* is incorrect.

[33] In *Somers*, the Ontario Court of Appeal was faced with several choices of law issues. The Court had to decide whether costs and prejudgment interest should be decided in accordance with Ontario or New York State law, and whether the *cap on non-pecuniary damages* (not a cap on prejudgment interest) recognized in Ontario law should be applied. For all three issues, whether or not the Ontario rule was substantive or procedural was determinative, based on the Supreme Court's holding in *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022 [*Tolofson*] at 1048-50.

[34] The Court of Appeal cited, at para. 13 Justice La Forest's description of the distinction between procedural and substantive law in *Tolofson*. At p.1072 of *Tolofson*, Justice La Forest wrote as follows:

> The forum's procedural rules exist for the convenience of the court, and forum judges understand them. They aid the forum court to "administer [its] machinery as distinguished from its product": Poyser v. Minors (1881), 7 Q.B.D. 329 (C.A.) at p. 333, per Lush L.J. Although clearcut categorization has frequently been attempted, differentiating between what is a part of the court's machinery and what is irrevocably linked to the product is not always easy or straightforward. . . .

> [I]n the conflicts of law field . . . the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.

[35] The Court of Appeal also cited, at para. 14, one of its earlier decisions for the following description of the distinction:

> [S]ubstantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. It regulates the conduct of Courts and litigants in respect of the litigation itself whereas substantive law determines their conduct and relations in respect of the matters litigated. (Sutt v. Sutt, [1969] 1 O.R. 169, at p. 175).

[36] Based on this distinction, the Court of Appeal held that costs are procedural. The Court noted that "costs are both a discretionary indemnification device and a mechanism by which abuses of the court's processes may be deterred or penalized. Costs are routinely used by Ontario courts to reward or sanction the conduct of parties prior to and during the litigation process." Thus, the Court concluded, at para. 18, that:

> Viewed from a multi-purpose perspective, therefore, costs are "means by which the ends of justice are attained" (Sutt v. Sutt, at p. 175 O.R., per Schroeder J.A.). They are an essential tool designed, in the words of La Forest J. in Tolofson, to "make the machinery of the forum court run smoothly" and to aid Ontario courts in "administer[ing] [their] machinery as distinguished from [their] product" (at pp. 1067-68 and pp. 1071-72 S.C.R., pp. 318 and 321 D.L.R.).

[37] Finally, the Court held that costs are properly considered procedural because "costs of litigation are incidental to the determination of the rights of the parties. They are not part of the lis between litigants" (at para. 19).

[38] By contrast, the Court held that prejudgment interest is a matter of substantive law (at para. 31). First, the Court noted that a party is presumptively entitled to prejudgment interest under s. 128(1) of the *CJA* (at para. 21). However, the Court also noted that this entitlement is not absolute (at para. 22): "[s]ection 130(1) of the Act authorizes a court, in its discretion and where it considers it just to do so, to disallow pre-judgment interest, allow it at a rate higher or lower than that provided in s. 128, or allow it for a period other than that provided in s. 128."

[39] The Court further noted, at para. 23, that:

> Modern theories of pre-judgment interest relate it to compensatory, rather than punitive, goals. Awards of pre-judgment interest are designed to recognize the impact of inflation and to provide relief to a successful litigant against the declining value of money between the date of entitlement to damages and the time when damages are awarded.

[40] The Court then considered the fact that s. 130(2) of the *CJA* sets out factors a court is to consider in deciding to award, vary or deny prejudgment interest. Some of these factors would allow a court to take into account conduct which adversely affected the progress of litigation. Thus, prejudgment interest could, in proper cases, be used as a mechanism to control the progress of litigation (at para. 25). The rational for this is largely related to the impact of delay caused by one party, and the fact that any such delay should be considered in making an award for prejudgment interest given that prejudgment interest is essentially "a head of damage which is available to respond to a delay in the delivery of awarded compensation" (at para. 27).

[41] Based on the above, the Court concluded as follows at paras. 30-31:

> The entitlement to claim pre-judgment interest is established in Ontario not by the Rules of Civil Procedure, as suggested by the motions judge, but by the Act. Section 128(1) of the statute confers a substantive right to claim pre- judgment interest on a person who is entitled to an order for the payment of money. That right may be displaced, varied or reduced, in the discretion of the court, where the conduct of the claimant has adversely affected the speedy progress of the litigation. The discretion of the court concerning pre- judgment interest relates to the denial or reduction, as distinct from the granting, of a right. **Accordingly, in my view, the character of the court's discretion in connection with pre-judgment interest is qualitatively different from the nature of the wide discretion afforded the court under s. 131(1) of the Act to grant, or deny, costs.** The legislature, through the Act, has established a specific policy with respect to pre-judgment interest. That policy does not include an unfettered discretion for Ontario courts on whether to award pre-judgment interest.
>
> I conclude, therefore, that **in Ontario pre-judgment interest is a matter of substantive law**. On my reading of Tolofson, there is no room for departure from the rule which dictates application of the lex loci delicti (the law of New York State) to claims in the Action for pre-judgment interest.

[42] Under the law of New York State, no prejudgment interest was awardable in personal injury compensation claims by statute – thus the plaintiffs in *Somers* did not receive prejudgment interest.

[43] The Court then dealt with the cap on non-pecuniary damages established by the Supreme Court of Canada in the following trilogy of cases: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Prince George School District No. 57*, [1978] 2 S.C.R. 267; and *Arnold v. Teno*, 1978 CanLII 2 (SCC), [1978] 2 S.C.R. 287, (collectively, the "Trilogy"). The Court held that this cap was a matter of procedural law and thus should apply to the case before it. The Court held as follows at paras. 57-58:

> In essence, therefore, the cap is a judicially imposed limit or restriction on liability for non-pecuniary damages. It is a device developed in Canada to avoid excessive and unpredictable damages awards concerning non-pecuniary losses and the corresponding burden on society which follows from such awards. In my view, the policy considerations which support the goal of avoiding such awards, articulated in the Trilogy, favour characterization of the cap as a matter of procedural law. In addressing those policy considerations, it is important to distinguish between the availability of heads of damage and the quantification of an award of damages in respect of heads of damage.
>
> The amount of the cap can be varied in exceptional circumstances, according to the facts and equities of the case. In contrast, the heads of damage are the claimed non-pecuniary losses. In this case, they are pain and suffering, shock and lessened enjoyment of life and normal activities, as pleaded by Ms. Somers. I conclude that the cap functions as a limit or restraint on liability to be taken into account in fixing the quantum of damages otherwise to be awarded in respect of Ms. Somers' pleaded non-pecuniary heads of damage, if proven. The cap thus pertains to the procedural, rather than the substantive, law of Ontario. It applies to the Action as part of the lex fori.

[44] As the above passage clearly demonstrates, the Court's reasoning in this part of *Somers* is specific to and restricted to the cap on awards for non-pecuniary damages established in the trilogy. It does not apply to the statutory "cap" on the prejudgment interest rate applicable to such awards – which is not really a cap at all as a judge has some discretion to vary this rate under s. 130(1).

[45] I therefore conclude, with respect, that *Cirillo* was based on a misreading of *Somers*. The decision also did not address case law holding that entitlement to a particular prejudgment interest rate is substantive law. *Rimes*, *Sidhu*, and *Flaharty* support the Plaintiff's position that entitlement to a particular prejudgment interest rate is a matter of substantive law in Ontario. I see no reason to depart from these cases, and so would not apply s. 258.3(8.1) of the *Insurance Act* retrospectively.

[46] In terms of the statements made by the Court of Appeal in *Pilon*, these are clearly obiter statements, and given my conclusion with respect to *Somers*, I do not need to rely on them.

[47] Moreover, the Court in *Somers* held that the entitlement to prejudgment interest under s. 128(1) and the ability of the Court to vary or deny the award for prejudgment interest under s. 130 of the *Act* are matters of substantive law. Section s. 258.3(8.1) of the *Insurance Act* simply requires a Court to award prejudgment interest in motor vehicle accident cases in accordance with s. 128(1) and, by extension, s. 130 of the *CJA*. As such, based on *Somers*, which is binding on this Court, I cannot see how s. 258.3(8.1) could be considered anything but substantive.

[48] The purpose the Legislature sought to achieve in enacting s. 258.3(8.1) also supports this conclusion. Section 258.3(8.1) was introduced as part of Bill 15, *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014. The Honourable Charles Sousa described the purpose of the new provision during the Bill's second reading (Ontario, Legislative Assembly, Debates (Hansard), 41st Parl, 1st Sess, (21 October, 2014), available online at: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?locale=en&Date=2014-10-21&detailPage=%2Fhouse-proceedings%2Ftranscripts%2Ffiles_html%2F21-OCT-2014_L016.htm&Parl=41&Sess=1#para28):

> Bill 15 also proposes a long-overdue measure that will help modernize the auto insurance system. If passed, this legislation would amend the Insurance Act to align the prejudgment interest rate for non-pecuniary loss, also called pain and suffering damages, for individuals injured in a motor vehicle collision to reflect market conditions. The current prejudgment interest rate on damages for non-pecuniary loss in a personal injury action is set at 5% per year. Meanwhile, the prejudgment interest rate for most other damages is based on Bank of Canada interest rates and calculated quarterly. Currently this rate is 1.3% per year. The 5%-per-year prejudgment interest rate for damages for non-pecuniary loss in a

> personal injury action increases the cost of bodily injury claims in the auto insurance system, which drives up costs for all consumers. This rate has not been adjusted since 1990. Linking this rate to current market conditions would help reduce the cost of bodily injury claims in the auto insurance system while still ensuring fairness to consumers.

[49] This statement clearly indicates that the reason for enacting s. 258.3(8.1) was to better match the award for prejudgment interest in motor vehicle accidents to the actual loss of interest incurred by a party due to the delay in getting an award for damages (which was generally much less than 5%), and, as a result, decrease insurance premiums. The section was not enacted to assist a court in controlling its process.

[50] Lastly, the Plaintiff submits that the Supreme Court's comments in *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256 [*Angus*] at para. 28., support the position that s. 258.3(8.1) should not apply retrospectively. In *Angus*, the Court stated:

> This case is a good illustration of the policy reasons why statutes should not be given retrospective operation in the absence of an intention to do so that is either expressed in, or is necessarily implied by the statute… Insurance companies calculate their premiums according to known risk factors. When the rates for the contract in question here were calculated, it was "known" that this particular risk--a suit in tort by Diane Angus against her husband--was precluded by s. 7. The insurance company relied upon that "knowledge" in setting its rates. A retrospective change to that circumstance should not lightly be implied.

[51] The 5% prejudgment interest rate for general damages was a known risk factor, and insurance companies took this into account in setting their premiums. I see no reason to depart from the Supreme Court's position that statutes should not be given retrospective operation in the absence of an express or implied intention to that effect, especially when the statute impacts the calculation of insurance premiums. While in *Angus* the Supreme Court was concerned with a situation in which a retrospective change would disadvantage insurance companies, I think the reasoning should apply equally to a situation in which the retrospective change would essentially result in a windfall for insurance companies and a disadvantage to insured persons who paid higher premiums.

[52] Accordingly, I would award the Plaintiff's prejudgment interest in the amount of **$89,167.81**, representing 5% per annum for the period from May 29, 2007, to April 30, 2015, on the $225,000 jury award for pain and suffering.

[53] Adding the amounts for prejudgment interest for both the pecuniary and non-pecuniary awards, the gross recovery for the Plaintiff is **$3,024,792.62**.

3. Does the Court have jurisdiction to make an order pursuant to the trust and assignment provisions of the *Insurance Act* in the absence of motion materials?

Background

[54] Before charging the jury, I issued a ruling on the assignment of future collateral benefits in relation to coverage under the Ontario Drug Benefits Program, in which I held that the value of any benefit Mr. El-Khodr receives under this program is not assignable to the Defendants under s. 267.8(12)(a)(v) of the *Insurance Act*, R.S.O. 1990 c. I.8. (*El-Khodr v Lackie*, 2015 ONSC 2824 (CanLII)). Rather, Mr. El-Khodr's potential coverage under this program is properly considered a contingency, and so the jury was instructed that it could take this potentiality into account in calculating an award for future medication costs.

The Law

Future collateral benefits

[55] Sections 267.8 (9) and (10) of the *Insurance Act* deals with a plaintiff's trust obligations:

> (9) A plaintiff who recovers damages for income loss, loss of earning capacity, expenses that have been or will be incurred for health care, or other pecuniary loss in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall hold the following amounts in trust:
>
> 1. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of income loss or loss of earning capacity.
>
> 2. All payments in respect of the incident that the plaintiff receives after the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.
>
> 3. All payments in respect of the incident that the plaintiff receives after the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment.

> 4. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of expenses for health care.
>
> 5. All payments in respect of the incident that the plaintiff receives after the trial of the action under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law.
>
> 6. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care.
>
> (10) A plaintiff who holds money in trust under subsection (9) shall pay the money to the persons from whom damages were recovered in the action, in the proportions that those persons paid the damages.

[56] Section 267.8(11) of the *Insurance Act* provides that "any dispute concerning a plaintiff's liability to make payments" of amounts held in trust pursuant to s. 267.8(9) to the person from whom the plaintiff recovered damages is to "be submitted to **arbitration** in accordance with the *Arbitration Act, 1991*."

[57] Section 267.8 (12) of the *Insurance Act* deals with the assignment of future collateral benefits:

> 267.8 (12) The court that heard and determined the action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile, **on motion**, may order that, subject to any conditions the court considers just,
>
> (a) the plaintiff who recovered damages in the action assign to the defendants or the defendants' insurers all rights in respect of all payments to which the plaintiff who recovered damages is entitled in respect of the incident after the trial of the action,
>
> (i) for statutory accident benefits in respect of income loss or loss of earning capacity,
>
> (ii) for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan,
>
> (iii) under a sick leave plan arising by reason of the plaintiff's occupation or employment,

(iv) for statutory accident benefits in respect of expenses for health care,

(v) under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law, and

(vi) for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care; and

(b) the plaintiff who recovered damages in the action co-operate with the defendants or the defendants' insurers in any claim or proceeding brought by the defendants or the defendants' insurers in respect of a payment assigned pursuant to clause (a). [emphasis added]

[58] Rule 37 of the *Rules* governs motions:

37.01 A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary.

[…]

37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise.

(2) **Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.**

(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.

(4) Unless the court orders or these rules provide otherwise, an order made without notice to a party or other person affected by the order shall be served on the party or other person, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion. [emphasis added]

[…]

The Defendants' Position

[59] Counsel for the Defendants requests that the Court consider the Defendants' written submissions on this issue as a formal motion requiring assignment of future collateral benefits.

[60] The Defendants request an assignment under s. 267.8 of future payments made to the Plaintiff pursuant to the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 ("SABS").

[61] For the period from March 30, 2015, until the present, the Defendants request that the Plaintiff account for all SABS payments for income loss replacement and housekeeping paid to the Plaintiff and for all SABS benefits paid directly to health care providers, and pay those monies to the Defendants.

[62] The Defendants also seek an assignment to the Defendants' insurer, Northbridge Commercial Insurance Corporation (Northbridge), of the Plaintiff's right to future SABS benefits payable by Royal Sun Alliance (RSA), the Plaintiff's insurer.

Future Loss of Income

[63] The Defendants request that the Court assign to the Defendants and to Northbridge all future payments for weekly income benefits until such time as the payments total $395,593 (the amount the jury awarded for future loss of income). The Defendants note that the jury award does not specify whether the jury based its award for future loss of income on an expected retirement age of 64 or 67 (the ages used by the Plaintiff's accountant at trial); however, the total future payments up to either age would not fully indemnify the Defendants' insurer, so there should be no reversionary interest to the plaintiff.

Future Housekeeping

[64] The Defendants argue that they are entitled to an assignment of $100 per week with respect to housekeeping payments, with no reversionary interest to the plaintiff, even though it would only take approximately 25.6 years for the payments to total $133,000 (the jury's award for future housekeeping loss) and the Plaintiff's normal life expectancy is another 31 years. The Defendants argue that the assignment of payments beyond the 25.6 years compensates the

Defendants' insurer for loss of interest on the $133,000 it will pay now with respect to housekeeping, and for which it will only be reimbursed incrementally over time.

Future Medication and Assistive Devices

[65] The Defendants seek an assignment of amounts payable to the Plaintiff for future medication expenditures, terminating when the Plaintiff reaches age 65. The Defendants further seek an order requiring the Plaintiff to keep and submit all accounts for prescription medication to RSA Insurance on a timely basis to ensure the terms of the assignment and repayment of such benefits to the Defendants are facilitated.

Professional and Rehabilitation Services

[66] The Defendants request that the Court order that, should RSA choose to make payments directly to service providers, as opposed to paying the amount of these accounts directly to the Defendants pursuant to an assignment order, the Plaintiff will be required to pay the Defendants the amount of such accounts.

Future Attendant Care

[67] The Defendants note that the Plaintiff is currently involved in arbitration proceedings before the Financial Services Commission of Ontario relating to past and future SABS benefits. The specific SABS claimed in these proceedings has not been made clear by the Plaintiff. The Defendants request that, should the Plaintiff receive attendant care benefits from March 30, 2015, onward from RSA insurance, the Court order that those benefits be assigned to the Defendants and Northbridge. There is no need to limit the extent of this assignment, as the jury's award for future attendant care benefits exceeds the total attendant care benefits for catastrophically injured individuals under the SABS.

The Plaintiff's Position

[68] The Plaintiff argues that section 267.8(11) of the *Insurance Act* excludes the Court's jurisdiction to adjudicate which payments are to be held in trust and how any such trust monies are to be distributed. The Court thus has no jurisdiction to issue orders with respect to the trust provisions of the *Insurance Act*, as requested by the Defendants.

[69] Despite repeated requests, the Defendants have, to date, failed to serve motion materials with respect to the assignment of future accident benefits. The Plaintiff submits that, as a result, this Court has no jurisdiction to determine the issues relating to assignment until the Defendants bring a motion.

[70] The Plaintiff submits that it would be inappropriate to file submissions on the assignment of future collateral benefits until a motion is brought. In any event, the Plaintiff takes issue with the Defendants' request for benefits which were not awarded by the jury or claimed by the Plaintiff (i.e. income replacement for any period after age 64, and certain medical treatments, such as physiotherapy).

[71] The Plaintiff argues that the Defendants bear the onus of proving that every assignment they seek was claimed and recovered in the litigation. The issue is not whether the Defendants can recover from the accident benefits insurer the amounts awarded, but whether the Plaintiff has been fully compensated.

Analysis and Conclusion

The Court's jurisdiction to impose a trust under s. 267.8(9)

[72] In *Peloso v. 778561 Ontario Inc.*, 28 C.C.L.I. (4th) 10 (Ont. S.C.) [Peloso] at para. 437, Justice Aitken described the relationship between ss. 267.8(9) and (10) (the trust provisions) and s. 267.8(12) (the assignment provision) as being "either-or":

> If the plaintiff is entitled to income replacement benefits from his or her insurer in the period following the trial, then when those benefits are received, the plaintiff shall hold them in trust (s. 267.8(9)1), and shall pay them to the persons from whom the plaintiff recovered damages for loss of income or loss of earning capacity (s. 267.8(10)). **In the alternative,** the court that heard and determined the action may order that the plaintiff assign to the persons responsible to pay the damages for loss of income or loss of earning capacity, all rights in respect of all payments for statutory accident benefits in respect of income loss or loss of earning capacity to which the plaintiff is entitled after the trial of the action (s. 267.8(12)(a)(i)). (emphasis added)

[73] This "either-or" relationship is also set out in the *Insurance Act* at s. 267.8(13), which provides that s. 267.8(9) no longer applies if an order is made under s. 267.8(12).

[74] The Defendants' request for payment by the Plaintiff of the SABS benefits he received and receives for the period from March 30, 2015 until the present, appears to engage the trust provisions (rather than the assignment provisions) of the *Insurance Act*. Counsel did not provide, and there does not appear to be, any case law interpreting s. 267.8(11) of the *Insurance Act*. On its face, the provision does appear to exclude the jurisdiction of this Court with respect to disputes over the payment of money held in trust by a plaintiff.

[75] This position is further supported by the fact that the s. 278(9) of the *Insurance Act* simply sets out a plaintiff's statutory obligation to hold certain payments in trust, without any mention of the court, whereas s. 278(12) explicitly states that "**[t]he court** that heard and determined the action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile, on motion, **may order that**" the plaintiff assign his or her rights in respect of certain payments to the defendant.

[76] In other words, the trust provisions in s. 267.8(9) are automatic. This is consistent with Justice Leach's interpretation of this provision in *Mayer v. 1474479 Ontario Inc.*, 2014 ONSC 2622, 33 C.C.L.I. (5th) 150 at para. 116:

> As I read ss.267.8(9) and 267.8(1) of the Insurance Act, R.S.O. 1990, c.I.8, the default position in relation to future collateral benefits, unless and until a court makes an order to the contrary, or the parties agree to some other arrangement, is that "a plaintiff ... shall hold [such] amounts in trust", and that "a plaintiff who holds money in trust under subsection (9) shall pay the money to the persons from whom damages were recovered in the action, in the proportions that those persons paid the damages". This may or may not be accompanied by an order directing a formal assignment of future collateral benefits, pursuant to s. 267.8(12) of the legislation, to henceforth ensure that payment of future collateral benefits goes directly to a defendant or defendants. For present purposes, however, the important point is that the legislation seems to automatically transfer beneficial entitlement to certain future collateral benefits, unless and until that default outcome is altered by party agreement or court order. (emphasis added)

[77] I therefore conclude that any dispute as to the **amounts** that Mr. El-Khodr is statutorily obligated to hold in trust, or with respect to the payment of those amounts to the Defendants, should be dealt with under the *Arbitration Act*.

The Court's jurisdiction to hear the motion for assignment of future collateral benefits absent formal notice of motion

[78] The Defendants have brought this motion for assignment of future collateral benefits without proper notice pursuant to Rule 37.01 of the *Rules*. However, under Subrules 37.07(2) and (3), the Court may proceed in the absence of notice "if the circumstances render service of the notice of motion impracticable or unnecessary" or "where the delay to effect service might entail serious consequences."

[79] The Defendants have not indicated that serious consequences would flow from a delay in order to effect service, and, in my view, there is no risk here of serious consequences.

[80] The question, then, is whether service of the motion is impracticable or unnecessary. In my view, service of the motion is unnecessary. The Plaintiff, as well as the Court, received the Defendants' submissions on the question of assignment. In my view, it would be a waste of time and resources to require the Defendants to file and serve a notice of motion and new materials when I believe the Plaintiff has had adequate notice of the relief sought. In keeping with Rule 1.04(1) of the *Rules*, I dispense with service of a motion record by the Defendants, it being the most expeditious and least expensive approach.

[81] However, in order to be fair to the Plaintiff, I will receive written submissions on the issue of the assignment of collateral benefits, not exceeding seven pages, by August 14, 2015.

[82] Based on the submissions I have received to date on this issue, I wish to set out the orders I would be inclined to give, as this may provide the parties with some guidance.

Future Loss of Income

[83] The jury awarded $395,593 for future loss of income. At trial, Mr. Rehman presented four different scenarios for the calculation of Mr. El-Khodr's future loss of income. The lowest amount Mr. Rehman presented was $416,414, which was based on the Economic Research Institute's current data for the income of tow truck operators in Ottawa and a retirement age of 64. As the jury's award is most in keeping with this scenario, it would be practical to infer that the jury's award was based on a retirement age of 64. I also note that the Defendants could have

sought clarification on this issue, but failed to do so. The onus is on the Defendants to demonstrate that every assignment they seek was claimed and recovered. Here, they have failed to demonstrate that the jury made an award for future loss of income beyond the age of 64.

[84] Therefore, I would be inclined to order that the Plaintiff assign to the Defendants or the Defendants' insurers all future payments for weekly income benefits until such time as the payments total $395,593 (the amount the jury awarded for future loss of income) or until the Plaintiff reaches the age of 64, whichever comes first.

Future Housekeeping

[85] I would be inclined to order that the Plaintiff assign to the Defendants or the Defendants' insurers his right to all payments for housekeeping expenses to which the Plaintiff is entitled in respect of the incident after the trial. I would also be inclined to order that the assignment continue until such time as the payments total $133,000.

[86] The Defendants requested that I make an order assigning a specific amount ($100 a month). I would not be inclined to do so as the amount the Plaintiff is receiving for housekeeping may change over time.

[87] The Defendants' argument that the assignment should not cease after its value has reached $133,000 in order to compensate the Defendants for loss of interest is without merit. The fundamental principle in an action for negligence is that the plaintiff should receive full compensation – i.e. a sum of damages that would place the plaintiff in the position he or she would have been in had the accident not occurred (*Cooper v. Miller*, [1994] 1 S.C.R. 359 at 368). I see no reason to reduce the amount of the Plaintiff's award for future housekeeping by the Defendants' loss of interest, and counsel for the Defendants did not provide any jurisprudential support for their position.

Future Medication and Assistive Devices

[88] I would be inclined to order that the Plaintiff assign to the Defendants or the Defendants' insurers his right to all payments for future medication and assistive devices to which the Plaintiff is entitled in respect of the incident after the trial. I would be inclined to order that the

assignment continue until such time as the payments total $82,429, or until the Plaintiff reaches the age of 65, whichever comes first.

[89] I would further find it appropriate to order the Plaintiff to keep and submit all accounts for prescription medication to RSA Insurance on a timely basis to ensure the terms of the assignment and repayment of such benefits to the Defendants are facilitated.

Professional and Rehabilitation Services

[90] The Plaintiff asserts that he did not claim amounts for physiotherapy. However, the Plaintiff claimed an amount for professional services, including case management and therapies he will need in the future as confirmed by my Jury Charge at p.89. Several witnesses, including Laurie Warren, Mr. El-Khodr's occupational therapist, Dr. Shawn Marshall, who undertook an assessment of Mr. El-Khodr's future care needs, and Liza Hadden, Mr. El-Khodr's case manager, all testified with respect to the Plaintiff's ongoing need for physiotherapy. I would be inclined to find, therefore, that the jury's award for professional and rehabilitation services included an amount for physiotherapy, and that the Defendants or the Defendants' insurers are therefore entitled to an order for the assignment of any future payments to which Mr. El-Khodr is entitled for physiotherapy in respect of the incident. I would order that this assignment continue until such time as the assigned payments for professional services total $424,550.

[91] The Defendants request that the Court order that, should RSA choose to make payments directly to service providers, as opposed to paying the amount of these accounts directly to the Defendants or the Defendants' insurers pursuant to an assignment order, the Plaintiff will be required to pay the Defendants the amount of such accounts. I am unable to find any case law on the issue of payments made directly by an insurer to a service provider, and the impact of such an arrangement on the assignment provisions of the *Insurance Act*.

[92] It strikes me that the simplest way to resolve this issue would be to make an order along the lines of what the Defendants have suggested. Thus, if RSA chooses to make payments, to which the Plaintiff would otherwise be entitled, directly to professionals for professional and rehabilitation services required as a result of the accident, then I would be inclined to order that the Plaintiff be required to pay the Defendants the amount of such accounts. To order otherwise

would be to allow plaintiffs to avoid the trust and assignment provisions of the *Insurance Act* by simply requesting that their insurer pay directly for services for which they recovered damages. In my view, any payments made directly to professionals by RSA in respect of the incident fall within the scope of "payments to which the plaintiff…is entitled" pursuant to s. 267.8(12); thus, I would be inclined to find that they are properly the subject of an assignment.

Future Attendant Care

[93] I would be inclined to order that the Plaintiff assign to the Defendants or the Defendants' insurers his rights in respect of all payments for attendant care costs to which he is entitled in respect of the incident after the trial of the action. As the jury's award for future attendant care benefits exceeds the total attendant care benefits for catastrophically injured individuals under the SABS, there is little risk that the value of the assignment will exceed the jury's award, but, for greater clarity, I would order that the assignment continue only until such time as the payments total $1,450,000.

Order to be served on Plaintiff's SABS Insurer

[94] As the assignments set out above will affect RSA, the Plaintiff's SABS insurer, and given that this motion with respect to the assignment provisions was made without notice to RSA, I order that a copy of this order shall be served on RSA pursuant to Rule 37.07 (4).

4. To what amount of costs is the Plaintiff entitled?

The Law

[95] Section 131 of the *CJA* gives the Court discretion to award 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.

[96] Rule 57.01 of the *Rules* set out the factors a court may consider in exercising this discretion:

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

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

[97] Rule 49.13 allows a court to take into account an offer to settle awarding costs (even if that offer does not meet the criteria set out in Rule 49.10):

> 49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

[98] Rule 57.01(7) requires that the court "devise and adopt the simplest, least expensive and most expeditious process for fixing costs."

The Defendants' Position

[99] The Plaintiff claims fees of $364,073.87 exclusive of GST/HST on a partial indemnity basis for over 1000 hours spent by counsel for the Plaintiff and members of their law firm.

[100] The Defendants argue that this amount exceeds what an opposing party would expect to pay in costs in this situation. By way of comparison, the Defendants indicated that their total fees, on a substantial indemnity basis, were $211,595, exclusive of HST.

[101] The Defendants also argue that Mr. Obagi's rate for hours spent prior to 2015 should be $325 per hour, and not $410 per hour, given that he did not have 20 years' experience until 2015.

[102] The Defendants submit that fees prior to 2010 are subject to GST of 7%, whereas fees after that date are subject to HST of 13%. The Defendants thus propose an increase of 10% to the fees for combined GST and HST.

[103] Based on the above, the Defendants submit that the Plaintiff is entitled to a maximum of $225,000 in fees on a partial indemnity basis.

<u>Disbursements</u>

[104] The Defendants also take issue with a number of the disbursements the Plaintiff is claiming, including costs for:

- food, travel and beverages during discovery, which the Defendants argue is not allowed by the Tariff;

- a future care costs reports and attendance of the expert, Ms. Wagenberg, at trial, because the number of hours claimed is excessive;

- photocopying and facsimile services, which the Defendants say should be reduced to account for anything chargeable to the Plaintiff's dispute with his own insurer over his entitlement to attendant care benefits;

- an expert report by an accountant, because the hours spent and the hourly rate are excessive;

- an expert report by a physician, because it was not used in trial nor was the physician called to give evidence;

- a rebuttal report, because this report was prepared for the Plaintiff's dispute with his insurer over attendant care benefits;

- Liza Hadden's attendance at trial, as the hours claimed for travel are excessive; and

- Dr. Jean Hall's attendance at trial, as the hourly rates claimed are far in excess of her treatment rate and are thus unreasonable.

The Plaintiff's Position

[105] The Plaintiff asks the Court to consider, under Rule 49.13, both his offer to settle and the Defendants' offer to settle.

[106] In a letter dated March 10, 2015, Mr. Percival set out the Defendants' offer to the Plaintiff:

> The defendants offer to the plaintiff $750,000.00 for claim and interest **plus** partial indemnity costs to be assessed, fixed or agreed upon.
>
> The plaintiff is entitled to claim future SABS, and the defendants do not seek an assignment of those collateral benefits. [emphasis in original]

[107] In an email dated Thursday, March 19, 2015, Mr. Obagi, counsel for the Plaintiff, wrote to Defendants' counsel:

> If it will assist your client, I can advise that I have instructions to settle this case for the sum of $3M plus costs and disbursements to be agreed upon and with no assignment of accident benefits.
>
> I look forward to hearing from you and would ask that your client make a counter-offer before we agree to proceed to a judicial pre-trial with RSJ McNamara next week. If the pre-trial is to be of any use, the parties have to be within the same ballpark otherwise we should simply be preparing for trial.

[108] Maria Krizel, counsel for the Defendants, responded as follows in an email dated March 20, 2015:

> We agree that we are too far apart to warrant a further Pre-Trial on Thursday. One of us is clearly wrong in our assessment of damages.

[109] The Plaintiff argues that its offer to settle for $3,000,000 plus costs with no assignment of accident benefits should be considered in awarding costs, given that the jury award is close to $3,000,000. In addition, the Defendants' unreasonably low offer to settle for $750,000 inclusive of interest with no assignment of accident benefits should also be taken into account.

[110] The Plaintiff further argues that the factors in Rule 57.01 support an award of costs in the amount claimed by the Plaintiff:

- *Hourly rates*: The Plaintiff submits that the hourly rates claimed are in accordance with the Costs Subcommittee rates and the principles set out in *Geographic Resources Integrated Data Solutions v. Peterson*, 2013 ONSC 1041, [2013] O.J. No. 717. Specifically, the Plaintiff argues that the rates are reasonable given the complexity of the legal and factual issues involved in the action, and the experience of the lawyers and staff members to whom the rates relate.

- *The amounts claimed represent what the Defendants could reasonably expect to pay*: The Defendants should have expected the greater costs incurred by the Plaintiff given the extensive preparation needed for a jury trial as well as the increased effort required for the Plaintiff to meet his burden of proof; an onus that was strictly required to be met by the Defendants until well after the trial was in process. In my opinion, two experienced counsel, as well as the assistance of an articling student, were necessary to effectively conduct the trial at cost efficient rates. In addition, work that would not have been apparent was required to prepare for expert witnesses the Defendants decided not to call at the last minute.

- *The amount claimed and the amount recovered*: In the Statement of Claim, the Plaintiff sought $1,600,000 plus an undetermined amount for future medical rehabilitation and housekeeping/home maintenance expenses. The Plaintiff later made an offer to settle for an amount less than $3,000,000. The costs claimed are reasonable and proportional considering both the amounts claimed and recovered.

- *Liability*: The Defendants contested liability until mid-trial.

- *Complexity of the proceedings*: This was a complex trial involving multifaceted injuries and requiring the testimony of numerous health professionals.

- *The importance of the issues*: The Plaintiff's losses and future care could not be more important or personal to the Plaintiff.

- *The conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceedings*: The following conduct on the part of the Defendants resulted in additional costs to the Plaintiff:

    - refusing to admit the pre-accident income information from Gervais Towing prior to trial, and then not challenging this evidence at trial;

    - refusing to agree with respect to the present value calculations, thus requiring the attendance of actuary, Guy Martel at trial;

    - failing to admit liability and causation until mid-trial, causing Plaintiff's counsel to prepare for and canvass evidence on these issue;

    - deciding not to call five expert witnesses after indicating to the Plaintiff an intention to call those experts at trial and serving their reports;

    - failing to indicate whether the Defendants required any of the medical practitioners indicated in the Plaintiff's notice under s. 52 of the *Evidence Act* to be available for cross-examination;

    - failing to advise the Plaintiff prior to trial as to whether the Defendants intended to file any s. 52 notices; and

- failing to bring a pre-trial motion seeking the financial information of Mr. Ibrahim Hamzeh, with whom the Plaintiff planned to go into business prior to the accident, which would have avoided requiring Mr. Kas Rehman, the Plaintiff's expert accountant, to attend trial for three extra days and prepare a revised report at the last minute, after the Defendants subpoenaed Mr. Hamzeh to attend at trial.

- *Denial of or refusal to admit anything that should have been admitted:* As explained above, the Defendants unreasonably refused to admit various facts and legal issues.

Final Directions on Costs

[111] It would appear that the judgment incorporating the verdict and the award made by the verdict has yet to be issued and entered. There should be no further delay in doing so, having regard to the directions laid out above.

[112] To the extent that it is still necessary for the parties to make additional written submissions with respect to costs, I direct that the parties submit their submissions no later than August 14, 2015. Submissions are not to exceed seven pages in length.

[113] However, I wish to note that I will receive additional submissions in order to direct the parties I do not intend to carry out a detailed assessment. The Court's role in awarding costs is not to count pennies, nor is the Court's role that of an assessment officer. The Court of Appeal stated in *Boucher v. Public Accountants Council (Ontario)*, 71 O.R. (3d) 291 at para. 26 as follows:

> [Rule 57.01(1)] lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in rule 57.01. Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant. (emphasis added)

[114] In reviewing Mr. Obagi's claim for fees, I note that he does appear to claim an hourly rate $410 for work done when he only had 19 years' experience. For example, Mr. Obagi claims

an hourly rate of $410 for "Mediation" when it is apparent from the dockets submitted that this work was done in 2014. With respect to other categories for which Mr. Obagi claims $410 or $390, it is difficult to say with any certainty how much of the work captured by that category occurred prior to 2015.

[115] Both parties acknowledge the impact of inflation on hourly rates. Counsel for the plaintiff argues that the net effect of making adjustments for inflation would increase the legal fees claimed, and not reduce them.

[116] Without going through the docket line by line, it would be impossible to verify exactly what work should be charged at which rate, and the impact of inflation on those rates.

[117] With respect to the disbursements claimed for photocopying and facsimile services, I note that additional detail from the Plaintiff with respect to this claim should allow the parties to reach an agreement. I also note that this is the type of question I would refer for assessment.

[118] The Plaintiff also submitted additional information on the disbursements related to expert evidence. Again, with this new information, the parties should be able to reach an agreement.

[119] Additional information was also provided with respect to the division of time between the tort and SABS activity related to the Plaintiff's file. This should address the Defendants' concern on this issue.

[120] Apart from some adjustment for the amount claimed related to the correct hourly rates for Mr. Obagi's fees, I agree with the Plaintiff's submissions on the application of the factors set out in Rule 57.01(1) to the circumstances of this case.

[121] In particular, I note that:

- This was a complicated case, requiring extensive expert evidence.
- The Defendants put the Plaintiff to task in terms of proving his case, and did not admit liability until part way through trial.
- The amount of costs requested by the Plaintiff is not disproportionate to the amount the Plaintiff recovered.

[122] The Defendants' invitation to compare the fees counsel for the Defendants charged to the amount of fees the Plaintiff is claiming is not helpful – the Plaintiff had the burden of proof and so naturally counsel for the Plaintiff's fees would be higher.

[123] Further, I reject the Defendants' argument that the disbursement for a physician's report should not be recoverable because it was not used at trial and because the physician was not called to give evidence. The Plaintiff had the burden of proof and the Defendants did not make any admissions on liability until mid-trial. As such, disbursements the Plaintiff made in order to meet the burden of proof, but which were later irrelevant due to the Defendants mid-trial admissions, should be recoverable.

[124] Finally, in my view, the Plaintiff's offer to settle for $3,000,000.00 should be given considerable weight.

[125] The Plaintiff's gross recovery amounts to $**3,024,792.62**, from which the Defendants will be entitled to deduct $173,814.82 for income replacement benefits paid by RSA. This is the amount I must take into account when considering the impact of a Rule 49 offer, based on the following principles:

- prejudgment interest is to be included (*Pilon v. Janveaux*, [2006] O.J. No. 887 at para. 16). The parties have agreed that prejudgment interest on the award for past income loss is to be calculated on the net amount (i.e. the jury award of $220,434 less the credit of $173,814.82).

- the amount is not to be reduced by the statutory deductible (s. 267.5(9) of the *Insurance Act*; *Rider v. Dydyck*, 2007 ONCA, 687, 268 D.L.R. (4th) 517 at para. 23).

[126] Given the proximity between the offer and the amount the Plaintiff recovered, I would be inclined to find that the offer supports the Plaintiff's entitlement to the costs claimed, subject to adjustments made for Mr. Obagi's fees.

Madam Justice Giovanna Toscano Roccamo

Released: July 28, 2015

CITATION: El-Khodr v. Lackie, 2015 ONSC 4766
COURT FILE NO.: 09-CV-43686
DATE: 20150728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KOSSAY EL-KHODR

Plaintiff

– and –

RAYMOND C. LACKIE, JOHN MCPHAIL, ATS ANDLAUER TRANSPORTAITION SERVICES GP INC., AND TRAILCON LEASING INC.

Defendants

REASONS FOR DECISION ON PREJUDGMENT INTEREST, APPLICATION OF TRUST AND ASSIGMENT PROVISIONS OF THE INSURANCE ACT, AND COSTS

Toscano Roccamo J.

Released: July 28, 2015