CITATION: Awan v. Levant, 2015 ONSC 2209
COURT FILE NO.: CV-09-00386377
DATE: 20150408

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Khurrum Awan, Plaintiff

AND:

Ezra Levant, Defendant

BEFORE: Justice W. Matheson

COUNSEL: *Brian G. Shiller and Angela Chaisson*, for the Plaintiff

Iain A.C. MacKinnon, for the Defendant

HEARD: In writing.

COSTS AND PJI ENDORSEMENT

[1] This endorsement addresses costs and pre-judgment interest arising from this libel action, which was decided by judgment released November 27, 2014. Since then, the parties have made written submissions about both matters.

[2] The judgment also provided that the parties could make written submissions about the removal of the defamatory words from the website if the parties were unable to agree on the removal plan. No submissions have been made in that regard, from which I conclude that there is no dispute in that regard.

Costs

[3] As the successful party, the plaintiff claims his costs. The defendant does not dispute the entitlement to costs, but there is a substantial dispute about the amount sought.

[4] The plaintiff seeks substantial indemnity costs in the amount of about $121,000, which includes fees of about $98,000, disbursements and taxes. In the alternative, he seeks partial indemnity costs to January 8, 2014, the date of an offer to settle, and substantial indemnity costs thereafter, totalling approximately $103,000. The defendant submits that costs should be awarded on a partial indemnity basis, in the range of $30,000 – $40,000.

[5] In support of the costs claim, counsel for the plaintiff submits that costs in defamation cases can and do sometimes exceed the damages award. I agree that this does sometimes occur. Given that the non-monetary aspect of the judgment is significant in a defamation case, I do not

think that a direct comparison between the damages award and the quantum of the costs claim is as material as it might otherwise be.

[6] The parties agree on the general principles that apply here. Costs are discretionary. Rule 57.01 of the *Rules of Civil Procedure* sets out factors I may consider in exercising my discretion, in addition to the result of the proceeding and any written offers to settle. Overall, the objective is to fix an amount that is fair and reasonable, having regard for, among other things, the expectations of the parties concerning the quantum of costs: *Boucher v. Public Accountants Council for the Province of Ontario,* [2004] O.J. No. 2634, 71 O.R. (3d) 291 (C.A.) at paras. 26, 38.

[7] Beginning with the result of the proceeding, judgment was granted in favour of the plaintiff, in the amount of $50,000 in general damages and $30,000 in aggravated damages. The defendant was also ordered to remove the defamatory words from his website. The judgment was therefore a combination of monetary and non-monetary relief.

[8] The plaintiff seeks substantial indemnity costs based upon offers to settle, among other reasons. Both sides served written offers to settle before trial. As of the commencement of the trial, there was an open written offer from the plaintiff that had been made on January 8, 2014. That offer had monetary and non-monetary components. The plaintiff offered to settle upon payment of $24,500 plus interest and costs, and the offer also required that the defendant remove all blog posts that mentioned the plaintiff from his website. As reflected in the trial evidence, there were more than 100 blog postings on the website that mentioned the plaintiff. Only nine were challenged in the action, and only a subset of the contents of those blog posts was the subject of the removal order. The offer therefore called for a much broader removal of blog posts than that ordered under the judgment.

[9] The plaintiff claims that the January 8, 2014 offer qualifies as a Rule 49 offer. Under Rule 49.10, the plaintiff must prove that the judgment was "as favourable or more favourable" than the above offer in order to benefit from that rule. The judgment was more favourable on damages alone, but not with respect to the removal of blog postings. Given the significantly broader removal requirement in the offer, and the nature of many of the other blog posts, I conclude that the plaintiff has not met his onus to prove that the judgment was as favourable or more favourable than the offer, as required under Rule 49.10(3). I have, however, taken the offer into account, as well as the other offers referred to by the parties.

[10] The plaintiff also points to the finding of malice in support of the claim for costs on a substantial indemnity basis. Such a finding can be a factor: *Warman v. Fournier,* 2014 ONSC 412, at paras. 14 and 17. I have taken it into account.

[11] The plaintiff also relies upon post-judgment publications of the defendant in support of the claim for substantial indemnity costs. After release of the judgment, the plaintiff did a blog post on his website entitled "I've lost my lawsuit. But I'm going to appeal. Here's why". The defendant also sent an email communication to individuals, soliciting funds to help him pay the judgment. That email contained largely the same content. The plaintiff submits that these communications repeated one of the libels, and demonstrated a lack of remorse and a desire to

continue to harm the reputation of the plaintiff. The plaintiff agrees that the defendant is entitled to criticize the decision, but submits that he must not do so in a way that repeats the libel. The plaintiff submits that the defendant crossed the line.

[12] There is no doubt that the defendant is free to criticize the decision. If, however, he repeats any of the libels, that may give rise to fresh claims against him and may also be relevant to any appeal, as illustrated by *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130, at paras. 193-94. However, I do not see this post-judgment conduct as a basis to increase the costs award for the pre-trial steps and the trial itself.

[13] Considering all of the submissions, I do not conclude that there should be an order for substantial indemnity costs throughout, as requested by the plaintiff. However, there is a sound basis for costs beyond simple partial indemnity costs. I have therefore fixed a somewhat higher amount.

[14] Counsel to the defendant has also identified a number of ways in which he submits the specific amounts claimed by the plaintiff are excessive. He makes these submissions within the context that this was an action brought under the simplified procedure in Rule 76. The simplified procedure is intended to provide a cost-effective method of resolving disputes where the damages claim is $100,000 or less. The choice to bring an action under the simplified procedure ought to be taken into account in considering what is fair and reasonable having regard for the expectations of the parties: *Sunview Doors Limited v. Academy Doors & Windows Ltd.*, [2007] O.J. No. 2589 (S.C.), citing *Trafalgar Industries of Canada Ltd. v. Pharmax Ltd.* (2003), 64 O.R. (3d) 288 (S.C.).

[15] I have considered all of the items raised on behalf of the defendant. While I will not go through them all in detail in this endorsement, there are some items that seem excessive within the context of an action commenced under the simplified rules. Most significantly, the plaintiff had two counsel present throughout the trial. While he was of course free to do so, this choice had a major impact on the costs. The trial costs for counsel represent about half the total amount claimed for fees.

[16] Another item of specific note is the request for payment of the plaintiff's travel costs to Ontario in the course of the litigation. The plaintiff was free to litigate in Ontario while living elsewhere but in my view a defendant is not obligated to pay for that travel in the context of a party and party costs claim. That amount totals about $9,500, more than half of the total amount claimed for disbursements.

[17] Many other specific amounts were challenged. I have taken all of the submissions into account in exercising my discretion under Rule 57.01. I conclude that the plaintiff shall have an order for costs fixed at $65,000 for fees, $8,000 for disbursements and applicable tax.

Pre-judgment interest

[18] Under s. 128(1) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 (CJA), the plaintiff is entitled to claim and have included in the order an award of interest from the date the cause of

action arose to the date of judgment. This right is subject to the court's discretion to vary the rate and/or period under s. 130 of the Act, or to deny interest altogether.

[19] This action was commenced in September of 2009. In accordance with s. 127 of the Act, the interest rate would be 1.3%.

[20] The defendant submits that the rate under s. 127 ought to be .5%, based on the date of the statement of claim. However, this action was commenced by a notice of action. Under Rule 14.01 and the related definition of "originating process" in Rule 1.03, the date of issuance of the notice of action is the relevant date, giving rise to the 1.3% rate.

[21] The plaintiff submits that s. 128(2) should apply, giving rise to an interest rate of 5%. The section provides as follows:

> 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... [Emphasis added.]

[22] As contemplated by this section, Rule 53.10 then fixes the applicable interest rate. It is 5%. It has been 5% for about 25 years. Ironically, when that rate was established, it was intended to impose a lower rate than the default rate: *Tait v. Roden*, [1994] O.J. No. 1850, 20 O.R. (3d) 20 (Gen. Div.). For example, in *Tait*, the contest was between the default rate of 13.5% and the above 5% rate.

[23] Subsection 128(2) was part of a legislative response to the 1987 Ontario Law Reform Commission Report on Compensation for Personal Injuries and Death. That Report criticized the practice of awarding damages for pecuniary and non-pecuniary damages at the same rate because of the cap on non-pecuniary damages. The cap was already adjusted for inflation. The Report concluded that giving the regular interest rate was effectively double compensation for inflation. A much lower rate (e.g., 5%) was more appropriate.

[24] The parties disagree about the applicability of s. 128(2). The plaintiff takes the position that damages for defamation are personal injury damages and the 5% rate should therefore apply. The defendant relies on *Tait*, which reaches the opposite conclusion.

[25] The Court in *Tait* did a careful review of the legislative purpose of s. 128(2), concluding that it did not apply to defamation cases. Among other reasons, the Court correctly observed that the cap that applies to non-pecuniary damages for personal injury does not apply in defamation cases. The concept of a cap, adjusted for inflation, has no role in defamation damages. I am therefore not convinced that a defamation action is an action for "personal injury" for the purpose of s. 128(2). My view is fortified by the following statement in *Hill* at para. 168, made in the course of deciding that there should be no cap in defamation cases:

> [T]he injury suffered by a plaintiff as a result of injurious false statements is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case... [Emphasis added.]

[26] The Ontario Court of Appeal also reached this conclusion, in a different context, in *United States of America v. Freidland*, [1999] O.J. No. 4919, 46 O.R. (3d) 321, (C.A.), at paras. 24-25. In that case, the Court concluded that an action for defamation was not a proceeding that related to "any death or personal injury" under s. 6(a) of the *State Immunity Act*, R.S.C. 1985, c. S-18.

[27] I further observe that the mischief that gave rise to the subsection is no longer served by a 5% rate given the interest rate climate throughout the period of time relevant to this case. This reality has been recognized in a package of recent legislative changes that were proclaimed in January of 2015. The *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, S.O. 2014, c. 9, amends various Ontario statutes including the *Insurance Act*, R.S.O. 1990, c. I.8. Subsection 258.3(8.1) of that Act now provides that s. 128(2) of the *Courts of Justice Act* does not apply in respect of the calculation of pre-judgment interest for damages for non-pecuniary loss in motor vehicle personal injury claims.

[28] It must be remembered that an award of pre-judgment interest is compensatory. Even if s. 128(2) did apply, I would exercise my discretion to impose the ordinary rate of 1.3%. In reaching that conclusion, I have had regard for the interest rates over the relevant period, the circumstances of this case and the different approach to assessing damages in defamation cases from non-pecuniary damages in other areas. In my view, an interest rate of 5% would be overcompensation.

[29] There is also an issue between the parties about the period over which pre-judgment interest should be ordered. Under s. 128, and again subject my discretion under s. 130, pre-judgment interest runs from the date the cause of action arose.

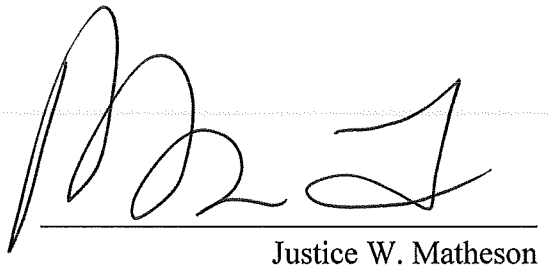
[30] The plaintiff claims that the cause of action arose when the notice of libel was served on July 14, 2009, shortly before the action was commenced on September 3, 2009. The defendant takes the position that in a defamation case the start date is at around the time of commencement of the proceedings, relying on *Hill* and *Barrack Gold Corp. v. Lopehandia,* [2004] O.J. No 2329, 71 O.R. (3d) 416 (C.A.). The difference in positions is small. The default period for interest is a bit more than five years.

[31] More significantly, the defendant asks that the interest period be reduced to one year given certain delays by the plaintiff in the prosecution of the action. Again, the defendant relies on the choice by the plaintiff to proceed under the simplified rules, submitting that proceedings under those rules ought to have a shorter time line to trial. Subsection 130(2)(f) of the CJA provides that in fixing the period for interest, I may take into account the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding.

[32] It is apparent that there were some pre-trial delays that were caused by the plaintiff and others that were not. I do not think a granular examination of each and every delay is called for when considering the obligation to pay pre-judgment interest. There is not an egregious delay that would cause me to dramatically shorten the default interest period to one year for general damages. The date of commencement of the action, September 3, 2009, is more appropriate. However, pre-judgment interest on the award of aggravated damages is another matter. In

arriving at that award, I took into account all of the defendant's conduct up to and including at trial. Bearing in mind the amount I ordered and my reasons for doing so, I conclude that to receive pre-judgment interest from the date of commencement of the action would amount to some double compensation. I therefore exercise my discretion to award pre-judgment interest on the aggravated damages award for a three-year period only.

[33] Bearing in mind all the submissions, and in the exercise of my discretion under s. 130, I order pre-judgment interest at a rate of 1.3%. That interest shall run from the date of commencement of the action on the award of general damages, and for a three-year period on the award of aggravated damages.



Justice W. Matheson

Released: April 8, 2015