

CITATION: Youkhana v. Pearson, 2024 ONSC 3184
COURT FILE NO.: CV-11-3780-00
DATE: 2024 06 04

SUPERIOR COURT OF JUSTICE – ONTARIO

7755 Hurontario Street, Brampton ON L6W 4T6

RE: YOUKHANA, Akram, Plaintiff

AND:

PEARSON, John, Defendant

BEFORE: Justice J. K. Trimble

COUNSEL: YOUKHANA, Akram, Self-Represented Plaintiff
Email: akramyoukhana3@yahoo.ca

FORGET, Martin, for the Defendant
Email: mforget@forgetsmith.com

HEARD: May 30, 2024, in Chambers

COSTS ENDORSEMENT

[1] This trial lasted 18 days, before a jury.

[2] In my Endorsement of 22 January 2024, I dismissed the action. In paragraph 4, I indicated I would decide who pays whom costs and in what amount, based on written submissions, and I set a timetable. Submissions were made in according with the timetable I set.

POSITIONS OF THE PARTIES

[3] The Defence requests its costs against the plaintiff on a partial indemnity scale up to January 8, 2024 and substantial indemnity scale thereafter, of \$93,644.00 in fees, HST of \$12,173.72, and disbursements of \$30,927.02, for a total of \$136,744.74. The Defence seeks this level of costs and costs on a substantial indemnity basis from the beginning of trial on the following general bases:

- a) Mr. Youkhana declined to accept six offers to settle for a payment to Mr. Youkhana.
- b) Mr. Youkhana dragged out this litigation for 14 years.
- c) Mr. Youkhana's conduct (including that of his sometime helper or agent, Mr. Younan) was egregious, and requires correction by the sting of a costs order.

[4] In his submissions, Mr. Youkhana, restates his positions at litigation concerning his injuries and inability to work. He reasserts his allegations that his own lawyers and the defence lawyers were conspiring to deprive him of his day in Court. As to costs specifically, he says (as he said before me at trial) that he is self-represented and unfamiliar with Court processes.

THE LAW

[5] Armstrong J.A. explained in *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (Ont. C.A.) that when a judge fixes costs, he or she does not simply count hours and look at rates. She or he must step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable.” (para. 24 & 26. See also *Davies, infra* at para. 52).

[6] In *Tri-S Investments Limited v. Vong* , [1991] O. J. No. 2292 (Gen. Div.), page 6, the Court said that the court’s function when fixing costs is not to second guess successful counsel on the of time that should or could have been spent to achieve the same result, unless the time spent is so grossly excessive as to be obvious overkill.

[7] In making this assessment, the following legal principles apply:

- a) Costs awards as between litigants have a number of purposes, including to a) indemnify (partly) successful litigants, b) encourage settlement, c) correct behaviour of the parties, and d) discourage frivolous or ill-founded litigation (see *394 Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 7238, at para. 10).
- b) Generally costs should follow the event (see *Bell v. Olympia & York Developments Ltd.*, (1994), 17 O.R. (3d) 135 (C.A.)), be proportional to the issues in the action and the outcome, and be reasonable for the losing part to pay, all circumstances considered (see *Boucher, supra*, and *Moon v. Sher et al.*, [2004] OJ No 4651 (C.A.)).

- c) Conduct of the parties is also relevant where it deserves sanction (see *Davies v. Clarington* (2009), 100 O.R. (3d) 66 (C.A.)). One party's playing "hardball" is a relevant factor to consider (see 394 Lakeshore, supra.).
- d) Costs should be proportional to the issues in the action and amount awarded. Proportionality, however, should not override other considerations, and determining proportionality should not be a purely retrospective inquiry based on the award. It should not be used to undercompensate a litigant for costs legitimately incurred. In *Aaccurate v. Tarasco*, 2015 ONSC 5980 (S.C.J.), McCarthy, J. said:

I am mindful that the principle of proportionality calls upon the court to consider the amount claimed for costs in relation to the amount recovered in the judgment, as well as the reasonable expectation of the parties. In my view, however, proportionality cannot and should not be routinely invoked to save litigants from the actual costs of proceedings in circumstances where those litigants have put forth a wholly unmeritorious defence to a legitimate claim or have caused the proceeding to become unduly prolonged or complicated. The principle should be applied thoughtfully and in a balanced fashion along with the other factors set out in rule 57.01.

- e) An undue focus on proportionality ignores principles of indemnity and access to justice (see *Gardiner v. MacDonald*, 2016 ONSC 2770 (S.C.J.) at para. 65). The trial judge must make an award that is fair and appropriate, overall.

RESULT

[8] In applying the principles above, for reasons stated below, I order that Mr. Youkhana pay the Defendants costs of \$120,927.02, which I consider to be reasonable and proportional in all the circumstances, and fair amount for Mr. Youkhana to pay, and the Defendant to receive as indemnity for costs. The sum, above, comprises \$90,000.00 for fees inclusive of HST, plus disbursements of \$30,927.02.

ANALYSIS

Entitlement to Costs

[9] Mr. Pearson was wholly successful in this litigation. He is presumed to be entitled to his costs. No circumstances were raised that suggest that Mr. Pearson should not be entitled to costs.

Scale of Costs

[10] I find that Mr. Pearson is entitled to costs on a partial indemnity basis up to the 5 January 2024, and to costs on a substantial indemnity basis thereafter. The reasons for this are set out below.

Mr. Youkhana's Conduct

[11] Mr. Youkhana's conduct during this trial requires correction. I will address his status as a self-represented litigant shortly. I selected 5 January 2024 as the date from which substantial costs will apply since that was the date on which Mr. Youkhana's conduct significantly changed.

[12] At some point in the trial, when he was without a lawyer, Mr. Younan, Mr. Youkhana's friend, began to assist him. Mr. Younan began to speak for Mr. Youkhana. Beginning with Mr. Younan's involvement, Mr. Youkhana became much more difficult in the conduct of the litigation. On 5 January 2024, however,

there was a significant change in the Plaintiff's behaviour. Mr. Younan sent an email to counsel for the Defendant at 6:30 pm that day in which he said:

"Off the record if I was in Ypukhanas (sic) shoes and I will never say this to him i would blow your head off and that of the lawyer who would have represented me and go to the insurance office and do the same to as many of their executives."

[13] Mr. Younan accompanied Mr. Youkhana to the Pre-Trial. The defence brought a motion, on notice, to have Mr. Younan barred from the Courthouse. Daley, J.'s endorsement indicates that he permitted Mr. Younan to speak for Mr. Youkhana once a reporter was summoned.

[14] During the hearing, according to the Defendant's submissions, Mr. Younan was disorderly. He spoke over Daley, J., yelled at him, made baseless allegations directed at defence counsel personally which were a clear threat. Daley, J. warned Mr. Younan about saying anything as he may face criminal jeopardy given the allegations that defence counsel made in the motion record.

[15] Daley, J. called Mr. Younan's conduct "threatening, shocking, and completely uncalled for." He was sufficiently concerned about the safety of the litigants, counsel, court staff, and the Court that he barred Mr. Younan from the Courthouse, except with leave of a judge, and had police escort Mr. Younan from the building. He permitted Mr. Youkhana to bring a motion before me at the outset of trial for leave to have Mr. Younan to assist him at trial. Finally, in the Courts'

email attaching Daley, J.'s endorsement, the court provided the Court's memo for self-represented litigants.

[16] Mr. Youkhana brought his motion before me on the first day of trial, although not within the time frame allowed, and on unsworn affidavits. The Motion Record rationalized and minimized Mr. Younan's clear threats. There was no apology and promise to abandon further like conduct. Mr. Youkhana also alleged that Defence Counsel's conduct had been belligerent and deceitful, without evidence supporting such allegations. Mr. Youkhana made similar allegations against Defence counsel throughout the trial.

[17] While Mr. Younan made the initial threats, he spoke with Mr. Youkhana's consent. I denied the motion. Rather than apologize for and distance himself from Mr. Younan's conduct, Mr. Youkhana rationalized and excused it. He is accountable for it.

Mr. Youkhana is a Self Represented Litigant

[18] Mr. Youkhana is a self-represented litigant.

[19] In *Crowe v The Manulife Financial Corporation*, 2010 ONSC 3302, David Brown, J. (as he then was) set out the challenges for the Court when fixing costs against a self represented litigant:

[13] Fixing the costs of a motion or proceeding against a self-represented party is always a challenging task. Courts struggle to balance the effects of the lack skilled technical advice available to litigants who are not represented by lawyers against the need for the courts, as adjudicators, to be, and to appear to be, indifferent between the interests of both parties to a lawsuit, represented or not.

...

[15] ...[I]t is necessary for the courts, in each case involving a self-represented party, to pay close attention to the factors enumerated in Rule 57.01(1) of the Rules of Civil Procedure, particularly those dealing with the reasonable expectations of the unsuccessful party, the conduct of the party, and whether any steps were improper, vexatious or unnecessary: Rule 57.01(1)(0.b), (e) and (f). Fixing costs in such circumstances will be an individualized process, focusing on the characteristics and conduct of the particular self-represented litigant, not measured against some abstract notion of the “typical self-represented litigant”.

[20] Brown, J., also stated that self-represented litigants are obliged to familiarize themselves with the basic rules and procedures that apply to the conduct of a trial, and to conduct themselves at all times in ways that promote cooperation, effective and timely communication, and civility, and that the self-represented litigants apply common sense to the resolution of issues that arise during the court of a proceeding (see: *Crowe*, at para 23).

[21] Mr. Youkhana has been self-represented at various times over the life of this file, most notably for the over two years leading up to trial. He had ample time to familiarize himself with his obligations during trial. He admitted at trial that during the last two years he only tried to find a lawyer. He did no other research. He did not attempt to educate himself about trial procedures, notwithstanding the admonition of several judges to do so.

Delay

[22] Mr. Youkhana has caused excessive and unexplained delay in this matter.

To assist Mr. Youkhana during the trial, I:

- a) Provided him with a hard copy of the Court's pamphlet for self-represented parties at trial.
- b) Described to him trial procedures including that because he intended to put into evidence the reports of one or more doctors, he had to make the doctor(s) available for cross-examination.
- c) Described to him how to arrange for a summons for his doctors and provided the form of the summons to him.
- d) After he and one of his sons gave evidence in chief which was perfunctory, I suggested to Mr. Youkhana and the son that they focus their evidence to Mr. Youkhan's life and work before the accident, and how it changed after the accident.

[23] He never summonsed a doctor as he wanted to. Since his doctors would not attend without a summons, he was unable to prove his damages.

[24] Since January, 2021, Mr. Youkhana has been self-represented.

[25] In February 2021, the trial was adjourned from the May 2021 to the January 2022 sittings at Mr. Youkhana's request. In December 2021, the trial of this action was adjourned again, this time to the sittings in January 2024 at Mr. Youkhana's request. Both adjournments were sought to seek counsel. Before Daley, J., on 11 January 2024, Mr. Youkhana presented no evidence about what steps he took to retain new counsel. Daley, J. denied his adjournment request.

[26] This action arises from the motor vehicle accident which occurred on October 10, 2009. Mr. Youkhana sues for over \$1 million. It has been 13 years since the Statement of Claim was issued.

[27] Mr. Youkhana has had more than ample time to retain counsel or to prepare himself to proceed with this trial. He has failed to offer any reasonable explanation for his failure in this regard.

[28] After Daley, J. denied Mr. Youkhana's request for an adjournment on 11 January 2024, Mr. Youkhana indicated that he was prepared to proceed with this trial during the week of January 15, 2024. He inquired as to how he could arrange to summon witnesses to the trial. Daley, J. directed him to the trial office to request Summonses to Witnesses which could be served upon his proposed witnesses.

[29] He did not summons anyone. Instead, he raised the issue again at trial. I described to him the process, referred him to the trial office, and provided him with a copy of the form to be used.

[30] Mr. Youkhana had been ordered some time ago to disclose "will say" statements from his wife and three children as to the evidence they will be offering at trial. Those statements were released on the eve of the 11 January pre-trial.

[31] Mr. Youkhana's documentary disclosure was an unnecessarily protracted process, during a time when he was represented.

[32] The matter was struck from the list once, and was the subject of three Pre-Trial Conferences.

Offers to Settle

[33] The Defendant served offers to settle on 29 September 2015, 9 November 2016, 20 December 2017, and 9 December 2020, all of which but one were time limited for acceptance, but which would have resulted in a payment to Mr. Youkhana. He accepted none of these. The 9 November 2016 offer remained open until five minutes after the start of the trial. On 22 December 2023, the Defendant made an offer to dismiss the action without costs which was also time limited for acceptance, which Mr. Youkhana did not accept. Mr. Youkhana never made an offer. On 16 November 2020, his then counsel said he would recommend a settlement for \$100,000.00 plus HST, costs and disbursements.

Summary

[34] Based on the foregoing, Mr. Youkhana failed to diligently prosecute this action. Indeed, his delays were unreasonable and unexplained. Based on the evidence, his approach to settlement was equally unreasonable. His actions, and his actions, alone, caused significant delay, which in and of itself prejudiced the

Defendant. His delays also worked to the prejudice of all other litigants in Central West Region. This matter consumed scarce public resources far out of proportion to those it deserved.

[35] Mr. Youkhana was entitled to have his trial. His entitlement came with the obligation to move the matter along expeditiously. Having grossly breached his obligation to the public to move his matter along, he must now pay the cost consequences of his delay and unreasonable approach to litigation.

ORDER

[36] Mr. Youkhana shall pay the Defendants costs of \$120,927.02. This sum, above, comprises \$9,000.00 for fees inclusive of HST, plus disbursements of \$30,927.02.


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by Justice J.
Trimble
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Trimble, J.

DATE: 4 June, 2024

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COSTS ENDORSEMENT

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