

Case Name:

Tilker v. Canada Life Casualty Insurance Corp.

Between

**David Tilker, plaintiff, and
Canada Life Casualty Insurance Corporation, defendant**

[2002] O.J. No. 2873

[2002] O.T.C. 393

42 C.C.L.I. (3d) 115

116 A.C.W.S. (3d) 341

Court File No. 99-638

Ontario Superior Court of Justice

Fedak J.

July 16, 2002.

(31 paras.)

Practice -- Costs -- Party and party costs -- Scale of costs, fixing of -- Entitlement to party and party costs -- Successful party, quantum -- Offers to settle -- Effect of failure to accept -- Costs to successful defendant -- Solicitor and client costs -- Power to award solicitor and client costs -- Solicitor and client costs as damages or punishment -- Measure of solicitor and client costs -- Reasonable charges, reasonably performed.

Application by Canada Life for costs of the action. Tilker's claim for damages and punitive damages was dismissed in its entirety. Canada Life sought costs fixed on a partial indemnity scale to May 14, 2002, the date of its offer to settle, and on a substantial indemnity scale thereafter. Tilker did not make any offers to settle during the action. Tilker accepted the hourly rates suggested by Canada Life and accepted the number of hours claimed for attendance at trial, meeting with witnesses, preparing examinations and cross-examination and preparing closing arguments. He disputed the number of hours claimed for work prior to trial. Tilker argued that the claims for printing of materials should be rejected or reduced due to the lack of supporting invoices and the claim for disbursements for preparation and attendances in court by adjusters should be rejected or reduced because of the

lack of explanation. Tilker argued that there should be no award on a substantial indemnity basis as there was no reprehensible, scandalous or outrageous conduct by him. Tilker argued that raising the issue of punitive damages, was, in itself, not enough for a finding that the action was reprehensible.

HELD: Costs awarded to Canada Life fixed in the amount of \$35,315. Canada Life's costs were based on a partial indemnity scale prior to the offer to settle and a substantial indemnity scale for work done after May 14, 2002. Tilker's refusal to accept Canada Life's offer to settle entitled it to costs on the higher scale. As well Tilker's claim was tantamount to fraud. All of the time spent as shown on the time docket and the Bill of Costs was reasonably incurred and was not grossly excessive or obvious overkill. Tilker's action for \$22,000 could have been commenced under the Simplified Rules and examinations for discovery could have been avoided. His claim for punitive damages was not abandoned until the end of the trial. Canada Life was completely successful in defending the claims. The issues raised were important not only to the parties but to insurance law in general. Tilker's many inconsistencies in his answers to questions at examinations for discovery, in-chief and on cross-examination, required more time than average to prepare for and complete the trial.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 49.10, 49.13, 57.01, 57.01(c), 57.01(d), 57.01(1), 57.01(2), 57.01(3), 76.

[Quicklaw note: Original reasons for judgment were released June 4, 2002. See [2002] O.J. No. 2309.]

Counsel:

Brent Thomas Hurst, for the plaintiff.
Martin Forget, for the defendant.

- 1 FEDAK J.:**-- In my judgment issued on June 4, 2002, I invited written submissions to be submitted within 30 days in the event the parties could not settle the matter of costs.
- 2** This issue has not been settled and I have now received written submissions from both parties.
- 3** The defendant, Canada Life Casualty Insurance Corporation (Canada Life) seeks costs fixed on a partial indemnity scale to May 14, 2002 and on a substantial indemnity scale thereafter in accordance with a Bill of Costs submitted, particulars of which are attached hereto as Appendix "A".
- 4** The plaintiff, David Tilker, (Tilker), did not make any offers to settle during the entire action.
- 5** The issue before me is whether a cost award should be based or fixed in accordance with the costs grid prescribed by Rule 57.01(3) which provides that where the court awards costs, it shall fix them in accordance with subrule (2) and the Tariffs.
- 6** In *Basdeo v. University Health Network* [2002] O.J. No. 597, Mr. Justice Nordheimer of the Superior Court of Justice, discussed the approach to be taken in determining the appropriate amount of costs under the new cost grid.

A party is entitled to its cost of preparing a motion, trial or appeal based on the time spent at the hourly rates which the court permits in accordance with the ranges set out in Item 1 of the cost grid. I reach that conclusion based on the fact that item 1 of the cost grid provides for "fees other than counsel fee" and in its body refers, among numerous other items, to preparation of hearing. It seems therefore that the time spent prior to the actual hearing is to be calculated in that manner.

It would then appear that, in addition to the amount which the court fixes for the time spent prior to the actual hearing, a counsel fee is to be fixed in accordance with the range of counsel fees provided for in item 2 of the cost grid for the actual hearing of the motion. The counsel fee is presumably to be set within the range taken into account not only the amount of time spent on the actual hearing but also the importance and/or complexities of the matters argued with other factors set out in Rule 57.01(1).

7 I adopt the approach used by Mr. Justice Nordheimer wherein the rates to be applied for preparation time is to be determined by referring to item 1 and for attendance at the trial by referring to item 3.

8 Under Item 1, a lawyer with less than 10 years experience can be given a rate of up to \$225.00 per hour on a partial indemnity scale and up to \$300.00 per hour on a substantial indemnity scale.

9 Martin Forget, solicitor for Canada Life, who has had carriage of the matter almost from the outset, has five years experience at the bar.

10 Canada Life proposes that his rate be fixed on a partial indemnity scale at \$90.00 per hour for work done prior to 2002 and a partial indemnity scale at \$130.00 per hour for work done in 2002 prior to the offer to settle of May 13, 2002. Canada Life further proposes his rate on the substantial scale be fixed at \$210.00 per hour. Tilker takes no issue with the proposed hourly rates for the work of the lawyers, students and clerk submitted by the defendant in the Bill of Costs, as being within the available range.

11 I agree that the rates proposed by Canada Life are consistent with the rates provided by the costs grid and consistent with the rules found to be reasonable by Mr. Justice Nordheimer in the Basdeo decision.

12 Tilker accepts that the hours spent for attendance at trial, meeting with witnesses, preparing examinations and cross-examination and preparing closing arguments is appropriate for a four-day trial.

13 Tilker objects to the claim for 147.9 hours spent prior to trial for the following reasons:

- (a) That Tariff A, Part I, of the Costs Grid does not contemplate indemnification for every fee charged by counsel to his client (see 3664902 Canada Inc. v. Hudson's Bay Co. (c.o.b. Bay Department Store) [2002] O.J. No. 2096;
- (b) That pursuant to Rule 57.01(c) and (d) of the Rules of Civil Procedure, the complexity is a factor to be considered when awarding costs. (See Pearson

v. Inco. Ltd. [2002] O.J. No. 2123 at page 2), Petronics Technology Inc. v. Chowdhry [2002] O.J. No. 2092.

- (c) Tilker maintains that the lack of complexity requires a severe cutback in the number of hours Canada Life should claim.

14 Likewise, Tilker takes the position that lack of invoices attached to the Bill of Costs with respect to the printing of materials and lack of explanation as to the disbursements for preparation and attendances in court by adjusters should result in either rejection or great reduction in these items.

15 Although the court should review the time and disbursements incurred to determine whether they were reasonably incurred, the purpose of the trial judge is not to second guess successful counsel on the amount 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 (see *Tri-S Investments Limited v. Vong* [1991] O.J. No. 2292).

16 I have perused the time dockets as listed in the Bill of Costs and find that all of the time was reasonably incurred and is not grossly excessive or obvious overkill as described in the *Tri-S. Investments Limited* case.

17 To arrive at the above conclusion I took into consideration various factors as set out in Rule 57.01(1):

- (a) (i) Tilker's action for \$22,000.00 could have been commenced under the Simplified Rules in Rule 76 of the Rules of Practice. Examinations for discovery could have been avoided.
- (ii) Tilker's claim for punitive damages was not abandoned until the end of the trial.
- (b) Canada Life was completely successful in defending Tilker's claims.
- (c) Although the issues in the trial were not overly complex, the court was nevertheless faced with questions as to whether Tilker had an insurable interest in the motorcycle, whether Tilker was able to demonstrate that the motorcycle was stolen, whether Tilker knowingly misrepresented or failed to disclose material facts in his application for insurance and whether Tilker wilfully made a false statement in respect of a claim under the contract of insurance.
- (d) Issues raised in this case were not only important to the parties, but to insurance law in general.
- (e) Tilker's many inconsistencies in his answers to questions at examinations for discovery, in-chief and on cross-examination, required more time than average, not only to prepare for trial but to complete the trial.

18 Time spent by students was not billed to Canada Life nor is it being claimed from Mr. Tilker.

19 There is no question that Canada Life is entitled to costs fixed on a partial indemnity scale up to May 13, 2002.

20 The question next to be addressed is whether Canada Life is entitled to costs on a substantial scale after May 13, 2002.

21 It is Tilker's position that it is not inappropriate to award Canada Life costs on a partial indemnity scale where the plaintiff has rejected a defendant's offer and has its case dismissed following trial.

22 Tilker relies on the decision of Mr. Justice Hawkins in *Kieran v. Ingram Micro Inc.*, [2002] O.J. No. 299 where he referred to a quote in the Supreme Court of Canada decision in *Young v. Young*, [1993] 4 S.C.R. 3:

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs, nor is the fact that part of the costs of the litigation may have been paid for by others.

23 Tilker submits that in the case at bar, there was no reprehensible, scandalous or outrageous conduct by the plaintiff and therefore this is not an appropriate case to award costs on a substantial indemnity scale.

24 Raising the issue of punitive damages is, in itself, not enough for a finding that the action was reprehensible, argues Tilker.

25 Tilker further argues that where credibility is a major issue, it is not appropriate to award solicitor and client costs. (see *News Marketing Canada Corp. v. De Lacamp* [2002] O.J. No. 1167, a decision of Mr. Justice Mandel.

26 I adopt the approach of the Court of Appeal in *S & A Strasser Limited v. Town of Richmond Hill* (1990), 1 O.R. (3d) 243, where it was found that Rule 57.01 and Rule 49.13, provide the court discretion to order costs payable on a substantial indemnity scale in certain circumstances.

27 Specifically, the court ruled that where a plaintiff rejects an offer to settle, and his action is subsequently dismissed, the defendant is entitled to its costs on a partial indemnity scale up to the date of the offer and on a substantial indemnity scale thereafter.

28 The Strasser decision is consistent with the policy underlying Rule 49.10, which is to encourage litigants to make reasonable efforts to settle in order to avoid costly litigation.

29 Considering the Strasser decision and other decisions which followed Strasser (see *Iorfida v. MacLeod* [1995] O.J. No. 2132 (Ont. Gen. Div.), (Somers J.); *Shah v. Mohr* [1998] O.J. No. 3866 (Glithero J.); *Interborough Electric Inc. v. Toronto (City)* [1992] O.J. No. 2725 (McMurtry A.C.J.O.C.) and *Beresford-Last (Litigation Guardian of) v. Dworak* [2000] O.J. No. 4636 (Lax J.)) and in light of Mr. Tilker's rejection of the Canada Life offer of May 13, 2002, Canada Life is entitled to costs fixed on a substantial indemnity scale from the date of the offer.

30 In addition to Mr. Tilker's refusal to accept Canada Life's offer to settle, the following factors also suggest that costs on a substantial indemnity scale would be appropriate after May 13, 2002:

- (a) This court found that on the balance of probabilities, Mr. Tilker sold the motorcycle prior to staging its theft. This conduct is tantamount to fraud and is conduct which cannot go without condemnation of the courts.
- (b) Mr. Tilker's claim for \$50,000.00 for punitive damages was not abandoned until the conclusion of the trial.

- (c) Mr. Tilker's claim for \$22,000.00 was within the amounts allowed under the Simplified Rules.
- (d) Canada Life was completely successful.
- (e) The court's finding that Mr. Tilker was not credible.

For the above reasons, the court finds that Canada Life is entitled to costs on a substantial indemnity scale after May 13, 2002.

31 In accordance with the Bill of Costs (Appendix "A"), Canada Life will be entitled to costs fixed at \$35,315.22, calculated as follows:

Total Fees \$ 28,147.00

GST - 7% 1,970.29

Disbursements 4,971.83

GST - 7% 226.10

Total \$ 35,315.22

FEDAK J.

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APPENDIX "A"

Court File No. 99-638

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID TILKER

PLAINTIFF

And
CANADA LIFE CASUALTY INSURANCE CORPORATION

DEFENDANT

BILL OF COSTS OF THE DEFENDANT

FEES

1. Review file material, legal analysis regarding deferences, and other issues, prepare pleadings, legal opinion to client: (Partial Indemnity Scale).

DAH (\$ 200.00 per hour)	16.30	\$ 3,260.00
MPF (\$ 90.00 per hour)	9.00	810.00
JWW (\$ 50.00 per hour)	5.60	280.00
LCC (\$ 50.00 per hour)	1.40	70.00

2. Preparation of affidavit of documents, review plaintiff's affidavit of documents, prepare for and attend examination for discovery: (Partial Indemnity Scale).

MPF (\$ 90.00 per hour)	25.70	\$ 2,313.00
JWW (\$ 50.00 per hour)	2.20	110.00
LCC (\$ 50.00 per hour)	0.30	15.00

3. Prepare list of defendant's undertakings, gather information in response to undertakings, prepare list of plaintiff's undertakings, prepare list of plaintiff's undertakings, review documentation in response to those undertakings: (Partial Indemnity Scale).

MKB (\$ 40.00 per hour)	2.80	\$ 112.00
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MPF (\$ 130.00 per hour)	11.10	1,443.00
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4. Trial preparation, discussion and correspondence with plaintiff's counsel regarding pre-trial, prepare summons' to witnesses, legal research on various issues, meeting with witnesses, prepare joint book of documents, prepare cross-examination of witnesses, prepare brief of authorities.

To May 14th, 2002 (Partial Indemnity Scale)

MPF (\$ 130.00 per hour)	9.20	\$ 1,196.00
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JWW (\$ 110.00 per hour)	.70	77.00
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MJH (\$ 60.00 per hour)	24.80	1,488.00
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After May 14th, 2002 (Substantial Indemnity Scale)

MPF (\$ 210.00 per hour)	34.50	\$ 7,245.00
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JWW (\$ 180.00 per hour)	3.00	540.00
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IAN (\$ 150.00 per hour)	0.30	45.00
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MJH (\$ 180.00 per hour)	1.00	180.00
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5. Attendance at trial, meet with witnesses, prepare examinations and cross-examinations, prepare closing arguments: (Substantial Indemnity Scale).

MPF (\$ 210.00 per hour)	40.70	\$ 8,547.00
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6. Prepare Bill of Costs and Submissions (Partial Indemnity Scale).

MPF (\$ 130.00 per hour)	3.2	\$ 416.00
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Fee

TOTAL	\$ 28,147.00
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GST 7%	1,970.29
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DISBURSEMENTS

Paid to file Statement of Defence	74.00
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Transaction Levy	50.00
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*Paid for Long Distance	3.29
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Motorcycle registration	6.00
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*Paid for Postage and Courier	69.87
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*Paid for Photocopying	241.46
*Print III (copy service)	1,317.42
*Paid for Facsimile Transmissions	93.50
*Transcripts	159.00
*Transcripts	853.50
*Reliance (process servers)	153.00
Conduct Monies (5 witnesses)	401.20
*Travel expenses	203.99
*Mileage	135.00
Adjusters fee prep & attendance at court	1,210.60
TOTAL DISBURSEMENTS	\$4971.83

GST ON DISBURSEMENTS INDICATED (*) 226.10

TOTAL DISBURSEMENTS \$5,197.93

TOTAL FEES (INCLUDING G.S.T.) \$30,117.29

TOTAL \$35,315.22

LIST OF LAWYERS - RATES

	Year of Call	Time Worked	
Martin P. Forget (1998)	2000-2001		\$ 90.00 (Partial Indemnity Scale)
	2001-2002		\$ 130.00 (Partial Indemnity Scale)
		May 14, 2002 on	\$ 210.00 (Substantial Indemnity Scale)
James W. Wilson (Student)	1999		\$ 50.00 (Partial Indemnity Scale)
James W. Wilson (2000)	2000		\$ 180.00 (Substantial Indemnity Scale)
Dale A. Herceg (1979)	1999-2000		\$ 200.00 (Partial Indemnity Scale)
Isana Nagla (2002)	2002		\$ 150.00 (Substantial Indemnity Scale)

Michelle K. Borg (Clerk)	2001	\$ 40.00 (Partial Indemnity Scale)
Michael J. Healy (Student)	May 14, 2002	\$ 60.00 (Partial Indemnity Scale)
	May 14, 2002 on	\$ 115.00 (Substantial Indemnity Scale)
Laura C. Camberari (Student) cp/s/qlrme/qlkjg	1999	\$ 50.00 (Partial Indemnity Scale)