

**CITATION:** Williston v. City of Hamilton 2011 ONSC 5400  
**COURT FILE NO.:** 07-33172  
**DATE:** 2011-09-16

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Dale Williston, plaintiff  
**AND:** Preston Gabriele and the City of Hamilton, defendants  
**BEFORE:** Mr Justice Ramsay  
**COUNSEL:** Ms Sumitra Lagoo and Ms Yan Lau for the plaintiff  
Mr Paul Ryan for the defendants  
**HEARD:** 2011-09-14

**ENDORSEMENT**

- [1] At the conclusion of a two-day trial on liability, I found that the defendants were responsible for 100% of the agreed damages of \$100,000, which includes pre-judgment interest. The plaintiff asks for costs of \$98,000 on a partial indemnity basis, which includes a \$40,000 augmentation for refusal to participate in mediation. The defendant submits that a cost order closer to \$35,000 plus reasonable disbursements would be appropriate. On the defendant's submissions, disbursements would be about \$15,000, including HST on fees.
- [2] At or about the time of the judicial pre-trial in July 2011, the defendant offered to settle for \$45,000 plus costs. The plaintiff offered to settle for \$113,400 plus costs. On September 9, 2011 the parties agreed on damages. The trial took place on September 13 and 14.
- [3] The plaintiff asks for an augmented award of costs in view of the defendant's refusal to mediate, and cites s.258.6 of the Insurance Act and the decision of the Court of Appeal in Keam v. Caddey, 2010 ONCA 565. The City could have saved the plaintiff and itself some money if it had agreed to mediation. I do not think, however, that I can award the augmented damages provided for in the Insurance Act because the defendant is not an insurer either as named defendant or, as far as I know, by way of subrogation.
- [4] I would say that the City has not seriously tried to settle the litigation. Instead, four days before the commencement of the trial it agreed to damages that were more than double its offer to settle of July 2011 and then, having settled the difficult issue after tying up plaintiff's counsel all summer with damages, it dug in its heels on the issue on which it had no hope of success beyond contributory negligence, and little hope of that. Unlike the plaintiff, the City has the resources to afford this sort of approach. I do not understand the

utility of it, but that is not my business, beyond fixing the appropriate indemnity for the successful plaintiff.

- [5] The plaintiff's law firm spent 247 hours preparing for trial. They had to prepare a number of witnesses, including medical witnesses. The plaintiff's lawyers controlled costs by assigning preparatory work to law clerks and students and conferring the trial upon two lawyers of relatively recent call.
- [6] To deal with the defendant's objections to the bill of costs in order, I would say:
- a. I do not see any duplication or waste in the bill of costs.
  - b. Two or three questions of admissibility of evidence that I decided adversely to the plaintiff did not add appreciably to the length of the trial.
  - c. I do not think that the decision not to call certain witnesses should deprive the plaintiff of the right to claim disbursements for them, given the last-minute timing of the admission on damages.
- [7] I agree with the partial indemnity costs as submitted, except that given the result obtained, I think that the plaintiff's bill for counsel fee for the appearance should be adjusted upward somewhat.
- [8] The plaintiff asks for, and is entitled to, partial indemnity costs. Given the foregoing I fix the plaintiff's costs at \$60,000 and order the City to pay them.

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J.A. Ramsay J.

**Date:** 2011-09-16