CITATION: Ramcharran v. State Farm Mutual Automobile Insurance Co., 2023 ONSC 3698
COURT FILE NO.: CV-15-536609
DATE: 20230728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
NORMAN RAMCHARRAN and MANORAMA MURUGESU Plaintiffs	*Sulaiman Mangal and Farhad Shekib,* Lawyers for the Plaintiffs
– and –	
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., JOHN DOE and JANE DOE Defendants	*R. Shawn Stringer,* Lawyer for the Defendant, State Farm Automobile Insurance Co.
	HEARD: JUNE 5 TO JUNE 20, 2023

G. DOW, J.

REASONS FOR DECISION – POST TRIAL ISSUES

THRESHOLD MOTION

[1] The plaintiff, Norman Ramcharran brought this action for damages following his involvement in a collision while in a parked in a commercial lot on February 12, 2010. The other vehicle left the scene and was never identified. The action proceeded to trial between June 5 to June 20, 2023.

[2] The action by Manorama Murugesu did not proceed nor did the claims against John Doe and Jane Doe.

[3] The jury returned a verdict of June 19, 2023 awarding $62,250 for general damages, **$305,000** for past loss of income and **$60,000** for future loss of income. The statutory

deductible amount for this year on the general damages award, being less than $147,889.50, is $44,367.24, leaving the net general damage award under consideration for judgment in the amount of **$17,882.76**.

[4] That amount is recovered only if the plaintiff meets the burden of proof that his injuries and impairment meet the statutory verbal threshold under Section 267.5(5)(b) of the *Insurance Act*, R.S.O. 1990 c. I. 8.

[5] The plaintiff was sitting in the driver's seat of his parked vehicle reviewing papers he and Ms. Murugesu had picked up when struck on the driver's side rear corner. The plaintiff's insurer, standing in the shoes of the unidentified motorist pursuant to the provisions of the Ontario Standard Automobile Policy (OAP 1) and Section 265 of the *Insurance Act, supra,* moved at the conclusion of the trial to dismiss the claim for general damages on the basis the evidence failed to surpass the verbal threshold.

[6] I heard submissions during the jury's deliberations. Briefly, Mr. Ramcharran had a pre-existing healed fracture with resulting arthritis in his right elbow which he claimed (and the absence of any medical records to the contrary indicated) was asymptomatic prior to the February 12, 2010 accident. As a result of the collision (in which his right elbow struck the steering wheel), it immediately became painful.

[7] The evidence at trial was that he received treatment, including laser acupuncture, on a decreasing basis over the next two years without significant relief. Mr. Ramcharran was found to be HIV positive in 1998 and was receiving treatment from an infectious diseases specialist, Dr. Rachlis at Sunnybrook Hospital. Dr. Rachlis referred him to Dr. Robin Richards, an upper extremities orthopaedic surgeon at Sunnybrook Hospital. Dr. Richards initially examined Mr. Ramcharran on May 7, 2013. Following examination and review of an x-ray, MRI and CT scan, all completed post-accident, Dr. Richards confirmed the above-described condition of Mr. Ramcharran's right elbow and offered to perform surgery. Such surgery would not restore the elbow to normal but had a 75 to 80 percent chance of reducing discomfort.

[8] Mr. Ramcharran, being right hand dominant, reflected on this and returned to Dr. Richards in 2015 to request the surgery. The surgery proceeded on October 2, 2015 and was expected to require three months for recovery. The surgery included the removal of tissue and the radial head of a bone at the elbow, with reattachment of the tissue and muscles. Mr. Ramcharran was seen on March 9, 2016 with good range of movement but ongoing weakness in his right arm.

[9] On May 9, 2016, Mr. Ramcharran was involved in a further motor vehicle accident in which he aggravated the right elbow injury. He also suffered injuries to his back, neck and right shoulder. His complaints of pain and weakness were ongoing as of the time of trial. He testified being unable to work full time.

[10] Mr. Ramcharran's pre-accident employment was that of a meat cutter. He had worked in that capacity with Dominion (which became Metro) between 1994 until early 2009. He was terminated for theft and was unsuccessful in his grievance to have his employment restored. Mr. Ramcharran then worked at a local Scarborough butcher shop, Bruno's, while collecting employment insurance between November 2009 and when he was laid off, February 6, 2010. This was six days prior to the subject accident.

[11] After his employment insurance ran out in July, 2010, Mr. Ramcharran applied for Ontario Disability Support and Canada Pension Disability benefits. He cited his HIV status as the reason for his disability and was granted both. His evidence at trial was that he felt able to work part time as a meat cutter. He had searched for such a job after the February 12, 2010 incident but without success.

[12] The defendant's medical expert was Dr. Terry Axelrod, also an orthopaedic surgeon specializing in the upper extremities. Dr. Axelrod saw Mr. Ramcharran on May 15, 2014. Dr. Axelrod opined at trial that Mr. Ramcharran's injury was soft tissue in nature and its effects resolved in the 4 to 6 months following the accident. The balance of Mr. Ramcharran's complaints were related to the onset of symptoms from the pre-existing arthritic condition of Mr. Ramcharran's right elbow which apparently became worse following a subsequent accident of May 9, 2016.

Analysis

[13] Counsel for the parties submitted the proper framework was that established in *Meyer v. Bright*, 1993 ONCA 3389. Given it addressed a modestly different earlier wording of the verbal threshold, I advised them I preferred to rely on the more recent decision of (now) Regional Senior Justice Firestone in *Malfara v. Vukojevic*, 2015 ONSC 78 which asked the following questions:

a) has the injured person sustained permanent impairment of a physical, mental or psychological function;

b) if yes, has the function which is permanently impaired an important one; and

c) if yes, is the impairment of the important function serious?

[14] The impairment complained of by Mr. Ramcharran is pain in his right elbow resulting in reduced strength and ability to grip in his dominant hand. This is a physical function. On the basis of the lack any evidence that it was symptomatic before the accident, I have concluded that it started with the tort committed by the unidentified vehicle involved in the accident of February 12, 2010. It has continued to the time of trial and, with the evidence of arthritis in the elbow joint, which worsens over time, it cannot be expected to improve or resolve. The plaintiff's complaint of pain and weakness in his right arm was subjective. Further, the evidence of decreased grip strength was by testing on multiple occasions over time using a Jaymar Dynamometer which measured his reduced right arm strength. This test was subjective to the

extent it requires the individual to put forth maximal effort and accepts the individual having done so.

[15] The caselaw is clear such subjective evidence can be relied on to meet the test for permanence or that the impairment is continuing indefinitely.

[16] Mindful of the jury verdict, it is not difficult to conclude the jury found the plaintiff's injuries and inability to work were a result of the accident of February 12, 2010. It should be noted in their addresses to the jury, counsel for the defendant gave a figure of $10,000 for the amount of general damages. This compared to the range of $80,000 - $100,000 given by counsel for the plaintiff. The assessment by the jury clearly reflected their finding being more favourable to the plaintiff's position than that of the defendant.

[17] As a result of the portions of the evidence favourable to the plaintiff tendered at the trial, and the jury's apparent acceptance of same, the plaintiff meets the test raised in the first question of whether there has been a permanent impairment of a physical function as a result of a February 12, 2010 accident.

[18] I appreciate, as the trial judge, that I am not bound to decide the threshold issue based on the jury's verdict. It is only one factor to consider.

[19] Regarding the second question, as to whether the impairment is important, the finding of the jury as to loss of income is instructive. The plaintiff's evidence in this regard was tendered through a forensic economic consultant who presented two alternate scenarios. The first scenario used an average of his 2005 to 2009 income, then indexed same for inflation from August 4, 2010 to the time of trial. August 4, 2010 was used as the starting point given Mr. Ramcharran was not employed as of the date of the accident. The figures were then reduced to 80 percent of the net income to the time of trial (given the date of the accident being before September 1, 2010) in accordance with Section 267.5(1) 2.i. of the *Insurance Act, supra.* This calculation totalled $390,177. The second scenario, using Statistics Canada data of average income for all workers in Ontario working full or part time for the full or part of the year, also reduced to 80 percent of net, was $311,382. The assessment at trial indicated the jury almost completely accepted that latter calculation.

[20] I also rely on Section 4.2 of *Ontario Regulation 461/96* which defines "permanent serious impairment" to include the requirement that the impairment "substantially interfere with the person's ability to continue his or her regular or usual employment ". This measure of one's ability to work is also to be considered when addressing whether the impaired function meets the requirement that it be important.

[21] Mr. Ramcharran's evidence of his desire to continue working to age 70 was quantified using two different scenarios and with different variables. The range put into evidence was between $54,990 to $341,933. Again, the jury found and awarded Mr. Ramcharran an amount of future loss of income within the range of evidence tendered. This compares with the

defendant's position of a four to six month soft tissue injury which, if accepted, the forensic economic consultant acknowledged, resulted in a zero loss of income.

[22] As a result, the answer to the second question is yes. That is, the plaintiff's limited function of his right arm meets the criteria that it be important.

[23] For the same reasons, I would also conclude the impairment of the important function to be serious. There was evidence at this trial of the plaintiff having a 15 year career as a meat cutter interrupted by his termination about one year before the accident of February 12, 2010. Despite the circumstances of his termination, no doubt limiting his future work opportunities, he sought and found work at Bruno's between November, 2009 and February 6, 2010 or six days prior to the accident of February 12, 2010.

[24] Counsel for the defendant stated that Mr. Ramcharran's credibility was clearly and seriously in issue. Counsel relied on Mr. Ramcharran being fired for theft from Metro, his failure to report his income from Bruno's while collecting Employment Insurance and advising Employment Insurance that he was ready, willing and able to work after February 12, 2010 while receiving employment insurance benefits until July, 2010. This was also while he was attending therapy at Toronto HealthCare.

[25] Mr. Ramcharran told multiple entities of having retired as of 2009. He used his HIV status rather than his accident injuries to support his claim for benefits. Despite these concerns, the jury chose to accept his injuries arising from the accident had resulted in a substantial loss of income.

OPCF 44R Coverage

[26] As this matter involved a claim of negligence against an unidentified operator of a motor vehicle, Mr. Ramcharran relied on the contractual and statutory provisions of the *Ontario Standard Automobile Policy* (OAP 1) and Section 265 of the *Insurance Act, supra.* These provisions limit the plaintiff's recovery from his or her own insurer to $200,000 under Section 251 of the *Insurance Act, supra.*

[27] Any amounts in excess of what is commonly called "minimum limits" may be recoverable under the OPCF 44R Family Protection Endorsement, sometimes referred to as underinsured coverage. However, that coverage, under Section 1.5 of the Endorsement has an additional requirement that the involvement of the unidentified vehicle "must be corroborated by other material evidence". This is defined to require either independent witness evidence (excluding a spouse or dependent relative) or "physical evidence indicating the involvement of an unidentified automobile".

[28] There was no independent witness evidence tendered at the trial. Statements made at the Collision Reporting Centre and the treatment facility where Mr. Ramcharran attended on the day of the accident are, as referenced in *Paolucci v. John Doe et al*, 2015 ONSC 7675 (at paragraph 16) "merely a repetition of the statements made by the plaintiff and cannot be

considered to be independent". It should be noted Ms. Murugesu, a passenger in the plaintiff's vehicle did not give evidence at the trial. Further, she is now the spouse of the plaintiff. As a result, Mr. Ramcharran must rely on other material evidence.

[29] Various decisions have canvassed this issue in summary judgment motions with divided reliance on the existence of damage to the vehicle or roadway. In this regard, and in the circumstances before me, I am in agreement with the comments in *Featherstone v. John Doe*, 2013 ONSC 3175 (at paragraph 22) that relied on the use of the word "indicating" in the Family Protection Endorsement as opposed to, for example, "prove". The question to address is whether another vehicle was involved. I am satisfied, by the damages photographed at the Collision Reporting Centre and marked as Exhibit "8" at the trial that this requirement has been met.

[30] I am reinforced in this conclusion by the trial strategy utilized by the defendant. Rather than submit no accident occurred and that the minor damage to the plaintiff's rear driver side bumper was somehow pre-existing or staged, it chose to rely on the minor nature of that damage to support its position of the plaintiff having only suffered a soft tissue injury to his right elbow as a result of it contacting the steering wheel. This position was maintained by the defendant's expert medical expert that any soft tissue injury which occurred would have resolved in the four to six months following the accident.

[31] The acceptance of physical evidence consistent with the plaintiff's version of events was also accepted in *Azzopardi v. John Doe*, 2014 ONSC 4685. Further, cases reviewing this issue have relied on this legislatively approved endorsement, as remedial in nature, to be interpreted in a broad and liberal manner (*Lewis v. Economical Insurance Group,* 2010 ONCA 528 at paragraph 12)

[32] I also rely on the statement in *Pepe v. State Farm Mutual Automobile Insurance Company*, 2011 ONCA 341 (at paragraph 14) that the intent of the qualification or restriction of an insurer's exposure is for the corroborative evidence to provide "some comfort as to the validity of the claim". I am satisfied, based on the evidence tendered at trial and its acceptance by the jury, as the finders of fact, the accident occurred and the claim was valid.

Costs

[33] The plaintiff initially sought costs on a substantially indemnity basis throughout the action based on the settlement position of the defendant being unwilling to compensate the plaintiff in any amount and formalizing that position with a November 9, 2015, Rule 49 Offer to Settle revoking any previous offers and seeking its costs on a partial indemnity basis.

[34] However, counsel for the plaintiff was unable to point to and I do not find any conduct on the part of the defendant which would justify this position. The plaintiff was not denied access to justice, nor were any steps taken by the defendant which lengthened the proceeding. To the contrary, I understand the defendant conceded the jury need not be asked if the collision

occurred and the defendant did not call some of its intended witnesses given the admissions made by the plaintiff in his cross-examination regarding his activity level and advising Honda Finance he was retired. Further, the defendant was entitled to have the claim against it determined by the Court. This was reinforced by the evidence tendered in Court and referred to above which questioned Mr. Ramcharran' s credibility.

[35] The alternative position of the plaintiff was that partial indemnity costs to its April 13, 2023 Offer to Settle and substantially indemnity costs thereafter should be awarded. On April 13, 2023 the plaintiff offered to settle for $100,000 for damages, pre-judgment interest "to be agreed upon or assessed in accordance with the *Courts of Justice Act*" plus costs to be agreed upon or assessed. This offer was open for acceptance until five minutes following the commencement of the trial or "unless earlier withdrawn in writing".

[36] This offer appears to be compliant with Rule 49. The plaintiff made a subsequent offer, on June 1, 2023, identically worded except that the amount for damages was reduced to $50,000. Given its date, being less than seven days before the commencement of the trial on June 5, 2023, its utility appears to be restricted to its possible effect, as submitted by counsel for the defendant, that it implicitly withdrew the April 13, 2023 Offer to Settle.

[37] In opposing the plaintiff's request for substantial indemnity costs after the April 13, 2023 Offer to Settle, the defendant relied on the statement in *Diefenbacher v. Young et al*, [1995] O.J. No. 939 (C.A.) in the fourth from last paragraph: "Conceding that the answer is elusive, I lean to adopting the parlance in normal understanding of a litigant that a decreasing offer by a plaintiff and an increasing offer by a defendant, without reference to the earlier offer, is by implication a withdrawal of the earlier offer. Its reality has disappeared in the ongoing negotiations in dealings between the parties and, prior to the present judicial debate of the issue, it is not sensible to consider that the parties could give thought to the earlier offer, in the context of costs consequences, after the second offer".

[38] This appears to ignore Rule 49.04 which expressly provides for the withdrawal of previous offers to be in writing. This decision does not seem to have been considered by the Court of Appeal in *Hasemi–Sabet Estate v. Oak Ridges Pharma Save Inc.*, 2018 ONCA 839 (at paragraph 25). Fortunately, in this matter, the issue is not whether the April 13, 2023 offer was available for acceptance but whether the cost consequences under Rule 49.10 should apply. I shall leave that for clarification by the Court of Appeal. I rely on Rule 57 and Section 131 of the *Courts of Justice Act* in fixing the quantum of costs to be award. In the absence of that statement in *Diefenbacher v. Young, supra*, I would certainly find the plaintiff is entitled to partial indemnity costs to the date of that April 13, 2023 Offer to Settle and substantially indemnity costs thereafter. I prefer to fix the quantum of fees for the following reasons.

[39] First, the application of Rule 49.10 is and generally should be retrospective in its application. In the face of multiple decreasing offers, it remains open to a party to request an elevated level of costs at the conclusion of the trial going back as far as its earliest offer that is

"as favourable or more favourable than", as stated in Rule 49.10(1), the judgment obtained at trial. The April 13, 2023 offer complies with that requirement.

[40] Second, the subsequent offer of June 1, 2023, by being less than seven days before the commencement of the trial, was not Rule 49 compliant with regard to costs consequences as expressly stated by Rule 49.03. That is, had the judgment been in an amount less than April 13, 2023 Offer to Settle but greater than the June 1, 2023 Offer to Settle, I would not have applied the costs consequences provided for under Rule 49.01. As a result, it strikes me as inconsistent to give the June 1, 2023 Offer to Settle the effect sought by the defendant when it should not have the costs consequences of Rule 49.10.

[41] Regarding quantum, plaintiff's counsel submitted a draft Bill of Costs seeking partial indemnity fees to April 13, 2023 and substantially indemnity fees thereafter of $323,940 plus HST of $42,112.20 and disbursements of $28,576.95 (inclusive of HST) for a total of $394,629.15. This compared to the Costs Outline prepared and submitted by counsel for the defendant with partial indemnity fees totaling $81,654.52. This wide discrepancy is troubling.

[42] The first issue is the hourly rate sought by plaintiff's counsel. This included lead counsel, called to the bar in 2000, and assisting counsel, called to the bar in 2016. I was advised, despite the existence of a Contingent Fee Agreement (which was not produced), the hourly rates at trial were $800 and $500 per hour respectively. The plaintiff also included time for a law clerk (who did not attend the trial) at $290 per hour. This compared to counsel for the defendant, called to the bar in 1990. His hourly rate to his client was $390 per hour and that of a senior law clerk (who did attend the trial) at $150 per hour.

[43] I have difficulty with counsel for the plaintiff seeking to apply his $800 per hour rate to his efforts going back more than 11 years to when the Statement of Claim was issued and when, the hourly rate quoted in the Contingent Fee Agreement was admitted to be much lower. I was also not persuaded by his reliance on commercial cases argued by "major downtown Toronto law firms (*Bain v. U.B S. Securities Canada Inc.,* 2017 ONSC 1472, at paragraph 21) where hourly rates in the range sought were relied on when updated for inflation.

[44] More directly relevant and comparable was the decision on costs referred to by counsel for the plaintiff, *Rochon v. MacDonald*, 2014 ONSC 591 where the learned Justice McCarthy stated (at paragraph 23) "It is difficult to conceive of lead counsel presenting a complex case in a more digestible, coherent and impressive fashion than what the Court witnessed from Mr. Oatley. The Court recognizes him as one of the leaders of the personal injury bar in Ontario."

[45] With respect to plaintiff's counsel, this matter was not on that level. I would also note that the hourly rate sought by Mr. Oatley in that case was $990 per hour. It was reduced to $450 an hour on a partial indemnity basis by Justice McCarthy. I am guided more by the submissions of counsel for the defendant that $500 per hour for lead counsel and $300 an hour for assisting counsel is appropriate.

[46] The second issue raised was with regard to the additional fees for the plaintiff's second counsel at trial. The defendant was advised in advance of the trial that lead counsel would be using a second counsel at trial. Almost 200 hours were sought for the efforts of this second counsel on the basis of 10 to 12 hours per day, 7 days per week. While second counsel did examine some witnesses and did make submissions on certain issues during the trial, I find that the amount of time claimed to be excessive. Counsel for the plaintiff also compared their combined level of expertise to that of counsel for the defendant and a senior law clerk to be roughly equal. While that may be so from years of experience perspective, I do not find it follows from an hourly rate perspective.

[47] I appreciate that trial experience in civil jury matters is difficult to obtain. In fact, the use of a second counsel in part, to obtain such experience, is to be encouraged. However, it is difficult to and require the unsuccessful defendant to pay for that counsel obtaining experience at an hourly rate which presumes he or she has that level of experience.

[48] Counsel for the plaintiff also relied on the accepted principle it requires more time to present a case than the defendant. Counsel for the defendant agreed with that principle. I do as well.

[49] I would also take into account the principle of proportionality. The plaintiff recovered under all heads of damages claimed. The total as detailed below is $382,882.76 net of the applicable deductible.

[50] I do not propose to do a line-by-line review of the Bill of Costs nor do I believe the law requires same. Counsel for the defendant relied on and I agree with the often repeated direction from the Court of Appeal that the overarching "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 (*Boucher et al v. Public Accountants Council for the Province of Ontario et al,* [2004] O.J. No. 2634 at paragraph 26).

[51] In all the circumstances, I award the plaintiff his costs of this action fixed in the amount of **$135,000** plus HST of **$17,550** for a total of $152,550.

[52] Regarding disbursements, counsel for the defendant generally conceded the bulk of same and, particularly the larger items such as expert report and attendance at trial for experts, where appropriate. I agree with the submission that items such as storage and "TIGI Transport" fees were not properly claimed or justified." Similarly, the claims for "Facts, Courier, Photocopies, Print etc" were excessive. I reduce the award of disbursements to **$26,500**, inclusive of HST as payable by the defendant to the plaintiff.

Pre-Judgment Interest

[53] The plaintiff and I were able to calculate the appropriate rate of pre-judgment interest on the net general damages from the date the Statement of Claim was issued, being February 9, 2012 to the date of Judgment (granted on motion by the plaintiff following receipt of the jury's

verdict on June 19, 2023) at the prescribed rate of 1.3 % percent per year to be **$2,646.65** and same is awarded.

[54] The parties requested the time to address the interest payable on the past loss of income in accordance with Section 128(3) of the *Courts of Justice Act* and subsequently advised me that amount should be **$31,900** and same is awarded.

Conclusion

[55] As a result, judgment shall issue in favour of the plaintiff and payable by the defendant in the following amounts:

a)	General Damages (Net of Deductible)	$ 17,882.77
b)	Pre-Judgment Interest on net General Damages	$ 2,646.65
c)	Loss of Income (Past)	$305,000.00
d)	Pre-Judgment Interest on Past Loss of Income	$ 31,900.00
e)	Loss of Income (Future)	$ 60,000.00
	SUB-TOTAL:	**$417,429.42**
f)	Costs (fees as fixed by me)	$135,000.00
g)	HST	$ 17,550.00
h)	Disbursements (inclusive of HST)	$ 26,500.00
	TOTAL:	**$596,479.42**

[56] Counsel may forward to me a draft judgment for signing, approved as to its form and content, at the email address through which they received these Reasons.

Mr. Justice G. Dow

Released: July 28, 2023

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