

INSURANCE LAW BULLETIN

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Taking a “hard-ball” approach does not come without consequences

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OVERVIEW

In *Brophy v Harrison*, 2019 ONSC 4377, the Ontario Superior Court considered the “hard-ball” approach taken by the defendant when determining the costs award.

FACTS

The plaintiff brought an action for damages sustained as a result of a motor vehicle collision. Both liability and damages were at issue. At trial, the plaintiff suggested a range of damages between \$996,900.89 and \$1,150,700.89, and the defendant suggested a range between \$5,000 and \$10,000. The plaintiff was ultimately awarded \$62,628.75, which after application of the deductible and deducting the accident benefits settlement, came to \$17,688.64.

While the plaintiff presented various settlement offers, the defendant did not make an offer to settle. Justice Casullo found that this left the plaintiff with no choice but to proceed to trial to seek recovery for her injuries. Although it was a fully defensible position for defendants to take, this decision makes it clear that there can be consequences to this approach.

Given that the plaintiff did not beat her formal offer of \$75,000.00, Rule 49 was not engaged. However, the plaintiff was successful against the defendant on damages and liability and was entitled to her costs on a partial indemnity basis. The plaintiff was awarded costs and disbursements of \$275,456.60.

Despite Justice Casullo’s direction that a Bill of Costs was to be included with written submissions, the defendant chose not to do so. Without knowing what the defendant’s costs were for the trial, Justice Casullo could not complete a ‘reasonable expectation’ analysis. The inference she was forced to make was that the quantum of the defendant’s costs approached those of the plaintiff.

The defendant suggested that a cost award of \$70,000 was more appropriate, given the fact that the amount recovered by the plaintiff was within the jurisdiction of Small Claims Court. The defendant submitted that there must be proportionality between the amount recovered and the costs award. However, Justice Casullo believed it was reasonable for the plaintiff to bring her action in Superior Court. Her case had merit and her decision to continue to trial was reasonable in the absence of any offers from the defendant. Justice Casullo rejected the defendant's position that the plaintiff's costs should be reduced because the ultimate verdict was less than the Small Claims Court limits, noting that costs of a proceeding are in the absolute discretion of the court

MOVING FORWARD

This decision reinforces the benefits to making reasonable offers to settle and the costs risks of failing to do so.