

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

BRAYDON THORNHILL, a minor by his
Litigation Guardian Jack Thornhill, NADINE
THORNHILL and the said JACK
THORNHILL personally

Plaintiffs

- and -

MICHAEL SHADID, THE CORPORATION
OF THE TOWN OF EAST GWILLIMBURY
and THE CORPORATION OF THE
REGIONAL MUNICIPALITY OF YORK

Defendants

) T. Boland and D. Romaine, for the plaintiffs

) P. Danson and A. Voudouris, for Michael
) Shadid

) J.M. Davison and S. Hill for The
) Corporation of the Regional Municipality of
) York

) **HEARD:** October 15, 16, 17, 22, 23, 24,
) 25, 26, 29, 30, 31, November 1, 2, 6, 7,
) 2007

HOWDEN J.:

**RE: NON-WAGE BENEFITS, COSTS AND PROTECTED – UNPROTECTED
DEFENDANTS AND APPORTIONMENT ISSUES**

[1] On January 31, 2008, the judgment on the issues of liability and most of the damage issues was released. Written submissions on the above issues have been received from all

counsel pursuant to the terms set in para. 169 of the judgment. In the following pages, I deal with each of these subjects so far as I was able.

Non-Wage Benefits

[2] In para. 163 of the judgment, I concluded that this was a head of loss which was proven. However, I did not appear to have the calculation by Mr. Wollach quantifying it. Further submissions on the quantum of non-wage benefits were permitted from Mr. Danson or Mr. Voudouris on behalf of the defendant Shadid, and for Mr. Boland or Mr. Romaine. Mr. Davison had made no submissions on the quantum of damages.

[3] Mr. Boland submitted Mr. Wollach's calculation of the group benefit lost to Ms. Thornhill. The basis for this claim is that nurses can elect to receive 13% of payroll, which includes the employer-paid pension contributions which have been included in the damage calculations. The value of employee benefits or non-wage benefits paid by the employer and not already included in the award of damages was found by Mr. Wollach to be \$68,021, using 6.5% (13% less 6.5%) of past and future salary losses. Mr. Danson and Mr. Voudouris take no issue with Mr. Wollach's calculation.

[4] I accept Mr. Wollach's calculation of the quantum of non-wage benefits lost to the plaintiff as a result of the accident. I find that her loss in this regard, not already included in the judgment, is \$68,021, which is added to the damages due from the defendants pursuant to the judgment of January 31, 2008.

Costs

[5] The plaintiffs' solicitors claim fees of \$367,311.33 plus \$9,965 for their time preparing written costs submissions and submissions in reply to the points raised by the defendants. Their total fee claim is therefore \$377,276.33 (all figures are without GST added). Disbursements are claimed at \$103,340.09 plus Mr. Wollach's bill for additional work of \$2,400. Mr. Wollach was the accountant retained by the plaintiffs and this bill was for work done by him regarding the apportionment of damage and non-wage benefits, issues dealt with by written submissions following trial.

[6] The trial took fifteen days, without a jury. Even at that length, it was a complex trial with difficult issues of law and fact to be addressed by detailed examinations and cross-examinations, mainly on liability issues. Without the fine example of civility, professionalism, organization and mastery of detail exhibited by all counsel, this trial could easily have taken a further three to four days and more. They were able to agree on the climatological facts and conclusions which saved considerable time.

[7] On behalf of York, Mr. Davison takes issue with the time spent by the plaintiffs' counsel on issues relating to validity of the MMS (Minimum Maintenance Standards), photocopying and reproduction and related disbursements, delivering, handling and pick-up of boxes of material by law clerks, and time taken by the lawyers on the factum and closing submissions. He proposed disallowance of costs claimed for uncalled witnesses. Mr. Davison suggested as reasonable costs

for the plaintiffs in the range of \$375,000. He submitted that they should be shared equally by the defendants, who each were found 50% responsible for the plaintiffs' damages.

[8] On behalf of Mr. Shadid, Mr. Danson's and Mr. Voudouris' submissions attacked the following:

- the late offer by Shadid partway through the trial of \$1,000,000, not matched by York; the suggestion is that there be no costs against Mr. Shadid after the date of that offer, October 31, 2007;
- the plaintiffs' costs claimed over and above \$250,000 are excessive;
- due to the complexity and proportion of trial time and effort on the subject of York's liability, it is submitted that only 5% of the plaintiffs' costs should be borne by Mr. Shadid, and 57% be shared equally with York, which should be liable for the remainder;
- regarding disbursements, because most of the disbursements claimed were directed at the claim against York, it should bear 37% of the disbursements and the remainder should be borne equally by each defendant.

[9] I have reviewed the plaintiffs' counsel's reply submissions.

[10] I would reduce the amount claimed for storage preparation to \$900 from \$2,100. While I understand why a lawyer did this due to the detail involved, I do not see that that entitles the lawyer to a regular hourly rate. I used \$150 per hour as a fair fee for this kind of task, not \$262.50 per hour as claimed.

[11] As to the Shadid offer made on October 31, 2007 during the trial, while I appreciate that I may consider it, I do not accept that it warrants excusal from costs for the remainder of the trial. To do as suggested would be to ignore Rule 49.11 (b)(i) and (ii), and to encourage a defendant to make mid-trial offers knowing that a co-defendant would not contribute significantly, in order to reduce the offering defendant's costs liability. The offer is, as plaintiffs' counsel suggests, not an offer to settle, but rather an offer to contribute. Costs will not be reduced on that account. The policy of the rule is to reduce trial time by making best offers prior to trial, and where there is more than one defendant, the offer is to be by all defendants. In this case, the mid-trial offers by both defendants totaled \$1.3 million, whereas the offers before trial stood at \$500,000 from the defendant Shadid, and \$175,000 from the defendant York. The trial judgment assessed damages at \$1,945,321 (\$1,875,300 plus \$68,021). Disbursements will be reduced by \$976.69 for the witnesses not called, as requested by Mr. Davison.

[12] I have reviewed the other submissions of counsel requesting reduction of the plaintiffs' costs claim, as well as the replies admissions. In my view, the costs claimed are fair and reasonable in the circumstances and are not beyond the expectation of the losing parties. They

were necessary to assist the expeditiousness of the trial, understanding of the evidence, and to achieve what appears to be an excellent result for the clients.

[13] I fix costs of the plaintiffs at:

Fees - \$376,076.33

Disbursements - \$103,363.40

[14] I have included in disbursements an additional \$1,000 of the \$2,400 claimed by Mr. Wollach for post-trial work regarding apportionment of damages. I will have more to say in regard to that issue shortly. Suffice it to say that as that issue requires further attention, I will consider additional costs later. Costs shall be shared equally by both defendants, except for disbursements, one-third of which shall be paid by York and the remainder shared equally. The submission on Mr. Shadid's behalf regarding unequal apportionment of the fee portion ignores the time taken at trial by counsel for Shadid on damages. I therefore do not accept that submission.

Assignment of Benefits

[15] Pursuant to s.267.8 (12) of the *Insurance Act*, I find that there should be an assignment of benefits, but on terms providing that the assignment is only to the extent that the individual defendants must pay under the judgment for related damages. The plaintiff, Ms. Thornhill, shall assign to the defendants her benefits on the following terms, to be interpreted strictly against the defendants in the case of any uncertainty:

- (i) the assignment to each defendant shall not occur until the plaintiffs have received full payment under the judgment including prejudgment interest;
- (ii) only benefits to which Ms. Thornhill is entitled as a direct result of the accident on December 25, 2002 are to be assigned;
- (iii) neither defendant is entitled to benefits for which that defendant was found not liable, and each is entitled to benefits to the extent that each paid in respect of the particular related head of damage;
- (iv) Ms. Thornhill shall carry out her responsibility under s.267.8 (12)(b); she shall be entitled to legal advice regarding any benefits sought by the defendants, and any loss to her resulting from participation required of her in a resulting legal proceeding shall be paid on demand by the defendant that is claiming such benefit.

Protected and Unprotected Defendants: Apportionment of Damages

[16] I have sincerely attempted to understand counsel's submissions under this head. Frankly, I do not. I feel that I have been left with incomplete calculations, discussion of methodologies

which are not carried forward in calculations, calculations by Mr. Wollach without the notes referred to in them, and a methodology from *Sullivan Estate* that counsel's own submissions do not follow. Unfortunately, this subject will have to be dealt with in regard to past income loss and future care costs by further submissions on a date to be fixed by the Trial Co-ordinator. I estimate one-half day for this purpose at the most. Of course, if counsel are able to agree on these issues, they have only to sign a consent indicating the terms of agreement so that I can include it in the judgment. The plaintiffs' counsel agrees with the submissions of counsel for Mr. Shadid regarding the deductibles under s.267.5 (7); I accept that recalculation and no further submissions are required on that subject. The Newmarket Trial Co-ordinator will be in touch with each counsel shortly in regard to fixing a date.

HOWDEN J.

Released: May 20, 2008