



## REASONS FOR JUDGMENT AS TO COSTS

[1] I delivered Judgment in this matter released on July 14, 2004, and my judgment provided for costs to be dealt with at a later date. I have now met with counsel and submissions have been made which have been most helpful.

[2] Paragraph [336] of the Reasons for Judgment reads as follows:

Judgment for the Plaintiff against the Defendants, Richard Allen and the Diocese, is for \$210,500 plus interest as provided in these Reasons pursuant to the *Courts of Justice Act*.

[3] Various offers to settle were made as follows:

OFFER	DATE	AMOUNT
1. Plaintiff's Offer to Settle	September 26, 2003	\$300,000 + PJI from September of 1991 + partial indemnity costs
2. Defendant Diocese's Offer to Settle	October 17, 2003	\$125,000 inclusive of PJI + partial indemnity costs
3. Plaintiff's Counter-Offer to Settle	October 22, 2003	\$250,000 + PJI from September of 1997 + partial indemnity costs
4. Email from Defendant Diocese regarding Final Offer to Settle	October 24, 2003	\$190,000 inclusive of PJI + partial indemnity costs

[4] As set out above, on October 22, 2003, Susan Vella, the senior counsel for the plaintiff ("PD"), made a counter offer to settle for \$250,000.00, plus interest from September of 1997, plus partial indemnity costs.

[5] The final offer was on October 24, 2003 from the Defendant, the Diocese, which was for \$190,000 inclusive of PJI, plus partial indemnity costs.

[6] I awarded PJI as set out in paragraph [319] of my Reasons, which I reproduce as follows:

I award non-pecuniary damages for the childhood abuse at \$125,000.00 which award will bear prejudgment interest at the rate set out in the *Courts of Justice Act* for the appropriate quarter as of September 17, 1991 (9.1%). The request for a blended interest rate by the defence is rejected.

[7] The interest rate assigned to non-pecuniary damages also applies to aggravated damages. Paragraph [325] of my Reasons reads as follows:

In the instant case, the plaintiff as part of general damages claims aggravated damages. I am of the opinion that this is an appropriate case for aggravated damages which I set at \$75,000 to express the Court's view of the conduct of Allen and the Diocese in this case. Allen's attitude during the childhood abuse, when he told the plaintiff that the problem was hers and that she should enjoy it, is just the sort of despicable conduct that will attract aggravated damages. Allen's refusal to apologize for his conduct is also blameworthy. This amount will bear interest in accordance to the date and amount set by me with respect to damages

[8] It is a given, that in all but a very limited number of cases, the successful party is entitled to its costs and costs follow the event, and they will in this case. The only issue is on what scale.

[9] The Judgment that I have awarded in this case, takes into account interest, which amounts to well over \$200,000, bringing my award to approximately \$450,000 plus costs. Clearly, the offer made on October 22, 2003, five days before the trial commenced on October 27, does not meet the well-established Rule 49 test, which is based on the amount of damages awarded prior to the calculation of interest.

[10] It is my judgment, that applying Rule 49, after taking into account the various offers to settle, the plaintiff is entitled to costs on a partial indemnity basis.

[11] Ms Vella has submitted to me that regardless of Rule 49, I should award the plaintiff substantial indemnity costs because of my findings with respect to the trust relationship between PD and Richard Allen, which led to my finding of vicarious liability on the part of the Diocese. In addition, Ms Vella has asked me to exercise my discretion under s. 131 of the *Courts of Justice Act* and Rule 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as amended.

[12] I have considered the non-exhaustive list of factors set out in Rule 57.01(1) and do not find reason to depart from the general principle of costs on a partial indemnity basis. The general principle may be departed from when the claim has a significant degree of novelty or public interest, neither of which, in my view, is present in this case.

[13] In my view, Rule 49 is a very important rule and Appeal Courts have said many times that it must be followed. See: *Niagara Structural Steel (St. Catharines) v. W.D. LaFlamme Ltd.* (1987), 19 C.P.C. (2d) 163 C.A.; 58 O.R. (2d) 773. Moreover, the *jurisprudence* states that departure from the usual costs consequences arising out of the application of Rule 49 requires

“special and rare” conduct plus some reprehensible conduct “to justify the imposition of substantial indemnity costs”, all of which is subject to the overriding principle of reasonableness.

[14] In this case, I am awarding costs on a partial indemnity basis only, in exercise of my discretion and applying Rules 49 and 57.01(1).

[15] In coming to my decision in this case with respect to the scale of costs and also as to quantum, I have been fully cognizant of the recent decision *Boucher v. Public Accountant*, [2004] O.J. No. 2634 (C.A.), which stands for the proposition that the costs claimed must be reasonable.

[16] Other cases considered by me include the following:

*Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.)

*Exxxotica Adult Video v. The Corporation of the City of Burlington*, (Div. Court)  
Court File No. 814/01

[17] I now come to the quantum of costs. In considering the quantum of costs, the length of trial must be of foremost consideration. The dates for this trial were as follows:

October 27 to 31, 2003

November 10, 12 to 14, 17 to 21, 24 to 27, 2003

January 20 to 23, 2004

February 4, 6, 10, 11, 18 to 20, 23, 2004

[18] In addition to the above-mentioned dates, counsel have seen me on at least one other occasion. Mathematically, this case was before me for approximately thirty days.

[19] When counsel appeared before me, counsel for the plaintiff filed a draft of what is called a “Revised Bill of Costs of the Plaintiff” on a partial indemnity scale. This Bill, which is attached to the record as far as fees and GST are concerned, amounts to approximately \$422,265.87. In addition, the plaintiff is seeking disbursements in the amount of \$59,235.47.

[20] The draft Bill was amended further to be for \$375,000.00, plus GST, plus disbursements.

[21] The Revised Bill of Costs sets out how the counsel for the plaintiff calculates her costs and I have noted that at least \$74,000.00 is claimed for a second counsel. My recollection is that the second counsel at trial played an important, but rather minimal role. Virtually all the presentations were made by Susan Vella who is a senior counsel respected by the Courts, and costs claimed in respect of her services are not out of line. However, the amounts claimed for paralegal help including students and law clerks totals \$24,154, which gives me some concern,

which is reflected in the amount referred to in paragraph [25]. In a nutshell, it could be said that amounts claimed for the non-lawyers are far-reaching for a “partial indemnity scale bill”.

[22] A close examination of the draft Bill also shows that various law clerks etc. have all been charged at the top tariff amounts.

[23] I must also mention the fact that the plaintiff, PD, through her counsel, very aggressively put forward the proposition that non-pecuniary damages and what I call “loss of income damages” (including Pension income) must reflect the fact that the plaintiff and Richard Allen were involved sexually when the plaintiff was a consenting adult. A great deal of time was also spent in this case dealing with the proposition that the plaintiff became an alcoholic because of the conduct of Richard Allen, during what I call the “minor years” and the “post minor years”. PD’s counsel argued strenuously that PD became a serious alcoholic that led to her resignation as a Separate School Board teacher in North Bay because of Richard Allen’s conduct.

[24] The defendant’s position in this case is that the Bill filed by Susan Vella, on behalf of the plaintiff, is just too much and is out of all proportion to the amount of the Judgment. The defendant’s counsel raised the issue that I have just touched on, that is, a great deal of the work done by the plaintiff’s counsel was part of an attempt to show the plaintiff is entitled to compensation, not only in the area of non-pecuniary damages, but also for loss of income (I am referring to the fact that she had to take early retirement in 1994).

[25] Applying the principles discussed, I am of the opinion costs should be fixed at \$260,000 plus disbursements and G.S.T.

[26] The disbursements claimed by the plaintiff’s counsel amount to \$59,235.47 as follows:

<b>Disbursements</b>	<b>Amounts</b>
Attendance Monies Paid	\$50.00
Court Reporter/Official Examiner/Court Fees Paid	1,311.91
Trial Record Filing Fee Paid	295.00
Court Forms Fee Paid	25.00
Process Serving Fees Paid	218.00
Summons to Witness Paid	171.00
Mediator’s Fee Paid	900.00

**Experts' Fees Paid as follows:**

Dr. N. Josefowitz	28,653.00
Mr. T. Strezos, C.A.	12,294.00

**Travel Expenses Paid as follows:**

Attend examinations for discovery	1,509.41
Photocopies Paid	10,667.00

**Other Expenses Paid as follows:**

Faxes	540.00
Courier	689.03
Computer Searches	1,413.86
Telephone	84.79
Teleconference Calling	23.47
Medical/Police Reports	390.00

**TOTAL DISBURSEMENTS    \$59,235.47**

[27] I am reducing the disbursement claim by \$7,500 which means that disbursements are \$51,735.47 plus GST. The reduction of disbursements by \$7,500 reflects my inability to justify a claim of \$10,667 for photocopying in what I call a minimal document case. Some of the disbursements claimed under the heading "Other Expenses Paid" are somewhat questionable but in exercising my discretion I am allowing them.

[28] I shall be adding to my trial record that I fixed the costs at \$260,000 plus \$51,735.47 for disbursements plus GST.

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Lissaman J.

**Released:** September 17, 2004

**COURT FILE NO.:** 97-CU-121279

**DATE:** 20040917

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

P.D.

Plaintiff

**- and -**

RICHARD ALLEN

Defendant

**- and -**

THE ROMAN CATHOLIC EPISCOPAL  
CORPORATION FOR THE DIOCESE OF  
SAULT STE. MARIE, IN ONTARIO, CANADA

Defendant

**- and -**

THE MOST REVEREND JEAN-LOUIS  
PLOUFFE D.D.

Defendant

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Lissaman\_J.

Released: September 17, 2004

2004 CanLII 30092 (ON S.C.)

