Taking a hard line on settlement backfires for insurer

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By AdvocateDaily.com Staff

TORONTO — An insurance company that played litigation hardball with an elderly car-accident victim has been ordered to pay $237,000 to cover the legal costs she incurred in winning a $20,000 settlement.

In her decision, Ontario Superior Court Justice Mary Sanderson said it would be contrary to public policy to reward the insurance company's uncompromising behaviour by assessing minimal costs against it.

``Insurers can, of course, pursue whatever strategy options they deem fit," Sanderson wrote. ``But especially where such strategies may have wide ranging and adverse implications involving widespread denial of access to justice, the use of such strategies should not be encouraged by the giving of cost breaks on foreseeable costs consequences."

The case arose in February 2009, when the car an 84-year-old woman was in was rear-ended. The woman initially sued for $1 million.

In response, the defendants' insurance company said it would never pay her any damages. According to court records, the insurer said through its lawyers it would not offer a single loonie to settle. The company said it did not believe the woman had suffered any significant injuries and would fight her tooth and nail.

The only acceptable outcome was a zero dollar settlement, the insurance company maintained. If the woman agreed to take no money, the insurer said it would not pursue legal costs against her. She refused.

However, following pretrial talks and mediation, the woman offered in March 2017 to settle for damages of $20,000, plus legal fees. Two months later, and just two weeks before trial, she said she would accept just $10,000.

``The parties all understood that to possibly succeed at trial, plaintiff's counsel would need to call sufficient medical and other evidence to convince a jury that her injuries had been caused by the accident, that they were real, to prove the quantum of her damages and to satisfy this court that the threshold had been met," Sanderson wrote.

The insurance company opted for a trial that was held in May and June last year at which the company mounted a "vigorous defence," Sanderson noted. In turn, the plaintiff's lawyer called extensive medical and other evidence.

The jury came back and awarded her a total of $67,500 in general damages and for housekeeping, medical and other costs. Following various deductibles mandated by law, the woman was left with a net total award of $20,414.83 — more than the $10,000 she had agreed to accept before trial, documents show.

In arguing for substantial legal costs — $268,000 — the plaintiff's lawyer argued the insurance company was fully entitled to adopt its take-no-prisoners approach, but would have ``appreciated the obvious risks of so doing." The insurance company countered that the demand was unreasonable and should be proportional to what she was actually awarded at trial.

``The costs she is seeking are all out of proportion to the amount recovered and for that reason should be reduced," the insurance company maintained.

Sanderson rejected that argument.

``For this court to let proportionality be the overriding, or even the predominant factor, would be grossly unfair to (the plaintiff) and would be to reward the uncompromising, and — in the light of the jury verdict — unreasonable behaviour of the insurer," Sanderson said.

In an interview with AdvocateDaily.com, Toronto personal injury lawyer Jasmine Daya says she commends Sanderson for exposing a practice that has become more commonplace in personal injury cases involving insurance companies.

"Unfortunately, over the last few years, several insurers are now saying openly to plaintiffs' lawyers that they are taking a similar approach, meaning they won't be offering anything or that they will take a hard line on settlement discussions in an attempt to intimidate plaintiffs and make them walk away," says Daya, managing partner of Fireman Daya & Co.

"I am hopeful that decisions like this will demonstrate to insurers that a reasonable settlement is better for everyone than a long, expensive trial that plaintiff's counsel will proceed with if necessary, particularly given the advent of cost insurance, which has helped level the playing field," she adds.

The insurer had made it clear from the outset it would never pay the plaintiff anything and the decision would not change, the judge noted, a position that she found would ``render meaningless and make a mockery of'' the pretrial resolution process.

The insurance company took one last kick at the can, arguing that the woman should have pursued her case in small claims court given the $20,000 she was awarded — which would have been far cheaper legally speaking. Sanderson rejected that argument, too, saying that approach would not have been practical.

After sifting through all the legal bills, she ordered the insurance company to pay the victim a total of $237,017.50.

— *with files from AdvocateDaily.com*