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A costly mistake: Proportionality affirmed as a guiding principle to cost awards

When the parties to an action settle their dispute but leave costs up to the court, can costs be assessed in an amount greater than the settlement payment? Parties may try, but as always, proportionality governs.

In Mullin v. Lagace (2015 ONSC 4267), the Ontario Superior Court considered this issue.

The plaintiff was a passenger in a car being driven by the defendant. After the car crashed, she sued. Before trial, the plaintiff and the insurer settled for $220,000, but left costs to be settled later. When the parties couldn't settle, the matter was referred to an assessment officer, who awarded more than the settlement amount in costs – some $230,000.

In reducing the costs award to $77,000, plus tax and disbursements for a total of $102,000, the court in Mullin v. Lagace confirmed that costs awards must be proportionate to the amount recovered. The court held that this had to be so, because of the imperative of Rule 1.04(1.1) of the Rules of Civil Procedure. Under that Rule, courts are required to make orders that are proportionate to the importance and complexity of the issues and the amount involved in the action. Given the magnitude of the award, Justice Cornell found that the assessment officer erred in law by failing to address proportionality in his reasons.

The Court held that the insurer's delay tactics throughout litigation also did not justify the excessive award. However, the decision acknowledged that in some circumstances litigation misconduct could justify elevated costs. This would require specific findings of fact. The assessment officer's finding the insurer had engaged in "not unusual" delay tactics did not rise to the level of misconduct that would justify a premium on a proportionate costs award.