The Law of Costs – A Brief Overview

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Introduction

In the preamble to a 2002 decision on the issue of costs, a judge of the Superior Court of Justice commented that "as with all matters in litigation, when the outstanding issues are decided, all that is left is the issue of costs. In the French language the bill is aptly referred to as *"la douleur*" the *"pain*"."[1] There can be no doubt that this sentiment has been shared by many a litigant.

It is a simple fact that litigation is expensive, and has been for a long time. This is well illustrated by the fascinating if perhaps depressing story of Richard of Anesty, a 12th-century English knight who decided to seek the King's justice with respect to his claim of hereditary entitlement to certain lands currently in the hands of a rival. What followed was five years of continuous litigation conducted under a system of civil procedure that often required plaintiffs to, quite literally, follow their suit in person. Anesty eventually won his case, got his land, and lost a fortune in the process.[2]

What makes Anesty's story interesting is that fact that he actually chronicled the litigation in a journal which has come down to us through history. Despite the length and complexity of the litigation, as well as the caliber of Anesty's legal team – his entourage

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[1] *Lammie v. Belair Insurance Co.*, [2002] O.J. No. 4732 at para. 2 (S.C.J.) (QL) [emphasis in original].

[2] Frederick Pollock & Frederic Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. (Cambridge: The University Press, 1898) at 158-59. Pollock & Maitland provide a short summary of Anesty's litigation:

> He was claiming as heir to his uncle certain lands of which Mabel of Francheville, who he asserted to be illegitimate, was in possession. He had to begin by sending to Normandy for the king's writ; soon after he had to send for another writ directed to the archbishop, since the question of bastardy would be transmitted to the ecclesiastical court. The litigation in spiritual form was tedious; he was adjourned from place to place, from month to month. The king summoned the army for the expedition to Toulouse; Richard had to go as far as Gascony for yet another royal writ bidding the archbishop proceed despite the war. The litigation went on for another year, during which he appeared in the archbishop's court on some ten different occasions. Once more he had to visit France, for he required the king's licence for an appeal to the pope. He sent his clerks to Rome and the pope appointed judges delegate. Then his adversary appealed, and again he had to send representatives to Rome. At length the Pope decided in his favour. Thereupon the case came back to the royal court and week after week he had to follow it. The king appointed two justices to hear his cause, and at length by the king's grace and the judge of the king's court he obtained the wishes for land.

of "friends and helpers and pleaders" evidently included some of the more pre-eminent legal minds of his day[3] – Anesty's recollections contribute little to either law or legal history. Instead, they focus almost exclusively on the one issue that was clearly at the forefront of Anesty's mind: his costs. In excruciating detail, Anesty notes the various payments made, horses lost, loans taken out and interest rates charged.[4] As is likely just as true of modern-day litigants, when the question of ultimate success or failure on the merits was left aside, Anesty was concerned less with the contribution his litigation would make to jurisprudence and more with how much he was spending to see the end of it.

Given the expenses involved, it should come as little surprise that the law's attention would be drawn eventually to the question of the costs incurred in enforcing legal rights and who should ultimately be responsible for them. While the law of costs has perhaps not stood out as a significant topic for legal historians, costs and costs jurisprudence would likely have been of just as much interest to early lawyers and litigants as they are to their present-day counterparts.[5]

The History of Costs

The concept of awarding a litigant an amount to compensate him or her for their costs incurred was introduced into English law relatively early. Historically, common law courts had no inherent jurisdiction with respect to awarding costs, thus leaving costs as an exclusively statutory remedy.[6] The traditional starting point for the history of the law of costs is the *Statute of Gloucester*, enacted by King Edward I in 1278. It provided that a

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[3] *Ibid.* at 164 and 214.

[4] An early translation of Anesty's journal is found in Francis Palgrave, *The Rise and Progress of the English Commonwealth* (1832). Palgrave concedes that Anesty's ultimate success in his litigation likely had less to do with the merits of his position or the quality of his representation, but was more likely the product of institutional bias in his favour, his personal connections and influence and the strategic use of disbursements that do not have modern equivalents in Part II of Tariff A.

[5] Arthur Goodhart, "Costs" (1929) 38 Yale L.J. 849 at 852. Aside from some other interesting pieces of historical trivia related to the law of costs, Goodhart notes that a 1793 edition of Hullock's *The Law of Costs* lists over a thousand references in the table of cases.

[6] Mark Orkin, *The Law of Costs*, 2nd ed. looseleaf (Aurora: Canada Law Book, 1987) at 1-1; John Baker, *The Oxford History of the Laws of England*, (Oxford: Oxford University Press, 2003) vol. 7 at 376. But see Pollock & Maitland, *supra* note 2 at 597; William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765) vol. 3 at 399. Several early legal historians have suggested that prior to the statutory rights of costs recovery, plaintiffs were recovering their costs on a regular basis simply by having them subsumed into their claims for damages.

jury could award costs as part of an award of damages to a successful plaintiff.[7] Subsequent statutes further expanded this entitlement, although the right to cost recovery was by no means comprehensive. Aside from a handful of exceptions, no costs were recoverable in an action other than one for damages. Also, costs were not recoverable where an action was ended by means other than a judgment.[8]

A further and more substantial gap in the nascent law of costs also remained: the absence of any provision for a defendant to recover costs. Save for a handful of statutory rights of recovery, successful defendants had no general right of costs recovery in civil actions.[9] Reform in this area was protracted and incremental, starting in the late 15th century when defendants were given a right to costs recovery in failed appeals or successful motions for non-suit. This was followed by several 16th-century statutes that granted a defendant the right to costs in certain types of actions.[10] Comprehensive cost recovery finally arrived in 1607, when successful defendants were granted the right to recover costs in any case where a plaintiff would have recovered them had he or she succeeded.[11]

The costs entitlement conferred by statute was absolute. Costs followed the event, and the courts had little or no discretion to withhold them. This changed with the passage of the *Judicature Acts* of 1873 and 1875 which merged the Court of Chancery with the common law courts. The Court of Chancery, as part of its inherent, equitable jurisdiction, had a wide discretion to award costs in matters before it.[12] As part of the merger of common law and equity, a new principle was established that the costs of any proceeding would now be within the sole discretion of the court. This approach to costs

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[7] 6 Edward I. c. 1 (1278). The actual wording of the statute only referred to a plaintiff recovering "the costs of his writ purchased", but this was liberally interpreted to include all of the attendant costs of the proceeding: Goodhart, *supra* note 5 at 852.
[8] See generally Baker, *supra* note 6 at 376-77.
[9] Goodhart, *supra* note 5 at 853.
[10] *Ibid*. See also Baker, *supra* note 6 at 378-79. Baker provides a detailed description of the various reforms to the law of costs carried out during the Tudor era.
[11] 4 Jac. I, c. 3 (1607). See also Goodhart, *supra* note 5 at 853.
[12] Orkin, *supra* note 6 at 1-1; Goodhart, *supra* note 5 at 854. The Chancery Court's jurisdiction in equity went further than simply granting costs to a successful party. See e.g. *Jones v. Coxeter*, (1742), 2 Atk. 400 (Ch.) where the Lord Chancellor granted the modern equivalent of an interim costs award to a impecunious litigant to allow her to carry on with her case.

has remained relatively unchanged to the present date, and is currently embodied in Ontario in section 131 of the *Courts of Justice Act*.[13]

Purpose and Principles

In the beginning, costs awards were all about indemnification. The purpose of costs was to indemnify, fully or partial, the successful party for the expenses incurred in hiring counsel to defend or enforce their legal rights. The oft-cited statement of the law with respect to costs was that penned by Baron Bramwell in *Harold v. Smith*:

> Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained.[14]

Indemnity remains the primary principle underlying the modern Canadian law of costs. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, the Supreme Court of Canada noted that the traditional purpose of costs awards remains indemnification, and that a regular award of costs has four standard characteristics:

> 1. They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
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> 2. Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
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> 3. They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
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> 4. They are not payable for the purpose of assuring participation in the proceedings.[15]

However, despite its longevity, indemnity is no longer the exclusive governing principle of the law of costs.[16] Three other justifications have been introduced: the encouragement of settlement, the prevention of frivolous or vexatious litigation, and the discouragement of unnecessary steps in proceedings.

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[13] R.S.O. 1990, c. C.43.
[14] (1860), 5 H. & N. 381 at 385.
[15] [2003] 3 S.C.R. 371 at paras. 20-21 [*Okanagan*].
[16] See *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 at 475 (Gen. Div.), where the principle of indemnification was referred to as "outdated."

The encouragement of settlement is achieved through the use of costs awards that penalize a party who has refused to accept a reasonable offer of settlement. In Ontario this is codified in Rule 49.10 of the *Rules of Civil Procedure*, which provides for specific shifts in costs entitlement based on the timing of an offer to settle and the amount of that offer relative to the final judgment. The purpose of Rule 49.10 is to provide an incentive to parties to make offers that reflect a reasonable element of compromise, and to motivate parties to reconsider their settlement positions as litigation moves forward.[17]

The threat of an adverse costs award serves as a strong disincentive for litigants who contemplate pursuing meritless or vexatious claims.[18] In a similar manner the rules with respect to the costs of motions are designed to discourage parties from bringing unnecessary motions by providing that the costs of motions are normally to be fixed and made payable forthwith.[19] As one judge explained, costs fixed and made payable forthwith serves the purpose of "focusing the minds of litigants on the cost of litigation."[20]

Recent decisions have also introduced a further principle into the law of costs: access to justice. Costs awards have been made in situations where the parties in question would normally not be entitled to them, such as where they are represented by counsel acting *pro bono* or where they are self represented.[21]

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[17] *Thomas v. Bell Helmets Inc.* (1999), 126 O.A.C. 353 at para. 54 (C.A.).
[18] *Okanagan*, *supra* note 15 at para. 26.
[19] Rule 57.03 provides:

> (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,
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> (a) fix the costs of the motion and order them to be paid within 30 days; or
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> (b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment.
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> (2) Where a party fails to pay the costs of a motion as required under subrule (1), the court may dismiss or stay the party's proceeding, strike out the party's defence or make such other order as is just.

[20] *Applied Systems Technologies, Inc. v. Sysnet Computer Systems Inc.*, [1992] O.J. No. 745 (Gen. Div.) (QL) [*Sysnet*].
[21] See generally *1465778 Ontario Ltd. v. 1122077 Ontario Ltd.*, [2006] O.J. No. 4248 (C.A.) (QL). The court's reasons reference many of the recent decisions on costs awards in these situations.

Costs in Ontario

The present-day jurisdiction to award costs of proceedings in Ontario is contained in section 131 of the *Courts of Justice Act*:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

While the basic jurisdiction to grant an award of costs has remained relatively unchanged, the procedure for awarding costs has seen several significant changes in the last two decades. Prior to that time, it was common practice for the court to award costs to a party and then for the award to be referenced to an assessment officer to determine the actual amount of the award in accordance with the established tariffs. Beginning in the late 1980s, courts began to eschew the use of assessments in favour of simply fixing the costs of proceedings, first with respect to interlocutory matters and then with all proceedings.[22] The fixing of costs eventually became the standard practice, with the use of references to assessment officers being restricted to "exceptional" cases. In *Boucher v. Public Accountants Council for the Province of Ontario*, the definition of an "exceptional" case was outlined as follows:

> The jurisprudence makes it clear that the determination of whether a case is "exceptional" or not is fact specific and will depend on the circumstances of each individual case. Only if the assessment process will be more suited to effect procedural and substantive justice should the Court refer the matter for assessment. There must be some element to the case that is out of the ordinary or unusual that would warrant deviating from the presumption that costs are to be fixed. Neither complex litigation nor significant amounts in legal fees will be enough for a case to be exceptional. The judge should be able to fix costs with a reasonable review of the work completed without having to scrutinize each and every docket. If that type of scrutinizing analysis is required, then perhaps, the matter would fall within the exception and be referred to assessment.[23]

The fixing of costs is a discretionary exercise by the court, and Rule 57.01(7) provide that it should be accomplished through the use of "the simplest, least expensive and most

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[22] See e.g. *Apotex Inc. v. Egis Pharmaceuticals*, [1991] O.J. No. 1232 (Gen. Div.) (QL); *Sysnet*, *supra* note 20.

[23] (2002), 166 O.A.C. 281 at para. 52 (Div. Ct.), aff'd [2004] O.J. No. 2634 at para. 15 (C.A.) (QL) [*Boucher*].

expeditious process" available. The factors to be taken into consideration are established by Rule 57.01(1):

> In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
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> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
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> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
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> (a) the amount claimed and the amount recovered in the proceeding;
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> (b) the apportionment of liability;
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> (c) the complexity of the proceeding;
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> (d) the importance of the issues;
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> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
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> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;
>
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
>
> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
>
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
>
> (i) any other matter relevant to the question of costs.

The current approach to the fixing of costs in Ontario was articulated in a series of recent decisions of the Court of Appeal for Ontario.[24] The fixing of costs is to be governed by an overarching principle of reasonableness. This approach was summarized by the Court of Appeal in *Zesta Engineering Ltd. v. Cloutier* as follows:

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[24] *Boucher*, *ibid.*; *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495 (C.A.) (QL) [*Zesta*]; *Moon v. Sher*, [2004] O.J. No. 4651 (C.A.) (QL) [*Moon*].

> In our view, the costs award should reflect more what the court views as a *fair and reasonable* amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.[25]

The shift towards a system of fixing costs based on a general principle of reasonableness was matched by a complementary devaluing of the weight given to the costs actually incurred by the successful party. Now, in determining what costs are fair and reasonable, courts have incorporated the reasonable expectations of both the successful and unsuccessful parties. This includes the parties' reasonable expectations as to potential cost recovery had they succeeded, as well as the potential costs that each party would have reasonably contemplated being exposed to had they been unsuccessful.[26]

The fixing of costs at an amount that is "reasonable and fair" also represents a further repudiation of the approach to costs awards that had prevailed under the earlier assessment system and, to a certain extent, under the short-lived costs-grid.[27] This approach was more formulaic, and involved in-depth consideration of the tasks undertaken, the specific time spent, and the applicable hourly rates. Now, instead of being the product of a mechanical exercise, costs awards are to reflect the court's own assessment of what costs are reasonable in a given proceeding.[28]

The current system of costs now utilizes three scales: partial indemnity, substantial indemnity and full indemnity. Partial indemnity costs have been generally defined as "an amount in accordance with the tariffs and practices of a particular court, up to an amount which is necessary to enable the adverse party to conduct the litigation."[29] In Ontario, partial indemnity costs have a technical definition under Rule 1.03 as being "costs awarded in accordance with Part I of Tariff A." While there has never been any precise

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[25] *Zesta*, *ibid.* at para. 4 [emphasis added]; *Boucher*, *ibid*. at para. 24.

[26] See *Moon*, *supra* note 24 at paras. 33-35, where the Court of Appeal noted that excess time spent by a party's counsel was a matter between counsel and the party, but that the client "should not expect the court in fixing costs to require the losing party to pay for over-preparation, nor should the losing party reasonably expect to have to do so."

[27] The grid was introduced in 2002 and was intended to provide assistance in the calculation of costs awards based on a formula of hourly rates multiplied by time spent. The costs grid was never comprehensively embraced and costs remained highly discretionary: see e.g. *Toronto (City) v. First Ontario Realty Corp.,* [2002] O.J. No. 2519 (S.C.J.) (QL). The costs grid was abolished in July 2005.

[28] See generally, *Boucher*, *supra* note 23 at para. 26.

[29] Orkin, *supra* note 6 at 2-1.

formulation of just how much indemnity is provided under the partial indemnity scale, it has been suggested that partial indemnity costs usually range from 50% to 75% of the costs actually incurred.[30]

Partial indemnity costs are the heir to the historical concept of party and party costs, and are the effective default scale of costs in Ontario. The use of a default scale of costs that does not ensure 100% recovery for a successful party has been justified as necessary to balance two competing considerations. The first is the idea that a successful party should not have to bear the costs incurred in enforcing or defending their legal rights. The second is the concern that the threat of potential liability for the other side's total costs will having a chilling effect on the willingness of parties to use litigation to assert or defend their legal rights. The partial indemnity scale strikes a balance between these two considerations.[31]

Substantially indemnity costs have a technical definition in Rule 1.03 as being "costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A." This formulaic definition generally places substantial indemnity costs into the same percentage range as that associated with the historical solicitor-client scale. However, there has been some suggestion that the introduction of the full indemnity scale has had the effect of pushing down the level of indemnification afforded by the substantial indemnity scale below where it stood prior to the 2005 amendments to Rule 57.[32]

The *Rules of Civil Procedure* mandate the use of the substantial indemnity costs in some situations. Examples include the cost consequences of offers to settle under Rule 49.10 and the costs rules applicable to certain summary judgment motions under Rule 20.06. Substantial indemnity costs also remain available to a court to punish reprehensible conduct.

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[30] *Ibid.* at 2-3.
[31] *Ibid.* at 2-6. See also *Foulis v. Robinson*, [1978] O.J. No. 3596 (C.A.) (QL); *Jacobi v. Newell No. 4 (County)* (1994), 28 C.P.C. (3d) 349 (Alta. Q.B.).
[32] *Antorisa Investments Ltd. v. 172965 Canada Ltd.*, [2007] O.J. No. 195 at para. 8 (S.C.J.) (QL) [*Antorisa*].

The full indemnity scale was created by the 2005 amendments to the *Rules of Civil Procedure*, which provided for additions to Rule 57.01(4) that specifically referred to the court's ability to award full indemnity costs. Prior to these amendments, the term "full indemnity" was not employed in the *Rules* with respect to costs. These amendments also created the formal distinction between the substantial indemnity and full indemnity scales.[33] Despite the fact that both substantial indemnity and full indemnity costs appear to have their antecedents in the concept of solicitor-client costs,[34] the substantial indemnity and full indemnity scales are different.

While it has not received much judicial commentary,[35] the full indemnity scale generally appears targeted at approaching or achieving total compensation of the successful party for their legal costs incurred. In *Manufacturers and Traders Trust Company v. Amlinger*, Perell J. suggested that full indemnity costs could include "legal services outside of the litigation and also services within the litigation that cannot reasonably be expected to be paid for by the opposing litigant, although they might be desirable for the client."[36] However, in the 2008 decision of *Burke v. Hudson's Bay Company*, the Court of Appeal for Ontario noted that full indemnity costs were still restricted to costs that were reasonably incurred.[37]

The *Rules of Civil Procedure* do not formally mandate an award of costs on the full indemnity scale in any particular situation, and examples of where such costs have been awarded is rare. Full indemnity costs have been recovered in situations where there is a contractual entitlement to them, such as an indemnity agreement.[38] They have also been

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[33] The current version of Rule 57.01(4) reads :

> Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,
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> (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
> (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
> (c) to award all or part of the costs on a *substantial indemnity* basis;
> (d) to award costs in an amount that represents *full indemnity*; or
> (e) to award costs to a party acting in person.

[34] See generally *Earth Energy Utility Corp v. Maxwell*, [2008] O.J. No. 4306 (S.C.J.) (QL).
[35] See generally *Hanis v. University of Western Ontario* (2006), C.C.E.L. (3d) 105 at para. 21 (Ont. S.C.J.).
[36] [2006] O.J. No. 5547 at para. 8 (S.C.J.) (QL) [*Amlinger*].
[37] [2008] O.J. No. 3936 at paras. 17-18 (C.A.) (QL) [*Burke*].
[38] See e.g. *Antorisa*, *supra* note 32.

awarded in estate actions to fully compensate estate trustees for their costs of dealing with the estate,[39] and in actions involving pension funds.[40] Full indemnity costs, like substantial indemnity costs, also retain the purpose of solicitor-client costs in serving as a tool to punish reprehensible conduct by a party during the course of proceedings; although it is unclear what levels of conduct will justify the use of one scale as opposed to the other.

Conclusion – Future Developments

On January 1, 2010, as a result of the recommendations made in the recent *Civil Justice Reform Project*, a series of amendments to the *Rules of Civil Procedure* will come into effect. One of the key amendments is the proposed Rule 1.04(1.1) which contains a codified principle of proportionality that will apply to the interpretation and application of the Rules:

> In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

While amendments to Rule 57 were proposed,[41] none are contemplated at this time. It is unclear how much of an impact Rule 1.04(1.1) will have on the law of costs. Proportionality has, to some extent, already been incorporated into the law of costs by the jurisprudence, but the question of whether proportionality will now have a greater role in determining costs awards will have to await judicial commentary.

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[39] See e.g. *Ashton Estate v. South Muskoka Memorial Hospital Foundation*, 2008 CanLII 21421 (Ont. S.C.J.).

[40] *Burke*, *supra* note 37.

[41] The Summary Report of the *Civil Justice Reform Project* had recommended that Rule 57.01 be amended to include the factor of the relative success of a party on the various issue raised in the litigation:

> The Civil Rules Committee should consider whether rule 57.01 should be amended to add, as a factor for the court to consider when making a cost award, the relative success of a party on one or more issues in the litigation in relation to all matters put in issue by that party. I make this recommendation not in the context of distributive cost orders (a subject on which the Court of Appeal has spoken), but rather in the context of court time which has been wasted in advancing frivolous claims or defences. It is one thing to advance claims or defences that manifestly have no merit. It is another thing to waste time doing it. Perhaps rule 57.01 (1) (e) is broad enough to capture my concern. I leave that to the Rules Committee.