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RETAIL CASE UPDATE

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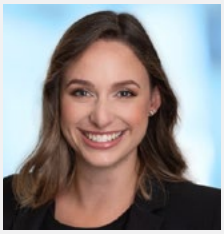

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David and Goliath: Who is Entitled to Costs?

A recent Ontario case, *Przyk v. Hamilton Retirement Group Ltd.*, 2019 ONSC 7498, is notable decision for large retailers, self-insured companies, and insurance companies. In that case, an insurer successfully defended a personal injury claim, but the court refused to award costs in their favour. This result was surprising as it runs contrary to the usual approach where the unsuccessful party bears the costs.

In *Przyk* an elderly plaintiff commenced an action against a retirement home for damages relating to injuries she allegedly suffered in a slip and fall. The defendant was represented by its insurer's in-house legal department. During the course of the litigation, the plaintiff expressed an interest in resolving the action, but the defendant was not interested. The defendant took the matter to trial on liability. An agreement had been reached in respect of damages, which were relatively modest. The jury ultimately found that the defendant was not liable to the plaintiff.

In refusing to award costs, Justice Whitten found that the elderly resident was an average litigant and was at the mercy of the insurer's overwhelming resources. Justice Whitten denied the request for costs based on evidence regarding the insurer's general "hardball" approach to litigation, despite not finding that approach was used in the proceeding before him. He stated that the insurer's strategy was "at risk of allegations of playing hardball" and he went on to say that in some circumstances that approach may result in no costs.

This case is important it underscores that large self insured companies and insurers may bear social responsibility and that courts may deviate from the usual approach regarding costs when there are broader issues, such as access to justice. This should be kept in mind where the amount of resources available on both sides is not equal.