

SUPREME COURT OF NOVA SCOTIA

Citation: Ocean v. Economical Mutual Insurance Company,
2013 NSSC 120

Date: 20130425

Docket: Hfx No 190673

Registry: Halifax

MAY OCEAN, of White's Lake, in the Province of Nova Scotia

Plaintiff

-and-

THE ECONOMICAL MUTUAL INSURANCE COMPANY, a
body corporate, registered to carry on business in the Province
of Nova Scotia and **RAYMOND PATRICK SULLIVAN** of Lantz,
in the Province of Nova Scotia.

Defendants

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: March 12th, 2013 in Halifax, Nova Scotia

Submissions: No submissions received from the Plaintiff.
Submissions received from Mr. Sullivan: February 14th, 2013
Final submissions received from The Economical Mutual
Insurance Company: March 19th, 2013

Decision: April 25th, 2013

Counsel: May Ocean (Plaintiff – did not appear)

C. Patricia Mitchell/Scott R. Campbell for the Defendant,
The Economical Mutual Insurance Company.

Raymond Patrick Sullivan (Defendant - Self-represented)

By the Court:

OVERVIEW

[1] On December 13th, 2000, May Ocean was involved in a significant motor vehicle accident with Raymond Patrick Sullivan. Mr. Sullivan was uninsured at the time of the collision. In the fall of 2010 and January of 2011, a 25-day trial was held to deal with the issues of liability for the collision and whether Ms. Ocean's insurer (hereafter referred to as "Economical") was liable to her under Section D of her automobile insurance policy.

[2] On May 31st, 2011, the Court released a decision apportioning liability for the collision 80% against Mr. Sullivan and 20% against Ms. Ocean. In addition, Economical was found to be liable to pay the Plaintiff the amount that she was entitled to recover from Mr. Sullivan as damages for bodily injuries resulting from the collision, up to a maximum of \$200,000.00. Damages were to be assessed at a later date.

[3] Shortly after the liability decision was released, Ms. Ocean refused to participate further in the proceeding (at least at this level of court.) Despite numerous opportunities to re-engage in the process, Ms. Ocean maintained her position. As a result, after 25 days of trial and numerous hearings, Ms. Ocean's action was dismissed as an abuse of process. The Court now has the task of setting costs for the 25-day liability trial.

BACKGROUND

[4] On December 5th, 2002, Ms. Ocean commenced an action in negligence against Mr. Sullivan. She also claimed against her insurer, Economical, pursuant to the uninsured motorist provisions of her own automobile insurance policy.

[5] In July 2008, Ms. Ocean was granted leave to amend her pleadings to bring a negligence and bad faith claim against Economical. These new claims were bifurcated from the original claims and were ordered to be heard by way of a separate trial.

[6] In September 2008, Economical applied for an order requiring the Plaintiff to be assessed by an independent medical expert in order to determine her competency to represent herself in this proceeding. A psychiatrist who assessed the Plaintiff on behalf of Economical had diagnosed her with a delusional disorder, persecutory type. In addition, there had been a suggestion from her own psychologist that Ms. Ocean had been diagnosed with Post Traumatic Stress Disorder. The application for a psychiatric assessment was granted (see 2008 NSSC 282.) This decision was subsequently overturned by the Court of Appeal (see 2009 NSCA 81.)

[7] In July 2010, the proceedings were trifurcated so that the issue of damages would be dealt with after the motor vehicle accident trial and the trial of the negligence and bad faith claims brought against Economical.

[8] As indicated previously, in the fall of 2010 and early January of 2011, a trial was held to determine liability for the motor vehicle accident and whether Economical was liable to the Plaintiff pursuant to the uninsured motorist provisions of her automobile insurance policy. The trial lasted 25 days. Much of that time was taken up with irrelevant matters raised by the Plaintiff, including what appeared to be a preoccupation with alleged threats that Ms. Ocean perceived to have been made by Economical and/or Mr. Sullivan. In May 2011, a decision was released on liability. On the issue of threats the Court found as follows at ¶ 117-119:

As indicated previously, Ms. Ocean alleges that Economical is involved in monopolistic and “conglomerate” activity. On the first day of trial, Ms. Ocean suggested that she intended to bring forward evidence of this activity so that her witnesses could “relax and come on the stand and not feel intimidated or pressured to lie in their interest and to thwart [her] case”. She went on to suggest that her witnesses were under duress and under threat from both of the Defendants.

In a ruling that I gave that day, I indicated that I was not going to permit a general inquiry into conglomerate or monopolistic activity by the insurance industry. However, I indicated that if Ms. Ocean had specific evidence that a witness had been threatened by either of the Defendants then I would hear that evidence. Various witnesses were questioned about this issue.

Having heard the evidence and viewed the demeanor of the witnesses that testified in this proceeding, I conclude that there is no evidence whatsoever that either of the Defendants threatened the Plaintiff or any of the Plaintiff’s witnesses in any way nor did these witnesses testify under duress. I have no doubt that the Plaintiff believes

that she and some of her witnesses have been threatened by one or both of the Defendants but the evidence simply does not support such a view.

[9] The issue of costs for the trial (hereafter referred to as “the motor vehicle accident trial”) was reserved until the conclusion of the entire proceeding.

[10] Thereafter, the Court case managed the file in an attempt to move the negligence and bad faith claims and the damages portion of the proceeding to trial.

[11] On April 29th, 2011, Economical applied to amend its defence to respond to the negligence and bad faith claims brought against it by the Plaintiff. Ms. Ocean objected to the amendment. On May 26th, 2011, an Order was issued granting Economical leave to amend its defence. The Honourable Justice C. Richard Coughlan ordered Ms. Ocean to pay costs of that motion in the amount of \$1,000.00 payable forthwith. Those costs were not paid.

[12] On September 9th, 2011, a motion was brought by Economical seeking security for costs in the amount of \$100,000.00 in relation to the negligence and bad faith claims brought against it by the Plaintiff. Ms. Ocean was served with notice of that motion but did not file any materials in response, nor did she attend for the hearing of the matter.

[13] On November 25th, 2011 an Order was issued requiring the Plaintiff to post security for costs in the amount \$10,000.00. This Order was not complied with.

[14] On March 20th, 2012, Economical filed a Notice of Motion seeking to strike the Plaintiff’s negligence and bad faith claim against it. Again, Ms. Ocean was served with notice of this motion but did not file any materials in response, nor did she attend for the hearing of the matter.

[15] By decision given on April 24th, 2012, the court dismissed Ms. Ocean’s claims against Economical for negligence and bad faith (see 2012 NSSC 144.)

[16] On October 1st, 2012, Economical filed a Notice of Motion seeking an order dismissing the Plaintiff’s claim for damages. The matter was heard on January 8th, 2013. Ms. Ocean was personally served with copies of the documents filed in support of the motion but, again, she did not file any materials in response, nor did she appear for the hearing.

[17] On January 23rd, 2013, a decision was issued giving the Plaintiff one final opportunity to re-engage in the action (see 2013 NSSC 14.) A further Case Management Conference was scheduled for February 5th, 2013, commencing at 9:30 a.m. Ms. Ocean was advised that if she failed to appear before the Court at that date and time her claim for damages would be dismissed. The Plaintiff did not appear at the time scheduled and, on that date, the remainder of her action was dismissed.

[18] Against this background the Court must now assess the costs that should be awarded in relation to the 25-day motor vehicle accident trial that concluded in January of 2011.

THE RELEVANT CIVIL PROCEDURE RULES

[19] As a preliminary matter, the Court must determine whether the 1972 *Rules* or the 2009 *Rules* on costs should be applied to the circumstances of this case. The 2009 *Civil Procedure Rules* took effect on January 1st, 2009, for all non-family actions. Civil Procedure Rule 92 deals with the transition from the 1972 *Rules* to the present *Rules*. There is a presumption in Civil Procedure Rule 92 that the 2009 *Rules* apply to an action started prior to January 1st, 2009, unless Rule 92 provides or a judge orders otherwise. A judge who is satisfied that the application of Rule 92 to an action started before January 1st, 2009, causes one party to gain an unfair advantage over another party may order that the *Nova Scotia Civil Procedure Rules* (1972) apply to that proceeding or part of the proceeding (see C.P.R. 92.08(2)(b)).

[20] The motor vehicle accident trial was an action commenced prior to January 1st, 2009. In my view, applying the 2009 *Rules* on costs will not cause one party to gain an unfair advantage over the other. Accordingly, I will apply the 2009 *Rules* when assessing costs.

[21] Costs are governed by Civil Procedure Rule 77. Civil Procedure Rule 77.02 provides:

General discretion (party and party costs)

77.02(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

(2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

[22] Rule 77.03 provides:

Liability for costs

77.03 (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.

.....

(3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

.....

[23] Rule 77.06 (1) provides:

Assessment of costs under tariff at end of proceeding

77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

.....

[24] The Tariffs are based on the amount involved in a proceeding. The Tariffs provide:

In these Tariffs unless otherwise prescribed, the “amount involved” shall be

- (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
 - (i) the amount allowed,
 - (ii) the complexity of the proceeding, and
 - (iii) the importance of the issues;
- (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to

- (i) the amount of damages provisionally assessed by the court, if any,
 - (ii) the amount claimed, if any,
 - (iii) the complexity of the proceeding, and
 - (iv) the importance of the issues;
- (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
- (i) the complexity of the proceeding, and
 - (ii) the importance of the issues;
- (d) an amount agreed upon by the parties.

[25] Rule 77.07 provides:

Increasing or decreasing tariff amount

77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

- (a) the amount claimed in relation to the amount recovered;
- (b) a written offer of settlement, whether made formally under Rule 10 -Settlement or otherwise, that is not accepted
- (c) an offer of contribution;
- (d) a payment into court;
- (e) conduct of a party affecting the speed or expense of the proceeding;
- (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
- (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) a failure to admit something that should have been admitted.

.....

[26] Rule 77.08 provides:

Lump sum amount instead of tariff

77.08 A judge may award lump sum costs instead of tariff costs.

[27] Rule 77.10 provides:

Disbursements included in award

77.10(1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

(2) A provision in an award for an apportionment of costs applies to disbursements, unless a judge orders otherwise.

[28] Finally, Rule 77.12(1) provides:

Award of costs in other circumstances

77.12 (1) A judge may award, assess, and provide for payment of costs for any act or omission of a person in relation to a proceeding or an order.

.....

THE PARTIES' POSITIONS

[29] The Plaintiff has not filed any materials on the issue of costs, nor did she participate in the hearing of the matter. For the purpose of this decision, I will assume that the Plaintiff is seeking costs for the motor vehicle accident trial.

[30] Mr. Sullivan has advised the Court that he is not seeking costs from Ms. Ocean and submits that he should not be ordered to pay costs to the Plaintiff due to the prolonged nature of the proceeding.

[31] Economical is seeking costs from Ms. Ocean. It submits that the only contested issue between itself and the Plaintiff in the motor vehicle accident trial was the amount of the policy limit for Section D coverage if liability was found on the part of Mr. Sullivan. It notes that the Court agreed with its submission and found that the policy limit was \$200,000.00.

[32] Economical seeks to base costs on the Tariffs. It acknowledges that it is inherently difficult to determine the “amount involved” for the purpose of the Tariffs since the Plaintiff did not proceed with the damages portion of her case. At page 7 of Economical’s brief the issue is summarized as follows:

Arguably, it could be said that \$200,000 is the most identifiable ‘amount involved’ for the purpose of Tariff A, because it is a clear and fixed number as between the Plaintiff and Economical. The fact remains, however, that we will never know the actual ‘amount involved’. The Plaintiff has never pleaded the specific amount of her requested damages, and she has now created the circumstance by which the assessment of damages will never occur.

[33] Economical submits that it would be just and appropriate to defer to a method that has been used in a number of cases that did not involve a monetary amount and use what has become known as the “rule of thumb” approach, whereby the court considers each day of trial to be equal to a set amount in order to determine the amount involved. Economical has referred the court to **MacCormick v. Dewar**, 2011 NSSC 10, where Bourgeois, J. determined the “amount involved” by considering each day of trial to be valued at \$20,000.00, as well as **Fermin v. Yang**, 2009 NSSC 222, where B. MacDonald, J. referred to this approach.

[34] In its original materials filed with the Court in relation to costs, Economical submitted that the amount involved should be set at \$500,000.00, which reflects twenty-five days of trial at \$20,000.00 per day (using the “rule of thumb” approach). Applying Scale 2 of Tariff A of the 2004 Tariff of Costs and Fees would result in a basic costs award of \$34,750.00. In addition, as per Tariff A, Economical sought an additional sum of \$2,000.00 per day of trial, which amounts to an additional \$50,000.00. Accordingly, Economical sought costs of \$84,750.00 (\$34,750.00 + \$50,000.00 = \$84,750.00) plus disbursements in the amount of \$3,825.15.

[35] At the hearing of the matter, the issue arose as to whether the 1989 or 2004 Tariffs apply to this action, which was commenced in December 2002. Economical acknowledged (properly in my opinion) that the prevailing view is that the 2004 Tariffs apply only to proceedings commenced on or after September 21st, 2004. Since this action was commenced prior to that date, the 1989 Tariffs would apply (see **Ackermann v. Kings Mutual Insurance Company**, 2012 NSSC 3, and the cases referred to therein.)

[36] Economical submits that under Scale 3 of the 1989 Tariffs basic costs would be \$19,375.00 on an “amount involved” of \$500,000.00. If one uses Scale 5 (to take into account the unusual circumstances of this case) basic costs would be \$30,325.00. In addition, while the 1989 Tariffs do not provide for an additional \$2,000.00 per day for each day of trial, Economical nevertheless claims this amount noting that this was done (without reasons) in **Ackermann v. Kings Mutual Insurance Company**, *supra*.

ANALYSIS AND CONCLUSIONS

[37] I should begin by commenting upon the effect, if any, that the Plaintiff’s mental health should have on the issue of costs.

[38] Throughout this proceeding concerns have been expressed about the Plaintiff’s mental health. One must consider whether Ms. Ocean’s mental health should be taken into account when dealing with the issue of costs.

[39] In my view, any mental health issues that the Plaintiff may suffer from should not insulate her from an order for costs. To decline to award costs due to the mental health of a party in a situation in which costs would otherwise be granted would, in my view, improperly penalize the party entitled to costs for circumstances that are beyond their control. Having said that, the issue of costs cannot be decided in a vacuum. When the court considers whether the conduct of a party affected the speed or the expense of a proceeding or whether improper or unnecessary steps were taken, it may take into account the fact that a party’s mental health may have made it more difficult to effectively and efficiently present their case. In other words, the court can recognize that conduct which prolonged a proceeding was not necessarily done with intentional disregard for the process or an intent to delay.

[40] That takes me to the issue of the proper costs award in the circumstances of this case. It is appropriate, in my view, to deal with the Defendants separately when it comes to the issue of costs.

RAYMOND PATRICK SULLIVAN

[41] As indicated previously, Mr. Sullivan was involved in the motor vehicle accident with Ms. Ocean. He was found to be primarily responsible for the collision. Ordinarily, costs are awarded to the successful litigant. In this case, that would mean that costs would be apportioned on the same basis as liability. In other words, Ms. Ocean would be granted 80% of her costs and Mr. Sullivan would be granted 20% of his costs. However, nothing about this case was ordinary.

[42] The 25-day motor vehicle accident trial was consumed by the Plaintiff's fixation with a number of issues unrelated to the accident itself. Despite repeated attempts to have the Plaintiff focus on the matters in issue, a great deal of time and effort was spent on ancillary matters that were not before the Court in this trial. This issue was dealt with in the decision relating to liability for the motor vehicle accident where it was stated at ¶ 123-124:

Counsel for both of the Defendants have expressed concern about the length of time that it took to hear this trial and the significant costs that have been incurred as a result. A trial which, in my view, would have taken no more than 5 days to hear with experienced counsel ended up being heard over approximately 25 days.

As a self-represented litigant, Ms. Ocean cannot be expected to conduct her case as effectively as an experienced lawyer. The difficulty in this case, however, went far beyond inexperience. Ms. Ocean appeared to be unable or unwilling to focus effectively on the matters that were in issue and seemed intent on subpoenaing witnesses and introducing evidence that was not relevant to this proceeding. In addition, she made serious allegations against both of the Defendants (such as allegations of threats) that were not supported by the evidence.

[43] As a result of the Plaintiff's actions, the trial was unfocused and consumed an inordinate amount of resources and time. This did not appear to be of concern to the Plaintiff, who was self-represented, but was clearly of concern to the Defendants both of whom had counsel at the time. (Mr. Sullivan has subsequently become self-represented.)

[44] When considering costs the Court may take into account whether the conduct of a party affects the speed or expense of the proceeding (C.P.R. 77.07 (2)(e)). It can also consider whether steps in the proceeding were taken improperly, abusively or unnecessarily (C.P.R. 77.07(2)(f)). See also C.P.R. 77.12 (1). Ultimately, the Court strives to issue an order relating to costs that will do justice between the parties (C.P.R. 77.02(1)).

[45] In my view, a great deal of the time expended on the motor vehicle accident trial was unnecessary and wasted. As was indicated in my decision on liability, a trial that would have taken no more than 5 days to hear with experienced counsel ended up being heard over approximately 25 days. This resulted in great expense. Despite the fact that Ms. Ocean was substantially successful in her liability claim against Mr. Sullivan, and I have concluded that neither Mr. Sullivan nor Ms. Ocean should pay costs to the other and that an order providing for no costs payable between these two parties will do justice between them.

ECONOMICAL

[46] As indicated previously, costs are usually awarded to the successful litigant. They are intended to reflect a substantial but partial contribution towards the successful party's reasonable expenses. In this trial, as between Ms. Ocean and Economical, it is difficult to consider either one of them to have been the successful litigant as that term is usually understood. This is due to the fact that there was very little in issue between these two parties at the time of the motor vehicle accident trial and Economical's participation was driven by a number of factors that did not require adjudication by the Court. I will elaborate.

[47] In its original Defence filed in 2003, Economical denied that the Plaintiff had a valid insurance policy in place at the time of the collision and took the position that if Ms. Ocean suffered any injury, loss or damage then such was caused or contributed to by the Plaintiff's own negligence. However, in 2008, Economical withdrew its suggestion that Ms. Ocean did not have a valid insurance policy at the relevant time as well as its defence of contributory negligence. By the time of trial, Economical had admitted that Mr. Sullivan was uninsured at the time of the collision, that Ms. Ocean had a valid insurance policy with Economical at the time of the accident and it did not take any position on liability for the collision. As noted in Economical's brief on costs, the only contested issue between the insurer and Ms. Ocean at the time

of the liability trial was the amount of the policy limit for Section D coverage if Mr. Sullivan was found to be wholly or partially responsible for the accident. In my view, this issue, which is a question of law, could have been dealt with prior to the trial pursuant to Civil Procedure Rule 12.

[48] The issue then arises as to whether it was necessary or reasonable for Economical to participate in the motor vehicle accident trial. In other words, since the only issue between Economical and Ms. Ocean could have been dealt with by way of a motion prior to trial, was it reasonable for the insurer to participate in a 25-day trial and then seek costs in relation to that trial? After considering all of the circumstances, I have concluded that it was reasonable for Economical to participate in the trial and to seek costs in relation thereto.

[49] As a preliminary matter, until late July 2010 (shortly before the trial began) it was thought that damages would be dealt with as part of the motor vehicle accident trial. Economical clearly would have had to be involved in the trial if damages were being considered. It was only in July 2010 that the court decided to deal with the issue of damages after both liability trials were concluded. This is important as prior to that time there wouldn't have been any reason for Economical to consider bringing a motion pursuant to Civil Procedure Rule 12.

[50] In addition, the manner in which the proceeding was being conducted by the Plaintiff was such that it was reasonable for Economical to participate in the trial. I will explain.

[51] Ms. Ocean has been self-represented since 2006. Over the years, her claims appeared to represent a moving target. I will provide a few examples.

[52] Shortly prior to the liability trial, Ms. Ocean filed correspondence with the court in which she indicated that she was advancing a claim for Section B benefits. No such claim was referred to in her Statement of Claim filed but, nevertheless, she attempted to advance a Section B claim on the eve of the trial.

[53] Further, during the trial, Ms. Ocean advanced a theory that Mr. Sullivan may have been racing with a large grey vehicle just prior to the collision. Again, there was no reference to this in Ms. Ocean's Statement of Claim.

[54] Clearly, Economical would have had an interest in both of these matters. They were Ms. Ocean's Section B insurer and would have had to respond to any Section B claim she may attempt to advance. Further, Section 4(1)(d) of the *Uninsured Automobile and Unidentified Automobile Coverage Regulations* provides that an insurer is not liable under subsection 3(1) of the said *Regulations* to a claimant who is legally entitled to recover a sum of money under the third party liability section of any motor vehicle liability policy. Accordingly, if Mr. Sullivan had been racing with an insured vehicle prior to the collision, this may have affected Economical's liability to Ms. Ocean under Section D of her policy. In my view, it was reasonable for Economical to participate in the trial to ensure that they could deal with these types of issues as they arose.

[55] Further, Economical was being sued for negligence and bad faith by Ms. Ocean and was, in my view, justifiably concerned about the Plaintiff attempting to introduce evidence during the motor vehicle accident trial about the negligence and bad faith claims that she had advanced. They wanted to be in a position to respond if this occurred (which it clearly did.) For all of these reasons, I am satisfied that it was reasonable for Economical to participate in the motor vehicle accident trial despite the limited issues that the Court had to adjudicate upon between these two parties.

[56] While I have concluded that Economical's participation in the trial was reasonable, it is difficult to also conclude that they were the "successful" party as this term is usually used. Clearly, they were successful on the matter of the policy limits for Section D but this was a very small issue in the overall proceeding, which took minimal time to deal with.

[57] The negligence and bad faith claims (which were part of the reason why Economical participated in this trial) have now been dismissed without being decided on their merits. One cannot know which party would have succeeded had those matters proceeded to trial. In saying this, I recognize that it is Ms. Ocean's actions that have prevented this from occurring.

[58] I am satisfied that Economical is entitled to costs in relation to this trial. The question is the appropriate figure for costs.

[59] Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed in accordance with the Tariffs of Costs and Fees determined under the *Costs*

and Fees Act. As stated previously, the Tariffs are based on the “amount involved” in a proceeding as defined in the Tariffs. In this case it is difficult to determine the “amount involved” for a number of reasons. First, the Tariffs are not designed to deal with cases where liability and damages have been severed. Second, we have a situation where a specific amount of damages was never formally claimed, determined or provisionally assessed. It would, in my view, be an artificial exercise to attempt to determine the “amount involved” for the purposes of the Tariffs.

[60] Further, I do not favour the “rule of thumb” approach suggested by Economical. In the Court of Appeal decision in **Veinot v. Veinot Estate et al.** (1998), 172 N.S.R. (2d) 111 (C.A.); leave to appeal to the Supreme Court of Canada refused at (1999), 183 N.S.R. (2d) 197 (S.C.C.), Pugsley, J.A. stated at ¶ 26:

With respect, I do not agree, however, that the rule of thumb, employed by the trial judge was an appropriate yardstick. It is, in my view, an arbitrary classification which in most cases, except by happenstance, would be of little relevance.....

[61] I conclude that in the unique circumstances of this case the court should exercise its discretion to award lump sum costs instead of Tariff costs (see C.P.R. 77.08.)

[62] In determining lump sum costs there are a number of matters that the court should consider over and above the protracted and unfocussed nature of this proceeding. First, in August of 2008 (well before the motor vehicle accident trial) Economical served Ms. Ocean with a formal Offer to Settle in the amount of \$75,000.00 plus interest, taxable costs and disbursements. This offer was not withdrawn until March 5th, 2012 (more than a year after the conclusion of the said trial.) Ms. Ocean’s subsequent abandonment of her action and the resulting dismissal, make it impossible to know whether this offer was less than or greater than the amount the Plaintiff would have been entitled to had she continued with her action.

[63] Further, Economical points out that the immense cost of the first trial has been “all for nothing at the end of the day” in light of the Plaintiff’s subsequent refusal to complete the proceeding. While this submission is correct, one cannot help but note that the Plaintiff’s eventual refusal to proceed with the action has resulted in a benefit to Economical in the sense that Ms. Ocean’s claim for damages (which Economical

was responsible to pay up to a maximum of \$200,000.00) has now been dismissed. While it is impossible to know how much this benefit is worth to Economical (and it would be improper, in my view, to speculate) we know that Economical's possible exposure was to a maximum of \$200,000.00 exclusive of interest and costs.

[64] If I had concluded that the "amount involved" in the proceeding was \$200,000.00 (which was Economical's maximum exposure under the policy in question) costs under the 1989 Tariffs would have been up to \$10,375.00 under Scale 3 and up to \$15,325.00 under Scale 5. Clearly, these figures would not be sufficient for a 25-day trial. The court has the discretion to increase this figure if the Tariff amount does not produce a reasonable figure taking into account a number of considerations including those listed under C.P.R. 77.07(2). The question remains, what figure is appropriate in the circumstances?

[65] After considering all of the above (including the long and protracted nature of the proceeding, the limited number of matters that were in issue between these two parties in this trial and the fact that Economical has been relieved of its obligation to pay Ms. Ocean's claim for damages), I have concluded that it is appropriate to award Economical lump sum costs of \$25,000.00¹ plus disbursements in the amount of \$3,825.15, such costs and disbursements payable forthwith.

OUTSTANDING COSTS AWARDS

[66] During the course of this proceeding, costs were ordered against the Plaintiff on various occasions with the payment of same being deferred until a later date (such as the conclusion of the proceeding) or a date to be set by the court. These costs Orders are as follows:

- (a) Order issued August 5th, 2008. Total costs and disbursements payable by the Plaintiff to Economical in the amount of \$3,215.30;
- (b) Order issued January 25th, 2010. Costs and disbursements payable by the Plaintiff to Economical in the amount of \$1,000.00;
- (c) Order issued August 5th, 2010. Costs and disbursements payable by the Plaintiff to Economical in the amount of \$900.00;
- (d) Order issued December 7th, 2011. Costs and disbursements payable by the Plaintiff to Economical in the amount of \$818.96;

- (e) Order issued April 24th, 2012. Costs and disbursements payable by the Plaintiff to Economical in the amount of \$3,944.78.

[67] As this action is now concluded, these various costs awards are payable forthwith.

[68] The Plaintiff shall forthwith pay costs to Economical in the amount of \$38,704.19 such costs representing:

Order issued August 5 th , 2008	\$ 3,215.30
Order issued January 25 th , 2010	\$ 1,000.00
Order issued August 5 th , 2010	\$ 900.00
Order issued December 7 th , 2011	\$ 818.96
Order issued April 24 th , 2012	\$ 3,944.78
Motor vehicle accident trial (costs and disbursements)	\$28,825.15
<u>Total</u>	<u>\$38,704.19</u>

[69] These costs are in addition to any other Orders relating to costs which remain outstanding.

Deborah K. Smith
Associate Chief Justice

Note:

¹ This figure includes costs relating to the motion to sever the issue of damages which was heard by the court in July of 2010.