

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Ketler v. Nova Scotia (Attorney General)*, 2015 NSSC 242

**Date:** 2015-08-20

**Docket:** Tru No. 340878

**Registry:** Truro

**Between:**

Mark Paul Ketler

Plaintiff

v.

The Attorney General of Nova Scotia,  
representing Her Majesty the Queen in right of  
the Province of Nova Scotia

Defendant

**Judge:** The Honourable Justice Gregory M. Warner

**Heard:** November 8 to 15, 2013 at Truro, Nova Scotia  
Written Decision: 2015 NSSC 170

**Final Written** August 7, 2015

**Submissions on Costs:**

**Counsel:** Nicolle A. Snow, counsel for the plaintiff  
Duane Eddy, counsel for the defendant

**By the Court:****Submissions to August 7, 2015**

1. Parties have agreed on costs flowing to the defendant following the court's decision at 2015 NSSC 170, with the exception of the successful defendant's claim for recovery of the full invoice costs of its expert witness, Dr. John Robinson, a civil engineer, in the amount of \$34,635. The plaintiff produced an expert report and testimony from a civil engineer on the same issues and has produced his invoice totalling \$8,506.

2. *Civil Procedure Rule 77.10* reads:

**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.

3. In *Claussen Walters & Associates v Murphy*, 2002 NSCA 20 ("*Claussen*"), Saunders J.A. wrote at para 12:

A finding of relevance, however, did not end the matter. Before obliging the unsuccessful appellants to pay a significant disbursement of almost \$16,500, the trial judge was required to consider whether the amount charged was just and reasonable. The proper approach was described by Chief Justice Cowan in **J.D. Irving Ltd. v. Desourdy Construction Ltd.** (1973) 5 N.S.R. (2d) 350 at p. 362:

In my opinion, Civil Procedure Rule 63.37, Clause (5) is to the same effect as the old Order LXVIII, r. 23 (vii) and the taxing master is to allow any just and reasonable charges and expenses as appear to him to have been properly incurred in procuring evidence and the attendance of witnesses. Charges by experts and others who are called as witnesses or attend as witnesses are to be allowed, but the amount allowed is to be fixed by the taxing master, having regard to the test of what is just and reasonable in the circumstances.

4. In *Cashen v Donovan*, [1999] N.S. J. No. 77 ("*Cashen*"), Goodfellow J. enumerated a non-exhaustive list of factors that might be considered in the determination of whether a disbursement for expert evidence was reasonable.

5. The analytical approach of Goodfellow J. in *Rhyno Demolition v Nova Scotia*, 2005 NSSC 147 (“*Rhyno Demolition*”), in respect of an expert’s bill totalling \$46,000 and of Wright J in *Andrews v Keybase Financial Group*, 2014 NSSC 287 (“*Andrews*”), where the accounts of two experts, one for \$23,800 and the other for \$108,700, are logical and instructive.

6. The onus is on the defendant to prove the necessity and reasonableness of the disputed disbursement.

7. Dr. John Robinson is a professional civil engineer with 44 years of work experience in traffic and transportation systems in North America. He played a key role in the development of road safety standards for highways in North America and as a road safety advisory, auditor and instructor. He prepared a 23-page report and testified at trial. As noted in the trial decision, his report and evidence was thorough; relied upon by the court and critical to the court’s understanding of the evolution of bridge standards in North America, Canada and Nova Scotia at various times and how they related to the condition of the bridge railing in issue in this case.

8. The defendant seeks to recover all of Dr. Robinson’s firm’s three invoices to the defendant for services in relation to this litigation. Attached to the three invoices are time sheets.

9. My breakdown of his services in the three invoices is as follows:

- i. Initial review of file materials – 1 hour
- ii. Preparation for and attendance at site visit on May 29, 2012 – 6 hours
- iii. Preparation for and meeting with client in January 2013 – 4.5 hours
- iv. Research and preparation of his opinion in August and September 2012 – 24 hours
- v. Preparation of final report (3½ days) in February 2013 – 28 hours
- vi. Reviewing notes, further research, answering inquiries from client and second site visit (September – October 2013) – 17 hours
- vii. Additional preparation for trial (1½ days) – 12 hours
- viii. A “stand-by” charge for attendance at trial the day before his evidence – 9 hours
- ix. Trial testimony on November 15, 2013 (from court opening at 9:30 am to about 11:45 am) – 5 hours

Total time by Dr. Robinson – 107.5 hours

10. The rates charged by Dr. Robinson were \$310 per hour for trial testimony (item ix), \$170 per hour for stand-by (item viii), and \$280 per hour for all his other time. In addition, one invoice identifies 6 hours at \$90 per hour for technical support by another person. The service is not described in the timesheets. All out-of-pocket disbursements are charged for two site visits and two days travel for the trial.

11. The plaintiff submits that the expert overbilled the defendant and that his account are unreasonable. The plaintiff's specific objections include:

- i. His hourly rate is too high.
- ii. The timesheets describe generally 107.5 hours by Dr. Robinson but not the 6 hours invoiced by a technician at \$90 per hour.
- iii. That 57 hours for file review and preparation of the report at \$280 is excessive.
- iv. No site visits were necessary. They added no value. The site had changed by the time of the first site visit and extensive photographs of the site were available.
- v. The defendant's expert disbursement is substantially higher than the reasonable bill of the plaintiff's expert. The plaintiff's expert's bill informs the unreasonableness of the defendant's expert disbursement.

12. The plaintiff does not challenge that it was reasonable or necessary for the defendant to retain an expert to produce a report and testify.

### Analysis

13. A useful starting point is Justice Goodfellow's enumeration of 11 non-exhaustive factors in the *Cashen* decision.

1. Whether the incurring of the disbursement was necessary or appropriate.

14. The plaintiff concedes that the retention of an expert was necessary and appropriate.

2. The amount involved in the litigation.

15. No evidence was provided by either party as to the plaintiff's quantification of his

claim at the time the experts were retained. The plaintiff's pre-trial brief, filed shortly before the trial, quantifies the claim as approximately \$200,000.

3. Complexity of the issues.

16. The trial lasted five days. Three physicians testified as to the plaintiff's injuries, but most of the evidence related to the condition of the bridge at various times relevant to liability as well as the duty on, and standard of care of, the defendant for the condition of the bridge railing. The duty and standard of care issue consumed most of the trial time and was somewhat more complex than a normal accident case. The relevant documentary exhibits respecting the liability issue contained approximately 1,053 pages of manual and policy excerpts, reports, data and photographs.

17. While not overly complex, I disagree with the plaintiff's assessment that the issues involving the expert evidence was not complex.

4. Whether or not sufficient expert opinion was readily available without incurring the costs ...

18. As noted above, the primary liability issue was identification of the duty and standard of care on the defendant. This required evidence from experts of the calibre and experience of Dr. Robinson. His qualifications and experience on the engineering committees that set safety standards for public highways, as an auditor of public highway projects, instructor other engineers as the appropriate standards, and writer of several important learned publications on the main liability issue, distinguished his opinion. This case benefitted from the level of his expertise.

5. Whether the incurring of the disbursement was necessary for the conduct of the litigation.

19. As noted above, the answer is: yes, it was necessary for the conduct of the litigation.

6. Whether or not the expert's report was of any assistance to the court?

20. Dr. Robinson's objective, concise but thorough report and his oral explanation of standards for road safety in North America, including as they relate to bridge railings, was central to the liability issue and was relied upon by the court in its entirety.

7. Professional quality of the expert's opinion

21. Dr. Robinson's report met a high-professional standard. It was clearly written, logically organized, concise but thorough. It contained the relevant factual basis of his opinion. It appeared to be free from bias, vagueness and inaccuracies.

8. Hourly rates in the profession and the extent to which the particular experts' hourly rate may vary from any standard and, if so, whether it is justified and to what extent.
22. No evidence was tendered to place Dr. Robinson's rates with those charged by professionals of his expertise and experience. Based on case law involving expert evidence before the court, and taxation decisions, this court concludes that Dr. Robinson's rate for research and trial evidence, based on his specialized, knowledge, experience and the quality of his report, was not out of order with professionals generally for forensic or opinion evidence.
23. Obviously the qualifications and experience of professional engineers may vary and the rates charged by lesser qualified or experienced engineers, may vary. Based on the extensive personal resume of Dr. Robinson, he appears to be a very busy professional, working full-time in an engineer firm, and at the peak of his career.
24. The plaintiff's materials included copies of two invoices of Dr. Wilson. He charged the plaintiff \$150 an hour for all his time (except travel time at \$50 per hour). It appears from his invoices that he works out of his home. Dr. Wilson was a highly qualified professional. It appears from his professional resume that he is, for the most part, semi-retired. Based on his identification of his education background, it appears that he is in his late 70s (High School matriculation in 1953). The majority of his extensive (111) writings were published between 1965 and 1980. Ten have been published since the year 2000.
25. As noted in the court's decision, the report prepared by Dr. Wilson did not match that prepared for this case by Dr. Robinson. The rate charged by Dr. Wilson does not inform the court about the reasonableness of Dr. Robinson's rate.
26. Having said that, for a professional engineer with the qualifications and experience of Dr. Robinson to charge at the rate that he charged in this case, would suggest that the time that he would need to review, research and prepare a report respecting issues central to his experience and expertise should be less than the time of a less experienced and qualified expert. The fact of his hourly rate has influenced the court's view of the reasonableness of the time he charged for research, preparation of his opinion, preparation his final report, and preparation for his oral evidence.
9. The relevance of the expert opinion evidence to the issue in question.
27. At the risk of redundancy, Dr. Robinson's opinion evidence was central to the legal issue of the duty and standard of care on the defendant.
10. Reduction in the expert's account, the extent of any collateral

benefit. ...

28. No collateral benefit was identified in the submissions of counsel.

11. Examination of the nature of the work and time involved in the preparation of the expert's report and any possible additional time requirement to respond to any subsequent expert's report.

29. The three invoices and, in particularly, the time sheet attached to the third invoice that relates to services charged for preparation for trial and attendance at the trial show that Dr. Robinson was consulted and asked about collateral issues, likely raised in Dr. Wilson's evidence.

30. At the trial, defence counsel attempted to lead evidence from Dr. Robinson about Dr. Wilson's report in evidence. Because no rebuttal report had been prepared and filed pursuant to *CPR 55*, the court ruled that defence counsel could not pursue eliciting rebuttal evidence from Dr. Robinson about Dr. Wilson's opinion.

## **Conclusion**

### **Point #1      Hourly Rate**

31. The justification for the high hourly rate charged by Dr. Robinson is his special expertise and extensive experience with the subject matter of his report – the duty and standard of care of public authorities respecting road safety. In that context, it is difficult to understand why it took 24 hours of research and preparation for an opinion in August – September 2012 (3 days) and a further 28 hours in February 2013 (3½ days) to produce his 23-page report. The time to research and prepare a report should reasonably be reduced in proportion to the level of expertise and experience of the author.

32. In my view, the time to prepare the report in February 2013, excluding the first site visit, and to conduct the review and research that resulted in the formulation of his opinion in September 2013 (31 hours) should not have exceeded two days (16 hours).

### **Point #2      Site Visits**

33. The plaintiff says that a site visit (first – six hours including two hours preparation; and second – four hours on the eve of the trial) was unreasonable or unnecessary.

34. In my view, the first site visit, to put the inspection reports and photographs into context, was reasonable. I am not satisfied that the second site visit was necessary or reasonable or what purpose it served.

35. I reduce the claim by four hours plus travel (\$108.16).

### **Point #3 Preparation Time**

36. Just before the trial (excluding the second site visit), Dr. Robinson charged 9 hours for e-mail exchanges and answering inquiries from the defendant (September 3, October 23 and 28) and 16 hours in trial preparation (October 22, November 10 and 11) for 5 hours of evidence on November 15<sup>th</sup>.

37. It appears that at least some of the nine hours claimed related to defence counsel's intent to have Dr. Robinson "rebut" Dr. Wilson's evidence, without a rebuttal report compliant with *CPR 55.05*.

38. I fail to understand why it would take 16 hours to prepare for testimony based on an opinion formed in September 2012 and a 23-page report based on that opinion in February 2013. I reduce the 9 hours claimed by 4 hours and the 16 hour preparation time by 8 hours.

### **Point #4 Stand-By Charge**

39. The defendant's case opened at about 10:40 a.m. on November 13<sup>th</sup>. Two witnesses took up the rest of the day. Guy Deveau testified for all of November 14<sup>th</sup>; Dr. Robinson testified from 9:30 a.m. to about 11:45 a.m. on Friday, November 15<sup>th</sup>.

40. The trial occurred at Truro, about 50 kilometres or 45 minutes from Dr. Robinson's office.

41. In the context of the defendant's order of witnesses, Dr. Robinson's \$170 per hour "stand-by rate", the relatively short distance between Dr. Robinson's office and the Truro courthouse, and the absence of evidence that the plaintiff was uncooperative respecting the scheduling of witnesses, it is not reasonable that the plaintiff be liable for more than four hours of "stand-by" time. I infer that Dr. Robinson's charge for five hours at \$310 per hour for November 15, when he (as scheduled) was the only witness and testified for just over two hours, included travel time and some time with defence counsel.

### **Point #5**



42. I agree with the plaintiff that no explanation was given respecting the claim for 6 hours at \$90 per hour, which charge appears to relate to work by a technician.

### Calculation

43. In summary, Dr. Robinson's evidence was necessary, of excellent quality, central to the issue of liability and relied upon. However, I do not understand and am not persuaded that all of the hours charged to the defendant were reasonable, or that it is just that the plaintiff be required to reimburse the defendant for them.

44. I make the following reductions:

|          |  |                    |
|----------|--|--------------------|
| Point #1 | 12 hours at \$280 per hour (\$3,360) plus HST  | \$3,864.00         |
| Point #2 | 2 <sup>nd</sup> site visit – 4 hours at \$280 per hour (\$1,120) plus HST plus expenses (\$108.16) | \$1,396.16         |
| Point #3 | 12 hours at \$280 per hour (\$3,360) plus HST  | \$3,864.00         |
| Point #4 | Standby time – 5 hours at \$170 per hour (\$850) plus HST  | \$977.50           |
| Point #5 | Technician – 6 hours at \$90 per hour (\$540) plus HST   | \$621.00           |
|          | <b>TOTAL:</b>  | <b>\$10,722.66</b> |

45. I approve the defendant's disbursement with the above deductions.

Warner, J.