SUPREME COURT OF NOVA SCOTIA

Citation: *Sabean v. Portage LaPrairie Mutual Insurance Company*, 2014 NSSC 464

Date: 20140430
Docket: Halifax No. 329383
Registry: Halifax

Between:

Andrew Sabean and Cathy Hallett

Plaintiffs

v.

Portage LaPrairie Mutual Insurance Company

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Heard:	By written submissions on December 20, 2013, January 16, 2014; and January 30, 2014.
Written Decision:	September 30, 2013
Cost Decision:	April 30, 2014
Counsel:	Derrick Kimball, Nash Brogan and Nancy Cochrane for Andrew Sabean; Scott Norton Q.C. and Katie Marshall for Portage LaPrairie Mutual Insurance Company.

By the Court:

Introduction

[1] The Plaintiff, Andrew Sabean, was awarded damages by a civil jury in May of 2013. He had been involved in a motor vehicle accident in Bridgewater on October 23, 2004, and had his left arm amputated. The jury awarded him damages in the total sum of $465,408.00. That amount is not in dispute.

[2] The Plaintiff's action at trial was against his own insurer, Portage LaPraire. It was commenced under Section D of his own auto policy because the driver of the other vehicle, the at fault driver, was inadequately insured. Portage then is responsible for any damages in excess of what Mr. Sabean had received from the at fault driver's insurer. The amount received in damages by Mr. Sabean from the insurer of the at fault driver, Wawanesa Insurance Company, was $382,131.13. That amount is not in dispute.

[3] In addition to Mr. Sabean, there was a second Plaintiff, Catherine Robar (Catherine Hallett). Both Plaintiffs settled with the at fault driver's insurance under a "limits agreement". The total settlement was for $500,000.00 less the

property damage claim of $17,868.87 for net damage claim of $482,131.13 for both Plaintiffs.

[4] In addition, the Plaintiff received $13,000 towards costs and disbursements of $3,079.27 for a total of $16,079.27. This amount when added to the $482,131.13 totals $498,210.40.

[5] Mr. Sabean and Ms. Robar reached their own settlement with respect to the amount between them of $498,210.40. That settlement had Ms. Robar receiving $100,000.00 all inclusive, leaving Mr. Sabean with $398,210.40. This amount net of costs and disbursements would be $382,131.13. It is that amount which the Plaintiff says should be deducted from the jury award of $465,408.00 to arrive at the damages remaining due to Mr. Sabean. The difference would be $83,276.27, owing to Mr. Sabean according to the Plaintiff.

[6] It is acknowledged by the Defendant Portage that costs and disbursements must be deducted from the amount "deducted" in the sense that they should not be credited to Mr. Sabean, when calculating the amount owed to him by Portage. They state in their brief, that under SEF 44, costs should not be considered in calculating amounts obtained by the insured and thus in calculating amounts due.

[7] Portage argues, however, that the costs and disbursements paid were for two claims, Mr. Sabean's and Ms. Robar's. In the result, the sum of $16,079.27 should be "split" or apportioned between the two Plaintiffs equally, meaning that $8,039.64 should be subtracted from Mr. Sabean's settlement amount ($398,210.40) leaving him with $390,170.76 instead of $382,131.13. When this amount, $390,170.76 is deducted from the jury award of $465,408.00, the Defendant Portage claims the amount owed to Mr. Sabean is $75,237.27 instead of $83,276.77 as claimed by the Plaintiff.

[8] Prior to the trial, on February 28, 2013, the Defendant, Portage made a formal offer to settle in the amount of $75,000.00, plus costs, disbursements and pre-judgement interest. While Portage acknowledges the offer, did not "beat" the amount owing by Portage to the Plaintiff, it came within $237.29 of the amount owing by Portage to the Plaintiff, taking into account the jury's award and the amount due by Portage, (if the Court accepts Portage's position).

[9] As a result, Portage submits that Mr. Sabean was not a successful Plaintiff, as had the formal offer been accepted, it would have saved very considerable legal costs and judicial resources.

[10] Portage further acknowledges that while it came close, the formal offer did not exceed the amount owed. Portage therefore is not seeking costs. Portage argues, however, that its offer was shown to be reasonable and accurate. Therefore, Portage argues that each party should bear their own costs, including disbursements.

[11] The Plaintiff argues that whether he "beat" the Defendant's offer by $237.99 or $8,276.87, the amount to which the Plaintiff is entitled exceeded the offer and the Plaintiff is still the successful party.

[12] The Plaintiff argues therefore that he is entitled to its costs based upon the basic tariff ($9,750.00) together with the additional $2,000.00 per day of trial for a total of $27,750.00. The Plaintiff also maintains he is entitled to taxable disbursements in the amount of $40,997.05.

[13] <u>Issue #1 – What is the amount owing by Portage to the Plaintiff, Andrew Sabean?</u>

[14] The Plaintiff maintains that none of the $16,079.27 should be deducted from the amount owed to Mr. Sabean because those costs and disbursements are not

amounts which the Plaintiff is legally entitled to recover under the SEF 44 endorsement, and specifically section 5(e). The policy states however, under clause 4(b), that the amount payable under the SEF 44 endorsement "is excess to any amount actually recovered by the eligible claimant from any source, (other than money payable on death under a policy of insurance)".

[15] The Defendant Portage submits that the costs and disbursements received were for both Plaintiffs and not just Mr. Sabean. Portage therefore argues that only half of the costs should be deducted ($8,039.64) from the amount received.

[16] As previously stated, the amount paid to Mr. Sabean would as a result be $390,170.76 ($398,210.40 - $8,039.64) instead of the Plaintiff's figure of $382,131.13.

[17] The Plaintiff submits that under s. 5(e) of the SEF 44 endorsement, an eligible claimant is not entitled to recover any amount in respect of costs against an inadequately insured motorist. Section 5 (e) states:

> In determining any amounts an eligible Claimant is legally entitled to recover from an inadequately insured motorist as defined in paragraph 1(e)(i), no amount should be included with respect to costs.

[18] Thus the Plaintiff argues that if costs cannot be claimed under the policy, then costs should not be "deducted" from the amount owed by Portage, when calculating the amount received from the inadequately insured motorist.

[19] The fact is costs were paid or recovered as an additional amount for "partial indemnity", as part of the "limits agreement".

[20] On the one hand therefore, the Defendant acknowledges that costs should not be subtracted from the amount owed. On the other hand, any amounts actually received under s. 4(b)(i) of the SEF 44 policy, suggests it should be deducted, as it is an indemnity policy for which the Plaintiff should receive no more or no less than full indemnity.

[21] A further argument for not deducting the cost amount, is that any settlement between the Plaintiff and Defendant, was between them. Why then should Portage as the SEF 44 insurer, be entitled to deduct from the amount it is required to pay under its policy, costs paid by another insurer? Costs are not damages.

[22] In my view, Portage is not entitled to take advantage of any cost award which the Plaintiffs' received jointly, by deducting said amount from the amount owed to Mr. Sabean. Those costs were incurred to recover those damages. If those costs are to be factored in, then any costs on the damage award still to be

paid, should also be factored into the equation. That is the only way to compare "apples to apples". Otherwise, deducting costs from a damage award to arrive at a damage award which is exclusive of costs is not a fair or consistent method of calculation. It is, in effect, comparing "apples to oranges".

[23] Further, I find that the settlement between the two Plaintiffs', is just that. What they agreed upon, in terms of costs is between them. Whatever the amount for costs was, as between them is unknown. It cannot be assumed the Plaintiff, Mr. Sabean, retained the full cost award or even half. What portion of either settlement amount represented costs is pure speculation. There is no cogent evidence of the shared cost amounts as between them. As such, those figures cannot be presumed.

[24] The Plaintiff has the onus of establishing damages, including the quantum.

[25] I am satisfied for all of the above reasons that the damage claim, received by the Plaintiff from the inadequately insured driver was $382,131.13, leaving the Plaintiff entitled to damages for the difference between that figure and the jury award of $465,405.00. That amount, which is $83,276.87, shall be the net amount owing in damages to the Plaintiff by Portage.

[26] Portage is therefore entitled to deduct $382,131.13, being the amount received by the Plaintiff Andrew Sabean under the limits agreement, exclusive of

costs and disbursements, for which no deduction (credit to the Plaintiff) shall be made.

[27] The Plaintiff is therefore entitled to damages from the SEF 44 insurer Portage in the amount of $83,276.87. This is the amount put forward by the Plaintiff as the correct amount. I concur.

[28] Issue #2 – What if any cost, are owing to either party?

[29] The Plaintiff is seeking costs in the amount of $27,750.00. These are "basic Tariff costs" of $7,500.00 plus an additional amount of $2,000.00 for each day of trial ($18,000.00) for a total of $27,750.00. The Plaintiff is also seeking taxable disbursements of $40,997.05.

[30] The Defendant argues that it made an entirely reasonable offer to the Plaintiff, one which was "exceedingly accurate". Having made such an offer, (which came close to beating the Plaintiff's award) the Defendant Portage argues the Plaintiff should not be entitled to costs, in these circumstances.

[31] Portage submits the *Rules* encourage such offers, which can lead to settlement. Had the Plaintiff accepted the Defendant's offer, considerable legal costs would have been saved.

[32] The Defendant Portage is not seeking costs.

[33] The Plaintiff submits he is entitled to costs because he was clearly the successful party. The fact is the amount of the Defendant's offer was less than the damage award, as evidenced by Portage's own calculations.

[34] The general rule is that costs are awarded to the successful party. The Plaintiff submits, "the general rule is affected only to the extent where a successful party can show they made an offer *exceeding* the amount the successful party was awarded." If the amount received by the Plaintiff had been less than the offer of $75,000.00, then the provisions of Rule 10 and in particular Rule 10.09 dealing with a "favourable judgement", would likely apply.

[35] As it stands, the Plaintiff is not seeking costs beyond the basic tariff, together with the additional per diem per days of trial.

[36] The question then is should this Court deviate from the Tariff, or would an order granting the amount sought by the Plaintiff do justice, as between the parties? (*Rule 77.02(1)*).

[37] *Rule 72.02(2)* states that nothing in the *Rules* limits the general discretion of a judge to make an order about costs, except after acceptance of a formal offer to settle. *(Rule 10.05)*.

[38] Therefore my discretion under the *Rules* is not limited.

[39] *Rule 77.06* states that party and party costs of a proceeding, must be fixed by the judge in accordance with the tariff, unless a judge orders otherwise.

[40] Rule 77.07(2) states that a judge may add an amount to or subtract an amount from, tariff costs. The applicable tariff is Tariff A. That *Rule* sets out examples of factors that may be relevant in increasing or decreasing tariff costs after the trial of an action.

[41] Of those factors, I find the following two (2) to be most relevant here:

a) The amount claimed in relation to the amount recovered;

b) A written offer of settlement, whether made formally… or otherwise, that is not accepted.

[42] It is uncontroverted, that the amount the Plaintiff was seeking in damages, was substantially more than it did in fact receive by the jury award.

[43] In addition, clause (b) is relevant, given the offer which was made by the Defendant. While it may have been reasonable, not to accept the offer of $75,000 at that time, the "closeness" or accuracy of the offer made by Portage warrants consideration at this time, in determining the degree of success the Plaintiff experienced at trial.

[44] In other words, the Plaintiff may have been successful at trial, but it was clearly limited, and far from what the Plaintiff had hoped to achieve, in terms of damages.

[45] In the result, and exercising my discretion, I find that a reduction in the Tariff costs is warranted. In my view, a reduction by 20% would do justice between the parties in these circumstances. I have considered whether the reduction should be greater. A one-third reduction however is substantial, and amounts to $5,550.00.

[46] The Defendant Portage also takes issue with the disbursements requested by the Plaintiff. Portage submits, as it did with costs, that each party should bear their own disbursements.

[47] In its submission the main complaint of the Defendant is that the "sizable" amounts of disbursements were not supported by documentation. Since that time the Plaintiff's solicitor, Ms. Cochrane has provided affidavit evidence in support of the disbursements incurred for trial purposes.

[48] The Defendant Portage argues further that the testimony of certain experts was entirely dismissed by the jury, and as a result the fees incurred were not reasonable in the circumstances. Specifically, Portage points to the jury's findings with regard to 1) past loss of valuable services; 2) cost of future care; and 3) cost of future valuable services.

[49] Portage submits that the evidence of their experts was preferred over that of the Plaintiff for these amounts. That may indeed be the case. With respect, however, just because certain experts are preferred does not mean the Plaintiff's experts were not relevant or their evidence was not probative.

[50] The Court must address whether the evidence of the experts was necessary and whether the charges reasonable. Just because the evidence of a witness is not

accepted, or accepted only in part, does not mean it was unreasonable to call the expert or that his or her testimony was unnecessary. That kind of foresight, would make the outcome of the litigation itself predictable. While the outcome is a form of measurement, the impact of certain evidence on a jury is difficult to measure.

[51] It is clear that the evidence of Dr. Maher and Dr. MacDougall were necessary to the Plaintiff, as was Dr. Koshi to the Defendant. All of these physicians, pain specialists and experts in their fields, were an integral part of this trial.

[52] Of the Plaintiff's total disbursements of $35,649.61, seventy-eight percent (78%) or $27,764.47 were dedicated to expert reports. Of those nearly half (46%) were paid to Drs. Maher and MacDougall.

[53] I have reviewed these two physician accounts. My calculations reveal a similar hourly rate of approximately $450.00 each. Given their experience and qualifications this appears to be the norm. Dr. Maher's account is slightly higher, but he has over 30 years of experience. All of their time is accounted for. I see no reason to adjust their accounts.

[54] In terms of the remaining experts, and the damages awarded, an obvious rejection of the evidence was with respect to past loss of valuable services. Other

heads of damage awarded proved to be less than what was claimed. In particular, I refer to the cost of future care and cost of future valuable services.

[55] Party and party costs are that sum of money which the Court orders one litigant to pay another to compensate the latter for the expense he or she has incurred in the litigation. The difference between these costs and the amount which the successful party is liable to pay his own solicitor is known as solicitor client costs, which are extra costs that the successful party must pay out of his own pocket. The amount awarded in party and party costs, would seldom, if ever, repay the successful party for the whole outlay, which the successful party has been compelled to make. In each case, costs and disbursements must be assessed, having regard to what is reasonable and necessary to do justice, considering the entire litigation.

[56] With these principles in mind, I think some reduction in the L. Stanley account would be in order, as well as an adjustment to the account of the actuary. I order a $1,000 reduction in the Stanley account and a 10% reduction to the account of the actuary, which translates to $510.00. In addition, I am rounding down the substantial photocopying charge from $5,667.25 to $5000.00 (20,000 copies at $0.25 each for a reduction of $662.25).

[57] Taking these reduced figures into account, the award of costs to the Plaintiff shall be as follows:

Costs	(27,750 – 5,550)		$22,200.00
Disbursements	(35,649.61 – 2,172.25)	$33,477.36	
Plus HST		$5,021.60	$38,498.96

[58] I turn now to consider the final issue of Pre-Judgment Interest.

[59] Issue #3 – what amount should be awarded in Pre-Judgment Interest?

[60] The parties agree that general damages attract interest of 2.5% per annum.

[61] The parties further agree that the central issue in their submissions was the amount due to Mr. Sabean from Portage. That amount has now been determined by this Court to be $83,276.87.

[62] The Defendant submits this amount cannot be considered as purely one type of damage or another.

[63] The Defendant Portage further submits that the proper rate for past losses (past loss of income and past loss of valuable services) is one-half of 4% percent per annum (on both general damages and past losses).

[64] Portage submits that the interest would begin to accrue on October 8, 2009, being the date that Portage was first notified of the claim. The Plaintiff agrees with this as the start date for interest, and further agrees that the method suggested by Portage, of allocating the remaining damages, based on the "pro-rata share" of the total damages award by the jury, is appropriate.

[65] Where the disagreement lies, is the rate to be applied to past losses. The disagreement is between the rate of 2.5 % (as submitted by the Plaintiff) and 2.0% (as submitted by the Defendant).

[66] Once the Court establishes which rate should apply, the remaining calculation will follow from there.

[67] I have decided that the appropriate rate should be 2.5% for past losses, and not 2.0%. My reason is that *Rule 70.07* states that the rate to be used on a liquidated claim is 5%, calculated simply, unless a party satisfies a judge that the rate or calculation should be otherwise.

[68] Portage has not satisfied me that the rate should be otherwise. Other than articulating that the rate should be 4% (in fact one half or 2%) for past loss, I have no further evidence that it should be. There is the implication in their request that 5% is too high (by 1%), but no further articulation as to why.

[69] Following the parties approach, I find that one half of the 5% will be used to calculate (simply) the rate of interest on both past losses and on general damages for the entire period. Strictly speaking, general damages are not liquidated damages, but the parties have agreed upon 2.5 % at any rate.

[70] In conclusion, the interest calculation on the amount owing to Mr. Sabean by Portage shall be as follows:

[71] **Calculation**

[72] The past losses and general damages total $241,809.00, which is 51.96% of the total jury award of $465,408.00. Taking 51.96% of the amount owing to Mr. Sabean of $83,276.87, one arrives at the amount of $43,303.97.

[73] Calculating interest at 2.5% on $43,303.97 for 54 months (October 8, 2009 – April 8, 2014) results in the amount of interest being $4,871.69.

[74] It is therefore ordered that $4,871.69 shall be awarded to the Plaintiff for pre-judgment interest in this matter.

[75] Conclusion

[76] The total award remaining owed to the Plaintiff, Andrew Sabean, by the Defendant Portage shall be as follows:

1.	Damages:	$83,276.87
2.	Costs:	$22,200.00
3.	Taxable Disbursements:	$38,498.96*
	*(Inclusive of HST $5,021.60)	
4.	Pre-Judgment Interest	$4,871.69
	Total	$148,847.52

[77] Order accordingly.

Murray, J.