SUPREME COURT OF NOVA SCOTIA
Citation: *Poulain v. Iannetti*, 2015 NSSC 303

Date: 2015-10-30
Docket: Hfx No. 288814
Registry: Halifax

Between:

George Poulain

Plaintiff

v.

David J. Iannetti

Defendant

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	January 5 – 7, 2015, in Halifax, Nova Scotia
Final Written Submissions:	September 3, 2015
Counsel:	Janus Siebrits, for the Plaintiff Ralph W. Ripley for the Defendant

By the Court:

Introduction

[1] This is a costs decision. In the main decision, reported at 2015 NSSC 181, the plaintiff claimed for damages for professional negligence arising from the defendant's legal representation of him after he was injured in a motor vehicle accident. After the accident the plaintiff received no-fault Section B benefits. He brought another claim for Section A benefits. He claimed that he had retained the defendant to represent him on both claims, but the defendant's position was that he was retained solely for the Section A claim. The plaintiff eventually accepted a settlement on the Section B claim. He claimed, however, that the defendant negligently failed to advise him that he might be entitled to additional Section B benefits (beyond the initial two years) due to total disability, or to seek separate legal advice on the settlement. I found that the defendant was not retained for the Section B claim. However, when the plaintiff came to him with the proposed settlement, the lawyer breached a duty of care by causing him to sign the Section B release, thus waiving any stage two Section B benefits. The defendant should have recommended independent legal advice, at least. I concluded that more likely than not, the plaintiff had a potentially successful claim for further Section B benefits as of 2006, and that:

1. He lost benefits of $16.70 per week plus pre-judgment interest, plus the net present value of the benefit until a notional date of death;
2. With a five per cent contingency reduction on the claimed Section B future loss, I awarded damages: $16.70 weekly from June 28, 2015 until his 65th birthday – October 23, 2016; $140 weekly from October 23, 2016 to October 23, 2035; and $1,000 nominal damages for the arguably less provident Section A settlement Poulain agreed to after he settled the Section B claim.

[2] The plaintiff now seeks costs.

The law of costs

[3] Costs are governed by Civil Procedure Rule 77. A presiding judge may "at any time, make any order about costs as the judge is satisfied will do justice between the parties": Rule 77.02(1). The judge has a general discretion "to make any order about costs, except costs that are awarded after acceptance of a formal

offer to settle under Rule 10.05…": Rule 77.02(2). As a general rule, costs "follow the result, unless a judge orders or a Rule provides otherwise": Rule 77.03(3). Generally costs are fixed in accordance with the Tariffs of Costs and Fees under the *Costs and Fees Act*, R.S.N.S. 1989, c. 104. The court has discretion, however, to add to, or subtract from, the Tariff amounts, pursuant to Rule 77.07, which provides:

> 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:
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> (a) the amount claimed in relation to the amount recovered;
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> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
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> (c) an offer of contribution;
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> (d) a payment into court;
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> (e) conduct of a party affecting the speed or expense of the proceeding;
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> (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
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> (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.
>
> (3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

[4] The Tariff requires the court to fix an "amount involved" as a basis for determining the measure of party-and-party costs. Where the main issue is "a monetary claim which is allowed in whole or in part", the Tariff provides that the amount involved is determined based on "(i) the amount allowed, (ii) the complexity of the proceeding, and (iii) the importance of the issues…". Tariff A is the applicable tariff for a party who has obtained a decision or order in a proceeding.

Amount involved

[5] The defendant says the amount involved should be fixed at $113,041.44, while the plaintiff sets it at $114,013.85. Each party accepts the following components of the amount involved:

> (1) $10,470.90 attributable to the amount awarded for the period 6 June 2003 to 27 June 2015;
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> (2) $1152.30 attributable to the amount awarded for the period 28 June 2015 to 23 October 2016; and
>
> (3) $1000 for the loss of the Section A claim.

[6] The small difference in the proposed amounts involved appears to be in the calculation of the component from 24 October 2016 to the notional date of death on 23 October 2035. For this period, I awarded $140 per week. The defendant calculates the present value at $100, 418.24 (with calculations provided), while the plaintiff makes it $101,390.65 (without calculations provided). The difference may be related to the inclusion or exclusion or pre-judgment interest, on which the parties disagree; the defendant says it is not counted in calculating the amount involved, while the plaintiff says this is a matter of discretion for the court. In either case, the Tariff amount will fall into the band of $90,001-$125,000.

[7] The defendant says costs should be calculated on the basic scale, that being Scale 2 of tariff A. In the defendant's view, the trial was not particularly long (at 2.5 days) and it involved only one expert witness. Scale 2 would give basic costs of $12,250.00. Tariff A also requires the court to add $2000.00 per day of trial to the basic amount. The defendant submits that in this case, have finished in less than half a day on the third day, $5000.00 should be added on account of trial duration, for a starting point of $17,250.00.

[8] The plaintiff agrees on the starting point of $12,250.00 pursuant to the basic scale, but argues that the amount for trial duration should be calculated on the basis of five days of trial, namely three days between 5 and 7 January 2015, as well as two days for the "first trial" on 4 and 5 July 2011. This would add $10,000.00, for a total of $22,250.00. The defendant says there is no basis for including the days of the first trial in 2011, and maintains that having finished this trial before noon on the third day, 2.5 days is the correct measure of duration. The plaintiff says it makes no sense to limit the costs award to this trial and exclude the first trial.

[9] The defendant says the costs award should be reduced on account of the plaintiff's lack of success on a "myriad of issues." He cites *Cape Breton Development Services Ltd. v. D. Roper Services Ltd.*, 2002 NSSC 39, [2002] N.S.J. No. 111, where MacAdam J. said, at para. 6:

> Recognizing that traditionally and pursuant to Civil Procedure Rule 63.03(1), costs follow the event, it is clear a party may "lose" not only by having an adverse decision on liability or responsibility, but also in obtaining an award substantially less than the amount claimed. Thus, in *Nathu v. Imbrook Properties Ltd.*, (1992) 4 Alta. L.R. (3d) 149 (C.A.), the Court of Appeal considered costs where the defendant had challenged and successfully reduced the plaintiff's damage award for economic loss. The court, at p. 151, stated:
>
> > While costs routinely follow the event, all costs are not dictated by the bottom line of recovery. Sensibly the expense of litigating unsuccessful issues may not be recoverable, or may even be awarded to the successful opponent, notwithstanding that the plaintiff succeeds on other issues. It must and does lie within the Court's discretion.
> >
> > Within the case law, the award of selective costs was recognized as long ago as 1893 see *Forrester v. Farquhar* [1893] 1 Q.B. 564. It was recently affirmed in *Herman v. Miller*, [1988] 2 W.W.R. 72, where Gerein J. ruled:
> >
> > > In short, the plaintiff put forth a serious and very substantial claim which is notoriously difficult to prove. The defendants of necessity had to resist and they did so successfully. It would be grossly unfair were the successful defendants still required to indemnify a party who had been unsuccessful in pursuing a claim and had expended large sums of money in such a pursuit.
> > >
> > > As I see it, the plaintiff obtained a part of what he sought and having been successful in the broad sense he is entitled to taxable costs as I ordered in my judgment. However, in this instance he should not be permitted to include in those taxable costs any tariff items or disbursements which relate to the witness tendered on behalf of the losing cause.
> >
> > A similar result calls for similar relief here. The plaintiff - respondent, Mrs. Nathu will recover the costs of the trial to be taxed under Column 6 of Schedule "C" with no restrictive rule to apply. That was the trial direction. But having failed in the outcome, on damages, the plaintiff will not be allowed to tax as tariff items fees or disbursements pertaining to her witnesses on the calculation of damage issue.

[10] The defendant argues that the amount of $10,470.90 recovered on account of Section B benefits is only about 13 percent of the amount claimed for the period up to trial in the plaintiff's pre-trial brief, which was $80,640.00. Further, the

plaintiff was (the defendant says) unsuccessful in his claim that the settlement of the Section B claim adversely affected his Section A claim; according to the defendant, the $1,000.00 in nominal damages on this account should be regarded as a "penalty" rather than a "loss." In addition, the plaintiff was unsuccessful in his position that the defendant was retained for the Section B claim. Accordingly, the defendant says the award of costs should be reduced by 20 to 25 percent.

[11] The plaintiff responds by arguing that Rule 77 presumes an entitlement to full costs for a party who is wholly or partly successful, and submits that the *Nathu* case cited by MacAdam J. in *Roper* involved "unique and novel" facts that are not of assistance in this case.

Disbursements

[12] The plaintiff claims disbursements totalling $16,723.98. The claimed disbursements include several travel-related expenses, which the defendant claims are not valid disbursements. The defendant cites several decisions for the principle that travel expenses, and related expenses of counsel, are not recoverable disbursements: *Westmount Transfer v. Mill-Joy* (1975), 18 N.S.R. (2d) 94 (Co. Ct.); *Feener v. Wilson's Fuel Co.* (1978), 28 N.S.R.(2d) 70 (Co. Ct.); *Re MacNeil Estate* (2002), 212 N.S.R.(2d) 133 (S.C.). This is indeed the general rule, with certain exceptions, including where a party establishes that retention of local counsel would not be appropriate: see *Wall v. Haney*, 2007 NSSC 153, at para. 17; *Wadden v. BMO Nesbitt Burns*, 2014 NSSC 11, at para. 75, affirmed at 2015 NSCA 48; *Beadle v. Pictou Landing Micmac Band*, 2013 NSSC 327, at para. 28.

[13] In addition, the defendant cites *MacDonald v. McCormick*, 2008 NSSC 6, where LeBlanc J. disallowed disbursements claimed on account of witness attendance at discovery and trial. There was no discussion of the issue, however. The defendant says the same principle applies to the plaintiff's own travel expenses. Having chosen to commence the proceeding in Halifax, he submits, the plaintiff is not entitled to claim a disbursement for travel.

[14] The defendant also challenges several other claimed disbursements. A payment of $1403.00 to Dr. Worth, who did not testify or provide an expert's report, though his reports from an earlier proceeding were before the court as part of the medical narrative. The plaintiff says the disbursement is on account of Dr. Worth being required to cancel ER shifts in order to attend at trial, followed by the defendant agreeing to his records being admitted by consent "very shortly before trial."

[15] The plaintiff claims $4653.43 on account of Dr. J.A. Collicutt. The defendant does not appear to dispute the relevance of his evidence, but argues that the bill has not been established as being "just and reasonable" (as per *Claussen Walters & Associates Ltd. v. Murphy*, 2002 NSCA 20, at para. 12), in the absence of a breakdown of how much of the bill was for travel; citing as per *MacNeil v. Borden*, [1999] N.S.J. No. 462, 1999 CanLII 1308 (S.C.), the defendant says the disbursement is not adequately proven. The plaintiff says Dr. Collicutt only appeared at trial because the defendant insisted on it, and it is therefore "ludicrous" for the defendant to object to the disbursement.

[16] The defendant challenges a disbursement of $460.00 for D & M Document Services, for which there is no apparent explanation. The plaintiff says this amount is on account of subpoenas to several witnesses whose records the defendant agreed to admit by consent at "the last minute." Accordingly, it is submitted, the plaintiff was merely ensuring that the witnesses' evidence would be available.

[17] The defendant says there is insufficient explanation of the claimed disbursement of $293.25 for Stephen Kennedy Bailiff Services, given that few witnesses were subpoenaed and few would have resided in Halifax.

[18] Various other trial-related disbursements provide no indication of when, or for what purpose, they were incurred, including witness fees in the amount of $138.00, courier expenses of $436.02, and correspondence expenses of $431.25. The defendant points out that any disbursements arising from the appeal in this matter were dealt with in the Court of Appeal decision of 23 January 2013. The defendant says it is not possible to say from the material provided which disbursements were incurred specifically for this trial. The defendant also appears to suggest that a nominal, rather than a per-page, disbursement is appropriate for fax charges.

[19] The plaintiff claims photocopy expenses of $2071.44. The defendant cites the following comments of Goodfellow J. in *Knox v. Interprovincial Eng. Ltd.* (1993), 120 N.S.R. (2d) 288 (S.C.):

> [105] The matter of photocopying is one of real concern to me, because again, there has to be some limitation and control over it. Sometimes the degree of photocopying is related to the personality of one's client, who may demand and require, indeed professionally the wisest course is often to provide a copy of everything and sometimes clients want two copies of everything, but it seems to me that you cannot have a complete license to simply Xerox at will, even if it is important for the case and lay the cost at the foot step of the unsuccessful party,

> the defendants. The Xerox bill here would indicate items in excess of 8,000 copies. I don't know whether included in the cost of twenty-five cents per copy, is administration or overhead; I suspect it does, but in any event, I think that a claim of $2,067 for Xeroxing in a case of this nature, even where it has required more paper than for example, most motor vehicle cases and a lot of other cases, it is just far far too high and that there has to be some kind of limitation. It seems to me there is a general application, counsel are going to have to do something more than just indicate they have done what they have to do, if they are going to get anything above some reasonable limit on photocopying and I think a reasonable limit is $1,000. I award $1,000 for photocopying.

[20] Other cases where judges have expressed concern about the scale of photocopying expenses, and in some cases reduced the claimed disbursement, include *Day v. Day* (1994), 129 N.S.R.(2d) 186 (S.C.), at para. 32 (reduction from 50 cents per page to 25 cents, plus 25 percent reduction to remove costs of "overhead Xeroxing that was done solely for the benefit of reporting to the client"); *Johnston v. Clearwater Seafoods Ltd.*, 2008 NSSC 403, at para. 20; *Xceed Mortgage Corp. v. Jesty*, 2014 NSSC 51, at para. 12 (global amount of $1217.10 reduced to $350.00 plus HST); and *Burns v. Sobeys Group Inc.*, 2008 NSSC 102, where Warner J. said:

> 27 With respect to photocopies, I assume that the Plaintiff's counsel claims that about 5,700 copies were made ($2,600.00 by $0.45). By reducing its claim to $1,500.00 it reduced its per copy charge to about $0.26. Based on my experience, this appears to be more than the actual cost to a law office to produce a photocopy. Unless costs have escalated substantially in the last few years, it appears the Defendant's objection has some merit. The claimant is obligated to prove its disbursements are actual and reasonable. The disbursements it is entitled to claim under party and party costs are not necessarily the same recovery it may contract to recover from its client, which contract may entitle the lawyer to include photocopies as a profit centre. I make no comment on the appropriateness of such a contract with its client, but I agree with Defence counsel that the Plaintiff is obligated to provide this Court with evidence of the actual cost of producing its photocopies. Unless parties can agree between them, the Plaintiff will have 30 days to provide proof of its actual costs. The Court notes that the manner of proving disbursements claimed in all cases is by affidavit evidence.

Analysis

The costs award

[21] The case was not complex. It was presented in a somewhat threadbare, though arguably efficient, manner; for example, though actuarial evidence (of life

expectancy) may not always be necessary (Hallett J.A. in *MacNeil Estate v. Gillis* (1995) 138 N.S.R. (2d) 1 (C.A.) at para. 207), it is preferable for a court to have it, so as not to be left to rely on summaries of generally applicable and publicly available statistics such as compiled by McKellar online.

[22] I am satisfied that the plaintiff herein has had substantial success. Both counsel agree that the amount involved is between $90,000.00 and $125,000.00. Scale 2 of Tariff A is applicable in the amount of $12,250.00, plus $5000.00 for 2.5 days of trial, for a total of $17,250.

[23] I bear in mind that, in ordering a retrial, Justice Hamilton stated for the Court of Appeal:

> 26 The judge ordered Mr. Poulain to pay Mr. Iannetti costs of $16,250 plus disbursements of $1,495.56. I would vitiate this order and direct that any amount paid in compliance be returned to Mr. Poulain. Regarding costs on appeal, I would order Mr. Iannetti to pay forthwith to the appellant $3,000 inclusive of appeal disbursements as costs for the appeal, in any event of the eventual outcome of the new trial. The entitlement and amount of costs of the first trial will be for the consideration of the trial judge after the new trial.

[24] While the plaintiff argued for the inclusion of costs for two days of the July 2011 trial, no legal authority or jurisprudential guidance for awarding costs for that trial at this time was provided; moreover I find that there is an insufficient temporal and substantive nexus between the costs associated with that trial and this trial. I am not satisfied that to do justice as between the parties at this trial, the two days of the 2011 trial should be factored into the costs award now. I am inclined to believe that that experience may have permitted the parties to shorten the 2015 trial. Both parties thereby benefited, although perhaps to varying degrees.

[25] Moreover, the rationale for costs awards would better be served if I did not include the two days of 2011 trial time in my calculation. Although in relation to a summary judgment motion, as Justice Farrar said in *Frothingham v. Perez*, 2011 NSCA 59:

> The respondents were the successful litigants on the motion. Generally, costs will be awarded to the successful party. Why this is so was addressed by Saunders J. (as he then was) in *Landymore v. Hardy*, (1992) 112 NSR (2d) 410:

> [17] Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged ….

[26] It is very difficult to say that the 2011 and 2015 trials could be considered to be one trial, at which the plaintiff was substantially successful.

[27] For those reasons, I decline to include the two days trial from 2011 in this costs award.

Disbursements

[28] Counsel for the plaintiff has presented the documents and other information in support of his claim to disbursements by way of written representations to the court. Counsel for the defendant has not objected to this manner of presenting the information. While generally affidavit or *viva voce* evidence is to be preferred where there is a dispute, I will assess the necessity and reasonableness of the disbursements on the basis presented by the plaintiff.

[29] Given my position regarding the costs award, I am generally hesitant to order as payable now those disbursements incurred prior to the Court of Appeal decision herein (January 23, 2013), unless they are demonstrated to have a nexus with the 2015 trial. The evidentiary onus is on the successful plaintiff.

[30] In dispute herein from that time period are :

1. Travel (unidentified individual): September 6, 2006 – $97.75; July 7, 2008- $303.54;
2. Travel (Mr. Poulain): November 12, 2010 - $169.60; November 16, 2010 - $244.64 [Marriott Hotel]; November 30, 2010 - $11.50 [parking];
3. Travel (Mr. Poulain): June 29, 2011 – $262.00;
4. Travel (unidentified individual) June 29, 2011 – $266.78 [notably Beacon Discovery Service has a charge on June 29, 2011 for $439.30, suggesting that these travel expenses were associated with the 2011

trial which concluded July 5, 2011, and with an order dated April 24, 2012]; July 27, 2011 - $231.98 (post-trial);

and since January 23 2013;

5. Travel (Mr. Poulain): January 2, 2015 - $400.00 (trial was heard January 5-7, 2015);
6. Travel (unidentified individual): February 10, 2015 - $1849.22 (post-trial, while the decision was on reserve).

[31] Bearing in mind the legal principles and jurisprudence, I permit from those disputed disbursements the following: $400.00.

Dr. Worth

[32] A $1,220.00 payment was made to Dr. Worth for "missed ER shifts January 8, 2015 (unable to be rescheduled)". Although the plaintiff's claim at page 5 of his July 29 brief suggests it was made on December 4, 2015, in the amount of $1,403.00, Dr. Worth's letter (invoice) is dated February 4, 2015, in the amount of $1,220.00. His invoice notes that he had expected that he would testify on or about January 8, 2015. I recognize that his reports were ultimately admitted as a physician's narrative pursuant to Rule 55.14. Nevertheless, I conclude that his cancellation of ER shifts on January 8, 2015 and the claimed cost is a necessary and reasonable expense of the litigation.

Dr. Collicutt

[33] There is no dispute that Dr. Collicutt's evidence was relevant and important to the plaintiff's case. The defendant disputes the amount of the expense attributable to Dr. Collicutt's attendance at trial. Dr. Collicutt did attend from Sydney at court in Halifax. He has significant mobility issues arising from a medical condition. Therefore, he would have been unavailable to attend to his work for the better part of three days. He would also have had expenses associated with his travel to Halifax and back, and his stay in Halifax. He presented the plaintiff with a bill in the amount of $4,653.43. The bill is substantiated by further particulars which allow the court to determine what amount thereof is a reasonable expense of the litigation. I am satisfied that his disbursements and expert witness fee is more likely than not a reasonable amount, and conclude it is a necessary and reasonable expense of litigation.

D & M Document Services

[34] The plaintiff puts forward a claim of December 9, 2014, for $460.00. The claim is substantiated by further particulars (service of subpoenas on David Iannetti, Drs. Collicutt, Watt, Dunn, Worth, and Munshi, as well as Wayne MacNeil and Karen Roberts), which confirm that it is a necessary and reasonable expense of the litigation. The claim is allowed.

Photocopies

[35] The plaintiff puts forward a claim of $2,071.44 at a rate of $0.25 per page. I agree with Justice Warner in *Burns v. Sobey's Group Inc.*, 2008 NSSC 102, where he concluded at para. 27 that a reasonable amount for photocopying would be "the actual cost to a law office to produce a photocopy". The claim is not substantiated by evidence or further particulars which would allow the court to determine whether it is a reasonable expense of the litigation. Nevertheless, I am prepared to allow $1250.00 as a lump sum amount for photocopying.

Facsimile charges

[36] The plaintiff puts forward as a facsimile-cost claim $431.25 at a rate of one dollar per "correspondence". The claim is not substantiated by evidence or further particulars which would allow the court to determine whether it is a reasonable expense of litigation. Nevertheless, I am prepared to allow $200 as a lump sum amount for these expenses.

Stephen Kennedy Bailiff Services

[37] The plaintiff puts forward a claim of $293.25 (December 11, 2014, just prior to the commencement of trial). The claim is not substantiated by evidence or further particulars which would allow the court to determine whether it is a reasonable expense of litigation. Nevertheless, I note that the court file contains subpoenas issued December 2, 2014 for Kathy Brace, Tricia Avery, Geoffrey Machum, and the defendant David J Iannetti. Mr. Kennedy generally operates in the area of Halifax County . I infer that the amount claimed was associated with service upon the following individuals from the Halifax area: Mr Machum and Tricia Avery. Mr Iannetti, Dr. Collicutt, Mr. Machum and Mr Poulain, all testified for the plaintiff. Tricia Avery's evidence was presented to the Court by

way of her earlier transcript. Based on the foregoing I am satisfied that the claim is more than likely a reasonable amount. I allow the claim of $293.25.

Summary of permitted disbursements

[38] The plaintiff claimed $16,723.98. I disallowed: $97.75, 303.54, 169.60, 244.64, 11.50, 262.00, 266.78, 231.98, 1,849.22, 821.44 [$2,071.44 less 1,250] and 231.25 [$431.25 less 200]; for a total disallowed - $4489.70. Therefore, the amount allowed as disbursements is $12,234.28

Conclusion

[39] I award as costs the amount of $17,250.00, plus disbursements in the amount of $12,234.28 (HST included). I direct the defendant to draft an order to reflect my disposition of the case.

Rosinski, J.