Date: 20110729
Docket: Syd No. 203307
Registry: Sydney

Between:

Joanne Boutilier

Plaintiff

- and -

Robert Pearcey and Harrietha Transfer Ltd.

Respondent

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Judge: The Honourable Justice A. David MacAdam

Heard: March 25, 2011, in Sydney, Nova Scotia

Subject: Costs; offers to settle; lump-sum costs; out-of-town counsel; experts' disbursements; factors in calculating lump sum award.

Summary: The plaintiff was awarded damages related to a motor vehicle accident, on an assessment by a jury. The plaintiff took the position that each party was partially successful and should bear their own costs. The defendants argued that they should be regarded as successful due to the effect of various offers to settle made prior to trial, and should therefore receive costs. The court was also required to determine whether the 1972 or 2009 *Civil Procedure Rules* governed the assessment of costs. The parties agreed that the 1989 *Tariffs of Costs and Fees* should be applied.

Issue: Entitlement to costs and the appropriate measure of costs.

Result: The 2009 *Civil Procedure Rules* applied to the determination of costs. The defendants were entitled to costs, having obtained a favourable judgment by comparison to an offer to settle made in

March 2010. The 1989 Tariffs were not adequate to provide a substantial contribution, and the court awarded lump sum costs. Although the plaintiff argued that it should be disregarded, the defendant's expert's account was factored in determining the lump sum award. The court rejected the defence submission that the additional expense of retaining out-of-town counsel should factor into the costs awarded. A negative factor was the failure of counsel to make timely disclosure of a modification or change in the opinion of her expert as to his prognosis for the plaintiff's recovery.