SUPREME COURT OF NOVA SCOTIA
Citation: Boutilier v. Pearcey, 2011 NSSC 307

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

Between:

Joanne Boutilier

Plaintiff

v.

Robert Pearcey and Harrietha Transfer Ltd.

Defendants

Judge:	The Honourable Justice A. David MacAdam
Heard:	March 25, 2011 in Sydney, Nova Scotia
Final Written Submission:	April 19, 2011
Decision Date:	July 29, 2011
Counsel:	Harvey M. MacPhee, Q.C., for the Plaintiff Jocelyn M. Campbell, Q.C., for the Defendants

By the Court:

[1] Following a civil jury assessment of damages, the plaintiff was awarded the sum of $142,952.00. In submissions to the jury the plaintiff suggested an award between $1,019,952.00 and $1,354,952.00 as a reasonable assessment of her damage. The defendants suggested a range of $54,952.00 to $84,952.00. The defendants also claimed that there should be deductions for failure to mitigate. The plaintiff denied that she failed to mitigate her damages.

[2] The plaintiff says that each party was "successful to a degree" and should, therefore, bear their own costs. The defendants say, having regard to various offers to settle made during the course of the litigation, that they were successful and should receive costs.

[3] The accident giving rise to this litigation occurred on July 6, 2001. The individual defendant, driving a truck owned by the corporate defendant, struck a stopped vehicle which in turn struck the vehicle driven by the plaintiff's spouse. The plaintiff, who was in the front passenger seat was injured, primarily in her jaw. She was taken to the emergency department of the local hospital and later released.

[4] At the time of the accident the plaintiff was a student. Following the accident she continued her studies, eventually achieving a nursing diploma. She obtained employment as a nurse and, with the exception of a maternity leave, has continued in her career. Although she had been able to continue with her nursing career she testified it has not been without difficulty. Her mother has assisted her, as well as her spouse, and she has restricted her time at work by not accepting overtime and by working less than full-time hours.

[5] Ms. Boutilier's primary doctor after the accident was Dr. Stacie Saunders. Dr. Saunders practices dental surgery in Halifax and has training and experience in the diagnosis and treatment of temporomandibular disorders and orificial pain. Ms. Boutilier has periodically travelled to Halifax for examination and treatment.

[6] The plaintiff sought general damages, damages for past and future loss of income, for housekeeping assistance she has required and for the cost of future care. The defendants, in addition to suggesting lesser amounts for general damages, housekeeping assistance and cost of future care, say no past or future loss of income had been established. The parties agreed on the plaintiff's

disbursements to the date of trial. The plaintiff did not seek compensation for expenses that had already been reimbursed.

[7] The parties exchanged a number of offers to settle before trial. The defendants made two formal offers pursuant to the *Civil Procedure Rules* that were in force at the relevant times.

[8] The award by the jury did not include any provision for pre-judgment interest. The parties agree that pre-judgment interest would not be due for the cost of future care since the expense would not be incurred until after the jury's award. There remains the calculation of pre-judgment interest for expenses incurred prior to the trial and for general damages.

The Applicable Rules and Tariff

[9] This proceeding was commenced on March 11, 2004, several months before a new Tariff for party and party costs was promulgated in September 2004, pursuant to the *Costs and Fees Act*, R.S.N.S. 1989, c. 104. The defendants argue that the 2009 *Civil Procedure Rules* apply to the issue of costs, but that the 1989 Tariff is applicable. Counsel references *Bevis v. CTV Inc.*, 2004 NSSC 209, where Moir J. held that the 2004 Tariff would not apply in an action commenced prior to its effective date. As a result, the parties do not dispute that the Tariff in effect on the commencement of this proceeding, the 1989 Tariff, is applicable to this proceeding.

[10] The parties do not agree on whether the 1972 or 2009 *Civil Procedure Rules* are applicable with respect to party and party costs. Counsel for the defendants in suggesting the new Rules are applicable, references Rule 92.02 of the 2009 Rules which provides:

> 92.02 (1) Unless this Rule provides or a judge orders otherwise these Rules apply to all steps taken after the following dates in the following kind of proceedings:
>
> ...
>
> (b) January 1, 2009 in an action started before that day.

[11] Counsel for the plaintiff submits:

> The use and application of old or new civil procedure rules was not canvassed during the trial and it is the respectful submission of the Plaintiff that the transition rule should not be applied to bring this action under the new Rules.
>
> In particular, given all of the steps, including many of the offers to settle made by both parties, were carried out under the 1972 Rules, it would be inappropriate and unjust to apply new Civil Procedure Rule cost consequences to an action that was carried out to the point of setting the matter down for trial pursuant to 1972 Civil Procedure Rules and their cost consequences.

[12] Absent any application to apply the old Rules to the determination of party and party costs, it would appear, and I so find, that the new Rules apply to the steps taken in this proceeding after January 1, 2009.

Judicial Discretion

[13] In any event, which Rules apply is of little practical consequence. Both Rules (Rule 63 of the 1972 Rules, Rule 77 of the 2009 Rules) provide, in addition to the Tariffs for determining party and party costs, broad judicial discretion to set an amount that is fair and just in the circumstances. The 1972 Rules provide, at Rule 63.02(1), that notwithstanding other costs provisions:

> ...the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court...

Similarly, the current Rule 77.02 provides that:

> 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.

And that, with the exception of Rules respecting certain settlement offers:

> (2) Nothing in those Rules limits the general discretion of a judge to make any order about costs....

Inadequacy of the 1989 Tariff

[14] The inadequacy of the 1989 Tariff in providing a “substantial contribution” was suggested by Freeman J.A. in *Williamson v. Williamson,* [1998] N.S.J. No. 492 (C.A.) and Wright J. in *Morash v. Burke,* 2007 NSSC 68. As observed by defence counsel, the 2009 *Civil Procedure Rules* permit a judge to depart from the Tariff “at his or her discretion”.

[15] Several rules are relevant to this issue. Rule 77.06(1) provides that party and party costs must be fixed in accordance with the Tariff “unless a judge orders otherwise”. Rule 77.07 lists a number of factors that may be considered by the judge in adding an amount to the costs calculated under the Tariff. Finally, Rule 77.08 allows the court to award a lump sum in lieu of the Tariff calculation. In *Campbell v. Jones,* 2001 NSSC 139, Moir J. commented on awarding lump sum costs, in lieu of applying the Tariff. He said, at para. 69:

> ...The tariffs were designed to achieve a substantial indemnity but without regard to the arrangements between the particular party and counsel. *One might say the objective was substantial indemnity against what would generally or ordinarily be charged to a client in like circumstances.* To preserve some element of that where a lump sum award is in order, the court should try to assess counsel's efforts on a general basis, and should take the actual fees into account only to the extent they tend to show generally what any client of any competent lawyer might expect reasonably to be billed for services necessary to the case at hand. In summary, the discretion to award a lump sum is not so restricted as with an award of solicitor and client costs; *tariff costs are usual and a lump sum is a departure from the usual; the discretion has been exercised where tariff costs would not produce a partial but substantial indemnification without artificially setting the "amount involved"*; the objective of a partial but substantial indemnification may or may not be sufficient reason to exercise the discretion; care must be taken to avoid employing fixed percentages or embracing the party's actual bill over a more generalized assessment. [emphasis added]

[16] The determination of liability in that case was reversed at the Court of Appeal, but the court awarded costs in favour of the respondent in the same amount as had been calculated by Moir J. at trial.

[17] In *Bevis v. CTV Inc., supra,* Moir J. stated, at para. 13:

> ...(1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial means, such as selection of an artificial "amount involved", in order to make the Tariff serve the principle. *Therefore, when*

> *reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion under rule 63.02(a) and order a lump sum. (3) To settle an appropriate lump sum the Court will have regard to the actual costs facing the successful party or the labour expended by counsel*, but the Court will seek to settle the amount objectively in conformity with one of the policies of the Tariff, to provide an indemnity that has nothing to do with the particularities of counsel's retention. *The Court will attempt to provide a substantial but partial indemnity against what would ordinarily be charged by any competent lawyer for like services.* (4) Finally, the Courts have usually avoided percentages. Substantial but partial indemnity is a principle, not a formula. [emphasis added]

[18] In a number of cases involving proceedings commenced before January 1, 2009, and concluded subsequently, courts have recognized the inadequacy of the 1989 Tariff and awarded lump sum party and party costs in lieu of applying the 1989 Tariff.

[19] In *Bevis v. CTV Inc., supra*, Moir J., after noting the amounts yielded by applying the old and new Tariffs, determined that the old Tariff provided "an amount much less than a substantial contribution to real costs" and made a lump sum award. His lump sum award was, in fact, greater than the amount calculated under the inapplicable new Tariff.

[20] Moir J. followed a similar approach in *Vogler v. Szendroi*, 2011 NSSC 13, where the injuries had occurred in 2000 and the proceeding commenced in 2003. Again, the lump sum award was greater than the calculation under the new Tariff.

[21] In many cases the courts have calculated potential party and party costs under both Tariffs as guidance in determining the appropriate lump sum. In effect, reference to the old Tariff was often used as a basis for establishing its inadequacy in determining an award for party and party costs, thereby causing the court to resort to the lump sum approach. The calculation of party and party costs pursuant to the new Tariff was often a barometer for fixing the appropriate lump sum. Such calculations, however, are not the only factors to be considered in fixing an appropriate lump sum award.

[22] The defendants cite several cases in which courts in this province have referenced "costs" calculations using the old and new Tariffs, and used the resulting calculation as guidance in fixing an appropriate lump sum.

Amount Involved

[23] The "amount involved" is one factor relevant in assessing lump sum costs. Pursuant to Tariff A of the 1989 Tariff, the amount involved, "where the main issue is a monetary claim which is allowed in whole or in part", shall be determined having regard to:

> (i) the amount allowed,
>
> (ii) the complexity of the proceeding, and
>
> (iii) the importance of the issues;

[24] When there was a monetary award, a practice developed of using the amount awarded as the amount involved: *Williamson v. Williamson*, [1998] N.S.J. No. 448, at para. 22. In *Curwin v. Sobeys Group Inc.*, 2007 NSSC 164, for example, McDougall J. held that the amount involved would be the amount awarded by the jury.

[25] Although in *Marshall (Litigation Guardian of) v. Annapolis County District School Board*, 2010 NSSC 179, Pickup J. set the "amount involved" as the amount claimed by the plaintiff, in *Nassim v. Perth Insurance Co.*, 2009 NSSC 417, Coughlan J., although clearly taking into account the amount claimed in determining the amount involved, did not equate the two. Smith A.C.J. followed a similar approach in *Farrell v. Casavant*, 2010 NSSC 46, where the plaintiffs, in their pre-trial brief, advanced claims ranging from $88,127.48 to $135,127.48. At trial the claim was dismissed, but the Associate Chief Justice provisionally assessed damages at $10,879.48. She awarded the defendant additional costs to take into account both the amount claimed as well as the failure of the plaintiff to accept two offers to settle. An important consideration in adding an additional $5,000.00 to the calculated costs was the failure to accept the offers to settle. She did not follow the formulas set out in Rule 10.09(2), "as that Rule was not in effect when either of the Offers were made." In the present case, only an offer to settle for $300,000.00, made in March 2010, was made after the 2009 Rules became effective.

[26] "Risk" differs from the perspective of a plaintiff and a defendant. The plaintiff's risk is that they would not have received what was eventually decided they were owed. For the purpose of assessing the amount involved for a plaintiff, reference is had to what the adjudicator, whether it be a judge or a jury, awarded. From the perspective of the defendant, the risk is what the plaintiff claimed in the litigation. There are, of course, in many cases though not this one, non-monetary claims advanced by parties.

[27] If it were necessary to set an amount involved, I would fix the amount involved for the plaintiff at the amount awarded, together with an adjustment for pre-judgment interest. In respect to the defendants, the amount involved would be $1,000,000.00.

Costs Calculated Using the Tariffs

[28] The defendants have calculated party and party costs using Tariff A of the 1989 Tariff. Using an amount involved of $1,000,000.00 and Scale 3, counsel calculates costs of $34,375.00, while using Scale 5 would yield costs of $55,825.00. Apparently then referencing 2009 Rule 10.09(3), counsel assumes entitlement to 75 percent of these amounts, for costs of $25,781.25 and $41,493.75 respectively. Stating the defendants have incurred professional fees of $220,428.89, counsel suggests these awards "will not represent a substantial contribution to the costs incurred by the defendants."

[29] Defence counsel, applying the 2004 Tariff, and again using an amount involved of $1,000,000.00, calculates costs at $64,750.00 using scale 2 and $80,938.00 using scale 3. Again calculating 75 percent of these amounts, counsel says would result in costs in the range of $48,563.00 to $60,703.50. Counsel, then applying the 2004 Tariff, suggests, according to the new Tariff, an amount of $2,000.00 per day for each day of the trial resulting in a suggested range under the 2004 Tariff of $81,563.00 to $93,703.50.

[30] However, the 2004 Tariff is not applicable here . Counsel acknowledges as much in her submission, saying that although the 2009 *Civil Procedure Rules* were applicable, in view of the date of commencement of this proceeding, the 1989 Tariff for costs was the applicable Tariff.

[31] Although satisfied as to the inadequacy of the 1989 Tariff in this case, I am not prepared to replace it by applying a Tariff that is clearly not applicable. The use of the calculations under the new Tariff is one factor in determining an appropriate lump sum, but simply replacing the old Tariff by the new Tariff, and calling it by another name, is not appropriate. In determining the appropriate lump sum, the calculation of costs under the new Tariff is but one factor, not a determination of the appropriate lump sum to be awarded.

[32] While acknowledging that the 1989 Tariff is the applicable Tariff in calculating costs, I am also satisfied that utilizing the 1989 Tariff will not result in a fair or reasonable amount of costs to the defendants.

Length of Trial

[33] Counsel for the plaintiff suggests that if this were a jury trial it would necessarily be longer than a trial by judge alone, and says there should be a decrease in the number of days of the trial to reflect this. Even if this submission had merit, which it does not, the jury motion was filed by the plaintiff. The plaintiff cannot now say that the number of days should be reduced because the mode of trial she chose made the trial longer than it would have been if the trial was held before a judge alone.

Divided Success

[34] Because the jury awarded more in general damages than the defendants suggested, and applied a lesser reduction in damages because of a failure to mitigate, the plaintiff suggests there has been mixed success. Counsel suggests this "is akin to an apportionment of liability and costs should be apportioned in accordance with the jury's award in relation to both damages and mitigation". (see *Sydney Cooperative Society Ltd. v. Coopers & Lybrand*, 2006 NSSC 276).

[35] Although, counsel's submission is interesting, it is not, in my view, correct. It is on the totality of what the jury awarded that success is to be determined.

[36] The defendants seek a lump sum award of costs and disbursements in the range of $154,949.07 to $167,090.07, having obtained (they submit) a favourable judgment as contemplated by Rule 10.09(3)(b), in circumstances where the

applicable Tariff does not provide a sufficient recovery of costs. The plaintiff says the parties should bear their own costs.

[37] As noted, the plaintiff's argument for a finding of "mixed success" is based on noting she received more in general damages than the defendants had suggested to the jury and that the plaintiff was also successful in her claims for costs of future care and housekeeping loss, again receiving more than the defendants had suggested under each heading. Counsel acknowledges that the jury declined to award damages for loss of income or loss of earning capacity. The plaintiff also submits that the jury did not reduce her damages because of a failure to mitigate by the amount sought by the defendants.

[38] Not noted by the plaintiff's counsel is that the plaintiff took the position that there was no failure to mitigate, and that the plaintiff argued for greater amounts than the jury awarded for both the cost of future care and housekeeping loss.

[39] The plaintiff's brief also references "an underlying concern (apparently by the defendants) with respect to the treatment" by one of the plaintiff's doctors, which was ultimately not put forward. Counsel says he was required to address the issue through the testimony of Dr. Saunders and the plaintiff herself. Counsel acknowledges that "following evidence and prior to making closing addresses" the defendants stated that the treatment by this doctor would not be raised as a contributing factor in the plaintiff's condition.

[40] There is no mixed success, unless the plaintiff was awarded approximately what she had been offered by the defendants, and the award of the jury placed her in the same position she would have been in, taking into account the date and timing of the offer and the subsequent costs and disbursements from the date of the offer to the award by the jury. Both parties from time to time made offers to settle. In no case did the offers break down the amounts related to particular heads of damages or state any specific allowance for failure to mitigate.

[41] The jury's award presumably reflects the jury's valuation of the plaintiff's damages. The plaintiff claimed a great deal more. The determination as to which party was successful will be based on the various offers made, the terms of the offers, the period for which they remained open and how they related to the jury's award, adjusted to reflect a number of issues or questions not put to the jury. To the extent the adjusted jury award was greater than the amount of any offer made

by the defendants, it can be argued that the plaintiff was successful to that extent, but only to that extent.

Offers

[42] There were a number of "all-inclusive" offers to settle by both parties. In view of the jury's award to the plaintiff, it is necessary, in respect to awarding costs to determine who was the successful party. Where a plaintiff's action is dismissed the determination is obvious. When there is an award, it is necessary to review any offers to settle during the litigation process. It is also necessary to consider whether, by virtue of an offer to settle, the defendant has obtained a "favourable judgment", and is entitled to the Tariff and an increased award of costs because of the plaintiff's rejection of the offer. The term "favourable judgment" is defined in Rule 10.09(1):

> 10.09 (1) A party obtains a "favourable judgment" when each of the following have occurred:
>
> (a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third party claim, at least one week before a trial;
>
> (b) the offer is not withdrawn or accepted;
>
> (c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.

[43] Rule 10.09(3) provides a formula for determining the costs of a party that does not fully succeed. The formula relates to the timing of an offer that is greater or more favourable than the court's award. When the offer is made less than 25 days after pleadings close it is the amount the Tariff would provide. If it is more than 25 days after the close of pleadings but before setting down, it is 75 percent of the amount. If it is more than 25 days after setting down, but before the finish date, it is to be 50 percent of the amount. If the offer is made after the finish date it is 25 percent.

[44] Rule 41A.11 of the *Civil Procedure Rules*, 1972 provided:

> Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters.

[45] Defendants' counsel prepared a chronological outline, to which the plaintiff did not object, of the various offers and their timing in relation to the dates of various steps in the litigation. Although there are a number of verbal and written offers by the plaintiff and the defendants, only two, both made by the defendants, are described as "formal", under the procedure for settlement offers under the *Civil Procedure Rules* in effect at the time of the offers. These two offers are dated April 25, 2008 and March 3, 2010.

[46] Relevant, therefore, in assessing which party was successful, is analysing the offers and comparing them to the jury's award after making any necessary adjustments.

Reasonableness in Rejecting the Offers

[47] The plaintiff says the defendant's offers of April 2008 and March 3, 2010, should not be taken into account. The plaintiff says she acted reasonably in rejecting these offers. Counsel refers to the condition of the plaintiff at the time of the April 2008 offer, almost seven years after the accident, when she was suffering from "a chronically painful TMS condition". He says the plaintiff's ultimate award was greater than that offered by the defendants at that time. With respect to the March 2010 offer, counsel says the plaintiff was beginning a regime of botox treatments with Dr. Saunders, which led to Dr. Freund's "hallelujah moment" that led him to form a new opinion, sometime in October 2010 and after the commencement of the trial, that within months the plaintiff would no longer need botox.

[48] In suggesting that the reasonableness of the plaintiff's rejection of an offer to settle is a circumstance to be taken into account in determining costs, the plaintiff references the following comments by Saunders J. (as he then was) in *Landymore v. Hardy*, (1992), 112 N.S.R. (2d) 410, 1992 CarswellNS 90, at para. 34:

> ...The object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding. *The combined effect of C.P. Rule 41A.11 and 63.04 is to promote settlement by penalizing unreasonable conduct in efforts to settle...* [emphasis added]

[49] Counsel then notes the observation of Grant J. (with particular reference to Rule 41A) in *Goode v. Oursen* (1991), 105 N.S.R. (2d) 389, at para. 20:

> The method used in the rule to encourage reasonable offers is by giving a cost benefit to the offeror and to encourage the acceptance of reasonable offers by penalizing the unreasonable rejection of reasonable offers.

[50] Also cited by plaintiff's counsel is the adoption of Justice Grant's views by Davison J. in *Hillier v. Mann*, 2002 NSSC 28, at para. 8:

> [8] I agree with the view expressed by Justice Grant. Rule 41A.11 *permits the court to look at all the relevant circumstances* and consider offers in writing which may not comply with the time limits or the quantum of offers stipulated in the other subsections of Rule 41A but which indicate a party has attempted to effect a reasonable settlement and the other party has not taken reasonable steps toward settlement. [emphasis added**]**

[51] Counsel also observes that the plaintiff made offers to settle for $150,000.00 and $167,000.00 during the winter and spring of 2008. However, these offers were withdrawn, only to be replaced by offers seeking higher levels of compensation.

[52] There is nothing in the statements by Justices Saunders, Grant or Davison to support the view that in determining whether an offer should not be considered, the court should consider whether it was reasonable for the offeree to reject it, notwithstanding the award made was less than the offer. With the advantage of hindsight, and in view of the jury's award, it could be said that the rejection of any offer greater than the award was, in fact, unreasonable.

The Relevance of Possible Costs in Comparing the Offers and the Award

[53] The offers were "all inclusive" and therefore, would presumably have had a cost component. The jury's award, however, was without costs. In considering whether the award was greater than any particular offer, it is necessary, because of the presumption that costs follow the event, to adjust the award to reflect an amount for costs, at least as of the date of the offer.

[54] In her chronology, defence counsel notes her costs and disbursements as of the dates of the two formal offers. Although her costs and fees would not be the

equivalent of party and party costs, they provide some indication as to when the substantial legal work and expenses were done and incurred, at least from the perspective of the defence. Plaintiff's counsel suggests that the plaintiff's costs during the initial period of the litigation would be greater than the defendants'. This submission would appear to be reasonable.

Original Trial Dates

[55] An unusual submission by plaintiffs' counsel is that "the plaintiff's claim for future care costs would have been borne out and would likely have resulted in a higher award" if the trial had proceeded on April 2, 2010, as originally scheduled, rather than in October 2010. In the interval Dr. Freund, the expert called by the defence, learned of progress in the plaintiff's condition that had not been shown in the treatment records prior to April 2010. It was this new information that he labelled a "hallelujah moment". Counsel presumably is suggesting that in April Dr. Freund would not have known of the plaintiff's improvement, and the previous uncertainty in her prognosis as to when she would recover would have caused the jury to make a higher award, and particularly to make an award in respect to her claim for future costs. Such a submission is untenable. Dr. Freund was permitted to testify about the effect of the new information notwithstanding the fact that he had not filed a supplementary report. The reason for this relates to the conduct of the trial, not whether any offer, or the award, should be adjusted to reflect what might have been the award of the jury had the evidence not been given.

Costs Before and After Offers

[56] In applying the old Rule, courts would sometimes award costs to a party up to the date of an offer and to the party making the offer from the date of the offer to the conclusion of the trial.

[57] In *Cyr v. Ouiellette et al.*(1983), 56 N.B.R. (2d) 409, in applying a New Brunswick Rule of court worded exactly the same as Rule 41A.11, the court awarded costs to the plaintiff up to the date of the offer by the defendant, and thereafter to the defendant.

[58] More recently, in *Curwin v. Sobeys Group Inc.*, 2007 NSSC 164, McDougall J., after making a lump sum determination for the costs of the litigation, applied Rule 41A and awarded 40 percent of the total costs to the plaintiff, together with

disbursements up to the date of the offer. The remaining 60 percent of the total costs, together with disbursements incurred from the date of the offer, was awarded to the defendant. McDougall J. then authorized a set off of the defendant's costs as against the jury's award and against the amount of costs awarded the plaintiff.

[59] There is, in my view, nothing in the new Rules to preclude apportioning of costs having regard to the timing of the offer. Rule 10.09 only deals with the percentage of Tariff costs that a less than fully successful party may receive, not whether the other party is entitled to costs up to the date of the offer in question.

[60] However, in the circumstance of a lump sum costs award, any entitlement to costs by a party before receiving a settlement offer is but one of several factors in determining entitlement and amount of the lump sum.

[61] Plaintiff's counsel is correct that consideration of offers to settle and their impact on costs is wholly within the discretion of the court. However, this is not because it was reasonable for the plaintiff to have rejected any offer, or giving effect to the circumstances of the plaintiff at the time. Rather, it is because in deciding to award a lump sum, as I have decided in this instance, the Rules relating to the effect of the filing of offers, whether made informally or formally pursuant to the Rules in effect at the time the offer was made, are not necessarily determinative. A lump sum is an award made having regard to all the circumstances.

[62] Although a relevant consideration, and an important one in most instances, whether a party rejected an offer that was greater than the eventual tribunal decision is not determinative of what the lump sum should be. There often are, as there were in this case, other factors to be considered.

Effect of the Offer to Settle

[63] A verbal offer by the plaintiff, early on in the litigation would have approximated the jury's award. An offer of $150,000.00 was made on behalf of the plaintiff on December 5, 2006. It was repeated in a letter from plaintiff's counsel dated December 14, 2006. It was withdrawn by letter from the plaintiff's counsel, dated May 31, 2007, and was later replaced by a higher offer. By the time of the trial the plaintiff was offering to settle for a figure substantially in excess of

what the jury awarded. The plaintiff's offers are not, therefore, a significant factor in my determination of entitlement to and the quantum of costs to be awarded.

[64] On February 18, 2008, the defendants offered to settle the plaintiff's claim for $150,000.00, all inclusive. Pursuant to 1972 *Civil Procedure Rule* 41A, the defendants formalized the offer to settle for $150,000.00, all inclusive, on April 25, 2008. At issue, therefore, is whether taking into account any relevant adjustments, this offer is greater or less than the plaintiff's actual recovery.

Prejudgment interest

[65] Counsel agree that the jury's award is to be adjusted by adding prejudgment interest to the awards of general damages and special damages including loss of valuable services, but not future housekeeping, as it represents a future rather than a past expense. The interest rate of 2.5 percent is also not in dispute. Only the duration is in dispute.

[66] The plaintiff seeks prejudgment interest from the date of the accident to the date of trial. Defence counsel says that in the circumstances of this case, "including the fact that the defendants made concerted efforts to resolve this matter at a very early stage - as early as November 25, 2005," that pre-judgment interest should be limited to four years.

[67] The plaintiff cites *Willis v. Bernard L. Mailman Projects Ltd.*, 2008 NSSC 94, where the matter was not brought to trial until 10 years after the accident. Counsel submits:

> The Court found no evidence of any delay on the part of the plaintiff in bringing the matter to trial for the 8 years following the accident and limited prejudgment interest for that time period. The Court held that the burden of establishing undue delay rests with the party alleging the usual rule should not apply.

[68] I have decided to award pre-judgment interest for five years and therefore would adjust the jury's award by adding pre-judgment interest at 2.5 percent for 5 years.

Advance Payment

[69] The defence made an advance payment to the plaintiff. In May 2009 the defendants advanced $14,000.00 towards the plaintiff's medical expenses. The advance was made pursuant to s. 131 of the *Insurance Act* R.S.N.S. 1989, c. 231. The section reads:

> 131 (1) Where an insurer makes a payment on behalf of an insured under a contract evidenced by a motor vehicle liability policy to a person who is or alleges himself to be entitled to recover from the insured covered by the policy, the payment constitutes, to the extent of the payment, a release by the person or his personal representative of any claim that the person or his personal representative or any person claiming through or under him or by virtue of the *Fatal Injuries Act* may have against the insured and the insurer.
>
> (2) Nothing in this Section precludes the insurer making the payment from demanding, as a condition precedent to such payment, a release from the person or his personal representative or any other person to the extent of such payment.
>
> (3) Where the person commences an action, the court shall adjudicate upon the matter first without reference to the payment but in giving judgment the payment shall be taken into account and the person shall only be entitled to judgment for the net amount, if any.
>
> (4) The intention of this Section is to permit payments to a claimant without prejudice to the defendant or his insurer, either as an admission of liability or otherwise, and the fact of any payment shall not be disclosed to the judge or jury until after judgment but before formal entry thereof.

[70] The defendants say the jury's award of $142,952.00 should be reduced by the $14,000.00 advanced to the plaintiff for which the defendants gave notice that a credit against any award would be sought pursuant to s. 131(3) of the *Insurance Act*.

[71] As outlined in counsel's May 2009 correspondence, the defence does not seek to have the payment deducted from the amount awarded by the jury, pursuant to s. 131 of the *Insurance Act*, *supra*. Plaintiff's counsel, after stating that the payment was held in trust by his firm, offered to provide receipts to show the money was expended to cover the costs of drugs and medical treatment. As these expenses were reimbursed, he said they were not included in the list of expenses agreed to by defence counsel and awarded by the jury. Counsel submits that had

he been told the defendants were intending to seek recovery of the advance, he would have added these amounts to the expenses put to the jury.

[72] Defence counsel states "...the Defendants do not seek to take advantage of a slip or mistake on the part of the plaintiff or her counsel...". However, counsel says it should be taken into account in determining whether the April 25, 2008 settlement offer was more favourable than the jury's award.

[73] I am satisfied that the plaintiff would be unfairly prejudiced if a credit against the jury's award was allowed either as a deduction in the jury's award or in calculating whether the award was more favourable than any offer to settle made by the defence. The defence does not dispute the validity of the expenses covered by the advance.

[74] Notwithstanding the wording of s. 131(3), in the circumstances of this case, it would neither be fair nor just to grant such a credit. In the alternative, if such a credit were to be allowed, I would add the sum of $14,000.00 to the jury's award for special damages.

"Exactness" of the offers

[75] The offer of $150,000.00 was "all inclusive" and to the extent it included a recognition of costs, they were included in the $150,000.00. Adjusting the jury's award for pre-judgment interest and party and party costs, likely to have been awarded to the date of the first formal offer, results in the offer being materially less than what the plaintiff would have received had the jury made its decision on the date the defendants offer was made. The shortfall would not be so insignificant that it can be ignored, as in *Blerot et al. v. Redvers Agricultural & Supply Ltd.* (1987), 18 C.P.C. (2d) 358, where the court observed that a "party making an offer to settle should not be expected to do so with complete exactness," and held that the defendant should not be penalized in costs because of a shortfall of $191.00 (paras. 16-18).

[76] In respect to the March 2010 offer the conclusion is different. Clearly, in respect to that offer, the defendants obtained a favourable judgment. Applying adjustments for pre-judgment interest and party and party costs as of March 2010 does not alter the conclusion that the jury's award was materially and substantially less than what was offered.

Expert Fees

[77] The defence called one witness, Dr. Freund. He was qualified as an expert witness and gave evidence in response to much of the plaintiff's medical evidence. The plaintiff suggests a number of criticisms in respect to Dr. Freund's account, which counsel says is "unreasonable", submitting that it should be "disregarded in its entirety." There are, as the plaintiff submits, limits on what may be included in an expert's accounts in a claim for party and party costs.

[78] The plaintiff refers to the decision of Cowan, C.J. in *J.D. Irving Ltd. v. Désourdy Construction Ltée* (1973), 5 N.S.R. (2d) 350, at paras. 22 and 24, where the Chief Justice observed:

> ...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.
>
> ...
>
> There remains the question as to the extent to which there is to be any allowance for charges and expenses with respect to consultations with experts, apart from actual attendance of such experts as witnesses. In my opinion, such charges and expenses may be allowed so long as they appear to have been properly incurred in procuring evidence and to the extent to which they are just and reasonable...

[79] In suggesting that Dr. Freund's account should be "disregarded in its entirety", counsel refers to the change or modification in Dr. Freund's opinion. Counsel's submission reads:

> Dr. Freund had previously provided 2 reports, both of which contained similar opinions with respect to the Plaintiff, and in particular that she suffered from an ongoing condition which she must manage. However, at some time after the trial began but before he testified, counsel for the Defendant provided updated medical records to Dr. Freund which resulted in him forming a new opinion which clearly contradicted his earlier position, stating that in the near future the Plaintiff would have no need for further botox treatment. Had the Plaintiff been aware of Dr. Freund's "new" opinion prior to his attendance, she might have had occasion to consider whether to proceed with the balance of the trial.

[80] This is not a reason to "disregard his account in its entirety". It relates to the conduct of the trial, not whether the defendants are entitled to claim Dr. Freund's account as a disbursement.

[81] Plaintiff's counsel refers to *Abate v. Borges* (1992), 12 C.P.C (3d) 391, 1992 CarswellOnt 369 (Ont. Ct. J. (Gen. Div.)), as authority for disallowing travelling time of an expert to attend a meeting with counsel to prepare for trial and time spent by an expert in reviewing the other party's report, since it was done to educate counsel. Counsel also took exception to Dr. Freund's travel expenses, suggesting flights can be booked for substantially less than was charged.

[82] Defence counsel responded that because of the number of changes in the dates of his scheduled testimony, Dr. Freund was required to purchase an air ticket that permitted changes. Also, he arrived in Sydney on the Saturday preceding his testimony on the following Monday, meeting with counsel on the intervening Sunday.

[83] There is nothing of consequence in Dr. Freund's accounts to cause any substantial adjustment. His rates are not materially different than those of Dr. Saunders, although he apparently spent more time in trial preparation. This is to be expected. The majority of the medical reports he had to review for trial were generated by the plaintiff's experts. To the extent they prepared by reviewing their own reports, it is not unexpected that Dr. Freund would require more time to review reports he did not generate and had not previously seen.

[84] Counsel also questioned the need to re-review medical reports for trial, when they would have already been reviewed when Dr. Freund prepared his reports. In addition to the fact that there were additional reports, the need for an expert to review reports that were reviewed sometime earlier in preparing reports for counsel is obvious. In testifying in court, and responding on cross-examination, he was entitled to re-read reports in order to respond fully on direct and cross-examination.

[85] It is unnecessary to review the accounts of the plaintiff's experts, other than to note that their accounts were not challenged by the defendants. To the extent counsel for the plaintiff challenged the account of one of his experts, further comment is unnecessary in view of my decision to award a lump sum, other than to

note that the expert was one of his client's treating physicians and presumably charged her regular rate to attend in court.

Out of Town Counsel's Expenses

[86] Defence counsel cites a number of cases on the question of whether party and party disbursements can include the costs of out of town counsel attending trial on behalf of one of the parties. She references *MacNeil Estate (Re)*, 2003 NSSC 50, affirmed 2003 NSCA 121, where Scanlan J., in an application heard in Truro, allowed travel costs for counsel from Stellarton. Defence counsel also acknowledged that LeBlanc J. in *DeWolfe v. Ferguson*, [2000] N.S.J. No. 523 (S.C.), and Edwards J. in *Simpson Estate v. Cox*, 2006 NSSC 116, did not allow counsel's travel and accommodation as compensable disbursements where the successful party had elected to retain out of town counsel.

[87] Defence counsel suggests this is an exceptional circumstance in that plaintiff's counsel, when initiating the proceeding, knew that counsel for the defendants resided and practiced outside Sydney.

[88] This exception, in my view, is not relevant. It has been recognized by many courts, in different jurisdictions, that a party should not be responsible for additional legal expenses incurred by the other party because it wished to retain counsel from outside the area where the litigation was being advanced. Apart from circumstances where it is shown that there is no other counsel competent to deal with the particular litigation practicing in the area, the predominant view has been that parties who wish to retain outside counsel may do so, but the additional costs of retaining counsel are theirs, regardless of whether they are successful or not.

[89] Defence counsel's expenses in attending trial in Sydney are not a consideration in my determination of costs in this matter.

Trial Conduct

[90] Although it was not raised by counsel, a factor in my determination of costs is trial conduct, specifically as it relates to the late disclosure by the plaintiff of medical records generated in the summer of 2010, and the inaction of the defence, on learning these documents had led Dr. Freund to a "hallelujah moment" and

caused him to change or modify his earlier prognosis on the expected recovery time of the plaintiff.

[91] The plaintiff's failure to forward these reports to defence counsel in a timely manner has been, to a large extent, ameliorated by the ruling allowing Dr. Freund to comment on them, and the fact that, initially without objection from plaintiff's counsel, he was able to give his opinion on the plaintiff's improved condition, from his reading of the assessments completed by Dr. Saunders.

[92] It is reasonable to assume that no later than the Sunday before Dr. Freund began his testimony, the information about his changed or modified prognosis would have been known to defence counsel. In the circumstances, it was incumbent on defence counsel to notify plaintiff's counsel as soon as possible of this anticipated change in Dr. Freund's testimony. Plaintiff's counsel was entitled to an opportunity to consider his options in view of this late development. He never had the opportunity, only learning of Dr. Freund's changed or modified prognosis while the doctor was on the stand.

[93] In the initial ruling permitting Dr. Freund to comment on the newly delivered records, a key factor was that the plaintiff's own doctor had already testified about them. Counsel were advised that the ruling only extended to allowing Dr. Freund to comment on these records. Both counsel, particularly counsel for the plaintiff, were cautioned that the ruling did not extend to permitting Dr. Freund to say that, as a result of reviewing these records, his opinion on the prognosis for recovery of the plaintiff had changed. He was cautioned that if any at time Dr. Freund should so testify or appear to be testifying, he should object, if he wished to do so. If he did, then I would consider whether Dr. Freund would be permitted to give such evidence.

[94] On at least two occasions Dr. Freund testified without objection that the record of Ms. Boutilier's improvement had in fact changed his prognosis. Later, when counsel for the defendants again brought her examination of Dr. Freund to the change in his prognosis, brought about by the recently delivered treatment records, counsel for the plaintiff did object. His objection was upheld and Dr. Freund was precluded from again reviewing the change in his prognosis brought about by his review of Dr. Saunder's most recent treatment records.

[95] Notwithstanding that Dr. Freund was able to testify about his changed opinion, I remain concerned about the failure of the defence to promptly inform plaintiff's counsel of this change in Dr. Freund's anticipated testimony. It is a significant factor in my consideration of what is an appropriate lump sum cost award in this case.

[96] In referencing plaintiff's counsel's failure to make a timely disclosure of updated medical reports, and defence counsel's failure to advise plaintiff's counsel of Dr. Freund's apparent change of opinion on the prognosis for recovery of the plaintiff, I did not, and do not, attribute any improper motive to either counsel. This proceeding involved considerable medical evidence with which both counsel have had to grapple. Their conduct throughout the trial was professional and in keeping with the standard of conduct expected by the court.

[97] Plaintiff's counsel said he forwarded the updated reports as soon as he received them. Defence counsel said she received them a matter of days before the commencement of the trial and forwarded them to Dr. Freund. It was only later that she heard of the modification or change in his prognosis for the plaintiff. She said when she learned this, it was in the middle of the trial, and shortly before Dr. Freund was to testify. It simply did not occur to her to telephone or e-mail plaintiff's counsel.

[98] The taking into account of these two "mis-steps" in determining costs, to the extent I have done so, is not, nor should it be taken as a criticism of the professionalism of either counsel. To do so would be a disservice to them. The mis-steps in this trial were dealt with during the trial, factored in determining lump sum costs and are not further relevant in the outcome or conduct of this litigation.

Conclusion

[99] Having regard to all the circumstances I am satisfied the defendants are entitled to costs, having obtained a "favourable judgment", when compared to the March 2010 formal offer to settle. The quantum of the costs is likewise to be calculated having regard to the various circumstances, including the timing of this offer and the issue of trial conduct previously referenced. I award the defendants lump sum costs of $60,000.00 "all inclusive".

[100] Judgment accordingly.

MacAdam J.