# SUPREME COURT OF NOVA SCOTIA

**Citation:** *Pyne v. Campbell*, 2017 NSSC 5

**Date:** 20170110
**Docket:** *Halifax No.* 275701
**Registry:** Halifax

**Between:**

Jacqueline Frances Elizabeth Pyne

*Plaintiff*

and

Allan Campbell and Unifund Assurance Company, a body corporate

*Defendants*

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| **Judge:** | The Honourable Justice Ann E. Smith |
| **Heard:** | December 13, 2016, in Halifax, Nova Scotia |
| **Written Decision:** | January 10, 2017 |
| **Counsel:** | Justin D. Morrison, for Unifund Assurance Company (subrogated claim of Jacqueline Frances Elizabeth Pyne)<br>Allan Campbell, not appearing<br>Jacqueline Frances Pyne, not appearing |

**By the Court:**

**Background**

[1] On January 2, 2007, Ms. Jacqueline Pyne commenced a proceeding against Allan Campbell and Unifund Assurance Company ("Unifund"). The statement of claim alleges that she suffered injuries in a motor vehicle accident on January 3, 2004 when the vehicle she was driving was stopped at a crosswalk. The claim alleges that Ms. Pyne's vehicle was struck on the rear by Mr. Campbell's vehicle.

[2] Ms. Pyne claimed against her insurer, Unifund, pursuant to the provisions of Section-D Uninsured Automobile Coverage in the event that Mr. Campbell was determined to be uninsured at the time of her loss.

[3] Indeed, it was determined that Mr. Campbell was unlicensed, uninsured and was driving the vehicle which hit Mr. Pyne's vehicle without the consent of its owner Mr. Lowell Butts.

[4] Unifund filed a defence and cross-claim on June 27, 2007, which Mr. Campbell did not defend. A default order against Mr. Campbell was issued on April 23, 2008 in favour of Unifund.

[5] Unifund added Mr. Butts as a third party to the action by court order dated May 4, 2010. Unifund filed a notice of claim against Mr. Butts on June 3, 2010. Mr. Butts filed a notice of defence on August 23, 2010.

[6] At a mediation on March 27, 2013 Ms. Pyne settled her Section-D claims based upon Unifund paying her the all-inclusive sum of $255,000 (the "settlement").

[7] On March 27, 2013, Ms. Pyne's claim against Unifund and Unifund's claim against Mr. Butts were both dismissed without costs by consent order. Ms. Pyne's claim against Mr. Campbell continued.

[8] In February, 2016, a notice of new counsel was filed indicating that Ms. Pyne was now represented by Justin Morrison. Mr. Morrison took over as counsel for Ms. Pyne to bring forward the proceeding on behalf of Unifund on a

subrogated basis pursuant to s. 149 of the *Insurance Act*, R.S.N.S. 1989, c. 231, as amended.

[9] An order for default judgment was issued against Mr. Campbell on February 19, 2016, with damages to be assessed after he failed to file a defence to the notice of action and statement of claim.

[10] This assessment of damages was originally scheduled to be heard on October 4, 2016, but the matter was adjourned to December 13, 2016 to provide counsel for Unifund with additional time to serve Mr. Campbell, who lives in Alberta, with the motion documents.

[11] The affidavit evidence of Mr. Morrison, Ms. Tracy Estey and Ms. Kira McGavin of Xpera Investigations establish that Mr. Campbell was served with all of the motion documents for the originally-scheduled October 4, 2016 motion and the rescheduled December 13, 2016 motion.

[12] Neither Mr. Campbell, nor anyone on his behalf, appeared in court on December 13, 2016.

[13] Ms. Pyne also did not appear on the hearing of the motion and I received no affidavit evidence from her.

**Issues**

[14] Should damages be assessed by the Court in the absence of contemporary medical and vocational evidence? If the answer to the first question is "yes", how should damages be assessed?

**Issue 1: Should damages be assessed by the Court in the absence of contemporary medical and vocational evidence?**

[15] The evidence before me on the substantive issues of the motion consists of the following:

1) The affidavit of Justin Morrison sworn to July 13, 2016 which attaches as exhibits various medical and other documentation relating to Ms. Pyne's injuries and losses;

2) The supplemental affidavit of Justin Morrison sworn on November 23, 2016 attaching the July 21, 2009 transcript of the discovery evidence of Ms. Pyne;

3) The affidavit of Dr. Thomas D. Loane sworn on June 21, 2016 which includes as an exhibit his November 13, 2008 independent medical report following his examination of Ms. Pyne on November 12, 2008. Dr. Loane's Affidavit also attaches as exhibits a report prepared by Dr. Diane MacDonald (psychiatrist) dated April 26, 2009 and various occupational therapists' reports (Direct Health Solutions/CBI) dated between April 30, 2010 and September 14, 2010.

[16] In *MacKean v. Royal & Sun Alliance Insurance Co. of Canada*, 2015 NSCA ("*MacKean*") the Nova Scotia Court of Appeal held that the settlement between a Section D insurer and its insured is relevant to the assessment of damages. Referring to the unique nature of Section D coverage, Bryson, J.A. noted that coverage is linked to the third party tortfeasor's conduct and that the insurer has no obligation to pay anything to its insured, other than the amount of damages caused by the wrongdoer's conduct. There must be sufficient evidence before the Court to allow it to assess whether the settlement was reasonable and reflecting the likely recovery at trial.

[17] The Court of Appeal held at para. 42:

> 42 In case such as this, the loss has been quantified once already, by the party responsible for paying it, on the basis of what the plaintiffs were "legally entitled to recover" from Mr. Goodall. Automobile insurers are very experienced personal injury litigants, whose routine business is to evaluate accident claims. They are not in the business of liberally distributing largesse to undeserving claimants. The Court should not defer to the insurer's calculation, but because the principle by which the settlement is effected is the same as that by which the Court would assess damages, it is relevant.

[18] Unifund should, therefore, submit evidence from the insured to support its position on the reasonableness of the settlement.

[19] I note that all the medical and other information provided to the Court relative to Ms. Pyne's alleged injuries and losses pre-dates the March, 2013 settlement.

[20] As stated by the Nova Scotia Court of Appeal in *MacKean, supra*:

> The assessment of damages is usually done as of the motion because damages are assessed "once and for all" at one time: *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Case. 127, *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at p. 236; *Watkins v. Olafson*, [1989] 2 S.C.R. 750. Specific types of

> damage may be calculated as of a particular date: *Johnson v. Agnew*, [1980] A.C. 367 (property loss).

[21] In *MacKean*, the plaintiff had settled a general damage claim nearly four years before the insurer sought an assessment of damages caused by the defaulting defendant.

[22] The Court of Appeal noted that in circumstances where the plaintiff has settled a general damage claim "some considerable time prior to assessment." (para. 61) The Court <u>may</u> (my emphasis) need more contemporary evidence to assess the reasonableness of settlement. The Court of Appeal further noted that that "would not normally be so for special damages and out-of-pocket types of damages." (para. 61)

[23] Counsel provided affidavit evidence as to his many attempts to obtain up-to-date evidence from Ms. Pyne. I am satisfied that Ms. Pyne in essence refused to cooperate with Mr. Morrison's attempts to provide an affidavit to the Court outlining her current state of health and occupational status, if any. Mr. Morrison arranged for Ms. Pyne to be subpoenaed to attend the originally-scheduled hearing of this motion on October 4, 2016, but he advised the Court on December 13th that that subpoena was never served on Ms. Pyne and his instructions were to proceed to this motion without further attempts to involve Ms. Pyne.

[24] This all leaves the Court with a dilemma. I am to assess damages as of the date of the motion, but I am left to assess damages based on medical and other evidence which is more than six years old.

[25] In the circumstances of this case, I resolve the dilemma by finding that I do not need more contemporary evidence to assess the reasonableness of the settlement.

[26] I consider the principles of accessibility, proportionality, timeliness, and affordability applicable in civil cases as articulated by Associate Chief Justice Smith in *Garner v. Bank of Nova Scotia*, 2014 NSSC 63 (N.S.S.C.) where Justice Smith endorsed and amplified the comments of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.).

[27] To require Unifund to take further steps to attempt to force an uncooperative plaintiff to provide up-to-date medical and employment information would go against the principles noted above.

[28] I do note that had Unifund brought its motion of assessment of damages soon after it settled with the plaintiff, the lack of timely medical and other documentation could have been avoided.

**Issue 2: How Should Damages Be Assessed?**

[29] At mediation, Ms. Pyne quantified her claim at $940,109.12. The heads of damages and amounts claimed were as follows:

(a) General Damages for pain and suffering - $130,000.00

(b) General Damages for loss of valuable services - $75,000.00

(c) *Quantum Meruit* claim on behalf of her husband - $50,000.00

(d) Past Care costs - $20,658.07

(e) Future Case costs - $102,407.40

(f) Past Income loss - $129,440.00

(g) Future Income loss - $211,200.00

(h) Future Section B benefits - $108,472.00

(i) Loss of Retirement benefits - $9,281.65

(j) Investment Administration Expense - $4000.00

(k) Deductible - $500

[30] Ms. Pyne claimed pre-judgment interest at 2.5% on general damages for a five-year period for pain and suffering, the *quantum meruit* claim, the loss of valuable services claim and the investment administration expense, for a total of $32,200.

[31] Ms. Pyne claimed pre-judgment interest for a five-year period at 5.0% on past care costs, past income loss and the deductible in the total amount of $37,650.

[32] Ms. Pyne sought to be reimbursed for disbursements in the amount of $8000 (medical files, reports, court fees, fees for discovery and miscellaneous office expenses).

[33] She claimed legal costs pursuant to Tariff F of the *Civil Procedure Rules* for settled or discontinued claims with an amount involved of $910,809.12 in the amount of $21,300.

[34] Counsel for Unifund suggests that if the Court "backs out" the heads of damages that relate to the future (i.e. following the settlement) and considers a "low end" approach to the range of general damages that Ms. Pyne would most likely have been awarded at trial, the Court will be left with an amount very close to the $255,000 which it paid to Ms. Pyne. That, he argues, should convince the Court that the settlement amount was reasonable and that costs should be assessed in the same amount. I am convinced that he is right.

[35] The following analysis will illustrate the argument counsel for Unifund advances and which I determine is reasonable based on the facts of this case.

**General Damages for Pain and Suffering**

[36] Unifund says that at trial Ms. Pyne would have been awarded at least $62,000 as general damages for pain and suffering.

[37] The medical information before the Court establishes that because of the motor vehicle collision, Ms. Pyne developed a chronic pain condition. Dr. Loane opined in his 2008 independent medical report that Ms. Pyne suffered cervical spraining injuries as a result of the accident with the diagnosis most responsible for her disability being a "pain disorder, chronic type, associated with a medical condition and psychological factors." Dr. Loane also opined:

> Ms. Pyne has a well ingrained chronic pain condition and has a number of risk factors for continuing with chronic pain including panic attacks, sleep disturbance, supportive or solicitous spouse, abnormal cognition regarding the injury and pathology.
>
> Unless these psychological factors are corrected she will likely continue to lead a disabled lifestyle and her chronic pain will continue to restrict her.

[38] Various occupational therapy reports from Direct Health Solutions/CBI in 2010 show that Ms. Pyne benefited only marginally from a Lifestyle Restoration program (she was mutually discharged at week three of the four-week program on the basis that further significant gains were unlikely). As of September, 2010, she had been unemployed since the accident on January 3, 2004.

[39] Counsel for Unifund provided me with the following cases in support of a general damage award in circumstances where the injuries suffered were generally similar to those suffered by Ms. Pyne: *Smith v. Stubbert* (1992), 117 NSR (2d) 118; *Hayward v. Young*, 2013 NSCA 64; *Marinelli v. Kiegan* 168 N.S.R. (2d) 252; *Woods v. Hubley* 140 N.S.R. (2d) 180; *Abbott v. Sharpe*, 2007 NSCA 6; *Maslen v. Rubenstein*, [1993] BCWLD 2354, 83 BCLR (2d) 131; *Yoshikawa v. Yu* (1996) 21 BCLR (3d) 318; *Khosa v. Kalamatimaleki* 2014 BCSC 2060.

[40] Counsel for Unifund proposes that an award of general damages in the amount of $80,000 would have been reasonable to compensate Ms. Pyne for prolonged pain and suffering, but, at the very least, an award at the high end of the modern day range of damages in *Smith v. Stubbert*, *supra*, (which he suggests is $27,500 to $62,000 in 2016 dollars) would have been awarded at trial.

[41] Based upon the medical documentation before the Court I am satisfied that allocating, even notionally, the sum of $62,000 as general damages for pain and suffering had this matter been tried, is reasonable.

**General Damages – Loss of Housekeeping Capacity and Loss of Valuable Services**

[42] Counsel for Unifund argues that at trial Ms. Pyne would have been awarded at least $30,000 in general damages to compensate her for the loss of various aspects of her daily life.

[43] Ms. Pyne was 40 years old at the time of the accident. She was married with five sons (four of them living at home). She enjoyed gardening and walking and worked seasonally as a horticulturist at a grocery store. As a result of the injuries she sustained in the accident, Ms. Pyne claimed that her activities of daily living were disrupted and she was not able to return to work.

[44] In November 2008 Ms. Pyne completed an Activities of Daily Living Questionnaire for Dr. Loane. At that time, she stated that she was unable to bathe using a bathtub, do yard work, sweep, vacuum, do dishes, buy groceries or do laundry. Ms. Pyne said she did some light meal preparation and made beds, but with difficulty due to back pain. She also described difficulty climbing stairs and with walking for more than 15 minutes because of back and hip pain and said she had to use a cane to relieve pressure on her back.

[45] At some point (the evidence is not clear) Ms. Pyne began receiving a Canada Pension Plan disability pension.

[46] At mediation, Ms. Pyne claimed $75,000 under this head of damages, relying on the following cases: *Miller v. Royal Bank of Canada*, 2008 NSSC 32; *Carter v. Anderson*, 1998 NSCA 76; *Warner v. 2331653 Nova Scotia Ltd.*, 2004 NSSC 142.

[47] Based upon the case-law noted above, and the evidence before the Court, I am satisfied that it was reasonable for Unifund to notionally allocate an amount in the vicinity of $30,000 as general damages for the loss of activities of daily living.

**Special Damages - Past Care Costs**

[48] As noted above, at mediation Ms. Pyne claimed the sum of $20,658.07 under the heading of damages for the cost of past care. I am satisfied that at trial Ms. Pyne would have been awarded special damages for past care costs in the range of $20,600.

**Special Damages – Past Income Loss**

[49] At mediation Ms. Pyne quantified her past income loss at approximately $129,400. From that sum Canada Pension Plan disability benefits and Section B benefits she received were deducted for a net amount claimed of approximately $78,000.

**Pre-judgment Interest on Amounts Claimed**

| | | |
|---|---|---|
| General Damages for Pain and Suffering | $62,000.00 + P.J.I. at 2.5% for five years | **$69,750.00** |
| General Damages for Loss of Valuable Services | $30,000.00 + P.J.I. at 2.5% for five years | **$33,750.00** |
| Special Damages for Past Care Costs | $20,658.07 + P.J.I. at 5% for five years | **$25,822.59** |
| Special Damages for Past Income Loss | $78,000 = P.J.I. at 5% for five years | **$97,500.00** |

| | | |
|---|---|---|
| | **Subtotal of Above:** | **$226,822.59** |
| Costs (Tariff F) | $5000.00 + $2536.44 (2% of $126,822) | **$7,536.44** |
| Disbursements | | **$8,000.00** |
| | **Grand Total:** | **$242,359.03** |

[50] The analysis set forth above does not allow for Ms. Pyne to have recovered any amount at trial for future cost of care, future income loss, Section B entitlement after age 65 years, loss of retirement benefits or an investment administration expense as well as the pre-judgement interest on these heads of damages. It seems highly likely that she would have been awarded some amount for one or more of these heads of damages, or conversely have been awarded more for one of the heads of damages reviewed above to make up the gap between the figure of $242,359.03 and the settlement amount of $250,000.

**Conclusion**

[51] I am satisfied that the analysis carried out above, in the particular circumstances of this case, allows me to conclude that the settlement paid to Ms. Pyne by Unifund reflected her likely recovery and was reasonable. I assess Unifund's damages in the amount of that settlement, i.e. $255,000.

**Costs**

I award costs of $1,000 to Unifund.

Smith, J.