SUPREME COURT OF NOVA SCOTIA
Citation: *Veinotte v. Chute*, 2020 NSSC 271

Date: 20201001
Docket: *Bridgewater*, No. 430878
Registry: Bridgewater

Between:

Linda Louise Veinotte

Plaintiff

v.

Richard G. Haugen and Janet E. Chute

Defendants

Judge:	The Honourable Justice Pierre Muise
Heard:	By Correspondence
Final Written Submissions:	September 30, 2020
Counsel:	Farhan Raouf, for the Plaintiff Robert Purdy, Q.C., for the Defendants

INTRODUCTION

[1] The question of liability was severed from that of damages in this matter. The Defendant admitted liability for the motor vehicle collision that was the subject her action; but, took the position that the Plaintiff had signed a valid release which prevented her from pursuing the Defendant for further damages. At the liability trial, I found the release signed by the Plaintiff was valid. This is my decision on costs relating to that trial.

[2] As the proceedings were discontinued against Richard Haugen, Janet Chute was the only remaining Defendant.

[3] She seeks $19,250 in costs, using Scale 2 (Basic) of Tariff A, based on an amount involved of $125,000 and 3.5 days of trial, plus disbursements. She advances that amount involved as being justified because it was presented as a roughly 50% reduction from the Plaintiff's assessment of the value of her claim, without liability issues, being between $250,000 and $300,00, which reduction would account for the severance of liability from damages.

[4] The Plaintiff submits the following. It was "inherently wrong" for the Defendant to refer to her settlement offer, and use it as a basis for the amount involved, as it was contained in a "without prejudice" letter . No costs should be

recoverable from her, or any award should be very nominal, because she owns no real estate and has no income, and the issue of the validity of the release was a novel one. The amount involved should be limited to the amount she and the insurer settled for, i.e. $4500, as the court found that amount to be reasonable.

COSTS

[5] "[A]bsent any specific agreement between the parties (or other special circumstances) the "without prejudice" privilege is "presumed to expire once the merits of the dispute have been decided": **Mahe v. Boulianne**, 2010 ABCA 74, para. 9. **Civil Procedure Rule** ("**CPR**") 10.03 provides that "[a] judge who determines costs may take into consideration a written offer of settlement made formally under this Rule or otherwise, unless the offer was made at a settlement conference or under an agreement that the offer would not be admissible in relation to costs". **CPR** 77.07(3) provides that a settlement offer made at a settlement conference "or during mediation must not be referred to in evidence or submissions about costs". The settlement offer in question was not made at a settlement conference, nor during mediation. There is no indication of any agreement that the offer would not be admissible on a motion for costs, nor of any "special circumstances" making it such that the privilege should continue after the merits of the case have been determined. Therefore, there is nothing "inherently

wrong" with the Defendant referring to the Plaintiff's "without prejudice" offer in her costs submissions.

[6] **CPR** 77.04 provides for relief from liability for costs due to poverty. It states, among other things:

> "(1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.
>
> (2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:
>
> (a) the party is notified of a proceeding the party wishes to defend or contest;
>
> (b) a claim made by the party is defended or contested."

[7] The Plaintiff in the case at hand has not made a motion to be relieved from liability for costs. She has waited until after the trial was completed to submit that she should not be required to pay costs because of poverty. The Court in **Canadian Residential Inspection Services Ltd. v. Swan**, 2013 NSSC 226, at paragraphs 26 and 31, addressed a post-trial request for exemption from paying costs. The Court noted that it is contrary to the purposes of **CPR** 77.04, and it deprives the successful party of notice that such an exemption will be sought, prior to it engaging in the pretrial and trial process. At paragraph 29, the Court highlighted that this timing-of-the-request criterium, should be stringently applied, as should

the criterium of establishing that, without immunity from costs, the party requesting exemption will be denied access to justice.

[8] In the case at hand, in addition to waiting until after the trial has ended to raise the issue of costs immunity, the Plaintiff has only provided her income tax return assessments from 2017 to 2019, and a representation that she owns no real estate. That is insufficient to establish that liability for a costs award would be a serious impediment to her making her claim against the Defendant. She did not provide any evidence regarding why her husband could not help finance her litigation. She did not provide evidence of what she had done with the funds from the sale of her business or from the income she earned in prior years. She did not provide evidence of inability to acquire an income source.

[9] For these reasons, even if the Plaintiff's posttrial submissions regarding exemption from costs could be considered a motion for such exemption, it would not be successful.

[10] Her lack of income from 2017 to 2019 does impact her ability to pay costs, which is a relevant factor to consider. However, other than her having no real property, there is no information regarding other resources she may have. In addition, since her condition did not worsen until years after she signed the release, she ought to have known that her chances of having it declared invalid were

limited and that, in pursuing the matter, she would be causing the Defendant to incur significant legal expenses. Plus, she started her action in 2014, well before the time she now says she has no income, and did not provide information regarding the reason for her lack of income from 2017 to 2019, nor regarding unavailability of alternative resources. In these circumstances, she could not reasonably expect any significant reduction in liability for costs.

[11] I disagree with the Plaintiff's submission that the issue of the validity of a release is a novel one. My decision following trial was reported as **Veinotte v. Haugen**, 2020 NSSC 167. It refers to multiple cases dealing with the validity of releases. The test for determining the issue was already well established.

[12] My comments in **Veinotte v. Haugen**, regarding the amount the Plaintiff had settled for, included those at paragraphs 147 to 149, which state:

> "[147] … By all appearances she had made significant progress and was well on her way to her pre-accident condition five and a half months post-collision.
>
> [148] A higher amount would have been more reasonable However, in the circumstances as they existed at the time, I cannot say that the amount settled on was "improvident, substantially unfair [or] divergent from community standards of commercial morality".
>
> [149] It is only years later that it became apparent that Ms. Finigan's condition had deteroriated and was likely to remain so for the long term. Even Ms. Finigan herself testified that, at the time she settled, she thought her physical and mental injuries would just go away and she would be fine, but her condition worsened substantially after she settled."

[13] I pause to note that, by the time of trial, the Plaintiff's last name had changed to Finigan. Any comments relating to the reasonableness of the settlement she reached with the insurer were as of the time of the settlement. If she had been successful in having the release declared invalid, her entitlement to damages would have increased substantially because of the subsequent deterioration in her condition. Therefore, the $4500 settlement amount is not a proper amount involved to use in determining costs.

[14] **Young v. Hubbards Food Service Ltd.**, 1995 CarswellNS 234 (S.C.) and **Slaunwhite (Guardian ad litem of) v. Little**, 1998 CarswellNS 189 (S.C.) dealt with costs following trial on the issue liability, which, as in the case at hand, had been severed from the issue of damages. The following principles can be extracted from those cases:

1. The amount claimed, demanded or presented as a settlement offer, to the extent "reasonably attainable" represents the other party's risk, which is relevant to costs, including determining the amount involved.

2. In setting the amount involved, it is important to recognize that severing liability from damages promotes the "just, speedy, and inexpensive determination of the proceeding". Using the successful party's full damages risk as the amount involved would be a

"disincentive" to such trial management measures. Therefore, the "amount claimed" factor in Preamble (b)(ii) to the Tariffs, is to be given less weight.

3. The extent of diminution in weight of the "amount claimed" or risk factor depends on the circumstances of the case. A relevant circumstance can include the likelihood that damages would have been agreed upon, had liability not been an issue.

4. The "complexity of the proceedings" factor, in Preamble (b)(iii), and the "importance of the issues" factor, in Preamble (b)(iv), remain significant.

5. It is still an "underlying principle" that a costs award should "represent a 'substantial contribution' towards the successful litigant's costs".

[15] **CPR** 7.07 also lists similar factors as being relevant to determining whether to increase or decrease tariff costs. They include:

> "(a) the amount claimed in relation to the amount recovered;
>
> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
>
> ….
>
> (e) conduct of a party affecting the speed or expense of the proceeding … ."

[16] Whether it is achieved through adjusting the "amount involved", or through increasing or decreasing tariff costs, the ultimate goal of a costs award is "to do justice between the parties": **CPR** 77.02; **Young v. Hubbards Food**, para. 16.

[17] Post-settlement health records were excluded from the trial. The settlement was finalized in early 2012. No income tax return information past 2012 was submitted as evidence at trial. The authorities and arguments presented at trial focussed on that which would have been a proper measure at the time of settlement. Therefore, it is not possible to assess, with precision, what damages would have been "reasonably attainable" had the release been declared invalid.

[18] The references, in the Plaintiff's pre-trial submissions, to post-settlement health records, combined with the pre-collision health conditions, suggest that the upper range of reasonably attainable damages, assuming an invalid release resulting in full liability, would have been, at best, in the $90,001-$125,000 range.

[19] Severance of the liability issue eliminated the need to deal with post-settlement health information and damages based on the Plaintiff's subsequently deteriorated condition. The severance was a reasonable step, taken with the consent of both parties. It reduced trial time and expense.

[20] The Court has only been presented with the Plaintiff's offer. It has no other information regarding negotiations. The $125,000 offer was made when the issue of the validity of the release had not been determined. It factored in a roughly 50% risk of the release being found to be valid. If the release had been found to be invalid, that risk would have disappeared. At that point, more likely than not, the Plaintiff would have increased her settlement offer amount to at least $250,000, the lower end of the range of damages it assessed as being reasonable . Therefore, it would have greatly exceeded what I have estimated to be a reasonably attainable amount. Considering the Plaintiff's long history of related pre-existing conditions, combined with the likely greatly excessive settlement offer, there is a reduced likelihood that the issue of damages would have resolved. Consequently, there is an increased likelihood the severance saved significant litigation resources.

[21] As conceded by the Defendant, it was not a complex case. The issues were fairly straight-forward. Only two witnesses were the subject of discovery examinations. The Plaintiff's only witnesses were herself, her counsellor and a psychiatrist who gave expert opinion evidence. The Defendant only called, as witnesses, the Section A adjuster, his assistant, the claims examiner, and the Section B adjuster.

[22] The question of the validity of the release was of great importance to both parties because it would determine whether the matter could proceed further. Unlike situations where a division of liability is possible, there was no middle ground result available. It was an all-or-nothing question. As it turns out, it resulted in a complete determination of the action.

[23] I note that **Young v. Hubbards Food** and **Slaunwhite v. Little** did not involve the validity of a release or a similar all-or-nothing question. Thus, the question in the case at hand is of even greater importance to the parties than that in those cases.

[24] Unless I order otherwise, I must fix the costs following the within trial in accordance with Tariff A: **CPR** 77.06.

[25] The Defendant did not provide information specifying her actual legal expenses. Therefore, it is impossible to determine whether the tariff amount is a substantial contribution towards those expenses.

[26] Considering these points, I find that an amount involved of $65,001 - $90,000, using Scale 2 (the Basic Scale) in Tariff A, without any further adjustment for the Rule 7.07 factors, will do justice between the parties.

[27] The trial, though it was heard over 4 days, only occupied about 3.5 days in total, because of adjourning early on some of the days.

[28] That results in a Tariff A basic Scale amount of $9,750, plus $7,000 ($2,000 per day multiplied by 3.5 days), for a total of $16,750.

DISBURSEMENTS

[29] "An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award": **CPR** 77.10.

[30] The Defendant claims disbursements totaling $1938.22, inclusive of HST, for: filing fees; printing/copies; long-distance phone charges; deliveries; postage; binding; and discovery costs. I am satisfied these claimed disbursements are consistent with the directions in Practice Memorandum No. 10, necessary and reasonable. Therefore, I approve them.

[31] The Defendant also claims disbursements totaling $1746.71, inclusive of HST, for travel, accommodations and meals, for her lawyer, and the articled clerk who accompanied him. They were from Halifax. The trial took place in Bridgewater.

[32] The Plaintiff declined the Court's invitation to present submissions on the question of whether it is proper for the Court to award these travel-related expenses.

[33] The Defendant acknowledges that Courts usually do not approve travel, accommodation and meal expenses as disbursements. However, it points to **Bain v. Nova Scotia (Attorney General)**, 2013 NSSC 82, and submits that the Court in that case:

1. appears to have "had no difficulty in awarding the cost of meals and accommodations for one defence counsel and, after due consideration, decided that it was appropriate to award those same costs for the second defence counsel"; and,
2. "seemed to put some weight on the fact that Rule 77.10 is different than the former Rule 63.10A and 63.30 in that it permits the Court to approve such disbursements as are "reasonable and necessary".

[34] The Court in **Bain** did highlight that the **2009 Rule** 77.10, which states that "an award of party and party costs includes necessary and reasonable disbursements", now allows the Court to approve such disbursements, while the **1972 Rules** 63.10A and 63.30, subjected them to approval by the taxing officer.

[35] That did not change the test for determining whether travel-related expenses of out-of-town counsel ought to be awarded. It merely eliminated the need to refer, to a taxing officer, the task of determining the reasonableness and necessity of disbursements generally. The Court in **Bain** recognized that. It stated, at paragraph 54, that **Rule** 77.10 "permits the Court to approve such disbursements as are reasonable and necessary".

[36] At paragraph 50, it commented that, in the cases where travel, meals and accommodations had not been approved as disbursements, "reliance was placed on there not being a provision which allows such disbursements". That, combined with its discussion regarding how **Rule** 77.10 differs from the prior **Rules**, may be taken as indicating the Court considered the test for determining those types of disbursements to have changed. However, it made other comments which indicate otherwise. They include the following.

[37] At paragraph 50, citing **Creighton v. Nova Scotia (Attorney General)**, 2011 NSSC 437. It stated:

> "The Court's view has always been that a party may retain counsel of their choosing. However, the resulting costs for travel, meals, and accomodations, if the trial is held outside of counsel's hometown, are not recoverable as disbursements, in the awarding of party/party costs."

[38] At paragraph 57, it prefaced its finding that the specific amounts claimed for travel-related expenses had not been proven to be reasonable and necessary by stating "[e]ven if I were prepared to depart from the caselaw provided."

[39] At paragraph 58, it referred to the uniqueness of the case, and added that "[o]rdinarily, the retention of counsel and related accommodation expenses would not be recoverable".

[40] At paragraph 59, "relying" on **Creighton**, it described the remaining travel-related expenses as the "cost of doing business".

[41] Other cases decided under the **2009 Rules** confirm the test, for determining recoverability of out-of-town counsel travel-related expenses, has not changed. They include the following.

[42] In **Wadden v. BMO Nesbitt Burns**, 2014 NSSC 11, at paragraph 70, the Court stated:

> "In *Wall v Haney*, the Court ruled that there was no authority to award as disbursements travel costs for away counsel to attend discovery and trial, subject to two exceptions: (1) when it was specifically authorized in the Court's decision; and (2) where the party was able to establish that the retention of local counsel was not appropriate."

[43] It found, at paragraph 75, that BMO had "not shown why it was necessary to obtain Toronto counsel".

[44] In **Matheson v. CIBC Wood Gundy**, 2014 NSSC 340, at paragraph 6, the Court stated:

> ***"Are the Mathesons entitled to recover disbursements incurred for the purpose of their Halifax legal counsel attending the hearing in Sydney, Nova Scotia?***
>
> Both counsel have set out the law and there is no apparent disagreement between the parties. The principles governing this issue can be summarized as follows:
>
> 1. Generally, a successful party will not be entitled to recover travel expenses incurred by out-of-town counsel as disbursements.
>
> 2. The only exceptions to this general principle arise where:
>
> (a) the court specifically orders the disbursement as part of its reasons; or
>
> (b) where the party is able to establish, either from the nature of the case, or the parties involved, or for some other good and valid reason, that the retention of local counsel would not be appropriate."

[45] The Court concluded there were special reasons to hire out-of-town counsel. It was a specialized and complex subject matter and the firm hired was familiar with the issues as it was "acting against CIBC in related proceedings".

[46] The Defendant, in the case at hand, highlights that Practice Memorandum No. 10, which was adopted June 24, 2016, refers to "[w]hen travel expenses recoverable" being "[a]s determined by the judge or agreed by the parties". I do not take that as changing the test for out-of-town counsel travel-related expenses either. It is the only disbursement item listed which includes the qualifier "when recoverable". That is consistent with the pre-existing rule that they are generally not recoverable.

[47] Both **Wadden** and **Matheson** relied on **Wall v. Haney**, 2007 NSSC 153. **Wall v. Haney**, at paragraph 17, quoted, with approval, paragraphs 2 to 4, of **Allen v. University Hospitals Board et al.** (2006), 384 A.R. 23 (C.A.), including the following passages:

> "[E]ntitlement to travel expenses for out-of-town counsel is governed by the 'unavailability of local counsel' test. …
>
> Where counsel are retained outside the judicial district where the action is commenced, the travel expenses of that counsel are not taxable unless the party who retained out-of-town counsel can demonstrate that there were no competent counsel within the judicial district who could hand the matter, or other special reasons. It is generally not sufficient that the party has formed a particular relationship with the counsel, or prefers for personal reasons to deal with that counsel. Those are legitimate personal reasons to hire that counsel, but not sufficient reasons to pass the costs on to another party ... ."

[48] At paragraph 18, the Court in **Wall v. Haney** concluded:

> "There is nothing in the present application to suggest any 'unique or exceptional circumstances' such as would justify the awarding of disbursements for travel, transportation and accommodations for out-of-province counsel."

[49] In the case at hand, no reason was provided as to why it would not have been appropriate to hire local counsel. The Court was not made aware of any "unique or exceptional circumstances" warranting it. The trial was relatively simple and straightforward. There were numerous lawyers in Bridgewater who could have competently handled it.

[50] Counsel for the Defendant was retained by her insurer. Insurers often have established relationships with particular lawyers or law firms. That is insufficient

reason, by itself, to “pass the costs”, of travel, meals and accommodations, to the other party.

[51] I did not order, as part of the reasons for my decision following trial, that such travel-related expenses would be recoverable as disbursements. No reason has been established for me to do so now.

[52] Therefore, I deny the Defendant’s claim for reimbursement of the travel, accommodation and meal expenses incurred by her lawyer and the articled clerk who accompanied him.

CONCLUSION AND ORDER

[53] Given that the Plaintiff, more likely than not, currently has limited ongoing income, she will require some time to pay.

[54] For the foregoing reasons, I conclude and order that the Plaintiff shall be required to pay costs to the Defendant in the amount of $16,750, plus disbursements, inclusive of HST, in the amount of $1938.22, by November 1, 2021.

[55] I ask counsel for the Defendants to prepare the order.

Pierre Muise, J.