

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Hankey v. Hughes*, 2022 NSSC 293

**Date:** 20221014  
**Docket:** Tru. 469357  
**Registry:** Truro

**Between:**

Amanda Marie Hankey

Plaintiff

v.

Henry Newton Hughes and Donald Wayne Cates

Defendants

**COSTS DECISION**

**Judge:** The Honourable Justice Jeffrey R. Hunt  
**Written Submissions:** September 22, 2022, in Truro, Nova Scotia

**Decision:** October 14, 2022

**Counsel:** Jennifer Langille/Daniel Wood, Solicitors for the Plaintiff  
Sheree Conlon K.C./Ben Johnson, Solicitors for the Defendants

**By the Court:**

**Introduction**

[1] The Plaintiff's claim for damages arising out of a motor vehicle collision was dismissed after a one-day trial. By agreement of the parties, this was a liability only hearing. The Plaintiff was found to have been solely responsible for the accident.

[2] The successful Defendants seek party and party costs in the amount of \$30,000.00. They note that they made an early settlement offer to the Plaintiff that essentially reflects the ultimate decision of the Court.

[3] For her part, the Plaintiff has advanced compelling evidence of her difficult personal and financial circumstances. She asks that the Court exercise its discretion to significantly limit the costs award, in light of these considerations.

[4] I have determined that her personal circumstances do militate in favour of a somewhat reduced costs award. The fact is, however, that a successful party has a presumptive entitlement to a meaningful award of costs. This remains the case even where the unsuccessful party presents a sympathetic picture of their individual circumstances.

[5] The costs regime has an important role to play in encouraging settlements, deterring unmeritorious litigation, and facilitating access to justice.

[6] Sympathy for an unsuccessful litigant's challenging circumstances must be balanced against the many objectives of the cost's regime.

### **Civil Procedure Rules**

[7] In *Armoyan v. Armoyan*, 2013 NSCA 136 the Nova Scotia Court of Appeal provided direction on the determination of costs under Rule 77. Key principles include the following:

- (1) The overall mandate of the Court is to do justice between the parties (para.10);
- (2) As a starting point, costs are quantified through application of the tariffs. The tariff amount may, however, be raised and lowered through the application of the factors found in Rule 77.07(2), including such things as offers to settle and the conduct of the parties (paras 12-13);
- (3) While the tariffs ought to be the norm, Rule 77.08 permits the Court to move to a lump sum when there is a reason to do so (para 14);
- (4) A basic principle is that the costs award ought to reflect a substantial contribution to the fees and expenses of the successful party (para. 16);

- (5) In a conventional case, where the circumstances align generally to tariff parameters, the tariff will have the benefit of some predictability of outcome (para 17);
- (6) Some cases however do not easily fit within with the structural assumptions underpinning the tariffs. For instance, a case with no obvious “amount involved”, or one with complexities which render the tariff amount unjust (para 8);
- (7) There will be cases where the subjectivity of applying the tariffs will exceed a critical level. In these instances, the tariffs may become more distracting than useful. In such a case it will be more realistic to move away from an attempted tariff calculation and towards a principled calculation of a lump sum, which should be derived from the application of objective criteria drawn from the Rules and case law (para 18).

### **Evidence and Submissions of the Plaintiff**

[8] The Plaintiff filed an affidavit in this matter. The Defendants did not seek to cross-examine.

[9] Ms. Hankey accepts that she was the unsuccessful party in the litigation. She argues, however, that her very difficult personal circumstances should lead the Court to either waive costs entirely or, at least, limit them significantly.

[10] Ms. Hankey has provided evidence that she is heavily in debt, with over extended credit and limited income. On a cash flow basis, her monthly expenses exceed her income.

[11] While many people struggle with their financial limitations, the Plaintiff does have additional challenges which make her situation even more difficult.

[12] Ms. Hankey is a single mother to two young children. One of the children suffers from chronic health issues. Her evidence is that he requires chemotherapy and other treatments due to these issues. Her already limited resources are strained by the extra demands imposed by his health.

[13] In her legal submission the Plaintiff seeks to have the Court consider Rule 77.04. This is a Rule which creates a regime under which certain litigants may qualify for an exemption from costs. Given the seriousness of this immunity from costs, there are several preconditions which the party seeking the exemption must meet. Whether the Rule has any application in this case will be considered below.

[14] The Plaintiff also argues that she should receive credit for making the reasonable concession of agreeing to bifurcate the proceeding. The decision to proceed with a liability only trial resulted in a more efficient process.

### **Evidence and Submissions of the Defendants**

[15] The Defendants did file evidence by affidavit. It took the form of a solicitor's affidavit which contained an account of the steps taken on the file

together with details of the accounts rendered to the client. The Plaintiff did not seek to cross-examine.

[16] The Defendants point out that, within 25 days of the close of pleadings, they made a settlement offer to the Plaintiff. This offer aligns with the ultimate decision of the Court. On this basis they argue they are entitled to enhanced costs under the Rules.

[17] As the successful litigants, the Defendants submit that their entitlement to substantial indemnity against costs ought to trump any claim to sympathy advanced by the entirely unsuccessful Plaintiff.

[18] They argue that it ought to have been obvious from the beginning that the claim was doomed to fail. They note their settlement offer to the Plaintiff would have been more favourable to her than the trial outcome, given that it consisted of a dismissal without costs.

[19] As noted, the Defendants presented the Court with copies of the accounts rendered by counsel. The filed affidavit indicates costs of \$46,280.00 plus HST and modest disbursements.

## **Discussion**

[20] The decision rendered by the Court on August 17, 2022, represented a final determination of the proceeding between the parties. Accordingly, Tariff A is the presumptive starting point for the consideration of the costs issue.

[21] However, the conventional application of the tariff is premised on the identification of an “amount involved”. This is a not a straightforward issue in the present case.

[22] This was a liability only hearing. The parties agreed to sever the issues of liability and damages. This decision was the correct one in the circumstances of this case. Both parties will have saved considerable resources as a result of this sensible agreement.

[23] One consequence, however, is that the Court does not have a record before it that would allow for an assessment of an amount involved.

[24] Neither was there an exchange of offers which might have included some quantification of the claim. Such offers might have provided some general indication as to how the parties viewed the stakes in the litigation. Clearly, such quantifications would have to be weighed with real caution. But in any event, these do not exist in this case.

[25] One basic fact is available to the Court. At the time she filed her Action, the Plaintiff indicated that the matter did not fall within Civil Procedure Rule 57. This means the Plaintiff was asserting that her claim exceeded \$150,000.00.

[26] Generally, however, the lack of information before the Court means that the identification of an “amount involved” for purposes of applying Tariff A would involve a very significant amount of speculation.

[27] Both parties appear to accept that it would be very difficult to apply Tariff A. I agree with this and conclude that consideration should turn to the application of the lump sum provisions.

#### **Rule 77.04**

[28] The Plaintiff seeks to have the Court apply Rule 77.04, a provision which allows a party to apply for an order that they are exempt from costs. For obvious reasons such orders are rare.

[29] The Rule directs that the motion must be brought as soon as possible after pleadings close, and it imposes a two-part test:

1. Party must prove they cannot afford to pay costs;
2. Party must prove the risk of costs award creates a serious impediment to litigating a claim.



[30] In *Canadian Residential Inspection Services Ltd. v. Swan*, 2013 NSSC 226, Warner, J. considered the application of Rule 77.04. I adopt his analysis and repeat it here, in part:

[26] The purposes of *Rule 77.04* is not to afford a losing party the opportunity, post-trial, to seek exemption from a costs award.

[27] The *Rules'* policy is to provide access by the poor to the judicial system. Discretion to apply *Rule 77.04* might be entertained where the financial imbalance between the parties may prevent a poor litigant with a legitimate and reasonable claim from receiving justice. The policy was not intended to give an unfair advantage to one party over another.

[28] I adopt entirely the analysis of my colleague Justice Wright in *MacBurnie v Haltern Container Terminal Limited Partnership*, 2011 NSSC322. Justice Wright notes that costs are an important element of the litigation process. Their purpose is to indemnify a successful party, to encourage settlement, to stop frivolous actions, to discourage unnecessary steps and to facilitate access to justice. These purposes are undermined when a party has an exemption from costs exposure.

[29] Because of the imbalance that a cost immunity order would create, the Court should exercise its discretion to grant such an order only as an extraordinary remedy where it is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice. That is to say, the two criteria specified in *Rule 77.04* should be stringently applied and where there is a comprehensive body of evidence adduced in support.

....

[31] The timing of the request for exemption affects the second criteria. The Plaintiff has been put through lengthy pre-trial processes and a six-day trial without notice that the Defendants may seek exemption from a costs award if the Defendants lost.

[31] As was the case in Justice Warner's matter, in the present proceeding there was no timely motion seeking a ruling under the provision. My view is that, even if an early motion had been brought, this situation does not appear to be one which would have benefitted from the section.

[32] Rule 77.04 is more likely going to be applied to certain public interest litigation matters. The nature of this proceeding does not seem to naturally fit within the provision.

[33] To grant a party a costs exemption is to seriously interfere in the normal working of the regime. I believe it would create a substantial risk of unfairness to first invoke Rule 77.04 after the conclusion of a proceeding. I have to decline to do so.

[34] As a fall-back position, the Plaintiff suggests that some of the principles around relief from costs ought to be applied, even where the formal application of 77.04 is not permitted. I do accept that a number of cases have weighed issues of impecuniosity when assessing costs. I believe there is a place for considering hardship within the overall assessment process. Various Courts have commented on this issue. See: *Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd.*, 2015 NSSC 39, at paras 6-8; *Mercier v. Nova Scotia (Police Complaints Commissioner)*, 2014 NSSC 309, at paras 5-9; *Windsor v. Poku*, 2003 NSSC 95 and *Hill v. Cobequid Housing Authority*, 2011 NSSC 219.

[35] I am also aware of the decision in *Farrell v. Casavant*, 2010 NSSC 46 where it was said that taking account of an unsuccessful litigant's financial circumstances ought to be the exception rather than the rule.

**Rule 77.08**

[36] Rule 77.08 allows the Court to award lump sum costs rather than a figure derived under the Tariff. This Rule ought to be read in conjunction with the following provision:

**General discretion (Party and Party Costs)**

77.02 (1) A presiding judge may, at any time, make an order about costs as the judge is satisfied will do justice between the parties.

[37] Both sides in this matter ultimately accept that the cost award here ought to be constructed under this provision. They do so, however, for different reasons. The Defendants seek an elevated amount based on their actual legal expenditure. The Plaintiff submits the award ought to be reduced to account for her financial and personal situation. In my consideration of this Rule, I have been assisted by a review of cases such as *Shannon v. Frank George's Inland Investments Ltd*, 2015 NSSC 133 and *Big X Holdings Inc v. Royal Bank of Canada*, 2015 NSSC 350.

[38] In the later case, Justice Campbell offered the following comments:

64 Under Rule 77.02(1) a judge can exercise discretion in making an award for costs "as the judge is satisfied will do justice between the parties". That discretion is exercised with reference to the legal framework of the Rules themselves and is guided by fundamental legal principles. The Rules provide some, albeit incomplete predictability of outcome, and other legal principles provide the flexibility required to do justice on the facts of an individual case.

65 The discretion should be informed by principles and policy considerations that underlie the Rules themselves. Successful parties and parties that have been subjected to unfounded claims and legal processes by another should be at least partially indemnified. A successful party should not be denied costs in the absence of misconduct. A costs award should provide substantial though not complete indemnity for reasonable legal expenses. A costs award should be proportionate having regard to the tension among concerns related access to justice including the financial imbalances, fair compensation for successful litigants, and discouraging unnecessary litigation.

66 That does not mean costs are based on the ability of the losing party to pay. Nor are they based on the need of the successful party. If that were the case, there would almost certainly be no costs awarded here. It does mean taking a step back to consider the implications of a costs award that would result from the strict application of the Rules and Tariffs.

[39] There are some factors present here which tend to assist the plaintiff in claiming she acted to minimize the costs of the litigation:

1. The Plaintiff did agree, without the need for a motion, to split liability and damages.
2. The liability only proceeding went ahead in a timely way and took only one day.
3. From the perspective of the Court, the hearing itself proceeded with good cooperation between the parties with respect to documents, witnesses, etc. This would have assisted in keeping costs down.

[40] The following factors work against the Plaintiff's position:

1. The Plaintiff received an early settlement offer that reflected the ultimate decision of the Court. This was not accepted. The position

of the Defence is that the Plaintiff essentially refused to engage in settlement discussion.

2. The Plaintiff appears not to have not altered her approach to the litigation following receipt by her of the CCTV evidence. For instance, her Statement of Claim continued to assert she was parked at the time of the collision. The issue is whether the Plaintiff engaged in a realistic assessment of her litigation prospects.

[41] On balance, the position of the Defendants in this matter is strong. They made an early settlement offer. They attempted to resolve the litigation and did not get any meaningful engagement from the Plaintiff.

[42] Justice Fichaud, in *Armoyan*, supra, at para 16, considered *Williamson v. Williams*, 1998 NCSA 195, when commenting on the approach that should be taken to quantify a lump sum:

In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[43] Having considered the arguments of both sides I have determined that the Plaintiffs request for no costs, or purely nominal costs, must be rejected.

[44] The Defendants in this case made an early offer to settle. In the circumstances it was a reasonable offer. It equates to the outcome ordered after

trial. It was incumbent on the Plaintiff to consider more carefully the risks and costs of proceeding.

[45] The Plaintiff has succeeded in demonstrating that her personal financial situation is poor. Additionally, she has further financial challenges caring for a chronically ill child.

[46] I have considered these aspects of her personal situation together with case law in which judges have weighed such matters when assessing costs. Based on the authorities, I believe these factors can play some role when a Court is weighing the question of what cost award will do justice between the parties.

### **Conclusion**

[47] The successful Defendants are seeking \$30,000.00, inclusive of disbursements. I have determined that in all the circumstances an award of \$23,000.00, all inclusive, will do justice between the parties. It reflects a substantial contribution to the Defence.

[48] The Plaintiff should know the quantification was impacted to a degree by the factors raised by her.

[49] Counsel for the Defendants is asked to prepare an order reflecting an award of \$23,000.00, all inclusive, in party and party costs.

Hunt, J.