SUPREME COURT OF NOVA SCOTIA
Citation: *Lewis v. Davie*, 2023 NSSC 142

Date: 20230511
Docket: Hfx No. 492026
Registry: Halifax

Between:

Mandy J. Lewis, Barbara Raftus as Litigation Guardian of Stacey Birkbeck

Plaintiff

v.

Clarence Joseph Davie

Defendant

Decision on Costs

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By written submissions
Final Written Submissions:	March 31, 2023
Counsel:	Nicolle Snow and Madison Veinotte, for the Plaintiff Connie Morrissey and Ashley Dooley, for the Defendant

By the Court:

[1] The Defendant admitted liability for the motor vehicle accident that injured the two Plaintiffs, and the Plaintiff, Mandy J. Lewis, settled her claim. As a consequence, the parties proceeded to Court only for an assessment of damages with respect to her granddaughter, Stacey Birkbeck ("the Plaintiff" or "Ms. Birkbeck"). This began on March 6, 2023. The Plaintiff was twelve at the time of the accident, and was sixteen years of age when she testified. Her mother, Barbara Raftus, acted as her Litigation Guardian.

[2] Ms. Birkbeck suffers from a severe anxiety condition, one which pre-existed the motor vehicle accident. In her testimony, she acknowledged this fact, and also that the anxiety condition is so severe that it presently prevents her from attending public schooling. Alternative arrangements have had to be made in order that she may continue with her education. During her testimony, she barely spoke above a whisper. She was visibly anxious and uncomfortable while on the stand.

[3] The Plaintiff opened her case and closed it by noon on March 6, 2023. The Defendant declined to cross-examine her, and called no evidence. Later in the day of March 6, 2023, counsel for the Defendant reached out to the Plaintiff's counsel. She advised that the Defendant was now in agreement to pay Ms. Birkbeck the damages that she had been seeking. These damages amounted to $8,678.00, plus interest. This is the present value of the cap for minor injuries. The total figure paid (inclusive of interest) was $9,663.07.

[4] The settlement did not include costs. The parties attended Court on March 7, 2023, and deadlines were set for the filing of briefs with respect to same. This decision will resolve the issue of costs. It will also resolve a preliminary issue, one dealing with whether to strike a portion of the affidavit upon which the Plaintiff relies in support of her position on costs.

The parties' respective positions

(i) The Plaintiff

[5] Counsel for the Plaintiff reminds the Court that the Plaintiff's position, at all times prior to and during the trial, was that her injuries fell within the cap imposed on "minor injuries" as defined in the *Insurance Act*, RSNS 1989, c 231, s.113E and s.13 of the *Automobile Accident Minor Injury Regulations*, NS Reg. 94/2010. The

Defendant's contention, up to the conclusion of the Plaintiff's testimony, was that not all "minor injuries" attract the capped figure prescribed in the legislation. Rather, the Defendant's position was that awards for minor injuries fall on a continuum, that only the most "severe" minor injuries receive the capped figure, and that the Plaintiff should not receive the full capped figure for her injuries. This was consistent with the tenor of their respective pretrial briefs.

[6] Ms. Birkbeck's counsel asserts that:

> 8. In Ms. Morrissey's March 6, 2023, email, wherein she finally agreed to pay Ms. Birkbeck cap damages, she stated: ***"Having reviewed this morning's evidence*** *with my client, I am authorized to offer...."*. The suggestion is that some part of the evidence presented in the Plaintiff's case was material enough to trigger the insurer to change its position; a position that had been advanced without concession, right up until trial.
>
> 9. It is the Plaintiff's position that the substance of her claim remained essentially unchanged during the course of litigation, offering no rational [sic] for a sudden mid-trial concession. It is trite to say, the parties are not permitted to engage in trial by ambush in any event.
>
> 10. What Ms. Morrisey learned at the discovery examination of the Plaintiff was not substantially different from the evidence that was presented at trial.
>
> 11. Ms. Morrissey discovered Ms. Birkbeck on June 16, 2021. Ms. Birkbeck had turned 15 the month before. Ms. Birkbeck gave evidence about her shoulder symptom flare-ups with activity. She also gave evidence about being scared to go to school and being around other people as well as details about her avoidance measures.
>
> [Emphasis in original]
>
> (*Plaintiff's Submissions on Costs, dated March 17, 2023)*

[7] The argument continues:

> 14. The evidence given at trial was very similar to the details revealed at the discovery examination. At trial, Ms. Birkbeck, her mother, and her grandmother all spoke about Ms. Birkbeck's occasional shoulder flare ups, about her shy with [sic] withdrawn nature, and her difficulty being around people due to her severe anxiety. There was nothing substantially new revealed during trial testimony that would warrant a reassessment of the claim and new instructions.
>
> (*Plaintiff's Submissions on Costs, dated March 17, 2023)*

[8] Counsel for the Plaintiff then proceeds to outline pretrial attempts to resolve the Plaintiff's claim. She says that on November 28, 2022, the Plaintiff forwarded a

formal settlement offer to the Defendant in accordance with *Civil Procedure Rule* ("CPR") 10.05. Therein, the Plaintiff offered to resolve her claim for general damages in the amount of $8,678.00, plus interest at 2.5%, as well as costs in the amount of $3,000.00 (or as determined by the Court) and her disbursements.

[9] On December 20, 2022, the Plaintiff rounded her settlement offer down to the figure of $12,000.00 all inclusive, in response to an offer from the Defendant.

[10] On February 26, 2023, with little more than a week to go before the start of the trial, counsel for the Plaintiff withdrew Ms. Birkbeck's offer of $12,000.00 “all in”, and reverted to her formal offer of November 28, 2022, subject to the proviso that the costs portion would now be determined by the Court. Plaintiff's counsel describes this as occurring after "...what appeared to be procedural gamesmanship from defence counsel." (*Plaintiff submissions on costs, para. 17*). On March 1, Ms. Morrissey, counsel for the Defendant, advised that the Defendant's then current settlement offer of $10,000.00 "all in" would be reduced to $9,000.00 at noon on March 3, 2023.

[11] The Plaintiff argues that the earlier settlement of Mandy J. Lewis' claim bears some relevance to the manner in which Defendant’s counsel dealt with her granddaughter, Ms. Birkbeck's claim. This is what she says:

> Suspected Gamesmanship – Mandy Lewis
>
> 19. Plaintiff counsel's February 26, 2023 letter to Ms. Morrissey, written *With Prejudice as to Costs*, outlines in detail the events that occurred on February 16, 2023, the due date of the parties Pre-Trial Briefs. It is strongly suspected that Ms. Morrissey had instructions to settle Ms. Lewis' claim long before 4pm on February 16, for the reasons outlined in the letter.
>
> 20. On February 16, 2022, Ms. Lewis extended an offer to settle, totaling $55,000. On November 28. 2022, Ms. Lewis delivered a Formal Offer to Ms. Morrissey to formalize her position by offering $46,000 in general damages inclusive of interest; costs of $4,000; and her disbursements, which at the date of delivery were $6,348.74. This formal offer was rounded back down to $55,000 on December 20. 2022, in response to an offer from the Defendant totaling $17,500.
>
> 21. On February 10, 2023, defence counsel offered to settle Ms. Lewis' claim for $40,000. This offer amounted to more than double the Defendants last offer. In response, on February 14, Plaintiff counsel delivered instructions for a nominal reduction of $2,500. It is believed that Ms. Morrissey will say she did not have instructions on Ms. Lewis' new offer of $52,500 until late on February 16. However, it is strongly suspected that Ms. Morrissey had instructions to resolve Ms. Lewis' claim on or before February 10, 2023, when she had instructions to jump from

> $17,500 to $40,000. It is submitted that if counsel had instructions to accept $52,500, it is very likely she also had instructions to accept $55,000, before the Plaintiff made the nominal move on February 14. A sworn affidavit from the responsible adjuster, detailing when she delivered her instructions to Ms. Morrissey to resolve Ms. Lewis' claim, would resolve this and clear Ms. Morrissey of any suggestion of procedural gamesmanship.
>
> [Emphasis in original]
>
> (*Plaintiff's Submissions on Costs, dated March 17, 2023)*

[12] The Plaintiff then returns to the manner in which her own claim was resolved (in mid-trial). Her counsel points out that the turn of events deprived both Ms. Birkbeck, and the personal injury bar as a whole, of much of the benefit that had been sought. It is true (the argument continues) that the Plaintiff received the damage amount to which she felt she had been entitled all along, which she had not exaggerated at any time, and which she had at all times conceded fell under the minor injuries cap.

[13] But, as her counsel points out, despite her extreme anxiety, despite the fact that she was terrified of coming to court, Ms. Birkbeck was required to show up and give evidence in order to maintain her principled position that she was entitled to full (minor) cap damages. In so doing, she sought to establish that the capped figure of $7,500.00 (present day indexed figure $8,670.00) does not operate as a scale for minor injuries, but rather is the figure to which a victim is entitled when their condition meets the definition of "minor injuries" as defined in the regulations.

[14] Plaintiff's counsel continues:

> 24. With the support of counsel, Ms. Birkbeck agreed to maintain her position. Although she was terrified of coming to court, she bravely showed up and gave evidence, as did her mother and grandmother. Plaintiff's counsel spent many hours in preparation for a trial where our costs and time exceeded the amount involved by a significant margin. **The driving force was the hope that the resulting decision would have precedential value for the personal injury bar. This would, we hoped, put a rest to the unjust and unsupported position being taken by insurers, and Intact Insurance in particular, regarding the cap**.
>
> 25. In sum, the stressful consequences visited upon Ms. Birkbeck by the insurers unwillingness to pay her cap damages, were all for naught. It is difficult to understand the motivation of the Defendant (by this we mean the insurer) to concede damages mid-trial due to the following factors:

- The nature of Ms. Birkbeck's claim had crystalized, at least by the time of her June 2021 discovery, and there were no substantial changes thereafter.
- Ms. Birkbeck was asking for exactly the same amount out of court as she was asking for in court, since general damages under the cap are prescribed by statue.

26. The conclusion that the Plaintiffs are left with is that **the insurer/Ms. Morrissey did not expect the Plaintiffs and/or Plaintiffs' counsel to be prepared to litigate this matter when one considered the work involved for the amount sought**. When pushed against the wall, the insurer likely believed we/the Plaintiffs would relent. When this did not occur, the plug was pulled on the trial mid-stream. This resulted in a waste of resources for both the court and the Plaintiffs' counsel.

[Bolding in original]

[15] The Plaintiff has filed the affidavit of Ibirajara Vidal, sworn March 16, 2023 ("the Vidal affidavit") in support of her position.

(ii) the Defendant

(a) Motion to Strike

[16] Preliminary to providing her position with respect to the Plaintiff's costs in this proceeding, counsel for the Defendant asks that portions of the Vidal affidavit be struck pursuant to Civil Procedure Rule 39.04(2). In paraphrase, she argues that Ms. Lewis' claim was never before the Court, and therefore the evidence regarding the resolution of her claim is not relevant to the issue of the costs to be awarded to Ms. Birkbeck. As a consequence, she argues that Exhibit "F", in its entirety, and those portions of Exhibits "E" and "G" (to the Vidal affidavit) which constitute communications between counsel regarding Mandy J. Lewis, must be struck on the basis that they are not relevant.

[17] Rule 39.04 states:

(1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.

(2) A judge must strike a part of an affidavit containing either of the following:

(a) information that is not admissible, such as an irrelevant statement or a submission or plea;

(b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay

> admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[18] This rule has been interpreted many times over the years. In *The College of Paramedics (Nova Scotia) v. McCannel*, 2022 NSSC 109, Justice Jamie Campbell summarized the effect of these authorities in the following manner:

> 15. Justice Davison's decision in *Waverly (Village) v. Nova Scotia (Minister of Municipal Affairs)*, [1993] N.S.J. No. 151, is the case that is often turned to when considering these issues. Justice Davison noted that all too often affidavits were then being submitted that consisted of "rambling narratives". Some were opinions and inadmissible as evidence. Affidavits must be confined to facts. There is no place for speculation or inadmissible material. The affidavit should not take on the flavour of a plea or summation.
>
> 16. The facts, for the most part, should be confined to those that are based on personal knowledge. When affidavits are used, in what were then called applications and now motions, they may refer to facts based on information and belief, but the source of the information should be set out. That information about the source should be enough to allow the court to conclude that the information comes from a sound source and preferably the original one.
>
> 17. The *Waverly* case has been affirmed by the Court of Appeal and has been consistently used in the Supreme Court in dealing with motions to have affidavits or portions of them struck. Legitimate criticism of affidavits include; the presence of inadmissible hearsay, argument, speculation, unsupported conclusions, opinions, impermissible comment on the credibility of others, and reference to irrelevant information: *Islam v. Maritime Muslim Academy*, 2019 NSSC 53.
>
> 18. Filing an affidavit is not just a litigant's chance to "have their say". A person does not get to raise everything that they think the judge should know, make a range of claims about the other side, or offer their opinion. An affidavit must be confined to information that is material and relevant. Material means that the information is about something that is in issue in the proceedings. Relevant means that the information or evidence makes the existence of a fact more of less likely. So, if

> something does not relate to the issues in dispute, as much as a person wants to get it off their chest, it is not material and the evidence about it is not relevant.
>
> [Emphasis added]

[19] The Plaintiff's point in setting forth what went on prior to the resolution of Ms. Lewis' claim appears to be an attempt to establish a pattern relating to the manner in which counsel for the Defendant goes about resolving claims. It is difficult to observe any possible relevance to Ms. Birkbeck's situation. It is even more difficult to understand the Plaintiff's counsel's contention that:

> A sworn affidavit from the responsible adjuster, detailing when she delivered her instructions to Ms. Morrissey to resolve Ms. Lewis' claim, would resolve this and clear Ms. Morrissey of any suggestion of procedural gamesmanship. (*Plaintiff's submissions on costs, filed March 16, 2023, para. 14*)

[20] Obviously, there is no onus cast upon counsel for the Defendant merely because counsel for the Plaintiff has made such allegations. This is particularly so where she would be required to violate solicitor/client privilege in order to "clear [her] of any suggestion of procedural gamesmanship".

[21] As such, I have not been convinced that there is any relevance to the manner in which the Lewis claim was resolved, when the issue of the costs to which Ms. Birkbeck is entitled is determined. As the Defendant points out, Ms. Lewis' counsel (who is also counsel for Ms. Birkbeck) put forward various offers to settle. Simply put, the offer pertaining to Ms. Lewis, which was extant on February 16, 2023, was accepted by the Defendant.

[22] The impugned sections of the Vidal affidavit, insofar as they deal with the resolution of the Lewis claim, will not be considered. Effectively, they are stricken as requested by the Defendant.

(b) Position on costs

[23] The Defendant points out that Ms. Birkbeck's case, which began on March 6, 2023, was an assessment of damages. The parties had agreed that she sustained a minor injury, but could not agree on whether she was entitled to the full amount of the minor injury cap on general damages. As counsel states:

> 10. The Defendant's position was that the full "cap" is not automatically payable to anyone who sustains any injury whatsoever in a motor vehicle accident, and that

> the Court retains its jurisdiction to award an amount less than the maximum cap in appropriate circumstances. There is no Nova Scotia authority on that point and thus the Defendant's position was not contrary to settled law.
>
> 11. The Defendant agreed to the admission of all treatment records months before the trial, so that no evidence was required from any treatment provider, and trial time and expenses would be lessened (Exhibits C and D to the Edwards Affidavit). All documents were entered by consent with the exception of one document which was filed with the Court before it was provided to the Defendant (Tab 5 of the Joint Exhibit Book). The Court heard evidence from Ms. Birkbeck, her mother Barbara Raftus and her grandmother Mandy J. Lewis, finishing in less than 2 ½ hours of Court time.
>
> [Emphasis added]
>
> (*Defendant's Submissions on Costs, dated March 24, 2023)*

[24] Further, the Defendant submits that additional evidence came out at trial, during the course of Ms. Birkbeck's direct examination, which had not been gleaned by the Defendant at the earlier discoveries in June 2021. For example, the Defendant contends:

> 13. Ms. Birkbeck's [earlier] discovery evidence including the following:
>
> - she and a friend often travelled by city bus from Eastern Passage to downtown Halifax, where they might walk along the waterfront (pages 8-9);
> - she played video games and engaged in social media (page 10);
> - she babysat children in her family in 2019. In 2020-2021, she babysat for other families, including strangers who responded to an advertisement made by Ms. Birkbeck and her friend Zoey. She cared for children as young as 1 year for many hours at a time. She took those children on outings by city bus to such public places as museums and indoor playgrounds, as well as to the indoor trampoline park Get Air (pages 10-14);
> - in addition to taking the children she was babysitting, she went to Get Air for her own
> - recreation "a lot", engaging in activities like front flips, handsprings and dodgeball (page 23);
> - she testified that she missed school the day after the accident, then only missed school when she had a physiotherapy appointment during school hours, not as a result of her injuries (page 20). The records entered at trial confirm all physic

appointments actually were after school hours (Tab 3 Joint Exhibit Book pages 20-39); and

- she did not pass up any babysitting jobs or stop engaging in any activities as a result of her injuries (page 20).

14. While the Plaintiff testified she experienced some soreness after such physical activities as handsprings or planks, that could hardly be considered out of the ordinary for anyone.

15. The Plaintiff did not testify that she disliked attending physiotherapy. She did not offer evidence that she cried and pleaded with her mother not to make her go. She did not offer evidence that she lied to her physiotherapist because she wanted to stop attending, so that the Defendant could consider whether the physiotherapy records could be relied upon.

16. While the Plaintiff testified to being anxious, she also testified to the social relationships, activities, and public outings outlined above. She did not offer any evidence that she was in treatment for, or had been diagnosed with, any anxiety condition.

17. The Plaintiff's mother did not testify at discovery.

(*Defendant's Submissions on Costs, dated March 24, 2023)*

[25] By way of contrast, the argument continues:

21. March 6, 2023, was the first time evidence was offered that:

- the Plaintiff hated physiotherapy so much that she cried before going, pleaded not to go and lied to her therapist that she had full pain-free function as the physiotherapy records entered at trial indicate (Tab 3 Joint Exhibit Book pg 16-17); and

- she had been diagnosed with, and was in treatment for, an anxiety condition.

22. Upon the conclusion of the evidence of the first witness Barbara Raftus, then the evidence of the Plaintiff Stacey Birkbeck, it was decided not to subject Ms. Birkbeck to cross- examination. Following the evidence of Mandy Lewis, Court adjourned for the day.

23. As communicated to Plaintiff counsel at 1:37 pm on March 6, 2023, Defendant's counsel conferred with their client and the decision was made to offer the Plaintiff the full "cap" amount in general damages. (Exhibit I to the Vidal Affidavit)

(*Defendant's Submissions on Costs, dated March 24, 2023)*

Analysis

[26] Rule 77 deals with costs. It begins this way:

> 77.01(1) The court deals with each of the following kinds of costs:
>
> > (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
> >
> > (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;
> >
> > (c) fees and disbursements counsel charges to a client for representing the client in a proceeding.
>
> (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.

[27] Costs always remain in the discretion of the Court. Rule 77, and the appended Tariffs, provide guidelines to assist the Court in the exercise of that discretion. When assessing costs, the objective is to do justice between the parties, insofar as possible.

[28] One potential limit on the Court's discretion is found in rule 77.02(2), which reads:

> Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

[29] Rule 10.05 states:

> (1) A party who makes a formal offer to settle under this Rule 10.05 may take advantage of the applicable provisions for costs in Rules 10.08 and 10.09.
>
> (2) A party may make a formal offer to settle an action, or a counterclaim, crossclaim or third party claim in an action, by delivering an offer to settle.
>
> (3) A formal offer to settle must contain the standard heading of the action, be entitled in one of the following ways, and be dated and signed:
>
> > (a) "Offer to Settle by Claimant (Monetary)", if it offers to settle entirely on the basis that money is paid to the party who makes the offer;
> >
> > (b) "Offer to Settle by Claimant (Non-monetary)", if it offers to settle on terms that include a requirement the other party do, or refrain from doing, something in satisfaction of a non-monetary claim;
> >
> > (c) "Offer to Settle by Person Claimed Against (Monetary)", if it offers to settle entirely on the basis that money is paid to the other party by the party who makes the offer;

(d) "Offer to Settle by Person Claimed Against (Non-monetary)", if it offers to settle on terms that require the party making the offer to do, or refrain from doing, something in satisfaction of a non-monetary claim made by the other party.

(4) The offer must include terms that would settle all claims in the proceeding between the party making the offer and the party to whom it is made, and the term that would settle costs must provide for one of the following:

(a) payment on acceptance of an amount stated in the offer;

(b) payment of an amount for costs to be determined by a judge;

(c) an option for the other party to choose between a stated amount for costs or determination by a judge.

(5) The offer must also contain both of the following terms:

(a) it is open for acceptance until it is withdrawn or the trial begins;

(b) it may be accepted only by delivery of a written acceptance to the party making the offer.

[30] I also include Rule 10.09, which is closely related:

(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.

(2) A judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:

(a) one hundred percent, if the offer is made less than twenty-five days after pleadings close;

(b) seventy-five percent, if the offer is made more than twenty-five days after pleadings close and before setting down;

(c) fifty percent, if the offer is made after setting down and before the finish date;

(d) twenty-five percent, if the offer is made after the finish date.

(3) A judge may award costs in one of the following amounts to a party who defends a proceeding, does not fully succeed, and obtains a favourable judgment:

> (a) the amount that the tariffs would provide had the party been successful, if the offer is made less than twenty-five days after pleadings close;
>
> (b) seventy-five percent of that amount, if the offer is made more than twenty-five days after pleadings close and before setting down;
>
> (c) sixty percent of that amount, if the offer is made after setting down and before the finish date;
>
> (d) nothing, if the offer is made after the finish date.

[31] In the circumstances, I am satisfied that there is no basis to apply Rule 10.09. The Plaintiff's damage award was not the result of a trial judgment (10.09(1)(c)). Equally important, one offer to settle was withdrawn by the Plaintiff on February 27, 2023 (Exhibit "G" to the Vidal affidavit). The subsequent offer, which was then put forward by her, on that date, indicated that it was open for acceptance "... anytime before trial begins." According to its terms, it was withdrawn on the morning of March 6, 2023, when the trial began (10.09(1)b).

[32] Of course, this does not mean that the Plaintiff's attempts to resolve the matter, short of trial, including any offers to settle made by her as she pursued that objective, are irrelevant. It just means that the augmented costs referenced in Rule 10.09 are not applicable.

[33] Since the trial had begun by the time the parties agreed upon the total of damages plus interest to be awarded to Ms. Birkbeck, Tariff "A", at the end of Rule 77, is the appropriate frame of reference with which to begin the analysis. I will reproduce it, and its preamble, below:

> TARIFFS OF COSTS AND FEES DETERMINED
>
> BY THE COSTS AND FEES COMMITTEE TO
>
> BE USED IN DETERMINING PARTY AND
>
> PARTY COSTS
>
> In these Tariffs unless otherwise prescribed, the "amount involved" shall be
>
> > (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
> >
> > > (i) the amount allowed,
> > >
> > > (ii) the complexity of the proceeding, and
> > >
> > > (iii) the importance of the issues;
> >
> > (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to

(i) the amount of damages provisionally assessed by the court, if any,

(ii) the amount claimed, if any,

(iii) the complexity of the proceeding, and

(iv) the importance of the issues;

(c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to

(i) the complexity of the proceeding, and

(ii) the importance of the issues;

(c) an amount agreed upon by the parties.

TARIFF A

Tariff of Fees for Solicitor's Services Allowable to a Party
Entitled to Costs on a Decision or Order in a Proceeding

In applying this Schedule the “length of trial” is to be fixed by a Trial Judge.

The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2,000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge

Amount Involved	Scale 1 (-25%)	Scale 2 (Basic)	Scale 3 (+25%)
Less than $25,000	$ 3,000	$ 4,000	$5,000
$25,000-$40,000	4,688	6,250	7,813
$40,001-$65,000	5,138	7,250	9,063
$65,001-$90,000	7,313	9,750	12,188
$90,001-$125,000	9,188	12,250	15,313
$125,001-$200,000	12,563	16,750	20,938
$200,001-$300,000	17,063	22,750	28,438
$300,001-$500,000	26,063	34,750	43,438
$500,001-$750,000	37,313	49,750	63,188
$750,001-$1,000,000	48,563	64,750	80,938

[34] Counsel for the Defendant argues:

30. Under Tariff A, the amount involved is "Less than $25,000". The Defendant submits that costs should be assessed on Scale 1, as the trial involved simple factual

> issues, with three lay witnesses, no experts, and minimal documentation. The Tariff A amount is therefore $3,000. While the total Court time consumed was only 3 hours in total over March 6 and 7, the Defendant accepts that $2,000 is appropriate for one day of trial. The total owing under the Tariff is therefore $5,000.
>
> (*Defendant's Submissions on Costs, dated March 24, 2023)*

[35] Counsel goes on to re-emphasize that the Defendant made all admissions and agreements to facilitate the efficiency of the trial. By way of example, the argument continues, months before the trial started, the Defendant agreed to the admission of all records so that no treatment provider needed to attend and give evidence.

[36] Moreover, the Plaintiff's evidence on direct included some new evidence which changed the Defendant's position with respect to settlement. As a result, the Defendant offered the Plaintiff the amount that she had sought, "... on the basis that this was the amount likely to be awarded if the trial continued" (*Defence costs brief, para. 36*). Further, in light of the anxiety experienced by the Plaintiff, the Defendant chose not to cross-examine her after her direct examination.

[37] As we have seen, counsel for the Plaintiff takes the position that the Defence decision to settle the matter on March 6, 2023, came as a "stunning surprise" to the Plaintiff, and "...pulled the rug out from under the Plaintiff...". The Plaintiff was not only proceeding on a "principled basis", since she felt that she was entitled to full (minor) cap damages,"...<u>but [also] to take a stand for all minor injury Claimants, who were being pushed up against the wall by insurers taking the same position</u> [the position that the cap operates as a scale for minor injuries]" [Emphasis in original]. (*Plaintiff submissions on costs, March 16, 2023, paras. 22 and 23*).

[38] As has earlier been referenced, the Plaintiff's "other incentive" to proceed to trial received elaboration:

> 24. …Plaintiff's counsel spent many hours in preparation for a trial where our costs and time exceeded the amount involved by a significant margin. <u>The driving force was the hope that the resulting decision would have precedential value for the personal injury bar. This would, we hoped, put a rest to the unjust and unsupported position being taken by insurers, and Intact Insurance in particular, regarding the cap</u>.
>
> [Emphasis in original]
>
> (*Plaintiff's Submissions on Costs, dated March 17, 2023)*

[39] This culminates in the argument that:

> 26. The conclusion that the Plaintiffs are left with is that the insurer/Ms. Morrissey [counsel] did not expect the Plaintiffs and/or Plaintiffs' counsel to be prepared to litigate this matter when one considered the work involved for the amount sought. ... This resulted in a waste of resources for both the court and the Plaintiffs' counsel.
>
> [Emphasis in original]
>
> (*Plaintiff's Submissions on Costs, dated March 17, 2023)*

[40] Her counsel does not specify what the Plaintiff's legal fees amounted to. She does concede, however, that Ms. Birkbeck had retained her under a Contingency Fee Agreement, such that the fees charged are based upon a percentage of the total amount recovered. Counsel argues that the Court should consider costs as distinct from the actual amount of fees which will be charged to her client under the Contingency Fee Agreement to which Ms. Birkbeck is subject.

[41] The Plaintiff references *MacDonald v. MacVicar Estate*, 2019 NSSC 108, where, following trial, a Plaintiff was found to be totally disabled due to the subject motor vehicle accident, and was awarded $760,933.00 in damages, including prejudgment interest. Murray, J., succinctly outlined the competing arguments respecting costs as follows:

> 111. In her supplemental brief the Plaintiff draws the Court's attention to the contingency fee arrangement between her and her counsel. She asks the Court to consider her obligation to pay 35% of the damage award plus disbursements. As such she seeks an lump sum over and above the tariff, to allow her to receive what would amount to a substantial contribution to her legal costs of $266,326.
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> 112. The Defendant submits that the contingency fee agreement is of no assistance to the Court as is not indicative of actual legal costs billed to the client. As required in *Landymore*, counsel "will be expected to outline the amount of time spent on the file, and the total fees charged to the client."
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> 113. That has not been done here says the Defendant. Thus, the figure of $266,326. as the Plaintiff's legal costs is a fiction.
>
> [Emphasis added]

[42] *MacDonald* and the authorities referenced therein do not assist Plaintiff's counsel with her argument. Indeed, they deal with situations that differ from the one with which the Court must deal in this instance. None of them stands for the proposition that the Plaintiff should be awarded more in costs than what she is actually required to pay to her counsel.

[43] Rather, those cases dealt with a contention that the frame of reference when considering the cost award should be the amount generated by the application of the percentage stipulated in the Contingency Fee Agreement multiplied by the actual award following trial, because the application of the percentage stipulated in the Contingency Fee Agreement amounted to much more than the amount generated by the applicable Tarriffs, based upon the amount involved. The argument mustered against this practice, generally speaking, was that the amount being paid pursuant to a Contingency Fee Agreement resulted from the manner in which the Plaintiff and their lawyer had negotiated the latter's compensation, rather than on the basis of the actual time that had been spent by the lawyers in pursuit of their clients' cases.

[44] Moreover, as this Court in *MacDonald* (and in the other authorities cited therein) made clear, in order for a Plaintiff to succeed in circumstances outlined therein, what they are actually billed must be disclosed, as well as full particulars of the time spent, in order for the Court to appreciate the relationship between what has been billed (whether pursuant to a Contingency Fee Agreement, percentage based, or upon a straight hourly rate). In each case, the Court must be able to assess the reasonableness of the fees which the Plaintiff must pay, in relation to the work which their counsel has expended. Otherwise, the presumption (enshrined in Rule77) that fees calculated in accordance with the Tariffs will result in "substantial" recovery by the winner, and do justice between the parties, would often have to be jettisoned when a party enters into a Contingency Fee Agreement with their lawyer.

[45] As the Court noted in *Walker v. Ritchie*, 2006 SCC 45 (albeit, a decision involving the *Ontario Rules of Civil Procedure* in force at the time):

> 16. The propriety of a risk premium [Contingency Fee Agreement based upon a percentage of the recovery] between lawyer and client is not challenged in this appeal. At issue is whether the plaintiffs' costs award, payable by the unsuccessful defendants, should be increased to take into account the risk of non-payment to the plaintiffs' counsel.
>
> [Emphasis added]

[46] Ultimately, the Court's conclusion in *Ritchie* was that:

> 28. Application of the *ejusdem generis* rule would suggest that it was not the intention of its framers that clause (i) would include the risk of non-payment to plaintiffs' counsel as a relevant factor to consider in an award of costs against an unsuccessful defendant. Unsuccessful defendants should expect to pay similar amounts by way of costs across similar pieces of litigation involving similar

conduct and counsel, regardless of what arrangements the particular plaintiff may have concluded with counsel.

29. In the Ontario Court of Appeal, Gillese and Lang JJ.A. concluded that the specific arrangement between plaintiff and counsel was not to be considered when an award of partial indemnity costs was ordered. Thus, a risk premium could not be assessed against a different unsuccessful defendant in this case. (At trial, an award of damages and [page 441] partial indemnity costs including a risk premium was made against the Wawanesa Mutual Insurance Company. The Court of Appeal reversed on the issue of risk premium and that aspect of the decision was not appealed to this Court.) At para. 113 of their reasons, Gillese and Lang JJ.A. stated:

> A defendant has no knowledge of the private arrangements between the plaintiff and his or her counsel and thus has no means of measuring the risk of engaging in litigation. Defendants would be unable to gauge their exposure to costs when deciding whether and how to defend as exposure would be dependent, at least in part, on the financial means of the plaintiff. This difficulty would be compounded by the fact that many plaintiffs would happily agree to any amount of premium if the premium were to be paid by the losing party. In situations where a party realistically understands that his or her exposure for costs is limited to an award on a partial indemnity basis, counsel ought not to be concerned that the normal elements of costs will be inflated by a private arrangement made between the other side and his or her counsel.
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> [Emphasis added]

30. I agree with that reasoning. However, I see no reason why it would not be applicable when the court, under Rule 49, makes an award of costs on the substantial indemnity scale as opposed to the partial indemnity scale. Substantial indemnity costs were defined simply as costs payable on a higher scale than partial indemnity costs. As their name suggests, they were not intended to fully indemnify a party for any amount it may have undertaken to pay its counsel. I therefore see no basis for a difference in approach to the issue of a risk premium as between an award of partial or substantial indemnity costs.

[Emphasis added]

[47] *Apropos* the above, I completely agree with Justice Murray's observation in *MacDonald*:

> 110. The applicable principle here is that the successful party will normally be entitled to costs, and those costs will be based on the tariffs, subject to other factors that may increase or reduce that amount (*Rule 77.07*). This is subject to those costs representing a substantial but incomplete indemnity for the Plaintiff.
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> [Emphasis added]

[48] In this case, as noted, the situation is completely different than that which is encountered in the authorities discussed above. Here, the application of scale one of Tariff "A" is appropriate. The trial settled after less than a full day. An amount involved of less than $25,000.00, yields costs of $3,000.00. The Defendant concedes that I should add an additional $2,000.00 to this figure (the amount to be added for each day consumed by the trial), notwithstanding the fact that the trial only consumed one half day of Court time before it settled. The Defendant argues that:

> 40. The Defendant submits that, whatever the percentage owing under the Plaintiff's Contingency Fee Agreement, it cannot possibly exceed $5,000 on a settlement of $9,663.07…
>
> [Emphasis added]
>
> (*Defendant's Submissions on Costs, dated March 23, 2023)*

[49] The Plaintiff, in her rebuttal submissions, does not dispute this contention.

[50] I now return to Rule 77.07. It provides as follows:

> 77.07(1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
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> (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;
>
> (c) an offer of contribution;
>
> (d) a payment into court;
>
> (e) conduct of a party affecting the speed or expense of the proceeding;
>
> (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
>
> (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
>
> (h) a failure to admit something that should have been admitted.
>
> (3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

[51] At this point in her submissions, the language deployed by Plaintiff's counsel becomes stronger:

> 37. **In sum, the only issue that required determination by this court, was the legal question that the insurer brought to the table. This was the insurer's case. The insurer pushed this matter into trial, by holding steadfast to its unsupported interpretation of the cap legislation. Once the insurer brought everyone into the court room: Your Lordship; two counsel for the Plaintiffs; three Plaintiffs; and two counsel in its own right - once we were all before Your Lordship to determine the legal question steadfastly argued by the insurer, the insurer conceded its position on damages. This is the very definition of manipulative, malicious and reprehensible conduct, and a flagrant abuse of judicial resources. This was a demonstration of exceptional conduct that warrants a departure from the usual cost analysis.**
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> 38. When considering the conduct of counsel/the insurer on this matter, any single one of the factors outlined above might not attract increased costs. However, when considering the above noted factors **in their totality**, it is clear that something went wrong in terms of the insurers handling of this matter. The conduct, **when considered as a whole**, is indeed improper, abusive or unnecessary. We further submit that the increase in costs pursuant to this Rule, should serve as a deterrent to insurers, where deep pockets allow the imbalance to magnify in a case where the injuries are minor and general damages are nominal, and prescribed by law.
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> [Bolding in original]
>
> *(Plaintiff's Submissions on Costs, dated March 17, 2023)*

[52] It appears as though the Plaintiff has argued, in part, that conduct by the Defendant, (by his counsel in particular) implicates 77.07(2)(b), (e), (f) and (h). To the extent that E, F, and H rest on allegations of "procedural gamesmanship" on the part of Defence counsel, I reject these arguments entirely. It must be borne in mind that the Defendant is taking the position that, in the circumstances, the Plaintiff should receive an amount that represents one hundred percent of her actual legal costs, at the very least.

[53] In essence, the argument of Plaintiff's counsel boils down to the fact she put in a lot of extra work with a view to obtaining a precedent for the benefit of the personal injury bar, had to put a very emotionally vulnerable Plaintiff on the stand in order to do so, was deprived of the precedent for which she had hoped, and therefore that this should somehow result in an award of costs that is more than one hundred percent of the Plaintiff's actual billed costs being awarded. In fact, she seeks an award of $21,945.00, plus her disbursements (*Plaintiff rebuttal submissions on*

costs, para. 17). This is more than four times the actual legal fees which her client will be required to pay. I cannot agree with such a position.

[54] Counsel for the Plaintiff likely could have sought a preliminary ruling on the point of law at issue between the parties, pursuant to Rule 12, prior to trial. Depending upon the result, it might (perhaps) have precipitated the overall settlement of this case. Regardless of the result, counsel would at least have received a ruling on the point.

[55] An appreciable portion of the legal time actually expended in this case (*Vidal affidavit, Exhibit "K"*) bore less relation to work specifically done to benefit the Plaintiff financially, and more to work that was intended to benefit the personal injury bar in general. In any event, as the Defendant points out "…hours tracked by Plaintiff's counsel and other staff is not relevant, as it does not reflect the amount that the Plaintiff will pay, that is, her expenses of litigation". (*Defendant's submissions on costs, para. 39*)

[56] In these particular circumstances, an amount fixed in accordance with Tariff "A" (scale 1), together with the concession made by the Defendant allowing for the $2,000.00 daily rate to be added to it (even though only a half day of Court time was consumed) is very appropriate. In the relatively unusual circumstances of this case, it will result in a payment of costs at least equal to, if not in excess of, one hundred percent of the legal fees which the Plaintiff will be required to pay to her lawyer. I conclude that a cost award of $5,000.00 to the *Guardian ad litem* for Ms. Birkbeck will do justice between the parties.

Disbursements

[57] The differences between the parties' positions with respect to the quantum of disbursements is quite small. The Plaintiff seeks $855.68. The Defendant submits that the sum of $700.00 represents fair compensation for disbursements. Their differences primarily involve whether interest charged upon the line of credit which Plaintiff's counsel's firm uses to finance client disbursements and travel expenses, as well as (mileage) charges incurred by Plaintiff's co-counsel to commute from Pictou County to Halifax for trial, is/are properly recoverable.

[58] I agree that I have a discretion under Practice Memo #10 to determine when travel costs for counsel are recoverable, and the amount thereof. I also agree that (in some cases) it promotes greater public access to legal services when the financing

of necessary disbursements can be made available to parties who might otherwise be bereft of the opportunity to pursue legitimate claims.

[59] Of course, the amount of mileage expense recovery sought, in the circumstances of the particular case in question, and the cumulative amount of interest attracted by the financing of disbursements, as well as the nature of the disbursements themselves, must also be considered.

[60] Here, a decision was made to have two counsel attend on a case that all sides agreed was a "minor injuries" capped case. That was certainly the Plaintiff's prerogative. However, it is quite another thing to say that such a decision must automatically trigger a requirement that the co-counsel's out of town mileage be paid by the Defendant.

[61] Balancing all of the applicable factors, the Plaintiff shall recover disbursements in the total amount of $800.00.

Conclusion

[62] The Plaintiff, Stacey Birkbeck, shall receive a total of $5,800.00 in costs and disbursements.

Costs of this motion

[63] Given the almost complete success of the Defendant on this motion to quantify costs and disbursements, and the nature of the (unsubstantiated) allegations directed by Plaintiff's counsel towards the Defendant's counsel, I considered awarding costs of this motion to the Defendant.

[64] Indeed, and in any event, I am required to consider indemnifying the Defendant, with respect to his (successful) application to strike portions of the Vidal affidavit (Rule 39.04(5)).

[65] However, as costs with respect to this motion were not requested by either side, and in the absence of either party choosing to make submissions pursuant to Rule 39.04(5), I have decided not to award any costs on this motion itself.

Gabriel, J.