Claim No: S.C.C.H No. 301835
(S.H. No. 135708)

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Cunning v. Doucet, 2009 NSSM 35

BETWEEN:

CHRISTINA M. CUNNING

Claimant (Plaintiff)

- and -

RENEE DOUCET and GINO DOUCET

Defendants

TAXATION DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on April 14, 2009

Decision rendered on August 20, 2009

APPEARANCES

For the Claimant	David Richey Counsel
For the Defendant	Robert Purdy Counsel

BY THE COURT:

[1] This is a taxation of disbursements arising from a serious motor vehicle accident dating back to the mid-1990's. The Supreme Court action was settled a few weeks before trial in early 2006, with an understanding that the Plaintiff's disbursements would be paid as agreed, or as taxed. An initial bill of costs was presented and a payment was made at that time in the amount of $9,605.66 plus HST. Several items were simply disputed and deferred to another discussion. It was also understood that there were likely further disbursements that had not yet been posted to the account, and that these would have to be looked at when presented.

[2] Within weeks a further bill was presented, which the Defendant disputed, and unfortunately, after about three years there has been no agreement on these additional disbursements, and as such the matter was brought before this court for adjudication.

[3] The job of taxing these disbursements is made a bit more complicated by the fact that the later bill presented did not credit the payment made, so I must compare the bill that was paid with the subsequent one and look at the incremental amounts that may be properly charged. It is also complicated by the fact that the original bill was paid without explicit protest of certain items, such as photocopying and faxes, which items are very much in contention before me, and it is unclear whether I have the authority to tax amounts already settled and agreed.

[4] Some of the items claimed are relatively straightforward. Others involve larger issues of principle that need to be decided, even though the amounts involved may not be large. Those decisions of principle will be approached first and they can then be applied to the claimed items, as presented.

PHOTOCOPIES AND FAXES

[5] A considerable amount of the bills - i.e. the one already paid and the one carried forward - is made up of photocopy and fax charges. Counsel for the Plaintiff indicated that his office charges $0.40 per photocopy. For faxes, both incoming and outgoing, he charges $2.50 for the first page and $0.50 per page thereafter.

[6] A first distinction that I wish to highlight is this: what counsel charges his own client is a matter of contract or quasi contract. What he proposes to pass on to another party in a taxation is a question of what is a reasonable and necessary expense. The principles are not the same.

Copies

[7] Dealing first with copies, there has been no tariff for photocopies established in Nova Scotia or elsewhere, as far as I am aware. However, no taxing officer in Canada has to my knowledge ever approved as much as $0.40 per page for copies made in a lawyer’s office. Every decision that I have seen where such a claim has been tried, has cut the figure down to $0.25 or lower, or has significantly reduced the number of copies allowed which leads to the same result - a substantial reduction.

[8] In my experience, there has been something of a tacit agreement within the bar (not just in Nova Scotia but in many places) that copies may be charged at an amount that far exceeds the actual cost of delivering them. In other words, the copy machine has been turned into a profit centre. Lawyers were routinely charging $0.25 per copy when I started practising law in the late 1970's, and that figure has either stayed the same or gone up a little.

[9] What this ignores is the fact that technological advances have made the actual cost of photocopies a small fraction of what they once were. Back in the 1970's and 1980's, a high-quality machine with a document feeder, collater and, perhaps stapler, was a significant financial investment. That has changed dramatically.

[10] Commercial enterprises such as Kinko’s or the Printing House will now deliver copies at rates less than $0.10 per copy, and evidently make a profit doing so. Anyone can buy or lease a machine with minimal capital outlay that will produce professional quality copies for less than that.

[11] Given the true economics of photocopying in this day and age, I do not think that the practice of charging even $0.25 per copy can be justified. I grant that there is a labour component to copying, but modern machines with efficient feeders make the work quite easy, and commercial outlets do all of the work at a cost that is built in to their per page cost.

[12] To compound the problem, litigation has become more paper-intensive than ever, with the result that most cases require more copying than they did years ago.

[13] It is not my place to try to establish a hard and fast rule about what amount is allowable, but I would suggest that the amount on a party and party basis should try to reflect the true cost of generating the copies. Where a case, such as the one here, involves thousands of copies of documents such as lengthy medical records, generally being copied in bulk, it is not unreasonable to suggest that the copying should either be farmed out to a commercial copier at their low rates, or if done in-house the lawyer should charge at a competitive rate with perhaps a small premium for the convenience of having them kept in-house.

[14] Where the copying is of small numbers of documents, the rate could be higher because no one would expect small copying jobs to be sent out. Similar issues would apply if there were colour copying involved.

[15] To illustrate the point, if counsel has 500 pages of medical records that require three sets of copies, that would be 1,500 copies. A commercial outfit would charge in the range of $150.00. At $0.25 per copy, the amount would be $375.00, while at $0.40 the charge would be $600.00. There is simply no principled basis to require an opposing party - whose obligation is to indemnify the opposing party for expenses reasonably incurred - to generate a profit of $225 to $400 for opposing counsel’s law firm.

[16] In the case before me, where the total number of copies run into the many thousands, I would have allowed no more than $0.15 per copy. That of course is just the starting point, because it does not address the issue of whether all copies can be charged to the opposing party. It is well recognized that on a party and party basis, the opposing party is not responsible for extra copies that are merely made for the client's or lawyer's convenience.

Faxes

[17] Faxes are another item that, in my respectful view, have habitually been the subject of charges that bear no rational relationship to the cost of providing the service. Firms have been using their fax machines as a profit centre, although probably not to the same extent as their photocopiers.

[18] The cost of a phone line and a fax machine are part of the cost of operating a law practice, and in this day and age are minimal. The incremental cost to send a fax is merely the time for someone to dial the number and feed the documents into the machine. To receive faxes there is a cost for paper and ink or toner, amounting to a few pennies per page. There is some human labour associated with taking faxes off the machine and directing them appropriately, but even this labour is no different from what occurs with items that come via the mail or by courier.

[19] There is simply no principled basis for why the sending or receiving of fax containing several pages should cost several dollars when the cost of a postage stamp is $0.54 and the cost of opening a mailed item is zero. With

lengthy faxes the disproportion is all the greater. It also bears mention that the labour component of sending a letter by mail or courier has never been regarded as a disbursement - it is simply part of the lawyer's overhead.

[20] I repeat again that if clients are willing to pay amounts that result in a profit to their lawyers, and contractually bind themselves to do so, that is well and good, but on a party and party basis this cost cannot be passed on to a third party whose obligation is to indemnify that party for the reasonable costs incurred in the litigation.

[21] My inclination is to allow no more than $1.00 for faxes sent, regardless of how many pages, and for faxes received (reflecting the cost of consumables) an amount of $1.00 for the first page and $0.25 for pages after the first.

Specific item: $1,250.00 for Dr. Legay's cancellation fees

[22] This item was claimed in the initial bill and disputed.

[23] The Plaintiff had been a patient of a well-known orthopaedic doctor, Dr. Legay, who produced reports and was slated to testify at the trial. He reserved a half-day for his attendance. He also indicated in correspondence to counsel for the Plaintiff, which was shared with counsel for the Defendant well before the trial, that he charged a cancellation fee of $2,500 if the trial were cancelled within four weeks thereof. In fact, he received about two weeks notice that he would not be required. He issued a bill for $1,250 - half of what he had said he would bill - which the Plaintiff seeks to pass on to the Defendant.

[24] The Defendant seeks to avoid payment of this bill on the theory that the doctor ought to have been able to mitigate the loss of income by booking other patients. On that theory, the Defendant would only have to pay if the doctor could establish that he was unable to make up the income.

[25] Counsel cited some British Columbia decisions which appear, unfortunately without much analysis, to take that approach. These decisions are not binding upon me as a taxing officer in Nova Scotia, and as for their persuasive value, I say (with respect) that I utterly disagree with them, for the following reasons.

[26] The Plaintiff has contractually bound herself to pay a cancellation fee. She has no basis after the fact to question whether the doctor is receiving an arguable windfall by being paid for the cancellation while also being paid to work during that time originally set aside. Such billing practices are common and have been accepted by the legal profession as a necessary cost.

[27] The theory of party and party costs is that the Plaintiff is entitled to be indemnified for expenses reasonably incurred. I cannot say that Dr. Legay's fee is not a reasonably incurred expense. To deny it on the basis that the doctor may be profiting from his cancellation fees, would ignore and defeat the indemnity principle.

[28] As counsel for the Plaintiff points out, as a result of an agreement between the Nova Scotia Barristers Society and Doctors Nova Scotia, lawyers are ethically bound to pay for doctors' reports and for their attendances within

45 days of receiving a bill. Of course, bills may be questioned and an improper bill should not be paid, but failure to pay a valid bill could become a disciplinary matter. All of which is to reinforce the fact that counsel for the Plaintiff could not legitimately question this bill from Dr. Legay. And he, in turn, is entitled to pass the expense on to his client, who seeks to pass it on to the Defendant.

[29] In my opinion, the question here of whether or not the Plaintiff herself, or the Defendant, should ultimately bear the expense of a cancellation fee, should not turn on the vagaries of whether or not Dr. Legay was able to make remunerative use of the time when he was otherwise scheduled to testify. Such a consideration might have some sway in the absence of a contractual arrangement to pay, where questions of *quantum meruit* had to be considered, but that is not the case here.

[30] I also believe it is unseemly and improperly meddlesome even to be questioning what an expert decides to do with the time freed up by a cancellation. He or she should be free to make the best use of that time, consistent with his or her professional or personal imperatives, without any concern that third parties are being financially affected.

[31] As such, this item is allowed as submitted.

Other specific items

[32] $37.55 for Quicklaw research: There was a time years ago when online research was a novel development and lawyers paid for this research by the time spent and could track individual client files. Most lawyers,

including Mr. Richey, no longer do this. They pay the much less costly monthly fee and take advantage of the system's ability to track individual clients or files and bill out the amount that would have been charged, had the lawyer subscribed to the "pay as you go" plan. That amount is basically a fiction because it is not an actual expense to the lawyer.

[33] Performing legal research is part of a lawyer's job. In my view, the ability to do online research is merely a convenience to lawyers, which is now available for a minimal cost. Absolutely free services are quickly becoming available, eg. through CANLII, which will in time as their databases grow likely give the commercial services a run for their money. As such, it is my view that online research is part of overhead and is not a necessary disbursement that can be passed along on a party and party basis.

[34] $781.00 for medical report: On closer inspection at the hearing it was determined that there was duplication and that $406 of this referred to an item already paid. I will allow the sum of $375.00.

[35] $3,600 for Diane Senechal: On a close inspection it appears that this charge was for therapy or counselling, and not for any report or witness fees. It is true that she did write a letter which would have been used at the trial, but there was no specific charge for that letter. As such it is not a taxable disbursement. It is an expense related to the cost of care, which would have been subsumed in the claim for damages.

[36] $117.00 for Brenda Pate: This is listed as a "professional consultant," which in actual fact means that she was the Plaintiff's first lawyer on the file, having represented the Plaintiff for about a year. This account is for

disbursements said to be $25.00 for “sundry”, $45.00 for photocopying, $35.00 for fax and $12.00 for postage. There is no indication as to the per copy or per fax charge, or what sundry refers to. Given my above comments on copies and fax, I allow the sum of $40.00 for this item.

[37] Lunches and travel expenses: There are some small charges for lunches and travel expenses. The travel expenses amount to some bridge tokens and parking for visits to Halifax for discoveries or meetings. With respect, these are not appropriate disbursements on a party and party basis. The rule of thumb is that the client is responsible to get his or her lawyer to the courthouse. Here there was no trial, but the principle is the same. I would extend that to include that it is the client’s responsibility to nourish his or her counsel with snacks and lunches.

Amounts claimed and allowed

[38] The amount paid initially by the Defendant, without protest, included the following amounts:

A. $541.30 for faxes
B. $2,595.20 for “office photocopies” plus $527.79 for “printing, binding and photocopying”
C. $145.61 for postage
D. $3,949 plus $60 for “disbursements”
E. $400 for Dr. Legay’s non-refundable booking fee

for a total of $9,605.66 plus HST.

[39] I will confess that I have found it difficult to discern precisely what amounts are still in issue for faxes and photocopies. This is in part a function of the fact that my original notes taken at the hearing were accidentally destroyed. It is also a function of the uninformative way the disbursements have been presented.

[40] In the result, I have considered the fact that the Defendant paid the original amounts for copies and faxes without explicit protest. Had those amounts been in front of me, consistent with my earlier comments those amounts would have been reduced substantially. It is also unclear how many of the copies claimed would have been made for the client's benefit, rather than for the litigation, the latter of which are chargeable on a party and party basis while the former typically are not. It is my view that justice is best served by disallowing any further amounts to the Plaintiff for copying or faxes. In the grand scheme, she has recovered considerably more than she would have received had the entire bill been taxed before me.

[41] There are further amounts for postage that are virtually *de minimis* but I will allow a global $25.00 for all incidental items.

[42] I note that there is a claim for ongoing faxes and copies that has accrued since the case was settled. I do not allow any such costs as I do not regard them as flowing from the settlement, but rather from the negotiation that resulted in the taxation.

[43] In the result, I will allow the Plaintiff the following claimed items:

$1,250.00 for Dr. Legay's cancellation fees

$375.00 for medical report
$40.00 toward Brenda Pate's bill
$25.00 for all other incidentals

[44] I also allow $87.06 as the cost of commencing this taxation.

[45] The bill is accordingly taxed at the all-inclusive amount of $1,777.06.

[46] If through inadvertence I have failed to consider any items, given the unfortunate loss of my hearing notes, I will retain jurisdiction to consider any claims not touched upon in these reasons.

Eric K. Slone, Adjudicator