

SUPREME COURT OF NOVA SCOTIA

Citation: *Grue v. McLellan*, 2018 NSSC 151

Date: 2018-06-20

Docket: *Tru.* No. 412326

Registry: Truro

Between:

Holly Elizabeth Grue

Plaintiff

v.

**Ryan McLellan, Gregory McLaughlin and
The Personal Insurance Company**

Defendants

**DECISION
(Costs Endorsement)**

Judge: The Honourable Justice Jeffrey R. Hunt

Heard: June 21, 22, 26, 27, 30, July 4, 27, 2017, in Truro, Nova

Written Decision: Scotia
March 23, 2018

Final Submissions May 31, 2018

on Costs:

Counsel: Peggy Power/Charles Thompson, Solicitors for the Plaintiff
Stephen Johnston/Joshua Martin, Solicitors for the Defendant,
Gregory McLaughlin
Christopher Madill/Tipper McEwan, Solicitors for The
Personal Insurance Company
Myer Rabin, Solicitor for Ryan McLellan

By the Court:

Introduction

[1] The parties in this matter have resolved a number of costs issues.

Remaining for determination are:

1. Party-Party costs between the Plaintiff, Holly Grue and Gregory McLaughlin;
2. Status of potential Party-Party costs claim between the Defendants, Ryan McLellan and Gregory McLaughlin.

Issue 1 – Grue/MacLellan

[2] Counsel on behalf of Greg McLaughlin acknowledges an obligation to pay costs to Holly Grue and submits that costs ought to be assessed as follows:

- Costs on Tariff A – Scale 2 with an amount involved of \$1,000,000.00. This results in an amount payable of \$64,750.00 plus \$2,000.00 per trial day (x 7 days) for a total of \$78,750.00.

[3] Counsel for the Plaintiff, Holly Grue, seeks the following:

- Costs on Tariff A – Scale 3 with an amount involved of \$1,000,000.00. This results in an amount payable of \$80,938.00 plus

\$2,000.00 per trial day (x 7 days) for a total of \$94,938.00. Additionally, they ask the Court to exercise its discretion to add a lump sum increase of \$30,000.00 bringing the award to \$124,938.00.

[4] I have reviewed in detail all the submissions of the parties. I recognize that the Plaintiff has achieved significant success on the issues important to her. The significant cost award conceded by Greg McLaughlin reflects a recognition of the stakes and the degree of success. The task before the Court is to determine whether an increase is warranted given the facts and the law. The objective of the Court is to strike a proper balance and do justice between the parties on the issue of costs.

Summary of Legal Principles

[5] *Civil Procedure Rule 77* deals with the awarding of costs. It gives the court a wide discretion to award costs to do “justice between the parties”.

[6] In *Armoyan v. Armoyan*, 2013 NSCA 136, the Nova Scotia Court of Appeal provided direction with respect to the principles to be considered when determining costs. Specifically, Justice Fichaud stated:

1. The court’s overall mandate is to do “justice between the parties”: para. 10;

2. Unless otherwise ordered, costs are quantified according to the tariffs; however, the court has discretion to raise or lower the tariff costs applying factors such as those listed in *Rule 77.07(2)*. These factors include an unaccepted written settlement offer, whether the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding: paras. 12 and 13.

3. The *Rule* permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15

4. The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to the party's reasonable fees and expenses: para. 16

5. The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17

6. Some cases bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions; a case may have "no amount involved" with other important issues at stake, the case may assume a complexity with a corresponding work load, that is far disproportionate to the court time by which costs are assessed under the tariffs, etc.: paras. 17 and 18; and

7. When the subjectivity of applying the tariffs exceeds a critical level, the tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the *Rules* or case law: para. 18.

[7] I have reviewed and considered the *Civil Procedure Rules* and case law with respect to lump sum awards of costs.

[8] *Civil Procedure Rule 77.07* provides factors which are relevant to increasing Tariff costs:

Increasing or decreasing tariff amount

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:

- (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.

[9] Generally speaking, these have been resorted to when a tariff calculation has been found to be “woefully inadequate”: see for instance *Urquhart v. MacIsaac*, 2018 NSSC 36. Justice Chipman in that case offers an overview of case law on the subject. In the circumstances before Justice Chipman he concluded the Tariff was inadequate. The “amount involved” for purposes of applying the Tariff was \$80,000.00. The hearing was six days long. The Tariff calculation in those circumstances was not reasonable.

[10] In the *Urquhart* case the amount involved (\$80,000.00) did not reflect the seriousness of the issues being tried and the interests at stake. In our present case,

the amount involved (\$1,000,000.00) does more accurately reflect the very serious issues and interests at play. It also results in a Tariff calculation of a different order of magnitude.

[11] In cases reviewed by the Court on the issue of lump sum increases it appears the Court had put to it details of the parties' legal costs. That is not the case here. I was not able to identify any equivalent case where a lump sum increase was sought where the actual legal costs were not put to the Court as part of the overall argument on appropriateness and reasonableness.

Findings

[12] While Holly Grue did have very significant interests at stake in this stage of the proceeding she was able to have some comfort in the knowledge that the indemnity obligation was going to devolve on either the Personal Insurance Company or the insurer for Greg McLaughlin.

[13] She clearly wanted a finding of consent to drive as between McLellan and McLaughlin and this was the outcome. She was aided in getting to this desired outcome by the efforts of The Personal which had the primary financial incentive to displace the indemnity obligation onto the insurer for McLaughlin.

[14] Unsurprisingly - given their primary pecuniary interest – The Personal took the labouring oar on issues relating to the consent to drive issue. This was entirely expected and appropriate. This was largely a “consent to drive” trial. There were other issues at play but the core of the dispute was the issue of consent. By the time of trial, it was agreed that no liability or contributory negligence rested with the Plaintiff.

[15] I have reviewed the list of items presented by Holly Grue as examples of instances where Greg McLaughlin ought to have acquiesced to the “Request for Admission” found as Trial Exhibit 15. Such a failure could be relevant under *Civil Procedure Rule* 77.07(2)(h). I do not find these compelling enough to warrant a departure from Tariff A – Scale 2.

[16] The true clash in this proceeding was that between the two insurers. Their examinations and submissions carried the bulk of the load on the issues at play.

[17] None of this is a criticism of the role played by counsel to Ryan McLellan or Holly Grue. Far from it. It was totally expected and correct that with the consent issue at play the two insurers would play the central roles. Had the matter been required to proceed to the next stage – quantification of damages – then the role of the Plaintiff would have been more central and determinative.

[18] In all the circumstances, it was not necessary to move to the quantification stage.

Issue 1 – Conclusion

[19] I find that the appropriate costs disposition is on Tariff A - Scale 2 for a seven day hearing. This results in a total award of \$78,750.00. In all the circumstances here a lump sum increase is not warranted. A departure from Scale 2 is not warranted. The parties have already resolved the issue of disbursements.

Issue 2 – McLellan/McLaughlin

[20] The issue of costs between Ryan McLellan and Greg McLaughlin is not a straight forward one. The Court has been advised that to-date no one on behalf of Ryan McLellan has advanced a costs demand to McLaughlin. This may not be totally surprising given the circumstances. Mr. Rabin was counsel to McLellan at the trial. Mr. Rabin passed away unexpectedly following the trial. His practice is being wrapped up by a legal custodian. Mr. McLellan may have viewed himself as an unsuccessful party at trial given the liability finding against him.

[21] I am asking counsel to Mr. McLaughlin to be in touch with Mr. Picard as custodian for Mr. Rabin. I ask that they advise Mr. Picard that if he intends to

advance a costs claim in this matter, any such claim and submissions must be directed to the Court by **Friday, July 20, 2018**.

[22] In the event costs are sought and submissions made, Counsel to Greg McLaughlin may file its own submissions within the 30 days following receipt of the position filed by Ryan McLellan.

J.