SUPREME COURT OF NOVA SCOTIA
Citation: *MacDonald v. MacVicar Estate,* 2019 NSSC 108

Date: 20190312
Docket: SYD No. 413101
Registry: Sydney

Between:

Kim MacDonald

Plaintiff

v.

The Estate of Ralph MacVicar as represented by his Executrix,Dorothy Baldoni

Defendant

LIBRARY HEADING

Judge:	The Honourable Justice Patrick J. Murray
Final Written Submissions:	January 23, 2019
Written Decision:	March 12, 2019
Subject:	Costs, Personal Injury Matter
Issue:	Damages award in a trial that lasted 9 days. Expert witnesses.
Facts:	Plaintiff awarded damages of $760,000. Defendant contesting costs on basis of Plaintiff's conduct and Defendant's success on motions. Plaintiff seeking that prejudgment interest be included in amount involved.
Result:	Costs awarded on basis of amount involved at Scale 3 due to complexity, importance, and unsettled question of law re: s. 113B of *Insurance Act* – award of future income. Court awarded costs totaling $101,345 plus disbursements of $50,379.12. Court cited general rule that prejudgment interest not included in amount involved, subject to circumstances of case. Prejudgment interest included here for reasons set out.
Cases cited:	***MacDonald v. MacVicar***, 2018 NSSC 271; ***Brocke Estate v.***

Crowell, 2014 NSSC 269; ***Mader v. Lahey***, 1997 CarswellNS 572 (S.C.); ***Seamone Co. v. Nova Scotia (Attorney General)***, 1999 CarswellNS 5 (C.A.); ***MacDonald v. MacVicar,*** 2018 NSSC 272; ***R. Baker Fisheries Ltd. v. Atlantic Clam Harvesters Ltd.***, 2002 NSCA 82; ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23, [2015] 2 S.C.R. 182; ***MacIntyre v. Cape Breton District Health Authority***, 2011 NSCA 3; ***Armoyan v. Armoyan***, 2013 NSCA 136; ***Campbell v. Jones***, 2001 NSSC 139; ***Cashen v. Donovan***, 174 N.S.R (2d) 320 (NSSC); ***Andrews v. Keybase Financial Group Inc.*** 2014 NSSC 287; ***Rhyno Demolition v. N.S. (A.G.)***, 2005 NSSC 147; ***General Electric Capital Canada Inc. v. R.***, 2010 TCC 490; ***Wadden v. BMO Nesbitt Burns***, 2014 NSSC 11; ***Bevis v. CTV Inc.***, 2004 NSSC 209.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

SUPREME COURT OF NOVA SCOTIA
Citation: *MacDonald v. MacVicar Estate*, 2019 NSSC 108

Date: 20190312
Docket: SYD No. 413101
Registry: Sydney

Between:

Kim MacDonald

Plaintiff

v.

The Estate of Ralph MacVicar as represented by his Executrix, Dorothy Baldoni

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Written Decision:	March 12, 2019, in Sydney, Nova Scotia
Final Written Submissions:	January 23, 2019
Counsel:	Hugh McLeod, for the Plaintiff, Kim MacDonald Lisa Richards, for the Respondent, Estate

By the Court:

Introduction

[1] This is a decision on costs following an award for personal injuries to the Plaintiff at trial, resulting from a motor vehicle accident in Glace Bay, N.S., on September 4, 2012.

[2] The Plaintiff, Kim MacDonald, was a passenger in a vehicle that had been rear ended by the Defendant, Ralph MacVicar, who passed away prior to the trial.

[3] My decision on liability and damages is recorded at ***MacDonald v. MacVicar***, 2018 NSSC 271. The trial extended over a period of ten (10) days.

[4] I found the Defendant driver at fault and liable in damages to the Plaintiff. The trial involved extensive medical evidence including several experts, all prominent physicians in their field of expertise. There was additional medical evidence from other physicians.

[5] The symptoms suffered by the Plaintiff involved her neck, headaches, pain in her right arm, and tremors. The medical evidence differed as to the cause and extent of her injuries.

[6] At trial, Ms. MacDonald was found to be totally disabled and I attributed this to the accident. The Plaintiff was awarded $760,933. in damages, including pre-judgment interest.

Issues

1. What is an appropriate cost award for the Plaintiff, Kim MacDonald?
2. What award of party and party costs will do justice as between the parties in this matter?

[7] There are a number of governing principles, which are mostly embodied in *Civil Procedure Rule 77*. Here, we are dealing with party and party costs in which one party compensates another party, for their expenses in the litigation. (*Rule 77.01(a)*)

[8] One of the main principles is that the cost award shall represent a substantial but incomplete indemnity of the successful party's reasonable legal expenses, together with reasonable and necessary disbursements.

[9] The parties agree that the Plaintiff is entitled to costs and they also agree that the starting point is the Tariff under the *Civil Procedure Rule 77.18*.

[10] Apart from this, the parties disagree on some of the basic components of an award of party and party costs. They disagree on the amount involved, on the number of days for the trial, on whether pre-judgment should be included in a determination of amount involved, and other matters.

[11] They disagree on whether the trial was complex, and whether the motions made before during the trial were necessary. They disagree on which scale should apply; Basic (Scale 2) or Scale 3 (+25%) or Scale 1 (-25%).

[12] There are additional issues ranging from whether certain medical witnesses should have been called, (Dr. Christie and Dr. Malik) to the conduct of the Plaintiff through its counsel. The Defendant takes issue for example, with Dr. King's fee account, arguing it is not a disbursement that should be borne by the Defendant. Similarly, Plaintiff's counsel takes issue with the Defendant's position and its conduct throughout the trial.

[13] These issues will be dealt with in more detail in this decision. At this time I will set out the basic position of each party, in summary form.

Position of the Plaintiff, Kim MacDonald

[14] The Plaintiff's position on costs is that this was a complicated trial that lasted two (2) weeks. A trial, says the Plaintiff, that was highlighted by complex issues of law and fact.

[15] There was extensive medical evidence with varying opinions. There were a series of motions including the motion by the Defendant to admit the statement of the late Ralph MacVicar and the motion by the Plaintiff to exclude the expert report of Dr. Alexander.

[16] Both of these motions were contested; the statement on the basis that it was hearsay evidence and therefore inadmissible, and the motion to exclude on the basis that it did not comply with the *Rule 55.04* governing its admission.

[17] The Plaintiff received a formal offer to settle from the Defendant in the amount of $350,000 all inclusive, (Tab 1). The Plaintiff was awarded more than twice that amount, as the decision came in at $760,933. plus costs.

[18] The evidence of Dr. Christie and Dr. Malik was a clearly contentious issue involving several lengthy pre-trial conferences. Neither of these physicians provided a *Rule 55* report. Ultimately, certain of their opinions were identified and admission of the evidence agreed to by the Plaintiff and Defendant.

[19] In terms of the motions heard, the Plaintiff as the successful party at trial, seeks costs to be awarded in the cause at the end of the proceeding. (*Rule 77.03(4)(a)(b)*)

[20] In terms of costs the Plaintiff submits this case should not be governed by the Basic Scale as follows:

> This case should not be governed by the basic scale because of the complex issues involved such as: Motion to Exclude Dr. Alexander's evidence, Motion to Exclude Ralph MacVicar Statement, Conference Motion Re: Dr. Haleem, Statements, Dr. Christie's Report and Dr. Malik's letters.

[21] The Plaintiff therefore seeks an award in the range of $750,000. - $1,000,000. based on Scale 3 of Tariff A in *Rule 77.18*. The Plaintiff's calculation as contained in her brief is as follows:

Tariff A

Scale 3:	
$750,001 - $100,000	$80,938.
$2,000 (for 10 days)	$20,000.
	$100,938
Scale 2: (which is a basic scale)	
$750,001 - $100,000	$64,750.
$2,000 (for 10 days)	$20,000.
	$84,750

[22] The total claimed by the Plaintiff therefore, is $100,938 for party and party costs plus disbursements. The Plaintiff also seeks a lump sum.

[23] The Plaintiff refers to *Rule 77.07(2)* and states there are factors present that are relevant to increasing (or decreasing as the case may be) costs after the trial of an action. In particular, the Plaintiff refers to *Rule 77.07(2)(e), (f),* and *(g),* arguing that the Defendant's conduct affected the speed and expense of the proceeding. These provisions refer to steps taken improperly or because they were in response to the other party unreasonably withholding consent.

[24] As an example, the Plaintiff refers to the reports of Dr. Malik and Dr. Christie, in paragraph 28 of her brief stating:

> 28. The action in not admitting those reports the Plaintiff alleges the Defendant unreasonably withheld her consent contrary to Civil Procedure Rule 77.07(2)(g).

[25] In addition, the Plaintiff seeks that a lump sum be added to the tariff amount based on the actual legal fees the Plaintiff will pay, as a result of the contingency fee agreement between her and her counsel.

[26] In his supplementary brief, Mr. McLeod states at paragraph 3, page 2:

> Most importantly the Plaintiff would ask the court to note that when scale 3 is used party and party the cost to the Plaintiff exclusive of disbursements will be $100,000. The Judgement is for $760,933 and the Plaintiff's legal costs are $266,326.
>
> $100,000
>
> $266,326 = 37%
>
> This itself mandates an additional lump sum, bringing it up to near 50%, see tab 2 the case of Campbell – MacIsaac v. Deveaux (supra).

[27] The agreement here provides for a contingency of 35% of the award as legal costs. Bringing it up to at or near 50% of the Plaintiff's actual legal expenses would require an additional lump sum of $35,163. As authority for this submission the Plaintiff relies on ***Brocke Estate v. Crowell***, 2014 NSSC 269.

Position of the Defendant Estate

[28] The Defendant acknowledges that pursuant to *Rule 77.06(1)* party and party costs must be fixed in accordance with the Tariff, "unless a judge orders otherwise".

[29] In its brief the Defendant submits [the Courts] "discretion comes into play in determining the 'amount involved', factors serving to reduce allowable costs as well as the number of days of trial – all of which affect a successful party's tariff costs as a whole".

[30] The "amount involved" and the "number of days for trial" are key determinations. As well determining which of Scale under Tariff A is adequate.

[31] The Defendant says there is no reason to depart from the usual practice of using the amount allowed as the amount involved. This was not an overly complex trial it argues, with the parties being at odds over the issues of causation and the extent of the injuries sustained by Ms. MacDonald.

[32] The Defendant submits the amount involved is $730,756. which is the amount allowed less pre-judgment interest. I will return to pre-judgment interest later in my decision.

[33] The Defendant further states the length of the trial should be set at six (6) days, and that the appropriate Scale is Scale 1 which is 25% less than the Basic

Scale. The Defendant's therefore submits that Plaintiff should be awarded costs of $37,313. plus $2,000 for six (6) trial days for a total $49,313.

[34] From this figure of $49,313. The Defendant says there must be a further substantial reduction to account for the Defendant's success on a series of motions. The Defendant therefore seeks set off pursuant to *Rule 77.11*.

[35] The Defendant refers to a number of factors which serve to reduce allowable costs. I will address each factor in my analysis and my overall conclusion as to an appropriate cost award.

[36] I will mention that the basic theme of the Defendant on the cost issue is that the conduct of the Plaintiff's counsel adversely affected the speed and expense of the trial. There were unnecessary procedural difficulties which caused delay.

[37] The Defendant also takes serious issue with the disbursements claimed by the Plaintiff stating for example, that Dr. King was an unnecessary witness.

[38] Under the rules, a judge may add to or subtract from the tariff amount, submits the Defendant.

Analysis of the Issues

Scale/Amount Involved

[39] The difference in the two positions with respect to the amount involved is the amount awarded for pre-judgment interest, which the Defendant says must be deducted. The amounts allowed in the decision for pre-judgment interest were $11,250. and $18,927. for a total of $30,177.

[40] The effect of such a deduction on the tariff amount here is significant in that it "drops" the Plaintiff's costs from the $750,000. - $1,000,000. range to the $500,000 - $750,000. range in Tariff A. In the latter, the basic cost amount is $49,750 and in the former the basic costs are $64,750., a difference of $15,000.

[41] The Defendant submits this issue is clear, referring to ***Brocke***, at para. 88:

> [88] In my view, in the case at hand, the "amount involved", for the purposes of Tariff A, is the amount awarded less statutory deductions, i.e. $798,319.39. Prejudgment interest is not to be included in the amount involved for the purposes of determining tariff costs: ***Mader***, *supra*, para. 39. However, it would not matter if prejudgment interest were added because the amount involved would still be in the range of $750,001 to $1 million. Using that amount involved, Scale 3 prescribes a tariff amount of $80,938. Since there were 17.5 days of trial, a further $35,000 is to be added in accordance with the specified supplementary daily amount of $2000. That results in total tariff costs of $115,938 which rounds off to $116,000. That is approximately 49% of the reasonable legal costs of $239,000.

[42] The Plaintiff takes a different view, submitting that pre-judgment interest should be included in the calculation of amount involved because Kim MacDonald had been deprived of non-pecuniary damages and past loss of income during this period leading up to the judgement. Unlike, ***Mader v. Lahey***, 1997 CarswellNS 572 (S.C.), cited with approval in ***Brocke***, the damages awarded here were suffered as of the date of the accident.

[43] The Plaintiff argues the purpose of pre-judgement interest is relevant and refers specifically to ***Brocke*** (paras. 45 - 48). The purpose pre-judgment interest is to compensate the Plaintiff for being without the money represented by the award of damages. (***Seamone Co. v. Nova Scotia (Attorney General)***, 1999 CarswellNS 5 (C.A.) at para.223).

[44] There is little question this was a complex matter as is evident by the varied medical opinions by experienced and respected physicians respecting the key issues of causation and the extent of the Plaintiff's disability.

[45] The surgery Ms. MacDonald underwent was major. The risks were identified by a neurologist with over 40 years of experience.

[46] In terms of the Scale, I reject outright that the minimum scale, Scale 1 under Tariff A should apply in this case. Advancing less than the basic Scale 2 fails to recognize this case for what it was. Any fair reading of my decision would confirm that. If anything this case lends itself to Scale 3 of the tariff. It was more involved, and more complex than the average personal injury matter.

[47] The trial itself was not extremely lengthy at 10 days but it did span beyond two weeks in terms of the overall time frame. Dr. Reardon, described the case as "complicated". The trial included numerous motions (approximately 6-8 at least) which required pre-trial and mid-trial rulings.

[48] A key issue involved an unsettled question of law, pertaining to whether an award of future loss of income should be granted on a gross or on a net basis. This question involved an interpretation of section 113 B of the *Insurance Act* and section 2 of the *Tort Regulations*. Counsel were unable to provide guidance in the way of caselaw as the issue had not been decided previously. Counsel submitted their interpretation of these sections. My decision on that issue is reported at ***MacDonald v. MacVicar,*** 2018 NSSC 272.

[49] In ***R. Baker Fisheries Ltd. v. Atlantic Clam Harvesters Ltd.***, 2002 NSCA 82, Justice Saunders cautioned that care must be taken to avoid duplication of the dual factors of complexity and importance in determining both amount involved

and the appropriate scale so as to avoid prejudice and duplicity in determining these items as against the defendant.

[50] It appears from the caselaw that whether pre-judgment interest should be included in the amount involved depends on the facts of each case.

[51] In this case it is critical to determine if pre-judgment interest applies because there are factors which would justify Scale 3 and the difference in costs is significant, eg. $65,000. vs $80,000. The amount for pre-judgment interest here places the amount involved in a higher range if it is included.

[52] As stated I am satisfied Scale 1 is not realistic or reflective of nature of case before me. I am further satisfied that nothing less than Scale 2 would suffice and it is likely Scale 3 can be justified.

[53] In determining the amount involved, I am attempting to assess with care, the appropriate factors in first determining amount involved, together with the appropriate scale before analyzing the factors which might reduce or increase the ultimate award, in the overall result.

[54] Among these considerations, in order to serve the underlying principle of costs, the claim for costs should include the Plaintiff's solicitors "billings". Put another way a breakdown of the Plaintiff's fees and disbursements to allow the Court to assess the reasonableness, and therefore determine a substantial, but incomplete indemnity of the Plaintiff's reasonable legal fees and expenses.

[55] In terms of the motions, the motion to exclude Dr. Alexander's opinion probably consumed the most time at trial, but the pre-trial dispute over the narrative opinion of Dr. Haleem and the evidence of Dr. Malik and Dr. Christie was also significant.

[56] In terms of those matters, as the trial judge I am in the best position to assess those matters, as I have a vivid recollection of what transpired between the Court and counsel, because of the importance of having those matters determined both during and in advance of the trial.

[57] I will return to discuss these motions in more detail as they pertained to whether the evidence of key witnesses would be admissible.

[58] At this time, for all of the above reasons, I find the amount involved is at least $750,001. quite apart from whether pre-judgement interest should be included, the Plaintiff entered the trial facing the loss of a nursing career. There was as well an important question of law that had to be ruled upon.

[59] These and other factors may ultimately justify a finding that Scale 3 should be awarded, but I will make that decision in the final analysis, after considering of all factors including those advanced by the parties.

Number of days of Trial

[60] Tariff A expressly states that the length of trial is an additional factor to be included in calculating costs under the tariff. Two thousand dollars, ($2,000.) shall be added to the amount calculated under the tariff for each day of trial. In applying the Schedule the "length of trial is to be fixed by the trial judge".

[61] In its submission the Defendant argues the number of days of trial should be fixed at six (6) days, as originally scheduled and not ten (10) days.

[62] On this point, I am immediately reminded that the length of the trial was discussed at several pre-trial conferences and it was deemed prudent by the Court and both counsel to add two (2) additional days, to accommodate the scheduling of witnesses, including the appearance of Dr. Alexander. This proved to be a prudent decision as additional days were needed, plus two more days as a result of motions that were made.

[63] I hasten to add this would also have been an opportune time for the Plaintiff to have raised the intended motion to exclude the Defendant's expert report.

[64] In its brief the Defendant provided a summary of the motions stating this was time spent at trial without the calling of witnesses. Therefore, it says this time should be deducted from the number of days at trial.

[65] Many of the motions involved a ruling to determine the admissibility of evidence of key witnesses. A *voir dire* is a trial within a trial. Witnesses were called for both sides at the October 25, 2019 *voir dire*. Simply because the trial time did not involve witnesses does not mean it was not trial time.

[66] The admissibility of a statement of a party to an action where causation is a major issue is not s trivial matter. Obviously, the speed and impact of the accident was an important issue. The statement sought to be admitted contained evidence of the driver on this issue.

[67] The Plaintiff was entitled to contest the admissibility of the statement on the basis of hearsay. One could not be totally surprised by this given the opportunity to cross-examine on the statement itself was not available.

[68] The Defendant also points to the issue involving Dr Haleem, arguing that the *voir dire* was unnecessary and the trial should be shortened accordingly.

[69] At trial, however, it became apparent that the Defendant's solicitor informed the Plaintiff that Dr. Haleem's letter could be admitted without calling Dr. Haleem as a witness.

[70] Ms. Fraser's letter of August 17, 2017 read as follows:

> I can confirm we do not require Dr. Haleem to testify at trial and her records can go in by consent.

[71] Moreover, notwithstanding that such a representation was made, the Court held a *voir dire* as the letter's admission into evidence was contested at trial.

[72] The Court ruled, notwithstanding the Defendant's acknowledged error in advising the Plaintiff otherwise, that the letter should not be admitted as it contained true opinion without Dr. Haleem being available to testify.

[73] In terms of procedure, this is an example of trial fairness to the Defendant. It could have been held to the promise in its counsels' letter that Dr. Haleem's records would go in by consent.

[74] A more obvious point involves the motion to exclude Dr Alexander's report. The Defendant argued both the Defendant and the Court were "totally taken aback" by the Plaintiff's motion and urged the Court not to allow the motion to be heard. It is true the Court was taken aback. Once again the court learned (and this formed part of ruling to allow the motion to proceed), that the Plaintiff's solicitor informed the Defendant months in advance of the trial, that it would be seeking to exclude the report at trial, based on the leading Supreme Court of Canada decision in ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23, [2015] 2 S.C.R. 182.

[75] In my decision rendered on November 29,2017 to allow the motion I stated:

> The Plaintiff's letter of June 14, 2017 is quite definitive, "Our motion will be at trial to exclude his (Dr. Alexander's) report for substantive reasons relating to his failure to comply with Civil Procedure *Rule 55.04(1),(2),(3).*

[76] To Defendant's counsel's credit, the issues of Dr. Malik and Dr. Christie, in response to the Courts direction, were addressed in a manner helpful to the Court and to both parties. Considerable time was spent on these issues.

[77] However, with respect to the argument that the motion time should not be counted in the number of days I am not persuaded, that four (4) days should be "cut" from the length of trial.

[78] The other motions did not consume any significant amount of time. The request for a view was perhaps sudden and unexpected. The Court simply advised counsel of the applicable rule and said it would consider it following an

opportunity for counsel to make submissions. Following submissions a day or two later, I declined the motion.

[79] I recognize the Defendant researched the motion and made a written submission, but the entire matter was rather brief and basically dealt with in a routine manner. It did consume some trial time but not a significant amount.

[80] Once again, because a motion is without merit does not mean it was frivolous or totally unnecessary and should not have been made. That is what costs consequences are intended to address.

[81] In this case the Defendant is seeking to shorten the trial time due to these motions, and at the same time seeks costs for the success on the motions. I have difficulty with that approach as I do not think a party can have it both ways.

[82] On the whole of the submissions on this point (including paras 31-39 of the Defendant's brief), I find the Plaintiff should have alerted the Court to the intended motion to exclude the Defendant's medical expert report. On the other hand, Plaintiff's counsel has always maintained he was following the procedure set out in ***WBL*** where it states at paragraph 45:

> The admissibility of the expert evidence should be scrutinized at the time it is proffered.

[83] In addition there was the amendments sought to the report of the actuary Ms. McKeating. All of these issues (mainly the motion to exclude) required additional trial time. In my view, a fair/reasonable estimate is two days.

[84] The Defendants reference to the interruption due to Plaintiff's counsel's "parking" difficulties involved minimal time. I will say it came at an inopportune time, during his cross of Dr. Alexander who had returned to court for a second time. Again it was inconvenient, but required only a brief recess. I am not persuaded that it merits a reduction in terms of costs.

[85] The Defendant also argued the Court's "admonishment" of Plaintiff's counsel for interruptions and unresolved issues requiring additional time is a factor in reducing costs. That particular statement was directed to both counsel.

[86] For all of the above reasons, I set the number of days of trial at 8.0 days.

Treating Physicians Narratives - Dr. Malik and Dr. Christie

[87] These respected surgeons both gave evidence at trial. Ms. MacDonald first consulted Dr. Malik and Dr. Christie performed what Dr. Reardon described as major, major surgery. One of the issues at trial was whether the surgery was necessary and whether it would serve to relieve the Plaintiff of her symptoms. The

Defendant argued the surgery was would only marginally improve any symptoms of the Plaintiff, which the Defendant submitted were in large measure, psychological.

[88] Having decided the several key issues, based upon all the evidence of which these witnesses found an integral part, the Court is now being asked to reflect back and consider whether these witnesses were necessary. I am not so sure that is the intent of the rule on costs.

[89] What the Defendant means, is that proper use of the physician's narratives by the Plaintiff could have allowed their opinions to be admitted, had the Plaintiff carried out its duty of identifying which opinions contained in the reporting letters of these physicians, were being relied upon. As authority for this position, the Defendant referred to *Rule 55.14(6)*.

[90] Significant time was spent in the weeks leading up to the trial, by the Court and both counsel, in an effort to resolve these admissibility issues.

[91] Neither Dr. Malik or Dr. Christie provided *Rule 55* reports.

[92] The context is this. The Plaintiff indicated at the date assignment conference, there would be no treating physician's narratives evidence at trial. No motion to introduce narrative opinion evidence was made prior to the finish date.

[93] The Defendant submits these witnesses were unnecessary and should not have been called. The Plaintiff says he did not wish to call them, but had little choice. It seems from the various correspondence provided by counsel, that both parties' position had changed.

[94] The Plaintiff's solicitor refers to a letter to the Court from Defendant's counsel dated October 23, 2017, in response to his on October 20, 2017:

> I am writing with respect to Mr. McLeod's October 20, 2017 corresponding concerning the admission of the medical reports of Dr. Christie and Dr. Malik, and their attendance at trial. The Defendant's position is that it will not consent to the admission of their reports unless the doctors are in attendance at trial and available for cross-examination.

[95] In the Defendant's Book of Evidence, Ms. Richards refers to a series of letters (at Tab 5) written between October 27, 2017 and November 8, 2017, culminating in the letter dated November 9, 2017 to the Court. That letter contained a chart identifying what the Defendant considered to be opinion and equally important, what it considered not to be opinion.

[96] A major part of the contention by the Defendant to these treating specialists testifying was in wanting to ensure that what the Plaintiff told these physicians would not be stated by them as opinion.

[97] In the letter to the Court dated November 8,2017 Defendant's counsel noted:

> - I would disagree with Mr. McLeod that all opinions in medical records from treating physicians go in automatically if the authors are there to testify. Rule 55.14 clearly sets out requirements for the admission of opinion evidence of treating physicians including the identification of the opinion prior to trial. In this case the opinions from Dr. Christie and Dr. Malik have yet to be properly identified for the Defendant. The Plaintiff's position ignores the requirements of Rule 55 with respect to opinions from treating physicians in his latest letter to the Court.
>
> …
>
> - If the Plaintiff could properly identify the opinions in Dr. Christie and Dr. Malik's reports on which he seeks to rely ***the Defendant would likely agree to them going in as long as the doctors are present, despite the lack of compliance with Rule 55****;* however we would reserve the right to object if some of the opinions identified are not really opinions. We would ask the Court to rule on that in advance. For example, ***some of the "opinions" appear to be nothing more than Ms. MacDonald's reports of her symptoms and condition to Dr. Christie.***
> - I apologize but I do not understand Mr. McLeod's position with respect to business records and "observations" vs "true opinions". My understanding of the ***Bezanson*** case is that opinions of experts such as medical doctors can never be business records. Simple observations may be. ***The Defendant's concern in this case, which we have expressed to Plaintiff's counsel before, is with opinions being admitted without the doctor's testifying, not with observations.*** With all due respect the Defendant submits that Mr. MacVicar's statement is not the equivalent of a medical opinion.
> - If the Plaintiff is submitting that the records should all go in wholesale, including opinion and fact, ***without the authors being present or the opinions identified, we object strenuously to that.***
>
> …
>
> - I trust this makes our position clear and look forward to the Court's guidance on these issues.

[98] Counsel asked the Court for guidance, and the letter of November 9 was in response to the Courts on November 8, 2017, which is included in the Plaintiff's cost submission of October 29, 2018 at Tab 10. In that letter I discussed the timing of a possible resolution as follows:

> Counsel generally speaking *Rule 55.14* provides a limited exception to what is otherwise a very stringent rule regarding the admission of expert opinion. An opposing party is entitled to know if the Plaintiff will be relying upon the narrative of a treating physician. It is entitled to receive information about the opinion and about material facts upon which it is based so as to determine: 1) whether to retain an expert to assess the opinion; and 2) prepare adequately for cross-examination. The rule requires that both the facts and the findings be made during treatment. Given what has happened Dr. Haleem will not be present for cross-examination. If matters can be resolved as to the other physicians and Mr. Feit then the focus of tomorrow's conference will be that of Dr. Haleem's records.

[99] It was my view at trial, that *Rule 55.14* does not expressly require the Plaintiff to specify the opinion being relied upon for the opposing party, but rather requires the party wishing to present this evidence to deliver to each party the narratives, be they the initial or supplementary, of the facts observed and the findings made (*Rule 55.14(1)*). The information provided must be sufficient for the other party to satisfy themselves whether to obtain an expert and prepare adequately for cross-examination. (*Rule 55.14(6)*).

[100] The Defendant takes a different view, referring to *Rule 55.14(6)* as outlined in its' reply brief of January 23, 2019 at paragraphs 17 - 27.

[101] Ultimately the Plaintiff agreed with the Defendant regarding the opinions of Dr. Christie and Dr. Malik. Mr. McLeod's letter of November 10, 2017, read:

> Further to our conference yesterday regarding the opinions of Dr. Christie and Dr. Malik this is to advise that an agreement between counsel has been reached respecting these opinions.

[102] Once the opinion were identified, the parties agreed to them going in "as long as the doctors are present despite the lack of compliance with *Rule 55*". The Court signified its acceptance of this compromise with a note on the November 10 letter of Mr. McLeod, at Tab 10 of his initial cost submission. There was no "missing ruling" on this point..

[103] As with many things, the outcome often seems obvious when viewed in hindsight. The question is was it reasonable for Mr. McLeod to call these witnesses. These physicians gave very relevant evidence, factual and opinion. I believe the answer is that clearly it was. In fact, it was agreed they would be called.

[104] At the same time, I find that Defendant's counsel made considerable effort to resolve the ongoing dispute on the narrative opinion, recognizing that the trial was fast approaching. This is a factor the Court is prepared to recognize in assessing the cost award in this matter.

[105] I shall now deal with the various other factors which counsel have submitted for the Court's consideration.

Offers

[106] The Plaintiff's award of damages exceeded the Defendant's formal offer which the Defendant says was $360,933. The Plaintiff is therefore entitled to damages as the successful party.

[107] The Defendant argues that compared to the amount sought by the Plaintiff, the Court's award underscores the "mixed success" the Plaintiff had at trial.

[108] The Plaintiff, in response, says the most significant factor is that the Defendant was not successful in submitting its all inclusive offer. This means that no "favourable judgment" has been obtained, pursuant to *Rule 10.09*. As such, the Defendant is not able to take advantage of those provisions in terms of costs.

[109] In the Courts view, while the Plaintiff did not recover the full amount sought, it did recover in damages an amount that was more than twice the amount offered by the Defendant.

[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.

Contingency Fee Agreement

[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.

[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."

[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.

[114] In ***Brocke***, my colleague, the Honourable Pierre Muise ruled that a contingency of 30% could "actually reflect reasonable legal costs in that case, having regard to the length of the trial and all of its complexities". The court was

provided with evidence of the Plaintiff's docketed fees, which were in excess of $449,000 for a 17½ day trial.

[115] In this case, the function of assessing the reasonableness of the contingency is made more difficult because there are no docketed fees for me to consider in relation to the contingency amount of $266,326.

[116] In ***Campbell-MacIsaac v Deveaux***, 2005 NSSC 15, [2005] NSJ No 42, the fees were $500,00 plus disbursements, which included a premium. As the account was "devoid of particulars", the Court was unable to "assess the fairness and reasonableness of the effort expended".

[117] Here also, the lack of detail makes it difficult to determine whether the fees charged were reasonable. Unlike ***Campbell-MacIsaac,*** this court has no amount for fees billed.

[118] Contingency fee agreements are addressed in *Rule 77.14(2),* which provides for payment of a solicitor services by his or her client, as follows:

> **77.14 (2)** A contingency fee agreement may provide for payment of a reasonable amount to
>
> compensate for services and the risk taken by the lawyer, and the amount may be
>
> based on a gross sum, a percentage of the amount recovered, or any other reasonable means of calculation.

[119] It was noted in ***Brocke***, that Oland, J. A., in ***MacIntyre v. Cape Breton District Health Authority***, 2011 NSCA 3, awarded lump sum costs of $300,000. where solicitor client costs were $700,000., without conducting an analysis of whether an amount less than solicitor client costs represented reasonable legal expenses.

[120] In ***MacIntyre***, as was the case in ***Brocke***, lump sum costs did not exceed the 50% threshold, considered to provide a substantial contribution. In ***Armoyan v. Armoyan***, 2013 NSCA 136, Fichaud, J.A. (at paragraph 37) stated; as referred to in ***Brocke*** (at paragraph 84) in part:

> [37] As noted in *Williamson*, with which I agree, generally speaking the "substantial contribution" should exceed fifty percent of the appropriate base sum, but should not approach the full indemnity of a solicitor and client award. The percentage should vary, in a principled manner, according to the circumstances of the case.

[121] Given the amount of pre-trial work, preparation, and the number of experts, it would not be surprising if the Plaintiff's fees in this case were in the $250 - 300,000. range. However, as I have no actual billings, that is only an estimate. It

could easily be more, given the number of issues. It could also be less, but that is doubtful since the case has been ongoing for five (5) years prior to trial.

Dr. King

[122] Dr. King gave expert testimony at the trial. He prepared an extensive, detailed report. He was called by the Plaintiff, Kim MacDonald. He examined her thoroughly and made findings on the issue of causation and the extent of her disability. His evidence was extremely relevant and probative, as is quite evident from my decision. His evidence formed a second opinion that the motor vehicle accident caused Kim MacDonald's difficulties. There are numerous examples of this at paragraphs 19, 129. The Defendant certainly felt the need to contest the opinion of Dr. King (along with Dr. Reardon). A couple of examples are at paragraphs 161 and 163.

[123] My decision at trial contains numerous references to Dr. King's evidence, because it was probative and helpful to the Court. The threshold requirements of admitting expert opinion include, necessity. That is, the evidence of Dr. King would be outside the realm of knowledge of the trier of fact.

[124] The Defendant takes issue with the account of Dr. King stating, his evidence was unnecessary, and that his account does not meet the requirements of being reasonable and necessary.

[125] It is my respectful view, that the opposite of that is true. Dr. King's evidence was marked by professionalism. His report was in many ways the most comprehensive. Dr. Reardon's evidence might have been preferred, but does not mean that Dr. Kings evidence was rejected. As he himself profoundly stated, nothing in medicine is 100%. Much of his evidence was accepted. An example is his conclusion regarding Ms. MacDonald's right arm dysfunction.

[126] The Defendant argues that the diagnosis of Thoracic Outlet Syndrome (TOS) is an opinion that no one agreed with or relied upon.

[127] While Dr. King's diagnosis may have been different than the others, I note that *Rule 55* requires that an expert bring to the Court's attention, anything that could lead to a different conclusion. The Plaintiff's calling of Dr. King as a witness seems to serve the spirit of that rule. (*Rule 55.04(1)(c)*)

[128] At this point, and in the plainest of term, this physician is entitled be paid for the services which he professionally rendered. It is simply the right thing to do.

[129] For all of these reasons, and others I could list, I find that it was reasonable for the Plaintiff to present the evidence of Dr. King, who met his primary duty to the Court of being an independent and impartial witness. In so doing, I reject the

suggestion being made, after the fact that Dr. King ought not to have been called. No objection whatsoever was made to the introduction of Dr. King's expert report either prior to or at the trial.

[130] Thus far, I have discussed the amount involved, touched on the appropriate scale, set the number of days for trial and in doing so, discussed the various motions. I have also dealt with the narrative opinion issue as well as some other issues contained in the submissions including offers, the amount claimed, the contingency agreement and Dr. King's evidence.

[131] Clearly a main theme of the Defendant's submission on costs focussed on the conduct of the Plaintiff's counsel, citing for example, unfamiliarity with the rules, and arguing that this adversely affected the speed and expense of the trial.

[132] In addition, the Defendant's submission rests on the success it had on the various motions and claims that it should be awarded costs, and further says that those costs should be set off against the trial costs awarded to the Plaintiff.

[133] I turn now to deal with those issues.

Set off – Motion costs

[134] Having already discussed the motions in determining the number of days of trial, I shall focus on the motion which consumed the most time and accounted for the most delay and additional legal work. That was the motion by the Plaintiff to exclude Dr. Alexander's report.

[135] The Defendant objected to the motion being heard. I asked for submissions on the procedure and on the merits of the motion itself. I issued two decisions in writing and provided detailed reasons. In my ruling of November 29, 2017, I ruled the motion could proceed. In my ruling on January 8, 2018, I ruled the motion to exclude the report would be denied.

[136] I do not intend to review my reasons here.

[137] The main basis for the Plaintiff's motion was that she felt Dr. Alexander's report lacked objectivity and focused on matters outside his expertise. The Plaintiff gave notice at an early stage, pursuant to the rules that the motion would be made and the basis for it. I think clearly the Court should have been notified, even if the Plaintiff was of the view that the law permitted her to raise it at time of trial. In the end, while I denied the motion, I did not find it to have been frivolous or vexatious, or made for an improper motive.

[138] I am, however, going to allow the Defendant's request that costs be awarded to it on this motion. Since I have accepted the delay by reducing the number of

days at trial, I will allow $1,500. and not the $2,000. requested. Pursuant to *Rule 77.11*, I will allow this amount to be set off against the ultimate cost award.

[139] Similarly, I am going to allow costs on the MacVicar motion to the Defendant in the amount of $1,000., because this was an important motion heard in advance of the trial proper.

[140] With respect to the remaining motions, exercising my discretion, I feel it is appropriate to award costs to the Plaintiff in the cause, because the Plaintiff's success at trial should not be overlooked or discounted.

Other Issues and Submissions on Costs

[141] There are several other issues that have been raised by the Defendant as factors that ought to reduce the cost award to the Plaintiff.

[142] In her submissions (at paragraph 25) Ms. Richards puts forth Mr. McLeod's letter of November 3, 2017, and his statement that he may have gotten (too) used to doing things under the "old rules". The Defendant is correct, this cannot be a reasonable excuse. However, what I take from this, is that Mr. McLeod was apologizing when he said, "If I have been difficult, please accept my apologies". While it is perhaps an admission that he could be more familiar with the rules, it is also a form of courtesy, an acknowledgement in the vein of trying to resolve the issues. It cannot be seen simply as something prejudicial to Plaintiff's counsel.

[143] Also, the Defendant submits that the Plaintiff has shown disregard for the rules of evidence by asking Dr. Reardon an additional question. The question, it seems, went to the heart of the issue. The answer was left totally up to Dr. Reardon. It was one question. I do not recall any objection or this being an issue at trial. Dr. Reardon was cross-examined thoroughly on all aspects of his report.

[144] There was also the late attempt by the Plaintiff to add an addendum to the McKeating report. This motion was denied and the amended document was not admitted. Supplementary questioning in oral testimony was permitted.

[145] I am not persuaded that any of the above matters warrant significant cost consequences. As stated by Moir, J., in ***Campbell v. Jones***, 2001 NSSC 139, the preferred approach is a "generalized one".

Disbursements

[146] Pursuant to *Rule 77.10*, an award of costs includes necessary and reasonable disbursements, which pertain to the subject of the award. The key words are reasonable and necessary.

[147] This litigation extended over a period of 5- 6 years and involved a number of expert witnesses. According to the caselaw, there are a number of governing principles involved in assessing whether disbursements are properly part of the damage award. Simply because a party retains an expert, does not mean the opposing party will be responsible for it, either in whole or in part. Similarly, some allowable charges such as copying must should not result in a profit.

[148] It must be recognized therefore, that what is reasonable and necessary will be dependant on the facts in each case. With these principles in mind, I turn to address the disbursements claimed by the Plaintiff in this matter.

[149] At the outset, the Court recognizes that it must ensure that all disbursements claimed are necessary and reasonable. I will however, focus on what is in contest as opposed to what is not, in terms of the disbursements claimed.

[150] I turn now to address those issues.

Copying

[151] The Plaintiff claims copying charges of $0.50 per page. The Defendant argues this is exorbitant and does not reflect the actual cost of such copies.

[152] The caselaw in this area varies in terms of an appropriate allowance, ranging from $0.05 per page to $0.25 per page. Reference has been made to the "real cost" of doing business. Without a hard and fast rule, the emphasis should be placed on the true cost of generating the copies. If done "in house" by the lawyer or law firm, the charges should be at a "competitive rate". Caselaw refers to the "convenience" of keeping the charges in house.

[153] Emphasis is often placed on keeping the charges to a minimum to ensure a party paying costs is being treated fairly. In my view, the time and effort expended by a paid employee in the law firm or sole practitioner is also a consideration. I would suggest that overhead costs such as leasing equipment is relevant.

[154] Further, copying (as are other charges) is a necessary part of litigation. Both sides must understand that as they undertake the process of commencing litigation and defending a claim as the case may be.

[155] In the final analysis it comes back to the proper measure to be applied; are the charges both reasonable and necessary. In ***Brocke***, Muise, J. limited the amount of recovery because of unnecessary photocopying. The objection here is not based on necessity, but on the reasonableness or the quantum of the charges.

[156] Given the importance of this case, and the fact that it extended over a period of years, charges averaging out to $350. per year do not seem unreasonable.

[157] The affidavit of Ms. P. Austin, filed in support of the claim for disbursements does not clearly state the reason the number of copies (1155) were multiplied by three (3) in arriving at the total figure of 3465. I expect this was one for each party and the Court, times $0.50 per page, this totals the amount of $1733.

[158] Mr. McLeod has provided a letter from a senior and well respected member of the provincial bar in civil litigation, in the person of Clarence Beckett, QC. He states that $0.50 per page is a reasonable cost for copying on a taxation.

[159] For the reasons above, I will allow the sum of $1155. based on a factor of 2.5 copies (2.5 x 1155) at $0.40 per page. It is likely this amount is no more than the cost of doing business and may even be less. However, I am mindful that courts have been careful not to pass along all of these disbursements to opposing parties. I believe this is a prudent and fair amount.

Fact Witnesses

[160] Based on my earlier discussion, I find that Dr. Christie's and Dr. Malik's evidence in the circumstances, was necessary. It should also be noted that they gave certain opinion evidence, and were not simply fact witnesses.

[161] The discussion in the caselaw is often focussed on the Court assessing the amount of preparation time and the nature of the evidence given. In terms of expert witnesses, relevance and assistance to the Court are considerations.

[162] In this case, the Defendant submits that the accounts of Dr. Malik and Dr. Christie should be disallowed due to non necessity. As stated, I do not agree.

[163] I have also ruled, however, there should be some consideration given to the Defendant's efforts to resolve the narrative opinion issue, given that it consumed a significant amount of time leading up to the trial. I shall address this in the overall cost award. That is a more appropriate way of dealing with the issue.

[164] This leaves the Court to determine whether the accounts themselves are reasonable. I have noted that Dr. Malik is a neurosurgeon with 40 years experience. His account of $1,500. seems totally reasonable. With respect to Dr. Christie, his stated fee for the court appearance is $2,500. He travelled from Halifax, and was the surgeon who performed the critical operation on Ms. MacDonald. The evidence pertaining to her surgery was an important issue.

[165] The accounts do not include a breakdown of the preparation time, but given the nature of the evidence itself, what a particular expert finds is reasonable preparation time, is much dependent on them. I have reviewed the expenses listed in Dr. Christie's account. I have no reason to question the integrity of these

accounts. Both witnesses clearly gave relevant evidence, which was of assistance to the Court. I will therefore allow their accounts in the amounts as stated.

Expert Witnesses

Dr. King

[166] Dr. King's account is significant in quantum. His bill for the thorough medical report provided was $10,350. and that has been paid in full. There were supplementary accounts for his rebuttal reports. The next significant bill was $7,127.89 inclusive of HST and expenses, which essentially covered his court appearance at trial, including airline travel and hotel accommodation.

[167] The Defendant submits that it should not be responsible for any fees related to Dr. King's report. Their objections are strenuous and based primarily on the argument that Dr. King's evidence was largely ignored by Plaintiff's counsel, in favour of Dr. Reardon's evidence.

[168] The Defendant also argues that Dr. King's retention was unnecessary and as such his account is an unreasonable expense. The Defendant says it should not be expected to "pick up the tab for both experts with their conflicting opinions".

[169] I respectfully disagree for the reasons earlier stated.

[170] The Defendant relies on ***Cashen v. Donovan***, 174 N.S.R (2d) 320 (NSSC), wherein Justice Goodfellow referred to a non exhaustive list of factors to consider in determining whether or not disbursements are reasonable. Included in that list are several factors which I find to be relevant here: 1) complexity of the issues; 2) whether or not the expert's report was of any assistance to the Court; and 3) the relevance of the expert opinion evidence to the issues in question.

[171] In ***Cashen***, the court stated the onus is on the party seeking the recovery of a disbursement to establish that the cost of such disbursement is reasonable. In ***Andrews v. Keybase Financial Group Inc.*** 2014 NSSC 287, Wright J. observed that the services provided were not itemized, but were described in very general terms. Moreover, except for one part, he found the opinion in question to be of little assistance to the court.

[172] In ***Andrews***, the court referred to ***Rhyno Demolition v. N.S. (A.G.)***, 2005 NSSC 147:

> 50. It is for the Court to make a determination of what in the circumstances is reasonable, with respect to both its incurrence and its quantum.

[173] In the present case, unlike the situation in ***Andrews***, I have found Dr. King's report to be of substantial assistance to the Court.

[174] In ***General Electric Capital Canada Inc. v. R.***, 2010 TCC 490, it was suggested the court should look at the preparation time required and the relationship between the opinion of the expert and the ultimate award. This is another way of saying the court should consider the relevance and value of the opinion to its decision. Under our rules, and under the caselaw authority in ***WBL***, an experts primary duty to the court is to be independent and impartial.

[175] In my view, having regard to the factors mentioned in ***General Electric***, it is not strictly whether the report contributed to the ultimate award, but whether it was relevant to the issues and helpful to the Court in reaching its decision. As noted by the Plaintiff, there were many references to Dr. King's report in the trial decision.

[176] As Dr. King himself stated in his letter at Tab 8 (explaining his account), whether the Court accepted his diagnosis of (TOS) was not the relevant issue, to the issue of his account. He made it clear what is hourly rate would be.

[177] I have reviewed the accounts of Dr. King and they contained the basic components of an invoice, include the date the services were performed, how much time was spent, the hourly rate, the total amount and the HST component. I note that on the original invoice #10478, Dr. King provided a detailed breakdown of the time spent reviewing the materials, consultation, preparation, conclusion, which even included the time spent proofreading and transcribing the report. Given the seriousness and complex nature of the medical evidence, the issue of causation, the total hours spent was 18 hours. This is not in my view unreasonable. I note further that his conclusion provided a breakdown of several headings such as Discussion, Diagnosis, Handicap, Management, Prognosis, and Summary.

[178] There is no question that Dr. King is entitled to be paid in full by the Plaintiff, who sought out his opinion. Once this evidence is presented to the Court, it is up to the Court to decide the value of the opinion. I therefore have difficulty with the Defendant's position that it should have been apparent to the Plaintiff's solicitor that Dr. Reardon's opinion was to be preferred. I do not think that is justified or fair to the Plaintiff or Dr. King. Certainly, the account being higher is not a reason.

[179] Exercising my discretion, I decline to reduce Dr. King's fees and find they were reasonably and necessarily incurred and find that the quantum, in terms of what he was asked to do, is also reasonable.

[180] I hereby approve them in their entirety.

Kelly McKeating – Actuary

[181] The actuary called by the Plaintiff, Ms. McKeating, provided several expert reports to the Court. In these reports the actuary categorized the potential losses that the Plaintiff would have incurred depending on the ultimate findings of fact and law by the Court.

[182] The reports were prepared in March, June and November of 2017. Essentially, these reports explained and summarized the loss of past and future income, loss of pension income and loss of housekeeping or valuable services.

[183] The Defendant acknowledges that Ms. McKeating's attendance added value to the trial, as evidenced by the Courts use of her evidence in its decision. The Defendant's main objection to full recovery of the account at their expense is stated at paragraph 81:

> 81. Ms. McKeating received no documentation from the Plaintiff's employers, she did not review transcripts from discovery examination, she did not review any medical documentation regarding the Plaintiff. She was told to assume total disability and to go from there.

[184] In addition, the Defendant argues that the multiplicity of the reports was due to repeated requests for revisions made by the Plaintiff's counsel. These revisions were mainly to deal with the calculations based on early versus later retirement ages. Examples given were at ages 67 and then 65 and 59. Also, the November 2, 2017 letters and proposed addendum was intended to address the gross vs net issue, under s. 113B of the *Insurance Act* and s. 2 of the Tort Regulations.

[185] It was acknowledged by Ms. McKeating that her reports were based on a assumptions which had to be proven. A key one was that of total disability.

[186] The major benefit of her evidence is that while it would up to the Court to determine, things such as income, age of retirement, and level of disability, the reports provided the framework, the tools, for the Court to make the necessary calculations, as applicable. A prime example of this were the multipliers available at various ages and levels of income. She readily acknowledged it was not her role to determine these critical facts, or the ultimate outcome of any damages awarded.

[187] In my view, it is not for the actuary to review discovery transcripts, medical documentation, except perhaps for background information. These are important findings for the Court to make based on the evidence given at trial.

[188] It is true the reports reflect information given by the Plaintiff's counsel. It must be kept in mind the Plaintiff has the onus of proving damages. It is not uncommon that this is done through the expert evidence of an actuary. Like other experts, the Court may accept all, part of none of this evidence.

[189] That said, I think there is some merit in the Defendant's argument that the sheer volume of the actuary's revised reports was not reasonable and necessary.

[190] The Defendant submits it should be responsible for half the cost of actuarial disbursement. I find for the reasons stated a fit and just figure would be 70%. Although the Court denied the November 10, 2017 addendum, the more important aspect of Ms. McKeating's evidence overall, was that it provided a mechanism to enable the Court to reach its conclusions.

Pre-judgment Interest – Amount Involved

[191] There was scarcely any evidence at trial of a lack of mitigation or delay and there is no evidence of a commercial lending. These are factors which would suggest an exception to the general rule that pre-judgment interest ought not to be included in the "amount involved". There is also the length of time the litigation took, a factor considered by Warner, J. in ***Wadden v. BMO Nesbitt Burns***, 2014 NSSC 11, where he included pre-judgment interest, but adjusted it by 50%. Even if such an adjustment were made here, the amount allowed would be within $5,000. of the next level of $750,001 - 1,000,000. In these circumstances, I am going to include pre-judgment interest in the amount involved. Additional reasons for this decision are appended hereto.

Scale 1, 2 or 3 – Table A

[192] As discussed, without repeating them, there are factors present that have added to the complexity and importance. In my view, these factors render the basic scale inadequate. In its' entirety this case merits consideration of Scale 3, and in doing so, I find it does so without duplicating the facts of complexity and importance, as was cautioned against in ***Baker***.

Contingency Fee Agreement

[193] The Plaintiff cited ***Brocke*** as authority for considering whether the tariff will yield costs that will result in a substantial contribution to the Plaintiff's reasonable legal expenses. A key component is reasonable legal fees, in terms of the principle of costs reflecting a substantial but incomplete indemnity.

[194] What a contingency agreement does is establish, in advance, what the actual legal fees will be because that is the contract that has been agreed to between the Plaintiff and his/her counsel. As noted by Gruchy, J. in ***Campbell-MacIsaac***, this does not necessarily determine reasonable legal fees, which are usually based on actual billings. I accept however, the principle in ***Brocke*** that the fees paid under such an agreement are a consideration, because it represents what the client, in this

case, the Plaintiff, will be required to pay from the amount allowed. Apart from that, I am not persuaded that such an agreement should be the determining factor.

Lump Sum

[195] The Plaintiff urges the Court to award a lump sum, and the fees to be paid under contingency are a major part of that argument. Consideration of a lump sum could proceed on a principled basis if the fees were detailed in terms of time, although time spent is but one of several factors in determining a reasonable legal fee. Other factors include, the degree of complexity, the degree of importance, the degree of success. It is evident that some of these factors have already been considered in arriving at the scale and to a limited extent, the amount involved.

[196] Earlier I had estimated what the Plaintiff's fees might be in terms of the range. I do not feel that such an estimate is secure enough on an evidentiary basis to be relied upon. I think it is fair to say that the Plaintiff's reasonable legal costs would be substantially more than the cost amount contained in Table A, even applying Scale 3. I am therefore inclined to allow, with some restraint, some amount over and above the tariff, in a lump sum. That amount shall be $15,000.

[197] In terms of disbursements, I cannot accept that the Plaintiff's claim for disbursements in the amount of $53,755.02 should be reduced by $30,853.91.

[198] This was not a "run of the mill case". Extra legal work was involved as well as a question of law that required a ruling. To that end, there was a public interest component.

Conclusion

[199] The following is a summary of the Plaintiff's final cost award in this matter.

Summary	
Amount Involved Tariff A Costs based on Scale 3	$80,938.
Length of trial (8 days x $2,000. per day)	$16,000.
Subtotal	**$96,938.**
Less 10% treating physician's narrative issue of amount involved costs	$8,093.
Set off motion costs to Defendants (Minus)	$2,500.
Subtotal	**$86,345.**
Lump sum over and above the tariff	$15,000.
Subtotal	**$101,345.**
Disbursements	
Amount Claimed	$53,755.02

Less reduction in copying charges (1733 – 1155)	$578.
Less reduction in McKeating Invoice (30% of $9,326.34)	$2,797.90
Subtotal	**$50,379.12**
Total Costs and Disbursements	**$151,724.12**

[200] Were it not for the reductions made, the amount awarded would approach more closely the threshold discussed in ***Armoyan***. That percentage will vary according to the circumstances. I am also mindful of Moir, J.'s statement in ***Bevis v. CTV Inc.***, 2004 NSSC 209, about avoiding percentages and focussing on principle. The Plaintiff has been awarded costs in the $750.001-1,000,000. range and at Scale 3. She has been awarded the clear majority of her disbursements. It is recognized by the Court that failing a remedy in costs, the Plaintiff will be responsible to pay the fees agreed to between her and her counsel from the award of damages. As stated in ***Campbell-MacIsaac***, "Those are matters between solicitors and clients". I will also add, as stated in ***Brocke***, that lump sum costs need not meet the 50% threshold to provide substantial contribution in every situation.

[201] In all of the circumstances, I believe this to be a fair award to both parties.

Murray, J.

Appendix "A"

It is reasonably clear that there is now a general rule that pre-judgment interest will not be included in the calculation of the amount involved. This rule is subject to it being included in the appropriate case.

Pre-judgment interest excluded

In *Brocke Estate v Crowell*, 2014 NSSC 269, [2014] NSJ No 406, Muise J stated that "[p]rejudgment interest is not to be included in the amount involved for the purposes of determining tariff costs…"[1] As authority, he cited *Mader v Lahey* (1997), 176 NSR (2d) 143, [1997] NSJ No 571 (SC), where Edwards J cited a line of earlier cases for the principle that "the 'amount involved' does not include pre-judgment interest…"[2]

In *Mader*, Edwards J cited three cases: *Skeffington v McDonough* (1992), 114 N.S.R. (2d) 181, 1992 CarswellNS 548 (TD); *Hines v Englund* (1993), 124 NSR (2d) 156, [1993] NSJ No 321 (SC); and *Kelly v Hadley* (1995), 138 NSR (2d) 272, [1995] NSJ No 87 (SC).

In *Skeffington*, Gruchy J said:

> 5 The plaintiff claims the "amount involved" should also include interest calculated from the date of the loss. I cannot accept that contention. The total interest award is the product of the quantum of damages, interest rate and time. The sum of that award increases as time is expended to final judgment. The imposition of costs on a figure including interest therefore would have an exponential effect on the overall award.
>
> 6 That is not to say that such an award might not be appropriate in some cases. A trial judge must examine and be mindful of the totality of the award. The judgment reflects variables including such factors as interest rate and time. Keeping in mind the totality concept and exercising my discretion as best I can, I find that the "amount involved" in this case is $95,000.

In *Hines*, Stewart J cited Skeffington and excluded pre-judgment interest from the amount involved.[3] Likewise, in *Kelly*, Goodfellow J cited *Skeffington* for the same

---

[1] *Brocke Estate* at para 88.
[2] *Mader* at para 39. The trial decision in *Mader* was affirmed without reference to the costs decision: 169 NSR (2d) 182, [1998] NSJ No 192 (CA).
[3] *Hines* at paras 21-22.

conclusion, as well as his own decision in *Canadian National Railway v Alweather Windows & Doors Ltd* (1993), 121 NSR (2d) 265, 1993 CarswellNS 519 (SC), where he said:

> 36 With respect to the matter of costs, it is my view that normally you do not include, in a determination of the amount involved, the pre-judgment interest. Pre-judgment interest is mandatory under 41(i) of the *Judicature Act* and the only real discretion in the court is the duration for which the pre-judgment interest is to be paid and the rate but it is readily calculable. In addition, there is very little work or effort in the determination of the rate of pre-judgment interest which, as I say, is mandatory. There may be an exceptional case where it is warranted to add to the amount involved for the purpose of taxation but I cannot conceive of one at the moment and certainly, in a normal case such as this, it is not appropriate…

In *Force Construction Ltd v Nova Scotia (Attorney General)*, 2009 NSSC 10, [2009] NSJ No 18, McDougall J held that inclusion of pre-judgment interest in the amount involved was "not an acceptable approach…"[4]

Justice Goodfellow took the same approach in *Gay v MacDonald* (1998), 170 NSR (2d) 322, [1998] NSJ No 422,[5] and *MacWilliams Engineering Ltd v DMLP Holdings* (1995), 139 NSR (2d) 84, [1995] NSJ No 15.[6] Pre-judgment interest was excluded from the amount involved in *Sysco Canada Inc v Joe's Warehouse Ltd*, 2011 NSSC 378, [2011] NSJ No 724 (Hood J),[7] *Musgrave v Ford*, 2016 NSSC 258, [2016] NSJ No 368 (LeBlanc J),[8] and *Horne v QEII Health Sciences Centre*, 2016 NSSC 266, [2016] NSJ No 386 (A Boudreau J).[9]

Pre-judgment interest included

As to circumstances where pre-judgment interest may be included in the amount involved, Gruchy J said the following in *Campbell-MacIsaac v Deveaux*, 2005 NSSC 15, [2005] NSJ No 42:

> 62 The plaintiffs add to this sum the amount of one hundred and thirty-three thousand three hundred and eighty-four dollars ($133,384.00) for pre-judgment interest a figure agreed upon by Lombard. Lombard says this amount should not be included in the "amount involved" for the purpose of party and party costs and refer to my decision in *Skeffington v. McDonaugh*, wherein I did not allow interest as a costs factor. I was clear in that decision, however, that the inclusion

---

[4] *Force Construction* at para 11.
[5] *Gay* at para 25.
[6] *MacWilliams Engineering* at para 73.
[7] *Sysco* at para 4.
[8] *Musgrave* at para 12.
[9] *Horne* at para 14.

> of that factor might be appropriate in some cases. For a more complete explanation of the circumstances of that case I refer to my decision in the matter of damages in that case (found in 112 N.S.R. (2d) 52), wherein I found that the plaintiff delayed the prosecution of the litigation and failed to mitigate his damages. In the instant case there is no suggestion of either of these factors. In addition, a considerable portion of the plaintiff's damage herein came from the loss of the commercial enterprise of a dental practice - which ultimately necessitated commercial borrowings - clearly a factor to be considered in the "amount involved."
>
> 63 I will allow the figure of one hundred and thirty-three thousand three hundred and eighty-four dollars ($133,384.00) to be included in the "amount involved" for the total sum of two million two hundred and ninety-six thousand one hundred and seven dollars ($2,296,107.00).

The circumstances in which pre-judgment interest should be included in the amount involved were considered again in *Wadden v BMO Nesbitt Burns*, 2014 NSSC 11, [2014] NSJ No 9, affirmed at 2015 NSCA 48, where Warner J said:

> 50 I would adjust the amount of the interest portion of the "amount involved" ($6,656,150) by 50% to reflect the realistic risk to BMO if damages had been awarded against it, and prejudgment interest was awarded. The extreme length of time taken by the litigation, and the fact that the prejudgment interest is such a large portion of the claim, make it fair that it be included in the "amount involved". Said differently, it would be unjust to penalize a successful party, who had not caused unreasonable delay in the proceeding, to exclude a major element of the claim or who was subject to the risk of a very substantial prejudgment interest claim.

It seems, then, that where a successful party has not been responsible for delay in the proceeding, or where there has been a commercial borrowing, or there has not been a failure to mitigate damages, these will be factors that can support inclusion of pre-judgment interest in the amount involved.