SUPREME COURT OF NOVA SCOTIA
Citation: *McKinnon v. Cadegan*, 2021 NSSC 274

Date: 20210708
Docket: Syd. No. 466969
Registry: Sydney

Between:

The Estate of Leroy McKinnon, Maureen McKinnon, Amy Kent McKinnon, Jill McKinnon, Kate McKinnon, Oliver Kent by his Litigation Guardian Maureen McKinnon, Hudson Kent by his Litigation Guardian Maureen McKinnon, Riley Gagnon, by her Litigation Guardian Maureen McKinnon, and Piper Gagnon by her Litigation Guardian Maureen McKinnon

Plaintiffs

v.

Perry Kent Cadegan

Defendant

Judge: The Honourable Justice Patrick J. Murray

Submissions: February 19, 2021; March 5, 2021; March 12, 2021; and April 14, 2021

Decision: July 8, 2021

Counsel: Nick Hooper and Lyndsay Jardine for the Plaintiffs
Stewart Hayne and Ryan Lebans for the Defendant

By the Court:

Introduction

[1] This is a decision on costs following a civil trial, with a jury, that extended over a four (4) week period between October 13 - November 5, 2020.

[2] The Plaintiff Estate and individual Plaintiffs, alleged harm to their husband and father, the late, Leroy McKinnon, caused by the Defendant, Dr. Kent Cadegan.

[3] The Defendant was Mr. McKinnon's long time physician and friend. The jury found that Dr. Cadegan had not caused the harm alleged.

[4] The parties made written submissions on the matter of costs, which were awarded to the Defendant. This decision is about the quantum of those costs, in accordance with Civil Procedure Rule 77, and related caselaw.

Issues

1. What is an appropriate cost award in the circumstances?

2. What are the reasonable and necessary disbursements to be awarded to the Defendant?

Position of the Parties

The Defendant – Dr. Kent Cadegan

[5] The Order for costs sought by the Defendant states, in part :

> WHEREAS this Action was tried at Sydney, Nova Scotia on October 13-15, 19-22, 26-29, and November 2-5, 2020 before Justice Patrick J. Murray, with a Jury. The Jury rendered its verdict on November 5, 2020 answering that the Plaintiffs had not established that the Defendant, Dr. Perry Kent Cadegan, had caused the harm alleged;
>
> AND WHEREAS this Court issued an Order Following Trial ordering that the within action be dismissed with costs and disbursements to be agreed upon or fixed by the Court;
>
> AND UPON receiving notice that the parties could not agree on costs, and upon reviewing submissions of the parties to fix costs;

[6] The Defendant submits this is not a case of mixed success. Dr. Cadegan was "entirely successful", submits Defendant's counsel. In their brief of March 11, 2021, counsel state:

> The Plaintiffs' case was dismissed. Your Lordship's Order following trial issued November 30, 2020 states: "it is hereby ordered that the within action is hereby dismissed with costs and disbursements to be agreed upon or fixed by the Court".

[7] The Defendant says, while the jury may have found a breach of the standard of care, the jury found the Plaintiffs' failed to establish that the Defendant was responsible for any loss. In short, negligence was not made out. The jury found Dr. Cadegan did not cause the harm alleged.

[8] A breakdown of the costs claimed by the Defendant, is summarized below:

Head of Costs	**Amount**
Costs Pursuant to Tariff A (Range of $500,001 to $750,000), at Scale 3	$63,188.00
14 Days of Trial	$28,000.00
Plus Formal Offer Multiplier of 0.5	$45,594.00
Disbursements – Expert Fees	$21,935.70
Disbursements - Hotel	$7,750.96
Disbursements - Travel	$800.00
Grand Total	$167,268.66

Plaintiffs' Position- Maureen MacKinnon and her family.

[9] The Plaintiffs submit, should the Court decide that the use of Tariff A is appropriate in the present case, that the Defendant is entitled to $35,250 in Tariff A costs, as per Rule 10.09(3)(c), plus $15,000 in reasonable disbursements, for a total of $50,250.

[10] However, they further argue that "this amount should be reduced substantially to account for the reasonableness of the Plaintiffs' actions in the litigation, the finding of fact that two breaches of the standard of care occurred, the public interest in the litigation, the superior capacity of the Defendant to bear costs,

and the significant "chilling effect" of imposing costs awards on ordinary Plaintiffs who advance reasonable causes of action."

[11] The Plaintiffs respectfully ask the Court to consider the "problems surrounding access to justice, which will be exacerbated if Plaintiffs' like the McKinnon family must risk tens of thousands of dollars in costs to be heard in Court." (see Plaintiffs' brief at page 10.)

[12] The parties have been unable to agree on costs. It therefore, falls to the Court to render a decision on costs that will "do justice between the parties" (Rule 77.02(1))

Costs - Generally

[13] Costs are governed by Rule 77 and the associated Tariff. Rule 77.06 states that party and party costs of a proceeding must be fixed by the judge in accordance with Tariff A, unless the judge orders otherwise.

[14] Under Rule 77.07, a Judge may increase or decrease costs based on a number of factors laid out in Rule 77.07(2)(a) through (h). Rule 77.07 states:

> **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.

[15] An award of party and party costs includes necessary and reasonable disbursements, pursuant to Rule 77.10.

[16] Finally, Tariff A sets three (3) scales for "Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding". Tariff A costs are determined by reference to the "Amount Involved" and then selecting the appropriate scale.

[17] In addition, Tariff A refers to the length of the trial:

> The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge.

[18] Each of these factors is considered below.

Tariff A – Amount Involved

[19] The first step in assessing costs is to determine the "amount involved" for Tariff A.

[20] The Nova Scotia *Civil Procedure Rules* specify the mechanism for determining the "amount involved" where a claim is dismissed. Rule 77 states that the "amount involved" is determined with reference to (i) the amount of damages provisionally assessed by the Court, if any (ii) the amount claimed, (iii) the complexity of the proceeding, and (iv) the importance of the issues.

[21] Specifically Rule 77, states:

> In these Tariffs unless otherwise prescribed, the "amount involved" shall be:
>
> "(b) **where the main issue is a monetary claim which is dismissed, an amount determined having regard to**
>
> (i) the amount of damages provisionally assessed by the court, if any,
>
> (ii) the amount claimed, if any,
>
> (iii) the complexity of the proceeding, and
>
> (iv) the importance of the issues;"

[22] The presumptive starting point is that party and party cost must be determined in accordance with the tariff of cost and fees, unless a judge decides otherwise. (Rule 77.06(1))

[23] In this case, the main issue was a monetary claim, which was dismissed. The Plaintiffs acknowledge this is uncontroversial; stating that Rule 77.06 directs the Court to fix costs with reference to the Tariff, unless the circumstances justify a departure from this approach.

[24] The parties, however, are "at odds" as to the quantum of costs, that should be fixed by the Court. I will, discuss the four (4) factors set out in the Tariff for determining the "amount involved".

(i) Provisional Assessment of Damages

[25] There was no provisional assessment of damages made at trial. The jury were instructed on damages in the event they found liability. They did not.

[26] At trial I did provide a range of damages for the jury to consider under the main head of "non pecuniary" loss of care, guidance and companionship.

[27] The Defendant submits that the midpoint of these ranges provide a reasonable basis for determining the "amount involved" in respect of this category of loss for each Plaintiff.

[28] The ranges provided to the jury and the midpoint is set out in the table below, (see Defendant's brief at page 3.)

Plaintiff	**Judicial Damages Range Loss of Care, Guidance and Companionship**	**Mid-Point Amount**
Maureen McKinnon	$100,000.00 to $150,000.00	$125,000.00
Amy Kent	$45,000.00 to $65,000.00	$55,000.00
Jill McKinnon	$45,000.00 to $65,000.00	$55,000.00
Kate McKinnon	$45,000.00 to $65,000.00	$55,000.00
Oliver Kent	$15,000.00 to $25,000.00	$20,000.00
Hudson Kent	$15,000.00 to $25,000.00	$20,000.00

Plaintiff	Judicial Damages Range Loss of Care, Guidance and Companionship	Mid-Point Amount
Riley Gagnon	$15,000.00 to $25,000.00	$20,000.00
Piper Gagnon	$15,000.00 to $25,000.00	$20,000.00
Subtotal: Loss of Care, Guidance, and Companionship		**$370,000.00**

[29] The Plaintiffs' submit there is no authority for this consideration. There is no reasoned basis, they say, for concluding the quantum the jury would have decided, within the range from which they were free to depart. In short the jury, as triers of fact made no provisional assessment of damages. Accordingly, this factor is "immaterial" in determining the "amount involved".

[30] The other heads of damage claimed were not subject to a judicial range. As such, the Defendant submits these should be considered under the next factor, "amount claimed".

(ii) Amount Claimed

[31] Similar to the other factors, the "amount claimed" is one factor to be considered in determining the amount involved.

[32] The Defendant submits the well known case of ***Leddicote v Nova Scotia (Attorney General)***, 2002 NSCA 47, as authority for his submission that the "amount claimed" is a proper consideration for determining the amount involved.

[33] Specifically, the Defendant notes several passages of the Court of Appeal decision:

> 82 **As Rule 63.04(2)(a)** [now Rule 77] **makes clear, the "amount claimed" is a proper consideration when fixing the "amount involved"** in an award of party-and-party costs. Based on the record in this case, it certainly seems to me to be a relevant consideration. The plaintiff adduced evidence including expert evidence to support large future loss claims. Difficult issues of negligence and causation were engaged. Each of the defendants was obliged to respond carefully and thoroughly in light of the claims made and positions taken. [Emphasis added].

> 86 Before leaving the subject I might add by way of a general observation that in matters before the court, not the least personal injury litigation, **one expects that a claimant's demands for relief are intended to be taken seriously. Putting them forward invites consequences.** Having paid close attention to the evidence and the arguments of counsel, a trial judge is well placed to separate the sensible from the unreasonable, the necessary from the unwise. **Thus, in an appropriate case, linking the "amount involved" in an award of costs to the claims put forward may be a useful tool in reminding litigants of the financial risks attendant upon suing and losing.** [Emphasis added.]

[34] Dr. Cadegan's counsel submits the claim for damages made by the Plaintiffs was significant. In addition to the documentary evidence tendered, each Plaintiff gave evidence on their own behalf, and where applicable as litigation guardian.

[35] With respect to non-pecuniary damages the Plaintiffs' brief included this submission:

> Ultimately, the Plaintiffs claimed non-pecuniary damages with reference to the available case law, citing cases in the range of $59,240 to $121,732 for Mrs. McKinnon, $42,000 to $63,000 for the deceased's daughters, and $12,000 for his grandchildren. Assuming the mid-point of these ranges, the Plaintiffs' claims for non-pecuniary damages amounted to $295,986. The Defendant claimed that these damages amounted to something in the range of $135,000. The Plaintiffs respectfully submit that both claimed quantifications should be taken seriously.

[36] The Defendant's submission is that for the most part the range provided by the Court aligned with the amounts claimed by the Plaintiffs.

[37] Once again, the Plaintiffs argue, "it is difficult to understand why the quantification advanced by the Defendant should not be taken seriously or invite consequences".

[38] The Defendant also argues that the amounts submitted by the Defendant, as appropriate damages, is not relevant in determining the amount involved, citing the case of ***Kerr v. 2463103 N.S. Ltd.***, 2014 NSSC 111.

[39] Simply put, there are at least two reasons, in my respectful view, for not considering the amounts argued by the Defendant. First, the wording of the rule. It clearly states "the amount claimed". It is only the Plaintiffs that have put forth a claim. The Defendant did not file a counter claim.

[40] Secondly, the amount suggested by the Defendant in its submission is not the amount claimed. The amount claimed would be based on the pleadings, in

terms of the party advancing the claim. The amount argued by the Defendant is clearly not the amount claimed.

[41] In addition, the amount argued by the Defendant, was put to the jury in some cases to provide some context for the range suggested by the Court.

[42] In the charge to the jury, they were instructed that "any range the Court suggested was just a guide", words to that effect. It was made clear that the amount of damages awarded, if any, was for their consideration and decision.

[43] With respect to the pecuniary claims, these relate in the main to the Plaintiffs' expenses, and will be discussed under below.

Other Amounts Claimed

[44] The Defendant submits these amounts are straightforward, as they are specific dollar figures put forth by the Plaintiffs' as part of their claim for pecuniary damages.

[45] These amounts claimed by the Plaintiffs' are:

Head of Damage	**Amount**
Funeral and Burial Expenses	$21,778.74
Moving Expenses	$28,485.11
Condo Fees (Past)	$33,687.60
Condo Fees (Future)	$43,267.14
Loss of Financial Contribution (Past)	$42,267.33
Loss of Financial Contribution (Future)	$47,206.03
Loss of Valuable Services	$7,500.00
Subtotal: Other Amounts Claimed	**$224,191.95**

[46] In their brief, the Plaintiffs submit in this case that it would be "unfair" to presume "perfect or complete recovery" by the Plaintiffs, as this is rarely achieved.

[47] I would reiterate that the amount claimed is but one factor in determining the "amount involved". I turn to the next factor.

(iii) Complexity of the Proceeding

[48] Dr. Cadegan's counsel states, without reservation, that this was a complex trial, noting numerous evidentiary objections and motions brought during the trial. These included:

- The Plaintiffs' motion seeking a declaration that the expert reports filed on behalf of the Defendant contravened the *Civil Procedure Rules* and the laws of evidence and should be deemed inadmissible (with success by the Defendant);

- The Defendant's motion to admit hearsay evidence, being the handwritten notes purportedly made by Leroy McKinnon, (with success by the Defendant);

- The Plaintiffs' motion seeking to render hospital and nursing records inadmissible for being too voluminous (later withdrawn by the Plaintiffs); and

- Questions from the jury on two occasions.

[49] Each of these issues, the Defendant says, required significant written materials and submissions. The complexity, he says, justifies the full amount claimed.

[50] The Plaintiffs argue, that generally claims of medical negligence are complex, but unlike most cases, this case did not require significant evidence on the quantum of future loss, loss of income, and future care needs.

[51] The Plaintiffs say motions are a routine facet of civil litigation, and should not be considered unduly onerous, for example, the motion with respect to hearsay evidence. In short, they argue that a claim under the *Fatal Injuries Act*, R.S. 1989, c. 163 does not rise to a level where the complexity of the proceeding justifies the full amount claimed as the amount involved.

(v) The Importance of the Issue

[52] There is little question this action was extremely important to both parties. The Plaintiffs' were attempting to redress what they submitted was the untimely death of Leroy McKinnon. The evidence, they say, showed the devastating effect this had on his family.

[53] Dr. Cadegan was defending the care he provided to his long time friend and patient, in this tragic situation. In doing so, he was defending the skill and reputation acquired as a physician of 40 years in the community of Glace Bay.

[54] The Court is mindful that it is a question of degree from case to case. While all cases are important, the intent of the rules is to distinguish, to some extent, the relative importance and complexity, as contributing to a proper determination of the amount involved.

Decision re: Amount Involved

[55] Having considered the four factors, with regard to the amount involved, I find as follows:

1) Provisional Assessment of Damages

[56] While strictly speaking there was no provisional assessment of damages, the ranges provided in the instructions to the jury were based on the submissions and case law received from the parties.

[57] The Civil Procedure Rules are generally intended to be interpreted contextually. Consideration of what is reasonable in a given case, is often relevant in arriving at a just decision in the circumstances.

[58] The midpoint of the suggested ranges is in my view, as close a thing as the Court has to a provisional assessment of damages. It is intended to reflect not only the parties' positions, but the current inflation rate value.

[59] I therefore, find that the midpoint of the range of damages provided in this case is an acceptable method of determining the amount involved, but only as one factor.

2) The Amount Claimed

[60] The Plaintiffs have taken, in their calculations, the mid point of their own ranges, which did not, for example, include the suggested upper limit of $200,000 in the Plaintiffs pre-trail brief involving loss of care, guidance and companionship in the case of Mrs. McKinnon.

[61] In addition, the Plaintiffs have said little in response to the Defendant's submission that the amounts for each head of pecuniary damage, were without contest, and put forward by the Plaintiffs themselves.

[62] In my view, there is no reason to take issue with those specific amounts, as claimed by the Plaintiffs at trial, under this particular factor of amount claimed.

3) Complexity of the Proceeding

[63] By any reasonable measure, this trial had considerable complexity, in its own right. The trial started with two motions to exclude the expert medical witnesses, that formed the basis of Dr. Cadegan's defence.

[64] The length of the trial itself extended over a four (4) week period. In addition, it was a jury trial. The medical evidence was considerable, with five (5) qualified experts being called, two experts in family medicine, a cardiologist, a gastroenterologist and a family medicine physician who was also a coroner in the Province of Ontario.

[65] There were other evidentiary motions throughout the trial, and both professional liability and damages were contested. As mentioned by the Defendant, there were several questions from the jury, that needed to be answered, which required discussions with counsel, and in some cases, a review of the evidence.

[66] There were varying medical opinions given by the experts, upon which instructions and counsel addresses had to be given. In many respects the medical evidence and related issues were complex and required considerable examination by counsel and the Court.

[67] The extent to which it was as complicated as other medical malpractice trials is difficult to say. There are, I am sure, other trials that have been longer or more complicated.

[68] However, I concur with the Defendant that this trial was complex.

Importance of the Issue

[69] The importance of the matter to the family of Leroy McKinnon and to Dr. Cadegan, I think is obvious and should not be underestimated for either party.

[70] The evidence confirmed the devastating impact Mr. McKinnon's passing. It is also difficult to imagine a more serious allegation against a long time family physician.

[71] The Plaintiffs have submitted that the intent of the litigation was also to prevent future "lapses", giving it a public interest component. That was not my impression of the evidence heard during the trial. This was primarily a monetary claim, as referred to in the Tariff.

[72] The Plaintiffs submit an appropriate figure for the amount involved is $300,001 to $500,000 given the lack of a provisional assessment and the differing amounts claimed.

[73] The Defendant points out that the Plaintiffs' suggested figure for non-pecuniary damages is $295,986. When combined with the Plaintiffs' claim for pecuniary damages of $224,191.95, this totals $520,177.95. Thus, using these figures the "amount involved" would fall within the range of $500,001 to $750,000 suggested by the Defendant under Tariff A, yielding costs in the amount of $49,750 for Scale 2 and $63,188 for Scale 3.

[74] As mentioned, the amount claimed is one of several factors in determining the amount involved. Using the Defendant's calculations, earlier discussed, the Defendant submits the appropriate amount involved is $594,191.95.

[75] As explained, whether or not a provisional assessment was available, or whether the range provided by the Court is used, the dollar amounts provided by each party are within a range of approximately $74,000 of each other in terms of the amount claimed.

[76] I refer to my earlier discussion on the complexity and importance of the matter. These factors support the argument that the amount involved is between $500,000 and $750,000 as does using the mid point of the range provided by the Court. In terms of that range, using the higher end would benefit the Defendant in terms of costs and using the lower end would benefit the Respondent. Using the mid point is fair, in my view.

[77] I conclude, on a balance of probabilities, that the amount involved is $594,191.95.

Appropriate Scale

[78] Once the amount involved is determined, costs are then assessed under Tariff A using the appropriate scale. Here, the complexity of the matter is once again relevant.

[79] In ***MacVicar Estate v. MacDonald***, 2019 NSCA 90, the Court of Appeal made several comments, that bear upon the Application of Scale 1, 2, or 3 in Tariff A.

[80] In ***MacVicar***, the Court stated:

> 132. ... To read the Appellant's counsel's submissions it would appear the case was a minor whiplash case, under the cap, and simple, without any pre-trial motion. **This was a complex case involving contested evidence, and competing medical reports and expert evidence** in respect to whether or not the Appellant was totally disabled.
>
> 133. There were three orthopedic surgeons, two neurologists and also a number of motions in the trial.

[81] I hasten to add the Court must be mindful to avoid duplication of the dual factors of complexity and importance, in determining both the amount involved and the appropriate scale. (See paragraph 49 of ***MacVicar*** trial decision at 2018 NSSC 108)

[82] The complexity in this trial may well justify Scale 3, especially in the context of a jury. However, I am cognizant that discretion pertaining to costs be exercised fairly and where appropriate, with some restraint.

[83] There is no question that Defendant's counsel met, the challenge of the complexity of this matter. Both parties counsel representations were of signification assistance to the Court. Where concessions could be made, they typically were.

[84] The Plaintiffs' submit that Scale 2 is the appropriate scale, it being the "default scale". The Plaintiffs' argue there should be compelling reasons to depart from the presumptive or basic scale, stating such reasons do not exist here.

[85] There is a significant monetary difference, a 25% variation between scales 1 and 3, and in this case the difference amounts to $13,438.

[86] While I generally concur with the Defendant, in ***MacVicar***, there were some additional and difficult legal issues that required in depth analysis, and issues without precedent.

[87] Exercising my discretion, I decline to award Scale 3. I shall award costs under Scale 2 which amount to $49,750.

The Number of Days of Trial

[88] In addition to providing a cost amount for the amount involved, Tariff A provides that the length of the trial is an additional factor in calculating costs under the tariff; stating that $2,000 shall be added to the amount calculated under the tariff, "for each day of the trial as determined by the trial judge".

[89] The Defendant submits that 14 trial days is reasonable, as there was one day that counsel were not required to attend. This would generate $28,000 in costs.

[90] The Plaintiff's submits, there were several "partial days", that included extended breaks in the evidence. Relying on the decision in ***Whalley v. CBRM***, 2019 NSSC 410, the Plaintiffs' submit the actual days of trial was 12, as opposed to calculating "simple calendar days".

[91] I have considered the number of days counsel attended for trial and the hours of court time each day. The Court sat for 15 days, and majority of those consisted of 6, 6.5, and 7 hours per day. There were also days when the Court stayed longer, sitting 8.5 and 9 hour days. Even on the shorter days, the Court sat for 4.0 to 4.5 hours, to accommodate witnesses appearing by video from out of province. One day required only a brief court appearance.

[92] Each party were represented by co-counsel, each appearance required an attendance, and as such, required preparation and organization.

[93] In ***Whalley***, I concluded that the number of days of trial was reflective of both the actual sitting time and was "reasonable". (See paragraph 73)

[94] In the present case, I find 13 days is a reasonable calculation for the length of the trial, which according to the Tariff is an additional amount of $26,000.

The Defendant's Formal Offer to Settle

[95] The parties have each made submissions on the effect of the Defendant's formal offer to settle, on the overall cost award.

[96] Prior to the trial, and before the Finish Date, the Defendant made a formal offer to settle to the Plaintiffs' pursuant to Civil Procedure Rule 10.

[97] The offer was made on July 20, 2020 and contained the following terms, as outlined in Exhibit "A" of the Affidavit of Sarah Stevens, sworn February 18, 2021.

> **Terms for settlement**
>
> I, Perry Kent Cadegan, offer the following terms to settle all of your claims against me:
>
> 1. You will consent to the Consent Dismissal Order and sign the associated General Releases in the forms attached hereto; and
>
> 2. To settle costs, I will forego all claims to costs, disbursements, and taxes against you.
>
> **Acceptance**
>
> You may accept this offer by delivering a statement of your acceptance in writing signed by you or your counsel to replace for delivery **any time before trial begins, unless the offer is withdrawn by us in writing**. [Emphasis added].

[98] The Defendant's offer was made for a dismissal on consent, on a "without costs basis".

[99] The offer was never revoked and remained open until the trial began. It was never accepted by the Plaintiffs.

[100] Civil Procedure Rules 10.09(2) and 10.09(3) are at issue.

(i) The Application of Rule 10.09.

[101] Both 10.09(2) and 10.09(3) contain the word "may" and are therefore permissive and not mandatory. This is in keeping with the discretion afforded to a trial judge on the matter of costs.

[102] Both rules require that the party obtain a "favourable judgment", as defined in Rule 10.09(1). In this case the Defendant states he has clearly met the three requirements for favourable judgment as set out in Rule 10.09(1) as follows:

> 10.09 Determining costs if formal offer not accepted
>
> (1) A party obtains a "favourable judgment" when each of the following have occurred:
>
> (a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third party claim, at least one week before a trial;
>
> (b) the offer is not withdrawn or accepted;
>
> (c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.

[103] The main difference between the two rules is that Rule 10.09(2) provides for an increase over and above what the tariff has determined as the cost amount, while Rule 10.09(3) states that the judge may award an amount which will represent the full cost award, save for disbursements. For example, the Plaintiffs here submit that 10.09(3) is applicable and accordingly, the Defendant is entitled to 60% of its costs under the tariff, **in total** as opposed to a 50% **increase** to be added to the tariff costs.

[104] The Defendant initially cited Rule 10.09(3) as being applicable, and added 60% to the costs determined under the tariff for "amount involved". This figure amounted to an increase of $45,594 based on the Defendants calculations.

[105] The Plaintiffs' responded by stating they agreed that 10.03(3) was applicable, but that the proper interpretation would result in a cost award to the Defendant in the amount of $35,250, if the Plaintiffs' Tariff A calculation is accepted.

[106] Rule 10.09 is attached as Appendix "A" in its entirety. Below are shortened versions for comparison:

> 10.09(2) A judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs **increased by one of the following percentages** …
>
> …
>
> 10.09(3) A judge may award costs **in one of the following amounts** to a party who defends a proceeding, does not fully succeed, and obtains a favourable judgment

[107] Rule 10.09(2) is available to a party who starts or who successfully defends a proceeding and obtains a favourable judgment.

[108] Rule 10.09(3) is available to a party who defends a proceeding, does not fully succeed, and obtains a favorable judgment.

[109] In its reply brief, the Defendant acknowledges that Rule 10.09(3) was put forth in error, and that the applicable Rule is 10.09(2), given that the Defendant was seeking an increase of 50% of the Tariffs under 10.09(2)(c) which states:

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

[110] The fine point therefore, assuming a favorable judgment, is whether Dr. Cadegan "successfully defended" the action started by the MacKinnon Plaintiffs', or is it a situation where he did "not fully succeed".

[111] In ***Young v. Hayward***, 2013 NSCA 65, the Court of Appeal held that "the trial judge was in the best position to assess relative success and award or refuse costs as a consequence".

[112] The Defendant submits it is not disputed that a favourable judgment opens the door to increased costs under Rule 10.09.

[113] The Plaintiffs' argue there was mixed success, and that Dr. Cadegan was not entirely successful, because the jury found he breached the standard of care. The jury also found that neither identified breach caused the death of Mr. McKinnon.

[114] The Plaintiffs relied on cases such as ***Boutilier v. Pearcey***, 2011 NSSC 307, and ***National Bank Financial Ltd. v. Potter***, 2014 NSSC 264. I am satisfied the applicable Rule is 10.09(2)(c). It is clear the Plaintiffs failed to establish all of the requirements of the test for negligence, of which causation is a critical part.

[115] The Plaintiffs case was dismissed. The Order signed and issued following trial on November 30, 2020 states, "It is hereby ordered that the within action is hereby dismissed with costs and disbursements to be agreed upon or fixed by the Court."

[116] On this basis, I concur with the Defendant that the Defendant successfully defended the proceeding. The Plaintiffs, unlike the case in ***Boutilier***, obtained no judgment (see paragraph 1 of ***Boutilier***, and ***Hayward*** at paragraph 19)

[117] I am further of the view and so find that the Defendant obtained a favourable judgment in that the three criteria for triggering Rule 10.09 have been met (a) a formal offer was delivered, at least one week before the trial; (b) the offer was not

withdrawn or accepted; and (c) a judgment was given providing the Plaintiffs with a result no better than they would have received by accepting the offer.

[118] These findings place the Court in a position to increase costs under Rule 10.09. Before providing a ruling, I shall consider the Plaintiffs further submissions as to the effect of the Defendant's Formal Offer to Settle.

(ii) Fairness Militates against the Application of Rule 10.09(2)

[119] In reviewing the further submissions in the Plaintiffs' brief, their additional arguments boil down to two reasons why this Court should not apply Rule 10.09(2).

[120] Firstly, in these circumstances, it would be unfair to impose a financial penalty on the Plaintiffs, whose claim was supported by expert opinion evidence, and pursued in good faith.

[121] Secondly, it was not unreasonable for the Plaintiffs to refuse to abandon their action in exchange for a "waiver of costs". It is the Plaintiffs' submission that the Defendant's "zero dollar offer", was not a reasonable effort at compromise to resolve the compelling positions.

[122] It is acknowledged that there is never a guaranteed result at trial, and parties must consider and understand the risks involved. Deciding whether to accept formal or informal offers to settle is part of the realities of litigation leading up to and including a trial.

[123] As earlier stated. the Rule is permissive and involves the exercise of some discretion. It is the Plaintiffs' submission that ***Hayward*** is authority for the proposition that "the incremental charting set out in Civil Procedure Rule 10.09 is entirely discretionary". (See ***Hayward*** at paragraph 14)

[124] There is no suggestion that the Plaintiffs' claim was made in bad faith or that their claims were frivolous. While the application of Rule 10.09(2) is discretionary, I find as a fact that Dr. Cadegan was entirely successful.

[125] Further, and with respect, the merit of the claim at this stage, is much less relevant. As the Defendant submitted, the trial was held, the jury rendered its decision, and no liability was found.

[126] On the other hand, I understand the Plaintiffs' position, that having come as far as it did, it was difficult for the Plaintiffs to accept a costs only offer. That said, there are the risks associated with litigation. Acceptance of the offer would (in hindsight) have saved them (the Plaintiffs') the costs in the proceeding.

[127] Exercising my discretion, I have decided **not** to invoke Rule 10.09(2)(c), to increase the Tariff amount by 50 percent. I am not satisfied the terms of the offer, while fair, were such that a 50% increase in the tariff costs is warranted.

[128] Before addressing disbursements, I shall deal with additional submissions and applicable Rules, including those submitted by the Plaintiffs' for a reduction in costs.

Public Interest Litigation

[129] The Plaintiffs' have intermittently referred to this litigation as "public interest litigation".

[130] I am aware of the term "public interest litigation", having considered that issue, in an in depth manner in the cases of ***Livingston v. Cabot Links Enterprises ULC***, 2018 NSSC 256, and ***Whalley***. Relying on the principles and reasoning applied in those cases, I am of the respectful view that this action commenced by the McKinnon family, does not constitute public interest litigation, nor does it have a public interest component. The facts speak for themselves, and point primarily, if not exclusively, to this claim being a monetary claim for compensation.

Judicial Discretion in Determination of Costs

[131] The Plaintiffs have asked the Court to consider a number of additional factors, which they submit warrant a reduction, in the costs award in this case.

[132] Several of these are related, and deal with the Plaintiffs' being "average plaintiffs facing a large institutional client". They should not, the Plaintiffs' submit, be forced to abandon reasonable litigation for fear of a significant cost award. Further, a substantial financial penalty raises an access to justice issue. The Plaintiffs' say this is also one they cannot afford. In their brief, the Plaintiffs' argue that:

> Based on the foregoing, the Plaintiffs respectfully request the exercise of judicial discretion, per Rules 77.02, 77.03, 77.06, or 77.08, to substantially reduce a costs

> award that would otherwise have a considerable chilling effect on the advancement of similar litigation in the future. It is simply not fair that an average plaintiff must risk losing so much to bring a reasonable case to trial.

[133] The Plaintiffs' have referred the Court to several cases, including ***Lockhart v. New Minas (Village)***, 2005 NSSC 93, and ***Gillan v. Mount St. Vincent University***, 2007 NSSC 249.

[134] Neither of these cases is similar to the case at bar. Clearly, in ***Gillan***, the Honourable Justice Arthur J. LeBlanc, intended to award costs that would be a "substantial contribution to the overall costs of the proceedings", and also to reflect the Plaintiffs' financial circumstances. Ms. Gillan had not returned to work in 11 years.

[135] In terms of Ms. Gillan's ability to pay a substantial cost order, Justice LeBlanc further stated in paragraph 12:

> [12] I am mindful that Ms. Gillan may not have the financial ability to pay a substantial costs order; nevertheless, I am satisfied that the defendant **should not be denied its costs** in the circumstances.

[136] In ***Lockhart***, the Honourable Justice Greg Warner, was addressing the issue of costs in the context of deciding whether to grant the Defendant's motion to sever a defamation claim from a wrongful dismissal claim.

[137] In that case, there was a real concern as to whether the Plaintiff, a discharged employee could pursue the claim to its final conclusion. No defence had been filed, no discoveries had been held, and no pre-trial preparation had been done. In those circumstances the Court noted that financing a single law suit would be difficult, but financing two law suits "could be devastating".

[138] Returning to the ***Gillan*** case, the majority of the substantial legal fees of co-counsel, ($30 - $40,000) were expended on the issue of whether the court had jurisdiction to hear the matter. Ultimately, the court decided it did not. The matter involved a slip and fall, coupled with a collective agreement.

[139] This Court accepts that most, if not all cases, are distinguishable on their facts. This alone is not a reason to discard or minimize the important principle of access to justice in not only the civil justice system, but the justice system as a whole.

[140] I find, on this aspect of the decision, there is very little in the way of solid evidence, upon which the Court can base its findings.

[141] In effect, the Court is being asked to make a number of assumptions. For example, that Mrs. McKinnon and her family are impecunious, and unable to afford payment of a substantial judgment for costs. Further, that Dr. Cadegan is "backed" by a powerful institutional client, I assume, referring to an insurer.

[142] These submissions are cast in many ways, as statements of fact. I recognize that such matters or assumptions may be reasonable, but to expect a substantial reduction to what is otherwise found to be in accordance with the Tariff, may of itself, be unrealistic.

[143] As the Defendant has stated, this is not a forward looking exercise. The trial was concluded, no liability was found, costs were awarded, which costs followed the result.

[144] In terms of hardship, again the Court is left to consider that there would be. The numbers are considerably higher perhaps than in many cases. Then again, the costs of litigation are very expensive for both sides. This trial ran for 4 weeks in duration, in the presence of a jury.

[145] It stands to reason that an average litigant (as referred to by the Plaintiffs) would face a financial challenge, if ordered to pay costs in the six figure range.

[146] The Court is being asked to consider "fairness", but in so doing the Court is duty bound to consider what is fair, to both sides, not simply one party. Fairness in all of the circumstances.

[147] The Plaintiffs' felt duty bound to pursue this litigation to the end. Dr. Cadegan was entitled to respond and defend the allegations to the trial's conclusion.

[148] There has been no suggestion made as to the use delay tactics, or complexity as a barrier to access to justice.

[149] Civil Procedure Rule 77.07(1) allows the Court to increase or reduce tariff costs, based on factors that may be relevant. The first example of such factors in 77.02(2)(a) is the amount recovered, compared to the amount sought by the Plaintiffs. If anything that is justification for increasing the tariff amount. Another relevant example/factor is in clause (b) is an offer (formal or informal) of

settlement. In this case, the Plaintiffs made a formal offer to settle, which is attached to the affidavit of Krizia Sadi, as Exhibit "A". Once again, there is a disparity of over $300,000 from what the Plaintiff offered and what was received, which was "nil".

[150] On the other hand, the Defendant did make the "costs only" offer and while I declined to increase the offer by 50% as per 10.09(2)(c), the Court still entitled, in my view, to consider that offer under this Rule 77.07.

[151] Mr. Hayne made a compelling argument that the complexity and importance of this trial warranted Scale 3 on behalf of his client, Dr. Cadegan. Mr. Hayne also made a reasonable argument that the number of days of trial should be fourteen (14).

[152] My ruling that Scale 2 applied benefited the Plaintiffs by a considerable amount. My ruling that the length of the trial is 13 days, benefited the Plaintiffs by a further reduction of $2,000.

[153] Respectfully, I decline to make any further reduction as sought by the Plaintiffs.

[154] I have decided, exercising the discretion referred to in the Rules, to make an increase of 15% to the cost award to the Defendant which amounts to $ 11,362.50. for a total of $87,211.50. plus disbursements.

Decision on Party-Party Costs

[155] In its conclusion, the Plaintiffs' submit that the Defendant is entitled to $35,250. in Tariff A costs, pursuant to Rule 10.09(3)(c), exclusive of disbursements.

[156] The Defendant claimed it is entitled to the sum of $63,188 costs pursuant to Tariff A (Range $500,001 to $750,000 at Scale 3); $28,000 ($2,000 per day times 14 days of Trial); plus a formal offer increase of 50% (Rule 10.09(2)(c) in the amount of $45,954) for a total of $136,782, plus disbursements.

[157] I have found and so rule that the Defendant is entitled to Tariff A costs (in the range of $500,001 to $750,000) at Scale 2, for 13 days of trial equalling sums of $49,750 and $26,000 for a total of $75,750.

[158] Exercising my discretion, I declined to apply Rule 10.09(2)(c) and denied the 50% increase referred to above but did increase the cost award by 15% (of $75,750.) pursuant to Rule 77.07 which would be $11,362.50 for a total of $ 87,211.50.

[159] The total disbursements claimed by the Defendants are: 1) $21,435.70 (Expert Fees); 2) $7,750.96 (Hotel Fees); and 3) $800 (Travel) for a total of $30,486.66.

[160] I turn now to consider the Defendant's claim for disbursements.

Disbursements

[161] The total amount claimed by the Defendant for disbursements is $ 30,486.66. Of this, the main disbursements were for the two medical reports of Dr. Bernstein in the amount of $11,326.50 and Dr. Drummond in the amount of $10,609.20.

[162] Both of these physicians were qualified to give expert opinion evidence in their respective fields of expertise. I gave separate rulings at the beginning of the trial, admitting these reports into evidence. The threshold requirements under ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23, require that these reports be necessary, but also that the expert evidence be presented to the Court in an independent and impartial manner.

[163] Rule 77.10 clearly states that an award of costs includes necessary and reasonable disbursements, which pertains to the subject of the award.

[164] This litigation, which extended over a period of 4.5 years, involved a number of expert witnesses, five (5) in total, including those expert physicians called by the Plaintiffs.

[165] It is not really an issue whether the expert reports were necessary. As stated, that was part of my ruling. In medical malpractice actions, expert medical witnesses are not uncommon, although the degree of reliance on them is subject to the decision of the trier of fact.

[166] The reports of Dr. Bernstein, Dr. Drummond as well as the Plaintiffs' experts were relevant to the issues to be considered by the jury. The experts' findings and opinion were included in and explained to the jury as part of the

Court's instruction on the law. This included expert evidence on the standard of care, and the issue of causation.

[167] The real issue pertaining to these disbursements is the quantum. The caselaw states such amounts must be reasonable both in their incurrence and the quantum. The parties differ with respect to these points. For example, the Plaintiffs' submit the sum of $15,000 is more reasonable than the $22,000 (round figures) claimed in total.

[168] What has been provided is a breakdown of the individual invoice amounts for each physician, with the last invoices including attendance at the trial. Individual time entries have not been provided. It is therefore difficult to assess the amount of preparation time for example, versus attendance in Court. Travel time was minimal as all experts testified virtually by video conference/link.

[169] These amounts are for evidence that was highly relevant, and beyond the scope of the trier of fact. Experts and their professional accounts are to be expected in this type of litigation.

[170] Each physician's invoice is fairly consistent in terms of the amount and in the range of accounts considered in other matters, even less in some instances. (See ***MacVicar***, 2018 NSSC 108)

[171] The Plaintiffs' position, succinctly put, is that these amounts are excessive for virtual testimony, that lasted for less than a day.

[172] It is my view, that whether the amounts are reasonable, is not merely a function of the time spent in testifying. Each of the experts testified for approximately 2 hours, but in total, with breaks and set up, their testimony combined amounted to one day.

[173] It is also the seriousness and gravity of the evidence to the issues and the people involved that must be considered. All experts, in my view, grasped the importance of this, and prepared accordingly.

[174] Overall, I see no reason why these accounts should not be paid in full. I would have preferred a breakdown in terms of hours, but otherwise, I am satisfied these physicians accounts are reasonable. They earned these fees and are entitled to payment for their professional opinions.

[175] In terms of whether the Defendant should undergo a deduction, by his choosing counsel from Halifax, I am not persuaded by that argument. The Plaintiffs did the same.

[176] In addition, the venue of the trial was determined to be Sydney. This was appropriate and in any event, not the choice of counsel.

[177] Having reviewed and considered counsel's expense for travel, the sum total of $800. for two counsel over a one period of a month is entirely reasonable.

[178] Similarly, the hotel bills include only the basic charges such as room rate and HST. This is at a reasonable, competitive rate at the Cambridge Suites, Sydney. The number of hotels in close proximity to the trial location is limited.

[179] In conclusion, I am satisfied that disbursements as submitted are reasonable and necessary. Total disbursements are hereby allowed at $30,486.66, a breakdown of which is follows.

Disbursement	**Amount**
Dr. Alan Drummond	$10,609.20
Dr. Charles Bernstein	$11,326.50
Hotel fees	$7,750.96
Travel (kms)	$800.00
Total Disbursements	**$30,486.66**

Conclusion

[180] The total costs awarded to the Defendant on a party and party basis under the Tariff of Fees (Rule 77 of the Civil Procedure Rules) is $87,211.50 in costs plus disbursements of $30,486.66 for a total of $117,698.16, payable by the Plaintiffs.

Murray, J.

Appendix "A"

10.09 Determining costs if formal offer not accepted

(1) A party obtains a "favourable judgment" when each of the following have occurred:

(a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third party claim, at least one week before a trial;
(b) the offer is not withdrawn or accepted;
(c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.

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

(a) one hundred percent, if the offer is made less than twenty-five days after pleadings close;
(b) seventy-five percent, if the offer is made more than twenty-five days after pleadings close and before setting down;
(c) fifty percent, if the offer is made after setting down and before the finish date;
(d) twenty-five percent, if the offer is made after the finish date.

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

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