Date: 20020130
Docket: S.N. 109050

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: *Hillier v. Mann*, 2002 NSSC 28]

Between:

GARY HILLIER

Plaintiff

- and -

ELEANOR B. MANN

Defendant

D E C I S I O N ON C O S T S

HEARD BEFORE: The Honourable Justice John M. Davison

PLACE HEARD: Sydney, Nova Scotia

DATE HEARD: October 9-17, 2001 (Judge and Jury)
Jury Award rendered October 17, 2001
Decision on Special Damages rendered November 23, 2001

DECISION ON COSTS: January 30, 2002

COUNSEL: Hugh R. McLeod
for the Plaintiff

Ian C. Pickard and C. Patricia Mitchell
for the Defendant

DAVISON, J.:

[1] This is a decision with respect to party and party costs in this action which was tried before a judge and jury in Sydney beginning October 9, 2001 and ending October 17, 2001.

[2] The action arises out of a motor vehicle accident which occurred on October 2, 1997. The defendant admitted liability for damages arising from the accident and counsel for the defendant admitted in submissions to the jury that the plaintiff was injured but not totally disabled and urged a finding that the injuries had no residual effects following a year or two years from the time of the accident. Counsel for the plaintiff took the position before the jury the plaintiff was totally disabled and urged recovery of a substantial amount for future loss of wages.

[3] The questions put to the jury and the answers given by the jury are as follows:

1. Q. Did the negligence of the defendant in the motor vehicle accident which occurred on October 2, 1997 cause or contribute to injuries to the plaintiff?

A. Yes ☒ No ☐

2. Q. If the answer to question 1 is "yes", at what amount do you assess the total damages of the plaintiff in the following categories?

A. (1) General damages for pain, injury, suffering, loss of enjoyment of life, past and future

$ 30,000.00

(2) Financial loss

(a) Past loss of income from October 2, 1997 until today, if any

$ 59,873.00

(b) Future loss of income, if any

$ 28,126.00

[4] Counsel for both parties have signed an agreement of facts with respect to the issue of costs. It is agreed the order of the court dated December 6, 2001 incorporates the award of the jury and the finding of the judge on special

damages, and that the amount to which the plaintiff is entitled is $118,184.55 inclusive of damages and interest but exclusive of costs and disbursements.

[5] The issues arising in this application require consideration of *Civil Procedure Rules* 63 and 41A, the relevant portions of which are:

> **63.02.** (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,
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> (a) award a gross sum in lieu of, or in addition to any taxed costs;
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> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
>
> (c) direct whether or not any costs are to be set off.
>
> (2) The court in exercising its discretion as to costs may take into account,
>
> (a) any payment into court and the amount of the payment;
>
> (b) any offer of contribution.
>
> . . .

63.04. (1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between partes shall be fixed by the court in accordance with the Tariffs and, in such cases, the "amount involved" shall be determined, for the purpose of the Tariffs, by the court.

. . .

63.15. (1) Where any thing is done or an omission is made, improperly or unnecessarily, by or on behalf of a party, the court may order,

(a) any costs arising from the act or omission not be allowed to the party;

(b) the party to pay the costs of any other party occasioned by the act or omission;

(c) a taxing officer to inquire into the act or omission, with power to order or disallow any costs as provided in clauses (a) and (b).

41A.02. A party may serve upon an adverse party an Offer to Settle (Form 41A(A)) any claim between them in the proceeding and, where there is more than one claim between them, to settle one or more of them, on the terms therein specified.

41A.03. An offer to settle may be made at any time before the commencement of the trial or hearing; but, where an offer to settle is made less than seven (7) days before the day on which the trial or hearing is commenced, the cost consequences prescribed by this rule shall not apply unless the offer to settle is accepted before the commencement of the trial or hearing.

41A.04(1). A party may revoke an offer to settle at any time before acceptance by serving upon the party to whom the offer was made a notice of revocation. (Form 41A(B)).

(2). Where an offer to settle stipulates a time for acceptance and is not accepted within that time, it shall be deemed to have been revoked.

(3) The cost consequences prescribed by this rule shall not apply to an offer to settle that has not been accepted and which has been revoked before the commencement of the trial or hearing.

41A.06. Where an offer to settle has been served, the party to whom the offer is made may accept it by serving notice of acceptance (Form 41A(C)) on the party who made the offer.

41A.07. Notice of acceptance may be delivered at any time before the commencement of the trial or hearing unless, in the meantime, the offer has been revoked.

41A.08. ...

(3) Where the accepted offer is silent as to costs, and the offer was made by the defendant and accepted by the plaintiff, the plaintiff may tax the party and party costs of the proceeding to the date when he was served with the offer to settle and, unless the defendant pays those costs within seven (7) days after assessment, issue execution therefor.

(4) Where the accepted offer is silent as to costs, and the offer was made by the plaintiff and accepted by the defendant, the plaintiff may tax his party and party costs of the proceeding to the date he was served with the notice of

acceptance and, unless the defendant pays those costs within seven (7) days after assessment, issue execution therefor.

41A.09. (1) Unless ordered otherwise, where an offer to settle was made by a plaintiff at least seven (7) days before the commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to the commencement of the trial or hearing, and where that plaintiff obtains a judgment as favourable or more favourable than the terms of the offer to settle, that plaintiff shall be entitled to party and party costs plus taxed disbursements to the date of the service of the offer to settle and thereafter to taxed disbursements and double the party and party costs.

(2) Unless ordered otherwise, where an offer to settle was made by a defendant at least seven (7) days before the commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to the commencement of the trial or hearing, and where the plaintiff fails to obtain a judgment more favourable than the terms of the offer to settle, the plaintiff shall be entitled only to party and party costs plus taxed disbursements to the date of service of the offer to settle and the defendant shall be entitled to party an party costs plus taxed disbursements from the date of such service.

41A.11. Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters.

[6] The Supreme Court of Nova Scotia proscribed *Civil Procedure Rule* 41A to encourage the parties to litigation and their lawyers to take reasonable steps to effect settlement. Litigation has become prohibitively expensive over the last decade, and persons are turning to other means of resolving disputes such as mediation and arbitration. Justice Saunders in *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 at p. 416 commented on the *Rules* as follows:

> The object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding. The combined effect of C.P. Rule 41A.11 and 63.04 is to promote settlement by penalizing unreasonable conduct in efforts to settle.

Saunders J., as he then was, also stated at p. 413:

> The court is and has always been concerned with the reasonableness of expenditures incurred in either advancing or defending a claim. The ever-increasing cost of litigation is a challenge which faces everyone touched by the adversary process, whether litigant, lawyer or witness.

[7] In *Goode v. Oursen* (1992), 105 N.S.R. (2d) 389 Justice Grant considered the discretion of the court as it related to costs with particular reference to *Civil Procedure Rule* 41A. He stated at p. 391:

> Our case law has set out the purpose of the offer to settle rule. The benefit to litigants of settling their own differences, of saving expense, doing away with the uncertainty and anxiety of litigation, saving court time and other advantages, are self-evident.
>
> The method used in the rule to encourage reasonable offers is by giving a cost benefit to the offeror and to encourage the acceptance of reasonable offers by penalizing the unreasonable rejection of reasonable offers.
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> Rules 41A.09(1) and (2) deal with the situation after trial and after a decision has been rendered. Rule 41A.11 involves the situation at the time the offer was made as well as after the trial.

> I consider that rule 41A.11 has the purpose of encouraging parties to make realistic offers to settle by rewarding parties who make realistic offers even though they may be slightly lower or higher than the eventual award. It should also penalize parties who do not accept realistic offers even though they may be slightly lower or higher than the eventual award, after trial.
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> I consider that this purpose can be realized by exercising the discretion given to the court under this section. I feel that is the reason for the rule. If offers were either eligible or not eligible under rule 41A.09(1) or (2), then there would be no reason for rule 41A.11.

[8] I agree with the view expressed by Justice Grant. Rule 41A.11 permits the court to look at all the relevant circumstances and consider offers in writing which may not comply with the time limits or the quantum of offers stipulated in the other subsections of Rule 41A but which indicate a party has attempted to effect a reasonable settlement and the other party has not taken reasonable steps toward settlement.

[9] It is clear in this proceeding the defendant and her counsel made several efforts to settle this action and the plaintiff's conduct toward settlement was unrealistic and not reasonable. In a written submission on the issue of costs counsel for the plaintiff stated, "... it should be understood clearly that at no time did Gary Hillier ever, before the start of this trial, offer to settle this case for any money." The agreement of facts state:

> 4. At no time prior to trial did the Plaintiff put forth an offer that he would accept in settlement of this claim nor make any counter offers.

[10] The defendant started by admitting liability. In September 2000 the defendant offered to settle by paying $125,000 “all inclusive”. This figure was confirmed by an all-inclusive offer to settle for $125,000 made by the defendant pursuant to *Civil Procedure Rule* 41A and filed with the Prothonotary on August 20, 2001. The offer was not at any time withdrawn by the defendant according to the agreement of facts.

[11] On August 27, 2001 the defendant, in writing, made an all inclusive offer of $175,000 which contained the following sentence:

> The offer remains open until 4:00 p.m. on Monday, September 10, 2001 at which time the offer will be withdrawn and a formal offer in the amount of $125,000 will be filed.

[12] On August 29, 2001 the offer of $175,000 all inclusive was rejected by a letter from plaintiff’s counsel. This gave rise to the defendant filing the all inclusive offer of $125,000 in accordance with *Civil Procedure Rule* 41A on August 31, 2001. I find the “all inclusive” offers included damages, interest, costs and reasonable disbursements.

[13] The Agreement of Facts contain the following paragraphs:

> 10. Following August 29, 2001, on a date which cannot be agreed to between the parties, defence counsel in a phone conversation with Plaintiff’s counsel reiterated that the offer of $175,000 was on the table and open for acceptance. Defence counsel went further and indicated to Plaintiff’s

> counsel, that he would recommend his client pay the amount of $200,000 in full and final settlement of this matter should the Plaintiff agree to accept this amount. Neither the $175,000 nor the $200,000 were acceptable to the Plaintiff.
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> 11. During a break in the jury charge on October 17, 2001, Plaintiff's counsel advised Defence counsel that his client would accept the amount of $175,000 if it was still on the table. Defence counsel, after seeking instructions, advised Plaintiff's counsel (following completion of the jury charge and when waiting for the jury's verdict) that the $175,000 was no longer open for acceptance but they would continue to pay $125,000 all-inclusive.

[14] Pursuant to *Rule* 41A.11, I exercise my discretion to award party and party costs to the defendant from August 31st, 2001. I exercise my discretion in this manner for three reasons.

[15] First, it is clear the plaintiff failed to take any steps prior to trial to attempt a settlement in this action. This, in my view, was unreasonable conduct which led to a long, expensive trial. In my view *Rule* 41A intended to discourage this type of approach. There was an exchange of a large volume of reports of medical doctors and other health care providers, some of whom testified. The plaintiff called to the stand a psychiatrist, an orthopaedic surgeon, a specialist in pain management, a family physician, a physiotherapist and an actuary. The defendant called to the stand a psychologist, a rehabilitation and physical medicine specialist and a rehabilitation consultant. It was known the cost of the trial would be excessive.

[16] Secondly, the credibility of the plaintiff was thrown into question from the outset of the trial. In his opening address to the jury, counsel for the plaintiff advised his client has a tendency to manipulate with his complaints. In cross-examination, the plaintiff agreed he had a tendency to exaggerate his complaints with a view to manipulating people. The plaintiff's explanation was that when he could not "get his point across" he tries to "turn things my way." Almost all of the expert witnesses agreed with this tendency of the plaintiff, with Dr. Jackson, the plaintiff's family physician stating he was "surprised" at the extent of the plaintiff's manipulation.

[17] It is clear many of the complaints of the plaintiff come from soft tissue injuries and that pain was a factor in any disability. As Dr. Jackson said, pain is a subjective symptom. As Dr. Munski, the psychiatrist who gave evidence on behalf of the plaintiff stated, the plaintiff has to "emphasize" symptoms and exaggerate them to make the doctor understand. Dr. Munski agreed, in cross-examination, a patient has to be honest and accurate and that if the doctor "missed the exaggeration" it could affect his or her opinion.

[18] Credibility of the plaintiff was in issue. Surely it would have been reasonable for the plaintiff to have considered that factor and, under the circumstances, become involved in settlement attempts.

[19] Thirdly, most of the doctors were of the view the plaintiff should return to work and it is clear the jury did not believe he was totally disabled when they gave a relatively modest award for future loss of income. The evidence was that he did not work for the whole year of 1996 and only six months in 1997, from January to June.

[20] The large majority of the medical experts were of the view he did not have total disability. Dr. Pollett, the pain medicine specialist, said he was totally disabled and that his psychological problem was a component of this opinion, but Dr. Pollett was unaware that Dr. Munski, the psychiatrist, called by the plaintiff said he could see no reason why he could not work to age 65 and there was no psychiatric problem preventing him from working. Dr. Jackson said there was no physical reason preventing him from returning to work.

[21] Dr. Pollett, Dr. Munski and Dr. Jackson were witnesses who gave evidence as part of the plaintiff's case. The defendant advanced witnesses including a psychiatrist, a physical medicine specialist and rehabilitation consultant all expressed views the plaintiff could return to work.

[22] This evidence was contained in most of the reports tendered by the experts. It should have prompted attempts to settle by the plaintiff.

[23] For the reasons expressed, I award costs of this action on a party and party basis to the plaintiff for a period extending to August 29th, 2001. I award costs of this action on a party and party basis extending from August 30th, 2001 to the end of this proceeding in this court to the defendant.

J.