IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Grey v. Dore, 2012 NSSM 12

SCCH No. 387081

Citation: 2012 NSSM 12

Between:

Michelle Grey

Applicant

– and –

Randy Dore

Respondent

Adjudicator: Augustus Richardson, QC

Heard: March 27, 2012

Decision: May 29, 2012

Appearances: Michael Dull, for the Applicant

Stephen Johnston, for the Respondent

By the Court:

[1] This is a taxation or assessment of the disbursements on a party-and-party account that arises out of the settlement of a personal injury action.

[2] The plaintiff Michelle Grey was a cleaning lady. She was injured in a slip-and-fall down the defendant's steps in September 2004. She sustained injuries to her neck, shoulder and right arm. She retained counsel (not Mr Dull), but the matter did not progress very far or very quickly. Mr Dull took over the file in 2008, and the matter progressed to discovery in September 2009. The discovery of the plaintiff revealed a host of issues concerning the plaintiff's condition. The plaintiff made an offer to settle for $50,000.00. Mr Dull then retained Dr Mahar, a well-known physiatrist in Halifax, to obtain a medical-legal report as to the nature, scope and cause of the plaintiff's injury and her inability to work. Dr Mahar's report, dated November 16, 2010, indicated that the plaintiff suffered from a number of injuries and aliments, including injuries from another slip-and-fall, and diabetes, all of which had had an impact and would have had an impact on her ability to work. Following that report the parties entered into settlement negotiations, which resulted in a settlement in December 2011 of $8,000.00 plus disbursements

as agreed or assessed. The parties were not able to agree on some of the disbursements–hence the matter was referred to taxation in the Small Claims Court.

Cost of Photocopying

[3] The plaintiff charged photocopying at 30 cents a page for a total of $1,357.20 (based on 4523 copies): Ex. C1. At the taxation Mr Dull reduced the claim to 20 cents a page. Mr Johnstone, on behalf of the defendant, did not object to the number of pages, but submitted that the charge should be in the range of 10-15 cents a page.

[4] The issue of charges for photocopying has been discussed a number of this by Adjudicators in this court: see, for e.g., *Bank of Montral v. Binder* (2005) 237 NSR (2d) 69 at paras.31-42; *Cunning v. Doucet* 2009 NSSM 35 at paras.7-16. The thrust of these decisions and others is that the practice of charging rates substantially in excess of the rates charged by commercial operations is frowned upon. Photocopying should not be viewed as a profit centre. The courts recognize that some (and indeed perhaps all) photocopying may have to be done in-house because of privacy or confidentiality concerns. Hence a rate that exactly mirrors a commercial rate may not be appropriate. However, charges of 25 or 30 or 40 cents a page are so far above the actual unit-cost of in-house photocopying that they cannot be called “reasonable.”

[5] In this case and for these reasons I would allow photocopying at 15 cents a page.

Dr Mahar’s Report

[6] The medico-legal report cost $2,100.00. Mr Dull on behalf of the plaintiff submits that the cost was reasonable and should be allowed. The reasonableness of the charge also has to be measured against the claim, which at that point was for $50,000.00. The report also helped demonstrate to the plaintiff that her problems were not, as she believed, all attributable to the accident for which she claimed against the defendant. There were other issues that had nothing to do with the accident. Once the report made that clear she was more prepared and more willing to accept a settlement figure less than the $50,000.00 she had initially been prepared to accept.

[7] Mr Johnstone submitted on behalf of the defendant that the fee was, in the circumstances, unreasonable. He submitted, relying upon the decision in *Coleman Fraser Whittorne & Parcells*

v. Canada (Attorney General) 2003 NSSM 3 at paras.65-68, that it was unreasonable for the plaintiff to have obtained a report in the first place. The discovery ought to have made clear that her claim was problematic. There was a dispute on liability as well as on quantum. Her medical files and history were known following the discovery. The fact that she eventually settled for $8,000.00 (which included an allowance for legal fees) supported a conclusion that the reasonably allowable claim in any event was low and that the plaintiff, acting reasonably, ought to have been able to understand that without a costly medico-legal report. It was not reasonable to lay that cost at the feet of the defendant.

[8] I agree that the cost associated with legal reports obtained from experts is always subject to the test of reasonableness. The test applies both to the actual cost of the report as well as to its necessity. So, for example, in *Coleman* plaintiff's counsel obtained an actuarial report before the issue of liability, which had been severed from damages and was before the courts, had been determined. Since the resolution of the liability issue (which turned on a limitation period) would make or break the claim, and since it was going to the Supreme Court of Canada, it was not reasonable to incur the cost of a report that addressed quantum at that time. This was doubly so given that rough actuarial estimates are easily calculated by reasonably competent counsel without the need for an actuary.

[9] I also agree that counsel should not, without good reason, obtain a multitude of expert reports, at least where such reports merely duplicate what is already known or in the file. Counsel should not assume that their disbursements for expert reports will automatically and without question always be allowed by the court. The test is always one of reasonableness.

[10] However, in the case before me I am satisfied that it was reasonable for plaintiff's counsel to obtain a medico-legal report from Dr Mahar. I say this for a number of reasons.

[11] First, and unlike the case in *Coleman*, this was not a case where the basic (if not fine-tuned, ready-for-trial) assessment could be performed by reasonably competent counsel. The question of whether the plaintiff's injuries were solely, or partially, or not at all attributable to the accident was fully within the scope of a medical expert's expertise. It was a medical question, not a legal one. But it was a question that had to be answered before the matter could settle.

[12] Second, plaintiffs in personal injury cases sometimes suffer from a form of causal myopia that attributes *all* their problems to the injury that brings them to court. Moreover, they have

become habituated to thinking of their problem in medical rather than legal terms. It may be difficult for plaintiff's counsel to explain to their clients that there is a difference between legal and medical causation; or to explain that their pre-existing or concurrent problems may have an impact on their claim. A medico-legal report from an expert can help a lawyer advise their clients as to the strengths and weaknesses of their claim and what they might expect to win (or lose) if they go to trial.

[13] What this means is that sometimes counsel *must* obtain a medico-legal report in order not just to pursue a claim but to advise their clients properly. Such conduct is in my view to be encouraged, because fully- and rationally-informed clients are more likely to conduct litigation in a reasonable fashion–and more likely to settle rather than to fight on to trial.

[14] I am satisfied that these considerations apply in the case before me. The plaintiff's injury and the question of her disability was obviously complicated. She obviously, for whatever reason, had developed an unreasonable high valuation of the worth of her claim. In such a case I am satisfied that the matter would not have settled without a medico-legal report to help her "see the light." I am accordingly satisfied that it was reasonable to obtain the report. I am also satisfied that the fee–$2,100.00–was not outside the range of fees for such reports charged by physicians of the skill and experience of Dr Mahar.

Conclusion

[15] For the reasons set out above

a. I allow the photocopying charge at 15 cents a page for 4,523.00, and

b. I allow the cost of Dr Mahar's report at $2,100.00.

[16] I believe that the other items in the disbursements claimed by the plaintiff at Ex. C1 were not disputed by the defendant. If they were I may be spoken to.

DATED at Halifax, NS
this 29th day of May, 2012

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Augustus Richardson, QC
Adjudicator