IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Gillis v. Intact Insurance Company*, 2018 NSSM 32

Claim No: SCCH 475871

BETWEEN:

KATHY GILLIS

Applicant

-and –

INTACT INSURANCE COMPANY

Respondent

Brian Hebert represented the Applicant/Plaintiff, Kathy Gillis.

Jeff Waugh appeared on behalf of the Respondent/Intervenor, Intact Insurance Company.

DECISION ON TAXATION OF DISBURSEMENTS

(1) This is a taxation of disbursements on a party-party basis following the trial of the action and written decision by the Honourable Justice Suzanne Hood in *Gillis v. Roy Stutely Plumbing and Heating Ltd.*, 2012 NSSC 244 ("the Trial Decision") and decision on costs at 2013 NSSC 249 ("the Costs Decision"). In addition to costs to the plaintiff, Justice Hood awarded Ms. Gillis disbursements to be taxed.

(2) The Respondent in this matter, Intact Insurance Company ("Intact"), acted as Intervenor in the main action and made submissions in the hearing on costs and in this hearing. The Defendant, Roy Stutely Plumbing and Heating Ltd., did not appear and default judgment was entered against it and the Estate of Roy Stutely. The hearing dealt extensively with the issue of causation of Ms. Gillis' injuries and quantification of damages.

(3) In the Costs Decision, Justice Hood denied costs against the Intervenor. She cited the decision of *A.B. v. Bragg Communications*, 2010 NSSC 356, noting that "Justice LeBlanc referred to the general rule that Intervenors are not to be subject to an

award of costs." She then went on to hold that "this is not a case where there is good reason to deviate from the general rule." Intact was found not liable as Intervenor.

(4) Based on that finding, Mr. Waugh stated the following in his brief on behalf of Intact:

"Intact submits that it does not have an obligation to pay other costs and disbursements until such time that coverage has been established. With that said, Intact objects to certain costs and disbursements claimed by the Applicant."

(5) I agree with Mr. Waugh's approach as it relates to its obligation to pay disbursements. As Intervenor, the liability for taxed disbursements necessarily follows the Court's determination on costs. According to the correspondence, the issue of Intact's liability for coverage under the Defendant's insurance policy has not yet been determined.

The Facts

(6) The facts leading to the claim are set out in the trial decision. In 1996, a hot water tank fell on Kathy Gillis' back from a significant height causing injuries to her neck, shoulders and back. Liability was found as a result of the default judgment. The plaintiff subsequently suffered injuries from a "shower incident" which persisted at the time of the trial. The question for the court was the extent to which Ms. Gillis' injuries were caused by the 1996 incident. Not surprisingly, Justice Hood's decision at trial dealt extensively with causation, both in law and fact.

The Tariff

(7) The taxation of costs in this matter was determined by Justice Hood to be governed by the 1989 Tariff for costs. The 1989 Tariff for disbursements is Tariff D which is found as a schedule to the *Costs and Fees Act*. I have cited the list of factors most relevant to this taxation set out in the Tariff

"In these Tariffs, the "amount involved" shall be
(a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
(i) the amount allowed,
(ii) the complexity of the proceeding, and
(iii) the importance of the issues;...

Tariff D

Tariff of Disbursements Allowable
to a Party Entitled to Costs

2. Disbursements recoverable from opposite party:

(1) Attendance money paid to witness….

(3) Reasonable cost of
(a) medical reports;
(b) hospital records;
(c) reports of experts,

intended to be used at trial which, unless the proceeding is disposed of beforehand, were supplied to the other parties at least 10 days before trial.

(4) Reasonable fees paid to an expert witness who gives evidence, up to $600.00 for each day examined and each additional day authorized by the taxing officer.

(6) In the discretion of the taxing officer, reasonable travelling and accommodation expenses incurred by a party in attending discovery or trial.

(7) Reasonable costs of copies of documents or authorities prepared for the use of the court and supplied to the opposite party.

(8) The cost of certified copies of documents such as judgments, orders, birth, marriage and death certificates, abstracts of title, deeds, mortgages and other registered documents where made exhibits.

(10) Reasonable fees paid for necessary personal service of documents where service is made in the Province.

(11) Fees paid to a clerk of a court, a prothonotary of the Supreme Court or the Registrar of the Appeal Division of the Supreme Court.

(13) All other reasonable expenses necessarily incurred, when allowed by the taxing officer."

(8) The onus is on the party awarded costs, in this case, Ms. Gillis, to establish the amount claimed for a disbursement is reasonable.

The Objections

(9) I have reviewed the Plaintiff's Bill of Costs and found them to be reasonable except as noted herein.

(10) In his Response to Taxation, Mr. Waugh listed six grounds of objection. During the hearing of this matter, two issues were resolved by agreement of counsel (i.e. Forensic Investigation and e-Carswell on-line research), while two others were decided by me at the conclusion of the hearing (Dr. Paterson's last invoice and Law Office Photocopying) to which I indicated orally how these will be determined.

<u>Forensic Investigation</u>

(11) This objection was withdrawn by the Respondent.

E-Carswell Research

(12) The Applicant's counsel agreed not to claim this amount.

Invoice of Dr. Paterson

(13) Dr. Paterson was contacted by Mr. Comeau and Mr. Hebert during the progress of the matter. He rendered a bill of $140 for his time. While the description used on this invoice is vague and ambiguous, Mr. Hebert has satisfied me that any clarification provided to him and Mr. Comeau was necessary and reasonable. I allow this amount in full.

Photocopying

(14) Mr. Waugh seeks a reduction in the amount allowed for the costs of photocopies made by his law firm and Ms. Gillis' previous counsel. He cites as authority *Burns v. Sobeys Group Inc.*, 2008 NSSC 112, and, *Poulain v. Iannetti*, 2015 NSSC 303. Based on the principles in those cases, I reduce the amount allowed to $1000 plus HST.

(15) The remaining issue is the eligibility of the expert expenses.

Expert Accounts

(16) The Respondent objects to the claim of two accounts: actuarial services and report provided by Jessie Gmeiner of Gmeiner Actuarial Services and a cost of care report prepared by Warren Comeau of Rehabilitation Alternatives Limited

The Case Law

(17) Counsel has referred me to the case of *Cashen v. Donovan* (1999), 174 N.S.R. (2d) 320 (SC). In that decision, Justice Goodfellow applied Tariff D and summarized the law relating to disbursements and expert accounts in particular:

"The onus is upon the party seeking recovery of a disbursement to establish the cost of such disbursement is reasonable. The costs sought must be reasonable, first in the context of the reasonableness of such disbursement being incurred, and secondly, in the composition and quantum of the disbursement.

There is no exhaustive list of factors to consider in determining whether or not a disbursement is reasonable but such would normally include:

1. Whether the incurring of the disbursement was necessary or appropriate.
2. The amount involved in the litigation.
3. Complexity of the issues.
4. Whether or not sufficient expert opinion was readily available without incurring the cost. *Osborne v. Osborne*, (1994) 130 N.S.R.(2d) 283, where it was held the actuarial expenditure was not at all warranted.
5. Whether the incurring of the disbursement was necessary for the conduct of the litigation.

Section 2(3)(c) deals with a reasonable cost of reports intended to be used at trial and recovery is not automatically excluded if a report is not used at trial.

In a given situation, it <u>might</u> be considered reasonable for the losing party, to an action to reimburse the costs of an expert's report, which was not utilized in evidence, i.e. the referral of a client to a specialist whose expert report addressed concerns with respect to one possible explanation for the consequences of the injuries suffered by the party in the accident. Another example might be where the engagement of the expert reduced the trial requirements by contributing to admissions or concessions.

You must remember when a person breaches her/his duty to another person causing loss and damages, all reasonable expenses incurred in advancing and establishing such loss and damages, should fall upon the tortfeasor.

6. Whether or not the expert's report was of any assistance to the court?
This determination is to be considered with number 5 and not necessarily in isolation. It has been held in:

> King v Leahy (1992) 109 N.S.R. (2d) 163
>
> [69] Actuarial evidence was tendered and the actuary, Mr. Brian Burnell, gave evidence. He readily acknowledged his reliance on the information provided to him and apparently this has been forcefully stated as the principle, "garbage in garbage out". This is a clear acknowledgment that actuarial evidence is only as reliable as the information provided.
>
> [79] Actuarial evidence should only be received where there has been evidence placed before the court which establishes with reasonable certainty the hypotheses on which the actuary is to make his calculations. Such a situation exists where there has been a total disability and it is clear that the plaintiff will not be in a position to earn income in the future. Such a situation also exists where it can be said from an appraisal of the evidence that there was a reasonable probability that the course of employment open to the plaintiff would have continued if the accident had not happened and a reasonable probability that the employment the plaintiff will be forced to take because of the accident will involve a loss of wages in the future, which loss can be calculated without recourse to speculation or conjecture.

The assumptions were so far off the mark, that the disbursement for the actuarial report was not allowed.

Kelly v. Hadley , (1995) 138 N.S.R.(2d) 272 at 295:

"It is clear from my conclusions that the actuarial evidence was of no benefit and in taxing disbursements, I would not allow any recovery for the actuarial costs."

See also Gay v. MacDonald [1998] N.S.J. No. 319.

Section 2(3)(c) permits the recovery of the "reasonable cost" of an expert's report. If only part of the report is useful at trial, then only part of the claim will be allowed *Knox v. Interprovincial Engineering Ltd.* , [1993] 120 N.S.R. (2d) 288 at 302. Additionally, if the attendance of the actuary in court was not necessary, the attendance allowance may not be coverable.

7. Professional quality of the expert's opinion.

8. Hourly rates in the profession and the extent to which the particular experts hourly rate may vary from any standard and if so, whether it is justified and to what extent.

9. The relevance of the expert opinion evidence to the issues in question.

10. Reduction in the expert's account, to the extent of any collateral benefit. *Wyatt v. Franklin*, (1993) 123 N.S.R. (2d) 347. Surveyors report in part, related to and resolved issues not within the litigation.

11. Examination of the nature of the work and time involved in the preparation of the expert's report and any possible additional time requirement to respond to any subsequent expert's reports.

(18) The list of factors provided by his Lordship are not exhaustive and from my readings of this case and others, including *Webster et. al. v. Blair*, 1991 NSSC 4499, and ,*Dow & Duggan Prefabrication Ltd. v. Smithers*, 1991 NSSC 4498, they vary in weight depending upon the circumstances. While binding on this Court, Justice Goodfellow's comments are intended to be guidelines to an Adjudicator or Justice in the exercise of his or her discretion in the taxation of experts' accounts. It is not necessary to list each consideration separately in the decision. In my view, it is sufficient to state that I have considered his comments carefully and applied them in reaching this decision.

Report of Rehabilitation Alternatives ("the Comeau Report")

(19) In the Trial Decision, Justice Hood stated the following in regard to the injuries suffered by Ms. Gillis:

"I have concluded that the tank falling on her did not cause Kathy Gillis' current lower back problems. I

conclude she suffered soft tissue injuries to her lower back which resolved by the end of November 1996."

(20) With respect to the Comeau Report, she stated the following with respect to the claim for valuable service:

[250] Since the decision in *Carter v. Anderson* (1998), 160 D.L.R. (4th) 464 (N.S.C.A.), it is clear there can be an award for loss of valuable services which is to be compensated separately from general damages.

[251] Warren Comeau has calculated this loss to be $42,916.76 based upon his anticipated yearly costs and the multiplier used by Jessie Gmeiner in her report. However, the costs he calculated were based upon his conclusion, at p. 6 of his report, that "Ms. Gillis suffered an injury to her back on August 4, 1996...." I have concluded that Kathy Gillis' current chronic pain and back problems are unrelated to that accident. Mr. Comeau's calculations, about which I need express no opinion, relate to costs he says will result from Kathy Gillis' current condition. They are, accordingly, not the responsibility of the Intervenor..

(21) Justice Hood went on to disallow other heads of damages supported by Mr. Comeau's analysis. The Respondent submits Mr. Comeau's evidence was unnecessary given that it assumes the plaintiff's long term conditions are the result of the tank falling on her rather than attributable to the other incidents. Accordingly, it fails to meet most of the criteria outlined by Justice Goodfellow.

(22) In the Trial decision, Justice Hood reviewed Ms. Gillis' medical history and the medical reports in evidence. She then reviewed the law and evidence related to causation of the injuries. After a thorough and careful analysis, she determined the plaintiff's injuries from the 1996 accident had resolved themselves by November of that year. The pain she suffers arises from other incidents. Such an analysis and conclusion accounted for 227 of 281 paragraphs of her Ladyship's decision.

(23) Put another way, the finding of causation of Ms. Gillis' injuries was not a foregone conclusion. Furthermore, valuable services has been a recognized head of damage since our Court of Appeal's decision in *Carter v. Anderson*. Had more of Ms. Gillis' injuries and pain been attributable to the 1996 tank accident, it would have been imprudent of her counsel not to come ready to argue for compensation for valuable services and the other heads of damage addressed by Mr. Comeau. In making that comment, I cannot predict how much of the report or evidence would have been accepted.

(24) While I am concerned about the size of the account, I do not feel it unreasonable in the circumstances. Additionally, I found the evidence was necessary.

(25) I allow the amounts charged by Rehabilitation Alternatives.

Gmeiner Actuarial Services Inc.

(26) Jessie Gmeiner prepared a report which was referenced by Mr. Comeau. Her report received only passing reference by Justice Hood in her decision. Ms. Gmeiner did not give evidence at trial.

(27) It would not be appropriate for me to comment on Ms. Gmeiner's report as it did not receive judicial commentary. In addressing the costs of a report for an expert who did not testify, the late Justice Gruchy stated the following in *Dow & Duggan (supra)*:

"This account while it may have been reasonable, does not appear to have been necessary."

(28) I find the plaintiff has not discharged the onus upon her to show this disbursement was reasonable and necessary. I disallow the fees charged by Gmeiner Actuarial Services Inc.

Taxation

(29) In summary, I have disallowed the services provided by Gmeiner Actuarial Services ($10,915 plus tax) and reduced the office copying to $1000 plus $150 HST (a reduction of $1185.87 plus $177.88 tax or $1363.75). Mr. Hebert has agreed to withdraw the claim for electronic legal research ($1620.50). I have allowed the remaining items, including the other items objected to by the Respondent/Intervenor. The bill is taxed and allowed as follows:

Amount Claimed	
Total Disbursements	$42,084.68
Tax	$ 4,544.49
Subtotal	$46,629.17

Disallowed	
Gmeiner Actuarial	$12,552.25
Photocopies	$ 1,363.75
e-Carswell Charges	$ 1,620.50
Total disallowed	($15,536.50)

Taxed and Allowed	**$31,092.67**
Taxation Fee	$ 99.70
Total	**$31,192.37**

(30) I have signed the Certificate of Taxation accordingly.

Dated at Halifax, NS,
on August 8, 2018

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Gregg W. Knudsen, Adjudicator

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Original: Court File
Copy: Applicant(s)
Copy: Respondent(s)