

NOVA SCOTIA COURT OF APPEAL  
Cite as: Desrosiers v. MacPhail, 1998 NSCA 158  
Freeman, Hallett and Bateman, J.J.A.

**BETWEEN:**

DR. JACQUES DESROSIERS and	)	Daniel M. Campbell, Q.C. &
JEAN PALMER	)	Colin J. Clarke
	)	for the Appellants
	)	
Appellants	)	
	)	Robert L. Barnes, Q.C.
- and -	)	for the Respondents
	)	Wanda & Craig MacPhail
	)	
WANDA MacPHAIL, CAROL M. NEWBURY,	)	Suzanne M. Fougère
WILLIAM EDWARD NEWBURY, CRAIG	)	for Wanda MacPhail
MacPHAIL, SUSAN ARSENAULT and	)	Appellant on cross-appeal
OSCAR ARSENAULT	)	
	)	
	)	Ronald Pizzo and
	)	Pauline A. Doucette
Respondents	)	for the Respondents
	)	Carol M. & William
	)	Newbury
	)	
	)	Appeal Heard:
	)	May 20, 1998
	)	
	)	
	)	Supplementary Decision
	)	on Costs:
	)	November 9, 1998
	)	

**SUPPLEMENTARY DECISION ON COSTS**

**HALLETT, J.A.:**

During oral argument on the appeal, counsel for the parties asked the Court to receive submissions on costs after the decision of the Court was released. The decision has been released. The Court dismissed the defendant's appeal from the trial judge's finding that they were negligent and that their negligence was the sole cause of the injuries suffered by the respondent MacPhail in a motor vehicle accident. However, the Court allowed the appeal from the quantum of the damage award made by the trial judge.

The Order of the trial judge provided:

..... that the Plaintiff, Wanda MacPhail, shall have judgment, jointly and severally, against the Defendants, Dr. Jacques Desrosiers and Jean Palmer, in the amount of \$724,547.66 together with prejudgment interest in the further amount of \$9,105.00;

**IT IS FURTHER ORDERED** that the Plaintiff, Wanda MacPhail, shall have her costs against the Defendants, Dr. Jacques Desrosiers and Jean Palmer, in the amount of \$41,393.00 together with disbursements to be taxed;

**IT IS FURTHER ORDERED** that the Plaintiffs, Carol M. Newbury and William Edward Newbury, shall have judgment, jointly and severally, against the Defendants, Dr. Jacques Desrosiers and Jean Palmer, with damages and costs to be assessed.

The Court has received and considered the written submissions of counsel on costs.

In fixing trial costs of \$41,393.00 plus disbursements, the trial judge used Tariff A, Scale 3 and applied a gross up, as agreed to by the parties, to take into account the fact that the trial judge's award exceeded an offer of settlement that was made by the respondent MacPhail pursuant to **Rule 41A** but was not accepted by the appellants. Therefore, the provisions of **Rule 41A.09** were triggered. This **Rule** provides for increased costs in such circumstances.

With respect to party and party costs, **Civil Procedure Rule 63.08** provides:

**63.08** The costs of an appeal and of the proceeding in the court below shall be as directed by the judgment of the Nova Scotia Court of Appeal, or in default of direction shall be in accordance with the applicable provisions of Tariffs.

Tariff A provides that on an appeal "the fees allowed shall be 40% of the sum determined by the Appeal Division of the Supreme Court under the Scale above".

A copy of Tariff A is attached as Schedule "A".

The use of the word "shall" with respect to the calculation of costs on appeal does not prevent the Appeal Court from exercising its discretion with respect to costs to be awarded on an appeal.

The sum fixed by the trial judge for costs on the trial should be reduced to reflect our reduction of \$111,172.00 in the damages awarded by the trial judge to the

respondent MacPhail. I accept the calculations of MacPhail's counsel that the trial costs be reduced to \$34,564.00 plus disbursements.

The trial judge did not err in ordering that the trial costs of the respondent Newburys be determined after the Newburys' damages are assessed. In my opinion, this was a valid exercise of the trial judge's discretion. This is so because costs are fixed under Tariff A in relation to "the amount involved". It goes without saying that until damages are assessed with respect to the respondent Newburys' injuries, it is difficult, if not impossible, to assess what, if any, costs of the trial before MacLellan, J. on the liability issue should be awarded to the Newburys.

With respect to the respondent Newburys' costs on the appeal, I would fix these costs at \$1,000.00 plus disbursements. The Newburys succeeded on the appeal in the sense that the appeal against liability was dismissed. Counsel for the Newburys had a backup position. He submitted that if the appeal on the liability issue were to be allowed by the Court, we should find that the respondent MacPhail was negligent in the manner she drove her motor vehicle which struck the motor vehicle in which the Newburys were passengers. The submissions of Newburys' counsel on appeal dealt exclusively with this latter issue. This Court found that the trial judge did not err in finding that MacPhail was not negligent. Considering the minor role played by Newburys' counsel on the appeal, a cost award of \$1,000.00 plus disbursements is appropriate compensation.

The principal cost issue before us was the determination of costs on appeal as between the appellants and the respondent MacPhail.

Counsel for the appellants submits that as there was divided success on appeal, the appellants, having failed on the appeal on the liability issue but succeeding on the damage issue, that there be no costs to either the appellants or the respondent MacPhail.

Counsel for MacPhail disagrees; he submits that liability was the far more important issue before this Court and that this should be recognized by the Court in considering what is an appropriate cost award. I agree.

I also agree with the submission of counsel for the appellants that the costs on appeal should be calculated at 40% of the trial costs calculated by the application of Tariff A without applying any gross up of trial costs made pursuant to **Rule 41A**. This interpretation necessarily flows from the wording of Tariff "A" with respect to costs to be awarded on appeal.

The order of Justice MacLellan fixed the respondent MacPhail's damages at \$724,547.00. We accept that in this case the amount awarded is the "amount involved". In exercising this Court's jurisdiction respecting costs, I would deduct from this sum \$111,172.00 being the amount by which we reduced the damage award. Applying Column 3 of Tariff A to the reduced figure produces the sum of \$25,765.00; 40% of

which is \$10,306.00. There should be recognition in the appeal cost award of the fact that the appellants succeeded in having the damage award reduced. The sum of \$10,306.00 should be reduced by twenty percent (20%). Eighty percent (80%) of the sum of \$10,306.00 is \$8,245.00 which I would round off to \$8,000.00. Therefore, I would fix the costs of the appeal payable by the appellants to the respondent MacPhail at \$8,000.00 plus disbursements.

Counsel for MacPhail's insurer, who represented MacPhail as defendant in the action commenced by Newbury, played no more than a watching role both at trial and on appeal. He seeks costs of the trial and on appeal equivalent to the costs awarded to MacPhail as a plaintiff/respondent. Costs are awarded to the party, not to counsel.

The Order of the trial judge did not provide for costs of MacPhail as a defendant in the consolidated proceedings. There was no appeal or notice of contention filed by MacPhail as a trial defendant respecting the issue of costs. Therefore, I agree with counsel for the appellants that the issue is not properly before us.

With respect to the claim for costs by MacPhail in connection with the

services of her insurers' counsel on the appeal, I would not make any order for costs as counsel did not participate in the appeal.

Hallett, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.

