IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Willis v. Bernard L. Mailman Projects Limited 2008 NSSC 94

Date: 20080402
Docket: SBW 196764
Registry: Bridgewater

Between:

Deborah E. Willis

Plaintiff

v.

Bernard L. Mailman Projects Limited
and Doyle Patrick Dorey

Defendants

INTEREST AND COSTS DECISION

Judge: Justice Suzanne M. Hood

Heard: February 13, 2006, in Halifax, Nova Scotia

Written Decision: April 2, 2008

Counsel: Donald L. Pressé and Glenn Jones, for the plaintiff
Nancy Murray, Q.C. and Patricia Mitchell, for the defendants

By the Court:

INTRODUCTION

[1] In a decision dated June 29, 2007, the plaintiff was awarded damages for loss of valuable services, special damages, future care costs, diminution of earning capacity and pension loss. The period of lost income was also calculated. The parties have now agreed on the amount of that lost income. They could not agree upon interest and costs.

ISSUES

1. Interest
   a. Period for interest
   b. Calculation of interest where advance payments were made

2. Costs
   a. Who should get costs and the effect of offers on costs;
   b. Fixing the amount of costs:
      (i) Old or new tariff
      (ii) Scale

(iii) Amount involved

(iv) Amount of costs

1. Interest

a. Period for interest

[2] The motor vehicle accident occurred in January 1996. The trial was held in September 2006. The defendants say there has been a delay in bringing the matter to trial and interest should be limited in time. The plaintiff says there is good reason for the delay and there should be no limitation on the time period for the payment of interest.

[3] The following is a time line of relevant events with respect to the interest calculation:

January 12, 1996 - motor vehicle accident

August 15, 2000 - interim payment of $100,000.00

August 15, 2002 - notice of trial filed by plaintiff

September 30, 2002 - date of October 27, 2003 set for trial

April 24, 2003 - application for further interim payment of $100,000.00; $40,000.00 granted, May 20, 2003

October 3, 2003 - request for adjournment of original trial dates

September 22, 2004 - defendants apply for new trial dates

September 24, 2004 - order permitting plaintiff's counsel to withdraw

October 2004 - trial rescheduled to October 24, 2005

Summer 2005 - trial adjourned because plaintiff received new medical information which was to be admitted at trial and defendant was then granted the opportunity for further IME's

September 2006 - trial.

[4] The plaintiff seeks interest for the entire period until judgment. The defendants say interest should be paid only to one of the following dates:

February 2002 - the date on which I concluded the plaintiff could have returned to work full-time;

October 2002 - the date of the defendants offer of $375,000.00 in addition to the $100,000.00 already paid;

October 2003 - the originally scheduled trial date.

[5] The first question to be answered is whether, as the defendants submit they should, offers have any role to play in determining for what period interest should be paid. I conclude they do not, unless they played a role in the delay in bringing the matter to trial. I conclude that, in this case, the offers did not contribute to delay.

[6] A series of offers were exchanged before the originally scheduled trial date of October 2003. Just before that trial date, the defendant withdrew all of its offers but there is no indication that was the reason for the adjournment of the October 2003 trial dates. The plaintiff says it was the defendants' settlement position that caused delay. However, there is nothing before me to indicate that dealing with defendants' offers caused any delay. After withdrawing its offers in September 2003, the defendants' next offers were made in July 2004, at a time when no new trial dates had been set, and in May 2005, by which time trial dates had already been set for October 2005. It does not appear that there were lengthy negotiations around the time of these settlement offers. The plaintiff says these offers were too low and, in light of that, I fail to see how outright rejection of offers hundreds of thousands of dollars less than the plaintiff's demands could have delayed her in

getting to trial. I therefore see no evidence that offers played any role in the length of time between January 12, 1996 and the start of the trial of September 5, 2006.

[7] The defendants say if I award interest beyond the period when I found that the plaintiff could have returned to work full-time, it would encourage higher claims. In my view, that is an issue for costs not interest. If the plaintiff is entitled to damages, she is entitled to interest on the money for the period for which she has been without it. That is the purpose of awarding interest. Interest compensates the plaintiff for the detriment arising from the delay in the damage award being made and prevents the defendants from a windfall by having the money for the intervening period. To conclude otherwise would, in my view, encourage defendants to hold off paying as long as possible to retain the benefit of having the money. The defendants have provided me with no authority supporting their submission and I decline to create such authority.

[8] The issue then is one of determining what interest I should award.

[9] The *Judicature Act,* R.S.N.S. 1989, c. 240, in ss. 41 (i) and (k) provides for the payment of interest on judgments as follows:

> **41** In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> (i) in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
>
> ...
>
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation.

[10] The usual rule is that interest is paid for the entire period from the date of the motor vehicle accident to the date of judgment. The exception is set out in ss. (k). I must therefore determine if the claimant has caused "undue delay" before I exercise my discretion in this regard. As Moir, J. said in *D.W. Matheson & Sons*

Contracting Ltd. v. Canada (Attorney General) (1999), 175 N.S.R. (2d) 201 (N.S.S.C.) at para. 182:

> ... a finding of undue delay is necessary before any discretion arises.

[11] The parties disagree about who bears the burden on this issue. In my view, the party alleging the usual rule should not apply (the defendant) bears the burden of establishing undue delay. The plaintiff does not have to establish entitlement to interest payable in the usual way.

Has There Been Undue Delay?

[12] The question has been posed as "Is the delay ... excessive or unwarranted?" (*Central Automatic Sprinkler Ltd. v. Trident Construction Co.*, 2000 CarswellNS 119 at para. 242). Length of delay is not determinative. The circumstances of each case must be considered in deciding the question of whether there is a satisfactory explanation for the delay.

[13] I conclude that the February 2002 date when the plaintiff could have returned to work is not the appropriate period to consider in determining payment

of interest, nor is the date of the defendants' substantial offer of settlement, as I have concluded above. The earliest trial date set was October 2003, almost eight years post-accident. I have no evidence of delay in bringing the matter to trial before that date. Interest should be payable at least to that date. I must consider whether it should be paid thereafter.

[14] The defendants assert that an alternative date for the end of the period for the payment of interest is the first date set for trial, October 2003. They say the matter should have gone to trial then. The plaintiff says the report of Dr. Heitzner, one of the defendants' experts, was only received in early September 2003 as were the copies of the surveillance videotapes. She says time was needed to deal with both. The defendants say Dr. Heitzner's report was delivered six weeks prior to trial and they did not have to disclose the surveillance material until ten days before trial but in fact disclosed it a month before trial.

[15] I must consider the conduct of the plaintiff leading up to the adjournment of the trial date in October 2003. The request to adjourn the October 3 trial date was, in my view, unnecessary. Dr. Heitzner's report was received somewhat later than everyone would have wished but not so late that, standing alone, it would have

been cause to adjourn the trial. In my view, the principal reason for the adjournment request was to deal with the evidence of the plaintiff's activities shown in the video surveillance. I conclude that led to an unwarranted and excessive delay in bringing the matter to trial. It is not a sufficient reason for a delay of almost three years.

[16] I concluded at trial that the activities shown on the videotaped surveillance were representative of the plaintiff's abilities and rejected her explanation for those activities. The plaintiff's efforts, during the period of adjournment, to explain away the activities she engaged in during the period of video surveillance were unsuccessful. The delay caused by the adjournment for that purpose was undue.

[17] I therefore conclude that interest should be payable only to the original trial date of October 27, 2003.

[18] The defendants also dispute whether interest should be paid on the award for diminution of earning capacity. In my decision, I concluded that the plaintiff had a diminution in earning capacity from February 2002 to June 2004 of $10,000.00 and a future diminution of earning capacity of $20,000.00. In my view, she is

entitled to interest on the past diminution of earning capacity up to October 2003 but not on the award of future diminution of earning capacity.

b. Calculation of Interest

[19] The defendants proposed a method of calculation of interest on past loss of income which they say was put forward by their actuary, Mr. Tarrell. The plaintiff says that proposal is unduly complicated and it is simpler to use the dates referred to in the decision. The defendants concede that either method, if used consistently, should have the same result. I am satisfied that would be the case but prefer the simpler calculation. It is a calculation used by Gruchy, J. in *Skeffington v. McDonough* (1992), 114 N.S.R. (2d) 181, 1992 CarswellNS 548 (N.S.S.C.T.D.). Gruchy, J. said in para. 10:

> 10 ... There are two methods readily available to reflect the accrual of the loss. The first is simply to assume the loss occurred at a point in time half way during any period under consideration and then to calculate the loss at the appropriate rate from that point of time. The second, amounting to the same thing, is to calculate the interest for that period at one-half the rate.

[20] The same approach was taken by Goodfellow, J. in *Cameron v. George* (1999), 178 N.S.R. (2d) 142, 1999 CarswellNS 206 (N.S.S.C.).

[21] Gruchy, J. used the mid-point of each period and the rate of interest he concluded was appropriate. I conclude this is the appropriate method to use in this case. The parties here have said they should be able to agree on the appropriate rate of interest, failing which they will make written submissions.

[22] In *Skeffington*, Section B payments had been made. Gruchy, J. said in para. 13:

> 13 ... they should be deducted from the loss at the time of the advance, thereby reducing the total interest to which the plaintiff is entitled.

I conclude that is the proper approach for the two advances made in this case: $100,000.00 paid on August 17, 2000 and $40,000.00 paid on May 15, 2003.

[23] In the case of the past diminution in earning capacity, the calculation of interest will be done in the same fashion with an end date of October 27, 2003.

2. Costs

a) Who should get costs?

[24] The plaintiff says she is entitled to her costs. The defendants say they should have their costs of $150,000.00 after either October 2002, when they made a substantial offer, or October 2003 when the trial was adjourned because of the surveillance videos. They said otherwise it would encourage plaintiffs to make unreasonable claims.

[25] The usual rule is that costs to the successful party follow the event. *Rule 63.03(1)* provides

> **63.03.**
>
> (1) Unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event.

[26] Costs are, however, in the discretion of the court. As Goodfellow, J. said in *Rhyno Demolition Inc. v. Nova Scotia (Attorney General)*, [2005] N.S.J. No. 225, 2005 NSSC 147 in para. 14:

> 14 ... That discretion must be exercised judicially. Civil Procedure Rule 63.03 makes it clear that unless the court otherwise orders, the costs of proceeding shall follow the event. The use of the mandatory direction 'shall' indicates that any departure from this basic direction must be justified by the circumstances of the particular proceeding.

[27] If I am to award costs in other than the usual way, there must be good reason for exercising my discretion to do so. Goodfellow, J. continued in *Rhyno* at para. 27:

> 27 In most of the cases where there is a denial or a substantial reduction in costs, the conduct of the successful party had a causal connection to the conduct of the litigation.

In that case, the party entitled to costs received a reduced costs award because of what Goodfellow, J. referred to as its "deceit" (para. 28) before the action commenced (para. 29). He reduced that party's costs by twenty percent.

[28] In *Hannah* v. *Canadian General Insurance Co.* (1989), 92 N.S.R. (2d) 271, [1989] N.S.J. No. 258, Hallett , J. (as he then was) (at p. 6 Quicklaw version) referred to Orkin's <u>Law of Costs</u>, 1987, Second Edition, quoting from the author at p. 2-11 as follows:

> The principle that a successful party is entitled to his costs is of long standing, and should not be departed from except for very good reasons ...
>
> (a) Misconduct of the parties. A ground for disallowance of costs may be found in the conduct of the parties either before or during the litigation. Thus a successful party may be disentitled to all or part of his costs if ... the litigation might have been avoided if the plaintiff had prepared certain documents properly ... or where the plaintiff presented a grossly exaggerated claim that took an excessive amount of time to try; ...

[29] The plaintiff received approximately fifteen to twenty percent of the claim he put forward at trial. Hallett, J. said at p. 7 (Quicklaw version):

> In conclusion on this aspect of the decision, the plaintiff should not be awarded full costs simply because he succeeded in obtaining a judgment. The plaintiff's claim was grossly exaggerated and unfounded and this should not be encouraged by awards of costs. The plaintiff shall have thirty-five per cent of his party and party legal fees to be taxed and one hundred per cent of his disbursements as taxed. With respect to the latter, the Taxing Master will be able to assess the reasonableness or lack of the same when he sees the final accounts of the expert witnesses.

[30] The defendants in this case say the trial was longer because of the time it took to deal with the video surveillance material. Most of the experts who testified were shown excerpts from the surveillance and asked to comment on it. The plaintiff herself commented on the activities shown on the surveillance. The plaintiff says the trial length would not have been affected had the claim been equal to the award. However, the evidence about the surveillance would not have

been necessary if there had been agreement that the plaintiff had recovered to the point where she could do the activities shown in the video. I conclude that it took a significant portion of the court's time to show Dr. Mahar, Dr. Heitzner, Dr. Yabsley, Dr. Eisener, Dr. Kelland and Darlene Sanford, the physiotherapist, excerpts from the videotapes and to have them comment on them.

[31] In addition, Dr. Mahar, Dr. Heitzner and Dr. Yabsley had watched all of the videotaped surveillance prior to trial and Dr. Mahar had made notes on it which were entered as an exhibit and about which he was questioned. In their reports, Dr. Heitzner and Dr. Yabsley addressed their conclusions after viewing all of the videotapes. They were questioned about these parts of their reports at some length. All of this took substantial time as did the questioning of the plaintiff about her activities and her alleged Dilaudid usage. A number of experts were questioned about Dilaudid and their knowledge of the plaintiff's alleged usage of it. As a result, I conclude the trial was lengthier because of the position the plaintiff took about her abilities in the summer 2003 when the surveillance was done.

[32] This brings me to the issue of the offers of settlement made in the time before the trial.

[33] *Rule 41A* provides as follows:

41A.03. An offer to settle may be made at any time 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)).

[34] There were various offers as follows:

Party	**Amount**	**Rule 41A**	**Date**
Plaintiff	$752,788.97		July 6, 1999
Defendants	$300,000.00		Nov. 8, 1999
Plaintiff	$750,000.00		March 14, 2000
Defendants	$475,000.00		April 27, 2000
Plaintiff	$750,000.00		May 3, 2000
Defendants	$300,000.00	YES	June 2, 2000
Defendants	$409,000.00	YES	June 5, 2000
(Amended 41A offer after payment of $66,000 general damages and PJI)			
Plaintiff	$634,000.00 *($700,000 less $66,000 already paid)*		July 17, 2000
Defendants	$375,000.00 *(in addition to $100,000 advance and $66,000 already paid)*	YES	Oct. 9, 2002
Defendants	Withdrew all offers		Sept. 23, 2003
Defendants	$52,000.00 *(in addition to $140,000 plus $66,000 already advanced*)		July 26, 2004
Defendants	$20,000.00 *(in addition to amounts already paid)*		May 20, 2005
Plaintiff	$350,000 plus PJI *(in addition to amounts already paid)*		Sept. 1, 2006

[35] The defendants withdrew their previous *41A* offer on September 23, 2003, approximately one month before the originally scheduled trial dates and after receiving the surveillance material. There were no *Rule 41A* offers outstanding at the time of trial in September 2006. Accordingly, *Rule 41A.03* does not apply because any *Rule 41A* offers had been revoked.

[36] However, *Rule 41A.11* gives the court discretion to consider offers. It provides:

> **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.

[37] In this case, the damage award totalled $272,053.09 without prejudgment interest or costs. All but one of the offers that were made, and which I may consider pursuant to *Rule 41A.11*, were inclusive of costs and interest. The exception was the plaintiff's offer of September 1, 2006 which excluded pre-judgment interest. None of the offers were close to the amount of damages

awarded. The plaintiff's offers were consistently substantially higher, the lowest being a total of $490,000.00 plus pre-judgment interest, in other words, well over $500,000.00.

[38] The defendants' offers fall in to two categories: those made before and those made after the surveillance was done and provided to the defendants in September 2003. As noted above, the defendants' largest offer, excluding general damages (which were not in issue at trial) was a *Rule 41A* offer of $409,000.00 made in June 2000. After the surveillance material was disclosed and the earlier offers withdrawn, the defendants offered a total of $192,000.00 ($52,000.00 plus $140,000.00 already advanced) in July 2004 and $160,000.00 ($20,000.00 plus $140,000.000 already advanced) in May 2005, just a few months before the trial dates then set for October 2005.

[39] The courts have considered the effect of *Rule 41A.11*. In *Goode v. Oursen* (1991), 105 N.S.R. (2d) 389 (sub nom. *Goode v. Oursen* (No. 3)), CarswellNS 554 (N.S.S.C.T.D.), Grant, J., in para. 25, distinguished between *Rule 41A.09* and *Rule 41A.11*. He said:

> 25 18. 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.

In para. 26, he said the purpose of *Rule 41A.11* was:

> 26 ... 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.

[40] I must consider what effect, if any, offers have on costs. In doing so, I am mindful of the purpose of settlement offers and *Rule 41A*. It has been stated in various ways. Goodfellow, J. in *Annand v. Cox (Peter M.) Enterprises Ltd.* (1992), 111 N.S.R. (2d) 196, 1992 CarswellNS 367 (N.S.S.C.) said at para. 50:

> 50 In my view, an offer to settle is a major means by which a party to litigation can try and insulate that party from costs being awarded against it and hopefully alleviate, in part at least, the expense to which that party incurs in having to participate in litigation.

He repeated that quote in *Roshanimeyden v. Mina Developments Ltd.* (2006), 241 N.S.R. (2d) 139, 2006 NSSC 39, 2006 CarswellNS 54 at para. 22.

[41] In *Ismaily (Guardian ad litem of) v. Dartmouth Surplus Ltd.* (1992), 114 N.S.R. (2d) 171 (sub nom. *Ismaily v. Dartmouth Surplus Ltd.*), 1992 CarswellNS 547 (N.S.S.C.T.D.), Tidman, J., in para. 11, said:

> 11 In all three of the cases cited by Mr. Jackson it was emphatically stated that the court in dealing with the issue of costs ought to exercise its discretion in a manner which encourages litigating parties to settle. The object, of course, being to avoid lengthly *(sic)* and expensive trials. In support of that principle I agree that the court must, whenever possible, encourage settlements. However, in exercising its discretion, the court's foremost responsibility is to do so reasonably and fairly after considering all the relevant circumstances.

[42] What costs award would best further the objective of avoiding the costs of trial and giving protection from a costs award to a party making a reasonable offer?

[43] I compare the offers made to the result at trial (ignoring the settlement of the general damages claim). Until just before trial, excluding the general damage award previously settled, the plaintiff sought a settlement of more than $600,000.00. After the disclosure by the defendants of the video surveillance material, the plaintiff made no offer to settle until four days before trial. That offer would, with pre-judgment interest, still have exceeded $500,000.00. Comparing the new amount sought to what was awarded, the plaintiff was still seeking an additional $350,000.00 inclusive of costs but not pre-judgment interest, while the

net effect of the court's damage award was an additional $132,000.00 exclusive of both costs and pre-judgment interest.

[44] The defendants had made substantial offers to settle before the video surveillance was done: $409,000.00 all inclusive in June of 2000 and $475,000.00 all inclusive in October 2002. They then withdrew their offers and subsequent offers were strikingly smaller in comparison ($192,000.00 and $162,000.00, both all inclusive, in 2004 and 2005). Comparing the new money offered to the award at trial, their offers were $52,000.00 and $20,000.00 all inclusive compared to the net award of $132,000.00 plus costs and pre-judgment interest (not including the $140,000.00 already paid).

[45] The defendants' later offers were closer to the court award than the plaintiff's offer just before trial. However, there was still a substantial difference between the defendants' offers of $192,000.00 and $160,000.00 and the award at trial of $272,000.00, therefore, in my view, not close enough to result in a reversal of the usual rule.

[46] I conclude that this is not an appropriate case for a costs award in favour of the defendants. This case is unlike that of *Annand*, *supra*, where the defendants' offer matched the court award. In that case, although the offer was made only two days prior to trial, Goodfellow, J. awarded a small amount of costs in favour of the defendant.

[47] The objectives of making offers to settle can, in my view, be met in the circumstances of this case without entirely depriving the plaintiff of her costs. This approach has been followed in a number of cases.

[48] In *Hannah*, *supra*, Hallett, J. concluded the claim was grossly exaggerated. He said on page 7 (Quicklaw version):

> As a general rule, as stated by Orkin, a plaintiff who has been successful should not be deprived of his costs lightly. However, as noted by Orkin there are grounds to deprive a plaintiff of his entire costs if the claim was grossly exaggerated, which is what I found in this case. At p. 2 of the main decision rendered in this case, I stated:
>
> > 'I find the blasting did cause some damage to the plaintiff's dwelling and some damage to the stone retaining walls but not all the damage for which the plaintiff had filed his proof of loss or the claim put forward at trial. The plaintiff's claim is in some respects greatly exaggerated and in others unfounded and unproven. The plaintiff's evidence in a number of areas is not credible and the opinion evidence as to the cause of the damage he

> seeks to have repaired has significant weaknesses as to the cause of the distress found in the dwelling by the plaintiff's expert engineer.'
>
> Later in the decision I set out in detail the basis for this finding.
>
> The plaintiff's claim was greatly exaggerated and he should not be entitled to his full costs. However, I think there should be some latitude.

Even having so concluded, he awarded the plaintiff, as noted above, a portion of his party/party costs.

[49] In *Rhyno, supra*, the successful defendants' costs were reduced by twenty percent. In *Curry Estate v. Burke*, [1990] N.S.J. 54 (N.S.S.C.T.D.), Hallett, J. declined to do as he had done in *Hannah*, saying in the last paragraph:

> I reject the defendant's argument that the plaintiff's claim was so exorbitant that the plaintiff should only be awarded a percentage of her costs as was done in *Hannah v. Canadian General Insurance Company* (1989), 92 N.S.R. (2d) 271. This case cannot be compared to the Hannah case as the duration of the trial was not affected by the amount of the plaintiff's claim which was the situation in the Hannah case.

[50] In *Novak v. Co-operative Fire & Casualty Company* (1980), 32 N.B.R. (2d) 91, 1980 CarswellNB 320, (N.B.Q.B.), Creaghan, J. said at paras. 53 and 54:

> 53 ... I am not of the opinion that the defendant is entitled to any costs. On the other hand this does not appear to be a case where the plaintiff should be allowed full costs including the expense of bringing Frederick Novak from Alberta. The plaintiff *(sic)* claims for the contents has failed; his claim for the dwelling is less than 75 percent successful; his excessive claim was unjustified and probably made it impossible for the defendant to negotiate a settlement.
>
> 54 Having considered the above and various other matters, some of which need not be mentioned, I allow costs to the plaintiff representing 50 percent of his normal party and party costs based on an award of $71,600.00.

[51] In *Weeks v. Weeks* (1977), 18 Nfld. & P.E.I.R., 1977 CarswellPEI 37 (P.E.I.S.C.), MacDonald, J. awarded the plaintiff one-third of his costs because he received only approximately ten percent of his claim. He said in para. 29:

> 29 ... Because of this extreme disparity between the claim and the amount received, I would only allow the plaintiff one-third of his taxed costs.

[52] In this case, I concluded that the plaintiff's claims were largely unfounded and her explanation for the activities shown on the video surveillance not credible. I concluded she could have returned to work full-time in February 2002 yet she did not do so until June 2004. Even in her offer dated September 2, 2006, five days before trial, she maintained that she would continue to suffer a loss of earnings in future. I concluded she had a modest diminution of earning capacity.

[53] As I have said above, I also conclude that the trial was lengthier because of the plaintiff's position on the surveillance videos and her activities depicted therein. In a case where the claims were greatly exaggerated and the trial was longer because of the plaintiff's unreasonable position with respect to the evidence in the surveillance videos, it is, in my opinion, appropriate to reduce the costs award to her, although she is the successful party. The damage award (without costs and interest) was approximately fifty percent of the plaintiff's last settlement offer, approximately forty percent of the $700,000.00 she had previously offered to settle for and just over one-third of the $800,000.00 claimed in her counsel's closing submissions to the court. Had the plaintiff accepted one of the defendant's earlier offers, she would have been better off than with the award from trial. That would have saved eleven days of trial and substantial time in preparation by counsel for both parties. The defendants, in the course of their submissions, indicated legal fees of almost $280,000.00 had been incurred by them to a date before the written post-trial submissions were completed. The largest portion of these costs was incurred after the dates of the defendants' substantial offers.

[54] Yet the plaintiff persisted in her unreasonable demands. This is, in my view, a situation similar to that in *Goode*, *supra*, where Grant, J. said in para. 49:

> 49 25. ... it appears to me that no reasonable offer prior to trial, would have been accepted by the plaintiff.

Here the defendants' offers, as it turned out, were more than reasonable and their non-acceptance resulted in the expense of an eleven day trial.

[55] Under the circumstances, the plaintiff is entitled to a reduced award of costs. She shall have fifty percent of her costs.

[56] I now turn to fixing the amount of the costs.

b. Fixing the Amount of Costs

(i) Old or new Tariff

[57] The plaintiff seeks her costs based upon the new tariff which took effect on September 21, 2004. She relies upon the decision in *Conrad v. Bremner* (2006), 242 N.S.R. (2d) 330, 2006 CarswellNS 119, 2006 NSSC 99.

[58] The defendants say costs should be based on the old tariff, since this action was commenced in 2000. They rely upon the decisions in *Bevis v. CTV Inc.*, [2004] N.S.J. No. 454, 2004 NSSC 209; *Little v. Chignecto Central School Board*, [2004] N.S.J. No. 494, 2004 NSSC 265; *Boutilier v. Boutilier Estate*, [2005] N.S.J. No. 23, 2005 NSSC. 16 and Driscoll v. *Crombie Developments Ltd.* (2006), 247 N.S.R. (2d) 289, 2006 NSSC 262, 2006 CarswellNS 395.

[59] I conclude that the result in the latter cases is preferable. As Moir, J. said in *Bevis* in para. 7:

> 7. ... The new Tariff of Costs and Fees was certified by the Costs and Fees Committee on 1 September 2004 and was approved by the Minister of Justice on 21 September 2004 and was published on 29 September 2004. Under s. 2(5) of the Costs and Fees Act, RSNS 1989, c. 104, the new Tariff comes into force 'upon publication in the Royal Gazette or at such other time subsequent to publication as the Costs and Fees Committee may determine.' The committee recommended that the new tariffs should 'have no retroactive effect' and should 'apply to proceedings commenced after they came into effect' except that the new Chambers Tariff 'could be adopted as practice immediately'. Consequently, this action would fall under the old Tariff system.

[60] The *Costs and Fees Act* governs the setting of costs and fees. It was not cited by B. MacDonald, J. in *Conrad*, *supra*. Accordingly, I conclude that the old tariff applies to this proceeding, which commenced before the new tariff came into force having no retroactive effect in a case like this.

(ii) Scale

[61] Both parties agree that the higher scale, Scale 4 of the old tariff, should apply because of the length and complexity of this matter. The trial was eleven days; a number of the experts' reports were submitted by consent without the experts testifying; the exhibits, including the medical reports, were voluminous; and the medical issues which had to be addressed were numerous. The trial was delayed on two occasions. Approximately twelve hours of videotaped surveillance was in evidence which, if played at trial in total, would have lengthened the trial by somewhat more than two days. By agreement of the parties, the court was able to view this evidence before trial.

[62] For all these reasons, I agree with counsel that Scale 4 is the appropriate scale. In *Hines v. Englund* (1993), 124 N.S.R. (2d) 156, 1993 CarswellNS 189, Stewart, J. allowed costs on Scale 4 referring in para. 26 to:

> 26 ... the length of the trial, the number of expert witnesses, the preparation required both at discovery and at trial, the numerous medical reports and documentation, and the detailed medical questions and actuarial evidence. ...

(iii) Amount involved

[63] The plaintiff says the amount involved should be the total award at trial, $272,000.00. The defendants say they should be awarded their costs based upon the $700,000.00 claim made by the plaintiff, less $140,000.00 previously paid, for a total amount involved of $560,000.00. Alternatively, they say they should be awarded their costs based upon the plaintiff's last offer to settle, just before trial, in the amount of $350.000.00 plus $140,000.00 previously paid and pre-judgment interest and costs for a total of over $500,000.00. I have concluded above the plaintiff, not the defendants, is entitled to costs.

[64] *Rule 63.04* deals with determining the amount involved. It provides:

> **63.04.** (1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties 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.

[65] It is up to the court to determine the amount involved. The tariffs deal with the issue for the guidance of the court. The tariffs provide:

> 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;

[66] In this case, the plaintiff's claim was allowed in part. The complexity of the proceeding has been dealt with above under the determination of which scale to use. The trial did not raise unusual issues which, in my view, is the intent of the phrase "importance of the issues."

[67] Because the plaintiff was partially successful, I do not agree that the amount claimed should be the amount involved in this case. In my view, it is a factor where the claim is dismissed. The tariffs say:

> (b) where the main issue is 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;

[68] Although the plaintiff's exaggerated claim was not accepted, she had some success at trial in that she was awarded a sum of $132,053.29 in addition to the $140,000.00 already paid. I have concluded above that she is also entitled to interest plus costs and disbursements although her costs will be reduced by fifty percent.

[69] In *Rhyno Demolition*, *supra*, Goodfellow, J. said in paras. 10 and 11:

> 10 The amount awarded can be readily related in the end to the amount of 'exposure' or 'risk'. This can be varied if it provides an inordinately high or an inordinately low result but, as is the case here, the 'exposure' or 'risk' is the amount determined by the court $185,000.00 and that is the appropriate 'amount involved' in this case for the purposes of a cost award.
>
> 11 The court, in determining the amount involved, has almost always chosen a figure equal or close to the amount awarded, Timmons v. Parkes 1998, 175 N.S.R. (2nd) 145.

[70] The defendants refer to *McManus v. Nova Scotia (Attorney General)* (1995), 147 N.S.R. (2d) 318, 1995 CarswellNS 210 (N.S.S.C.) where Palmeter, A.C.J. used the amount claimed as the amount involved for the purpose of awarding costs. However, in that case, the plaintiff was unsuccessful. Palmeter, A.C.J. said in para. 2:

> 2 Under normal circumstances it has been my practice to award costs on the amount of damages awarded, but in this case no damages have been awarded.

[71] Goodfellow, J., in *Rhyno Demolition*, said the usual practice is to use the amount awarded. I see no reason to depart from that in this case. I conclude the amount involved is the amount of the award totalling $272,053.09.

(iv) The costs award

[72] Moir, J. in *Bevis*, *supra*, set out the principles to be followed in determining costs. He said in para. 13:

> 13 ... (1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial means, such as selection of an artificial ‘amount involved’, in order to make the Tariff serve the principle. Therefore, when reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion

> under rule 63.02(a) and order a lump sum. (3) To settle an appropriate lump sum the Court will have regard to the actual costs facing the successful party or the labour expended by counsel, but the Court will seek to settle the amount objectively in conformity with one of the policies of the Tariff, to provide an indemnity that has nothing to do with the particularities of counsel's retention. The Court will attempt to provide a substantial but partial indemnity against what would ordinarily be charged by any competent lawyer for like services. (4) Finally, the courts have usually avoided percentages. Substantial but partial indemnity is a principle, not a formula.

[73] Using scale 4 of tariff A of the old tariffs and an amount involved of $272,053.09, the costs award would be $8,850.00 plus four percent of the amount over $100,000.00 or $6,882.00 for a total costs award of $15,732.00.

[74] For a trial of this length and complexity, this would be a wholly inadequate award of costs. It comes nowhere near approaching a substantial but not complete indemnity, even recognizing that costs awards have receded substantially from that target in recent years with the rising cost of litigation. I therefore conclude I should consider a lump sum costs award either in addition to or in lieu of tariff costs.

[75] *Rule 63.02(1)(a)* provides:

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,

(a) award a gross sum in lieu of, or in addition to any taxed costs;

[76] The defendants seek costs payable to them in the amount of $150,000.00 based on an amount involved of more than $500,000.00. I have concluded the amount involved is approximately one-half that amount. I could conclude that, if I were to use that amount, the defendants would be seeking approximately $75,000.00. That is one approach in considering what a reasonable costs award should be.

[77] Another approach is to consider what the costs would be if costs were to be awarded under the new tariffs. Based upon an amount involved of $272,053.09 and scale 3, the costs would be $28,438.00 plus $2,000.00 per day for eleven days for a total of $50,638.00. This does not take into account the number of trial days which would have been required if all the experts had testified or if the hours of video surveillance had been played in court.

[78] In *Driscoll*, *supra*, Wright, J. gave a lump sum costs award in lieu of tariff costs, taking into account the plaintiff's partial success. He quoted from Moir, J. in *Bevis*, *supra*, and then said in para. 30:

> 30 Although no specifics of the plaintiff's solicitor-client costs have been provided, Mr. Gavras submits that such costs for a two day trial including discoveries usually falls within the range of $15,000-$20,000. That estimate seems generally reasonable to me, considering the pre-trial procedures that included discovery of the parties, an expert witness, and interrogatories. It is obvious in this case, therefore, that the 1989 Tariff, in providing a guideline amount of $3,000 for counsel fees, fails to provide a substantial indemnity to the largely successful plaintiff.

[79] In this case, using that figure as a guide, the solicitor-client costs of this proceeding would have been approximately $82,500.00 to $110,000.00. The length and complexity of this trial, to which I have referred above, would result in the tariff costs being too low for a matter such as this. As some indication of the actual costs, the defendants, as I have noted above, submitted a schedule of their legal fees as an exhibit to the affidavit of Nancy Murray. Their total fees were $279,513.66 not including the time spent preparing closing submissions in writing. However, the plaintiff in this proceeding did not have counsel between September 2004, when her previous counsel was permitted to withdraw, and June 2005 when her present counsel filed a notice of change of solicitor. The defendants' legal fees

and the comments of Justice Wright confirm my conclusion that a costs award of $15,732.00 is not a proper costs award in this case.

[80] I conclude that a lump sum award should be made in lieu of tariff costs, taking into consideration all the factors to which I have referred, including those set out in *Rule 63.04(2)*. I have already considered the plaintiff's conduct in determining that her costs award should be reduced by one-half.

[81] I conclude a costs award of $60,000.00 would be a substantial but not complete indemnity for costs. That award will be reduced by fifty percent resulting in a costs award of $30,000.00 in favour of the plaintiff.

[82] The parties have said they would try to agree on both the amount of interest and the disbursements to which the plaintiff is entitled. The disbursements are not to be reduced by fifty percent. If the parties cannot agree, I will accept written submissions.

Hood, J.