

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**Citation:** Curwin v. Sobeys Group Inc., 2007 NSSC 164

**Date:** 20070530  
**Docket:** SH 204439  
**Registry:** Halifax

**Between:**

Lynn Curwin

Plaintiff

v.

Sobeys Group Inc. a body corporate

Defendant

**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** January 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31, February 1, 2, March 30, April 25, 2007, in Halifax, Nova Scotia

**Counsel:** David W. Richey, for the plaintiff  
David Miller, Q.C., and Nancy I. Murray, Q.C., for the defendant

**By the Court:**

[1] After a 15 day trial before a court comprised of a Supreme Court judge and jury, the plaintiff was awarded a total of \$13,600.00 in damages. Of this amount, \$10,000.00 was for general damages and \$3,600.00 was compensation for past loss of income. The jury allowed nothing for future income loss or for future care costs.

[2] The court is now asked to decide on the final form of the order including pre-judgment interest and costs.

**BACKGROUND**

[3] The incident giving rise to the action occurred at the Sobeys Westphal store on November 8, 1997. The plaintiff, while proceeding through the check-out counter, struck the inside of her left knee against a metal door that was slightly protruding near

the bottom of the counter. As a result the plaintiff suffered an injury to her knee that ultimately led to surgery followed by several months of physiotherapy to alleviate the pain she was experiencing.

[4] At trial the defendant used surveillance video of the plaintiff to challenge her credibility. Although the jury is not required to provide reasons for its verdict it is clear that the jurors were not persuaded by the plaintiff's testimony as to the severity of her injuries or the effects these injuries had on her enjoyment of life and her ability to resume normal activities. Although she was awarded damages, the quantum received could hardly be said to justify the amount of time and effort expended in taking the matter to its ultimate conclusion.

[5] It is now left to this court to determine the issue of costs. It does so in the face of an offer to settle made in writing by the defendant on February 3, 2006 which exceeded the amount awarded by the jury. This offer complied with the requirements of **Civil Procedure Rule 41A**.

[6] Subsequent to this the defendant made an even more generous offer to settle. This offer which was made on August 11, 2006 was left open for acceptance until one month prior to the commencement of the trial which was scheduled to begin on January 15, 2007.

[7] Neither of these **Rule 41A** offers was accepted by the plaintiff. The plaintiff instead remained steadfast in her demand for an all-inclusive settlement in the amount of \$220,800.00. This had been initially communicated to defendant's counsel on September 24, 2002. On Thursday, January 11, 2007 her counsel made an offer to settle for \$90,000.00 plus interest at 2.5% per annum on \$40,000.00 calculated from November 8, 1997 to the date of payment plus costs (taxable costs and disbursements including cancellation fees, if any, of expert witnesses). This offer was in the form prescribed by **Rule 41A** but out of time to invoke the consequences of **Rule 41A.03**

[8] The plaintiff made one other final offer to settle during the course of the trial but this too was for an amount significantly higher than what the jury ultimately awarded.

## **ISSUES**

[9] The issues this Court must decide are:

1. Pre-Judgment Interest:
  - (i) rate of interest;
  - (ii) the period for which such interest is payable;
2. The plaintiff's entitlement to costs;
3. The defendant's entitlement to costs based on its **Rule 41A** offers to settle.

## **DISCUSSION AND DECISION**

[10] **Pre-Judgment Interest:** The incident giving rising to this action occurred on November 8, 1997. The action was commenced on July 18, 2003 which was approximately four months prior to the expiration of the six-year limitation period. The plaintiff's surgery and rehabilitative treatments had been concluded by mid-1999. A mediation took place on May 26, 2005 but without success. It was the defendant which filed a Notice of Trial with Jury on February 7, 2006.

[11] In accordance with **Bush v. Air Canada** (1992), 109 N.S.R. (2d) 91, 1999 Carswell N.S. 569 (N.S.C.A.) I am prepared to award pre-judgment interest at the rate of 2 ½ % per annum. I am not persuaded to order such payment for the approximately 9 ½ years that have elapsed since the incident occurred. Counsel for the defendant have argued that the Court ought to exercise its discretion and limit the plaintiff's claim for pre-judgment interest to a period of four years. I am prepared to exercise my discretion to award pre-judgment interest of 2.5% per annum for six years which is the prescribed period to commence this type of action under the *Limitation of Actions Act*.

[12] **Plaintiff's and Defendant's Entitlement to Costs:** The plaintiff is entitled to costs by virtue of being successful at trial albeit in an amount that was far less than what was sought. Both parties agree that the old tariffs apply since the proceedings commenced before September 29, 2004 being the date on which the new tariffs were published in the Royal Gazette.

[13] There is disagreement between counsel on how costs should be awarded. Given the enormous amount of time consumed by this trial and the relatively small amount of damages awarded by the jury, to simply calculate costs based on the tariffs would result in a completely inadequate amount.

[14] In **Bevis v. CTV Inc.**, [2004] N.S.J. No. 454, Moir, J. stated:

....(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.

[15] **Civil Procedure Rule 63.02(1)(a)** provides as follows:

Costs in discretion of court

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;

[16] The amount involved for purposes of determining costs in this case is the amount awarded by the jury. To apply the tariffs to this rather modest award would not provide substantial indemnity to the parties particularly the defendant which is also entitled to costs after February 3, 2006 based on its **Rule 41A** offer to settle.

[17] In the case of **Driscoll v. Crombie Developments Ltd.**, [2006] N.S.C. 262, Wright, J. awarded costs that approximated \$3,333.33 per day. This would equate to approximately \$50,000.00 (rounded up slightly) for a 15-day trial. I will exercise my discretion to set a lump sum amount for costs of \$50,000.00. I estimate that the amount of work performed in advancing the plaintiff's claim to the point of the defendant's **Rule 41A** offer on February 3, 2006 (which also includes participation in the mediation session) to be approximately 40% of the total time required to bring the matter to its ultimate conclusion.

[18] The plaintiff is therefore entitled to costs of \$20,000.00 (40% of \$50,000.00) plus disbursements up to and including February 3, 2006.

[19] The defendant is entitled to costs of \$30,000.00 (60% of \$50,000.00) along with all disbursements incurred from February 4, 2006 to the conclusion of trial with the following two adjustments:

- (1) JWM Consulting Inc., — the amount claimed for the surveillance carried out on the plaintiff is \$5,768.00 (includes HST). The cost of bringing the two operatives to Halifax for the second time to correct certain inaccuracies in their earlier testimony should not be allowed. This amounts to \$826.80 which deducted from the full amount reduces it to \$4,941.20.
- (2) Dr. Stanish's cancellation fee of \$5,700.00 appears to be based on a rate of \$500.00 per hour for 10 hours plus H.S.T. The defendant is entitled to be reimbursed for the cost of its experts reports but I am not prepared to order the plaintiff to cover the full cost of the cancellation fee. Although Dr. Stanish might not have been able to book 'OR' time in anticipation of being called to testify I cannot accept that he could not find other meaningful and remunerative work to fill his day. I therefore reduce the amount of the defendant's claim for this disbursement to \$2,500.00 plus H.S.T. for a total of \$2,850.00.

[20] The amount owed to the defendant for its taxed costs and disbursements may be set off against the amount awarded to the plaintiff by the jury and the taxed costs and disbursements awarded to her by the court.

[21] The parties shall each bear their own costs of this application.

[22] I will leave it to counsel to prepare the final form of order reflecting this and the jury's verdict.

J.