**IN THE SUPREME COURT OF NOVA SCOTIA**
**Citation:** Cheevers v. Halifax (Regional Municipality), 2006 NSSC 54

**Date:** February 9, 2006
**Docket:** SH - 158344
**Registry:** Halifax

**Between:**

Frances F. Cheevers

Plaintiff

v.

Halifax Regional Municipality

Defendant

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**DECISION**

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| **Judge:** | The Honourable Justice Gerald R. P. Moir |
| **Heard:** | February 9, 2006 |
| **Written Decision:** | February 14, 2006 (Requested by Counsel) |
| **Counsel:** | Devin Maxwell, counsel for the Plaintiff<br>Michael Dunphy, counsel for the Defendant |

**Moir, J. (Orally)**

[1] The parties have settled the amount for disbursement to be ordered as costs but they disagree on the amount of party and party costs. The trial decision is under appeal and the appeal is to be heard in March. Therefore, it is necessary for the Court to resolve party and party costs quickly.

[2] For the defendant, Mr. Murphy proposes $9802, the result under the applicable tariffs using the judgment amount of $180,919 as "the amount involved" and the basic scale, level three. For the plaintiff, Mr. Maxwell proposes costs under the tariffs of $15,325 ($200,000 "amount involved" and scale five), plus a lump sum of $30,000. The defendant's secondary position is that if the Court is to resort to a lump sum, the amount should take account of the new tariffs, which are applicable to cases started after September 2004 and the lump sum amount should be substantially lower than the new tariffs would provide.

[3] With the exception of one line of decisions, the case law seems well settled that costs are to be awarded according to the tariffs unless it is manifest that such will not produce a substantial but partial indemnity against what the case would cost on an objective assessment: See for examples *Hines and Nova Scotia*, [1990]

105 N.S.R (2d) 240 (SC) ; *Landymore v. Hardy*, [1992] 112 N.S.R. (2d) 410 (SC); *Williamson v. Williams,* [1998] N.S.J. 498 (CA); *Hardman v. Alexander,* [2003] N.S.S.C. 151, among many others cited by Mr. Maxwell in his brief.

[4] I am not aware of any modern decision further restricting the Court's ability to depart to a lump sum except a line of decisions of Justice Goodfellow which may seem to do so. I do not agree that the decision in *Atlantic Business Interiors Ltd. v. Hipson,* [2004] N.S.S.C. 166 (SC) is an example of a case where the Court refused to depart from the tariffs. There a claim was advance for an increase on account of an offer to settle but "no claim is otherwise advanced for increase costs by way of an additional lump sum" (para 6). The decisions of my colleague, Justice Goodfellow, do not explicitly propose a departure from the Court of Appeal decision in *Williamson,* or the Supreme Court decisions leading to it or following it.

[5] In my assessment, this is a case for departure from the tariffs. I agreed with Mr. Dunphy's submission that the readiness of the Court to depart from the old tariffs sacrifices certainty and predictability. However, certainty has to give way to justice when a discretion is exercised. A case was presented with great efficiency

through the cooperation of two experienced counsel. They took a week for trial where others might have taken weeks. That alone tells of the costs in client and counsels labours to prepare, and an award of $9800 would be unjust in a system that purports to provide a substantial indemnity. Nor do I think that increasing the "amount involved" or the scale can produce a genuine result. It would be backwards and artificial. Therefore, I shall set party and party costs on the basis of the lump sum.

[6] Mr. Maxwell advises me that the value of his firm's services approaches $100,000. Mr. Dunphy points out that the Court has been given no detail by which to assess the reasonableness of that figure. However, the Court does not indemnify actual solicitor and client costs. We are often given much more detail on actual costs and they serve to help us estimate what costs might be expected on a case of this kind, generally speaking. Mr. Dunphy says I am left to apply experience and common sense, which I maintain the Court must do to some extent when exercising discretion for a lump sum. Mr. Dunphy points out that, in this case, the reliance on experience is at an extreme because of the lack of detail.

[7] I agree with Mr. Dunphy's submission that the new tariffs are also a good point of reference. They represent a modern estimation of a just indemnity that should work in most new cases, maybe almost all new cases. They should largely avoid the sacrificing of predictability for a just indemnity.

[8] Mr. Dunphy calculates the award as if the new tariff applies, to be $30,750. Some of the issues were legally complex. The central issue of fact going to causation was complex. The efficiency of trial, including the defendant dispensing with the need for medical testimony, suggests a more complex preparation than seven days of trial might indicate. It is arguable that the case should be treated as complex, the new scale 3. Also, there is an argument for increasing the number of days to eight to allow for post-trial briefs. These arguments would lead to an award of $37,000.

[9] Mr. Maxwell proposes that delay caused by the defendant is a factor to enhance costs in this case. It has not been established that the defendant caused any delay significant for costs.

[10] Both counsel argue that their clients' position on damages going into trial tends to support their positions on costs. The disputed claims were pain, suffering and loss of amenities, loss of past income and loss of future income. On the first, at the end of trial, the defendant suggested $65,500, the plaintiff suggested $125,000, and the Court awarded $90,000. On the second the plaintiff suggested $200,000, the defendant suggested $55,482, and the Court award $68,119. On the third the plaintiff suggested $96,000, the defendant suggested nothing, and the Court awarded nothing. In my assessment the results on damages do not suggest either party wasted any time or expense. Although the defendant was more successful than the plaintiff on some questions of quantification this does not move me to depress the costs award.

[11] Mr. Dunphy submits that the costs award should be depressed because of the plaintiff's approach to causation. He says the plaintiff's position was defined by the plaintiff's expert's opinion which was premised on silver dust being visible inside the cell where arcing caused Mr. Cheevers injuries. In fact, no silver dust was visible inside the cell. There was, however, evidence of dust inside the cell and there was evidence of dust and silver heaped immediately outside the cell. I do not see the difference between dust visibly containing silver and dust inferentially

containing silver fines to be such a marked departure in position as should affect Mr. Cheevers' entitlement to a just indemnity.

[12] I, for one, do not find it helpful to order tariff costs plus a lump sum. Once persuaded to depart from tariff I find it more consistent to deal with costs exclusively as a lump sum. Considering all of the circumstances of this case I am satisfied that a partial indemnity totalling $30,000 would be fair to both parties.

J.