SUPREME COURT OF NOVA SCOTIA
Citation: Marsh v. Paquette, 2011 NSSC 70

Date: 20110221
Docket: Hfx. No. 149594
Registry: Halifax

Between:

Carolyn Marsh

Plaintiff

v.

Wendy Paquette and 1132011 Ontario Inc.,
c.o.b. Enterprise Rent-A-Car

Defendants

C O S T S D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: By written submissions: the last received on December 1, 2010

Counsel: David W. Richey, on behalf of the plaintiff
Philip Chapman, on behalf of the defendants

By the Court:

[1] The defendants were awarded costs after a 19-day trial in which the plaintiff received damages of much less than 10 percent of her claim.

ISSUES

1. Costs;
2. Disbursements; and
3. Pre-judgment interest.

FACTS

[2] The plaintiff was injured in a motor vehicle accident in August 1996. The matter went to trial in 2009 over a total of 19 days. Prior to trial there were a number of pre-trial conferences as well as substantial pre-trial procedures, including nine discoveries.

[3] The defendants did not admit liability but the Court found there was liability. The plaintiff was awarded damages of $10,000 after the Court concluded that the medical sequelae from the motor vehicle accident had entirely resolved by March 1997.

[4] The plaintiff's evidence was found not to be credible. One of the factors was a statutory declaration sworn by the plaintiff for the Workers Compensation Board in January 2001 in which she claimed that the injuries from the motor vehicle accident had resolved before a workplace injury in April 1999.

[5] The defendants seek costs, their disbursements of $28,091.72 and submit that pre-judgment interest should be paid only for four years.

[6] The plaintiff points out that she was successful against the defendants. She also says that even if there was a discount to the costs award based only upon damages of $10,000, that amount plus disbursements of approximately $28,000 would be a "devastating" costs award for the plaintiff. She says the Court has the discretion to consider her financial circumstances when making an award of costs.

ANALYSIS

1. Costs:

[7] I concluded that the defendants were largely successful [para. 298 of the decision] and therefore should be entitled to its costs. However, as the plaintiff has pointed out, the defendants were found liable for her injury and she was awarded damages.

[8] The defendants had offered to settle for $15,000 before trial and, on the eve of trial, increased the offer to $25,000. The plaintiff's last offer to settle was $99,000. That offer was made on June 28, 2007 and left open only until July 19, 2007. Her previous offer to settle, for $275,000 plus interest, was made in December 2003.

[9] *Civil Procedure Rule* 77 deals with costs. It provides in part:

> **Scope of Rule 77**
>
> 77.01 (1) The court deals with each of the following kinds of costs:
>
> (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
>
> **General discretion (party and party costs)**
>
> 77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> **Assessment of costs under tariff at end of proceeding**
>
> 77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the Costs and Fees Act, a copy of which is reproduced at the end of this Rule 77.

[10] The defendants submit that the costs should reflect a substantial contribution towards the costs of the defendants without being a complete indemnity. She submits that the cases refer to a percentage which is two-thirds of actual costs, citing *Williamson v. Williams*, [1998] N.S.J. No. 498 (C.A.). They say, therefore, that a

lump sum costs award should be made, based upon the actual costs of $172,928.40. She submits the award should be $103,757.

[11] In my view, lump sum costs should be considered only after Tariff costs have been calculated and a decision made that they do not represent a substantial but incomplete indemnity of the defendants' costs.

[12] In *Campbell v. Jones*, 2001 NSSC 139 Moir, J. set out the principles applicable to determining costs at p. 65:

> It appears that usually tariff costs are awarded. ... Judges have expressed reluctance to artificially increase the "amount involved" in order that tariff costs should reflect a substantial indemnity:.. ...the failure of tariff costs to meet the objective has been a factor in decisions to depart from tariff costs and to exercise the discretion under *Rule* 63.02(a) to award a lump sum:... ...they have sometimes made reference to the successful party's actual costs: ... ... the court will not lay down any percentage of actual costs as a rule of thumb: ... Also, the costs are subject to objective assessment: ...

I turn first to the Tariffs.

[13] The Tariffs provide:

> In these Tariffs unless otherwise prescribed, 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;

[14] The first thing I must determine is the "amount involved." The claim was allowed, but only in part, to the extent that I concluded the defendants were in fact the successful party. The damage award was less than the amount offered prior to trial.

[15] I do not accept that I should use the amount of the damage award as the "amount involved." The parties spent 19 days of trial on a claim that the plaintiff was permanently disabled from working and should be compensated in general damages as well as for lost income and loss of valuable services.

[16] Counsel for the defendants says the amount claimed was between $189,000 and $424,000 according to his calculations. He then says I should consider the "amount involved" to be $300,000 to $500,000.

[17] The plaintiff clearly was making a substantial claim. Some indications of the amount of the claim are the offers she made to settle, the last being $99,900 approximately two years before trial.

[18] In her pre-trial brief, the plaintiff referred to cases where the plaintiff was permanently disabled and suffered chronic pain. She also referred to cases where substantial awards were made for loss of income. She claimed loss of past income for periods she was not receiving Workers Compensation Board benefits and for the shortfall between those benefits and what she submitted she would have earned. She also claimed loss of future income (net of WCB) until the date she would reach her 65th birthday in 2026. She also made a substantial claim for loss of valuable services.

[19] Taking all these things in consideration, I conclude the "amount involved" was $200,000.

[20] If, instead, I were to consider only the actual amount of the award, I would add a substantial amount to it because of the complexity of the proceeding. The plaintiff's family doctor testified about her medical history, beginning with the 1980's and continuing to the date of trial. A psychologist testified for the plaintiff and a physical medicine and rehabilitation specialist testified for the defendants. In addition, a number of treating professionals testified for the plaintiff.

[21] Because there was an injury before the motor vehicle accident and subsequent workplace injuries, the medical evidence was voluminous. There were conflicting reports given to various healthcare providers. Some indication of this is reflected in the length of the trial decision, 115 pages. Based upon that analysis as well, I conclude that the "amount involved" was $200,000.

[22] Using that "amount involved", the Tariffs provide for costs of $16,750 on Scale 2, the basic Scale, $20,938 on Scale 3. I do not consider Scale 1 to be applicable in this case.

[23] The defendants submit I should use Scale 3. The plaintiff submits I should use Scale 2. Although there was substantial medical evidence, I do not conclude the proceeding was so complex as to take it out of Scale 2, the basic Scale. It was a personal injury claim arising from a motor vehicle accident, where there were prior medical issues and subsequent injuries. This is not uncommon in such cases. Once findings of credibility were made, the relevant medical evidence to be considered was for a period only up to March 1997.

[24] In addition, I am to fix the "length of trial." The trial evidence took 18 days and an additional full day was taken up with oral closing submissions. I therefore conclude that the length of trial was 19 days. Multiplying that by $2,000 per day adds an additional $38,000 to the Tariff costs award.

[25] Scale 2 of Tariff A results in costs of $16,750 to which is to be added $38,000 for a total of $54,750.

[26] The plaintiff says such a costs award would be "devastating." She submits there is authority for the Court to exercise its discretion to award no costs to the defendants.

[27] The plaintiff refers to three decisions as authority for this. The first, *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (C.A.) is a family law decision. The Court referred to "undue financial hardship" (in para. 8) but then in a subsequent paragraph (para. 11) referred to "the respondent's impecuniosity."

[28] In *Windsor v. Poku* 2003 NSSC 95, the unsuccessful plaintiff was a senior citizen living on a fixed income made up of Canada Pension Plan and Old Age Security and had "no major assets" (para. 13). The Court also considered her husband's income. MacLellan, J. said in para. 19:

> 19 I conclude that here it is appropriate for me to consider the financial circumstances of the plaintiff in deciding an appropriate amount of costs.

He concluded she should pay costs and disbursements of $10,000 in spite of the evidence of fixed income and no major assets (para. 20).

[29] In *Flynn v. Halifax (Regional Municipality)* 2006 NSSC 106, LeBlanc, J. referred to the above cases. He concluded the plaintiffs should not pay costs to the Halifax Regional Municipality for one portion of the claim on which they were unsuccessful. He said in paras. 29 and 30:

> 29 The plaintiffs are entitled to costs based on the following amounts involved: $22,280.00 as against HRM and Applewood jointly, and $69,985.00 as against Applewood alone. The plaintiffs shall have their costs against HRM and Applewood jointly for the walls in the amount of $3,375.00 and against Applewood for the slab: $7,050.00.
>
> 30 HRM shall be entitled to recover its costs against Applewood, but shall not recover costs against the plaintiffs. ...

He referred to the plaintiff's argument with respect to hardship to them if they had to pay costs to HRM.

[30] However, there are several reasons why I do not accede to the request in this case to award no costs to the defendants.

[31] Firstly, I distinguish the cases to which reference has been made. In *Kaye*, *supra*, the matter was a matrimonial matter and impecuniosity was referred to, not just financial hardship. In *Windsor, supra*, although the plaintiff lived on a fixed income and had no major assets, she was ordered to pay costs and disbursements totalling $10,000. MacLellan, J. concluded the amount involved was $50,000 and the costs would otherwise have been $4,875. He awarded costs of $4,800. The disbursements claimed were $21,832.10 of which $15,300 was the amount related to the experts called by the defendant. He ordered the plaintiff to pay $5,200 towards the defendant's disbursements.

[32] In *Flynn, supra*, the plaintiffs were largely successful. They obtained judgment against HRM and their builder for $22,280 and against the builder alone for $69,985. HRM had made an offer to settle greater than the amount the Court ordered them to pay the plaintiff. I do not see that case as bearing much resemblance to this one. The plaintiffs in that case were successful overall, although they had refused an offer from HRM less than, but very similar to, the amount awarded.

[33] The plaintiff says it would be a hardship if she were required to pay costs. That is no doubt true of many parties. However, this plaintiff has an income from WCB and, unlike the plaintiff in *Windsor* does have a major asset: she is joint owner of a home in a newer subdivision in a good neighbourhood. The family is not impecunious; her husband has a good job and they are in their 50's.

[34] The second reason for declining to award no costs to the defendants is the overall purpose of a costs award. As Saunders, J. (as he then was) said in the oft-cited case of *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (S.C.) in para. 17:

> [17] Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. Winning counsel's fees will not be entirely reimbursed, but ordinarily the losing side will be obliged to make a sizeable contribution.

[35] In this case the plaintiff should have known that proving her claim was going to be problematic. This is so given her sworn statutory declaration and other evidence which conflicted with her claim that the motor vehicle accident of August 1996 resulted in her becoming permanently disabled. It made her likelihood of success doubtful at best. Sober second thought should have led to a more reasonable approach to settlement, which is encouraged in all cases. Public policy favours settlement. The offer of $25,000 was made late in the day, only days before the trial was to commence. It was an offer which, in hindsight of course, was a very favourable one. To deprive the defendants of their costs would penalize them when I have found them to have been largely successful and when I concluded the plaintiff was not a credible witness.

[36] However, there is a factor which the defendants have not considered. Although I found the defendant to be largely successful, they were not totally successful. Some account must be taken of the fact that liability was contested and found against the defendants. Furthermore the plaintiff was awarded a small amount of damages.

[37] In my view it is therefore appropriate to reduce the costs award calculated using the tariffs by a percentage to reflect the plaintiff's limited success. Accordingly, I reduce the costs award by ten percent, resulting in costs of $49,275.

[38] I therefore must consider whether costs in that amount represent a substantial but not complete indemnity of the defendants' costs in these circumstances. It is only if I conclude it does not that I should consider the defendants' request for lump sum costs.

[39] The defendants say their actual legal costs were $172,928.40. However, the Court has in the past cautioned against too great a reliance upon actual costs in determining an appropriate costs award. As Moir, J. pointed out in *Campbell v. Jones*, *supra*, at page 66:

> ...The party's choice of counsel and the terms of retention have no bearing on tariff costs. The tariffs were designed to achieve a substantial indemnity but without regard to the arrangements between the particular party and counsel. One might say the objective was substantial indemnity against what would generally or ordinarily be charged to a client in like circumstances. To preserve some element of that where a lump sum award is in order, the court should try to assess counsel's efforts on a general basis, and should take the actual fees into account only to the extent they tend to show generally what any client of any competent lawyer might expect reasonably to be billed for services necessary to the case at hand...

[40] He continued in the same paragraph at page 67 to summarize the principles with respect to a lump sum cost award:

> In summary, the discretion to award a lump sum is not so restricted as with an award of solicitor and client costs; tariff costs are usual and a lump sum is a departure from the usual; the discretion has been exercised where tariff costs would not produce a partial but substantial indemnification without artificially setting the "amount involved"; the objective of a partial but substantial indemnification may or may not be sufficient reason to exercise the discretion; care must be taken to avoid employing fixed percentages or embracing the party's actual bill over a more generalized assessment.

[41] It does not appear that the amount of the defendants' costs have been taxed. The number of hours spent and the hourly rates used are not before me. I therefore consider the length of the trial, the number of discoveries, the number of pre-trial conferences, the massive amount of medical evidence covering the years 1981 to 2009

and the labour involved in pre-trial procedures and trial preparation. A figure greater than $150,000 is not at all surprising.

[42] Although it has been said in some decisions that a substantial but incomplete indemnity should be in the range of two thirds of actual costs, it is recognized, and I agree, that no fixed percentage should be used. Furthermore, as I have said above, there must be some recognition of the fact that the plaintiff did have some small degree of success.

[43] In all the circumstances I conclude in my discretion that a costs award of $49,275 is a substantial but not complete indemnity of the defendants' costs.

2. Disbursements

[44] The defendants claim disbursements of $28,091.72. After receiving the defendants' submissions I asked defendants' counsel for substantiation of a number of the disbursements referred to in his original affidavit. These were subsequently provided in a booklet. That booklet included two additional invoices, one for $200 for file review by Jason Roth in preparation for discovery. The second was a second invoice from Dr. Thomas Loane for review of file material in preparation for trial ($679). This increases the defendants' disbursements by $879.

[45] After the invoices were received, it appeared to me that there was an error with respect to invoices from Drake Recording. As evidenced by invoices at tabs 18 and 19, the total paid was $454.54, not that amount plus another $318.94. The latter amount should be deducted from the total disbursements. The result of the additions and reductions increases the total claimed disbursements to $28,651.78.

[46] The additional information supplied was copied to counsel for the plaintiff and no further submissions were received from him about the disbursements. His original submission was that without substantiation they should not be allowed.

[47] However, I can now assess the reasonableness of the disbursements. With a few exceptions I conclude they are reasonable and should be paid. The disbursements I disallow are the following:

1. all costs associated with the attendance of Wendy Paquette at trial;

2. the witness fee and mileage for "Ken Soley" who did not testify; and
3. a portion of the disbursements for photocopying and facsimiles.

1. All costs associated with the attendance of Wendy Paquette at trial.

[48] Liability was not admitted and Wendy Pacquette testified about the motor vehicle accident. She testified that the vehicle she was driving did not move. This evidence was contradicted not only by the plaintiff's witnesses but by Wendy Pacquette's own report of the accident given at the time, as well as by the testimony of another of the defendants' witnesses. I found the evidence of Wendy Paquette not to be credible in this regard.

[49] In my view liability should have been admitted. If so, the testimony of Wendy Paquette, which was not helpful, would not have been necessary. Accordingly, I reject the disbursements associated with her attendance at trial. These are:

1. $641.53 (airfare)
2. $ 60.00 (taxi from airport)
3. $ 95.00 (meals and transportation to airport)
   $796.53

2. The witness fee and mileage for "Ken Soley" who did not testify.

[50] This witness was not called by the defendants. Fees of $50 with respect to his attendance are not a reasonable disbursement to be paid by the plaintiff.

3. A portion of the disbursements for photocopying and facsimiles.

[51] These two items total $4,551.23. Clearly, these costs are generally accepted as reasonable. The questions are whether the unit charge is reasonable and whether these charges include costs for internal purposes or reporting to the client.

[52] Plaintiff's counsel referred to *Rhyno Demolition v. AGNS* 2005 NSSC 147. In that decision Goodfellow, J. said at pp. 27 and 28:

> In *Bank of Montreal v. Scotia Capital Inc.* 2002 NSSC 274 at para. 13 the court said that photocopying to be claimed as a disbursement:

> ... must be necessary for the party and party dealings and not expenditures for communication with one's client beyond reporting that which transpired on a party and party basis.

In that case, the photocopying disbursement was reduced by 50 per cent.

[53] In *Elliott v. Nicholson*, [1999] N.S.J. 310 (S.C.) the Court allowed the entire photocopying disbursement, saying that "20 cents is a reasonable and appropriate amount to charge for photocopies..." (para. 8) In this case the photocopying charge was 25 cents per page, which, since it has been 12 years since *Elliott* was decided, is in my view a reasonable charge.

[54] Facsimiles are charged amounts such as $1.25, $1.50, $4.50, *et cetera*. No authority has been cited with respect to the reasonableness of these charges. Without knowing why some are charged at one rate and some at others it is difficult to determine if these are reasonable. The question with respect to both types of disbursements is whether there is a component of reporting to the client. I note that some of the photocopying and facsimile charges are struck out in tab 34. It may be that some of the photocopying disbursements are accounted for elsewhere.

[55] I have no explanation of who received all the facsimiles or the reason for all the photocopies. In a matter such as this, it is reasonable to expect there to be a substantial number of photocopies and facsimiles between the parties. I do however conclude that some of the photocopies and some facsimiles were of a reporting nature. Without being able to specifically assess this, I reduce these disbursements by 15 per cent. That results in allowable disbursements of $3,570.41 for photocopying and $298.14 for facsimiles.

[56] Disbursements are allowed in the amount of $27,111.57.

3. Pre-Judgment Interest

[57] The plaintiff seeks the payment of pre-judgment interest for the entire period from August 15, 1996 to the date of judgment, February 5, 2010. The defendants say the general rule is that interest is payable for four years unless there is a reasonable explanation for the delay. The defendants say there was no real effort to advance the matter after the Defence was filed in 2002 until the Notice of Trial was filed in 2007.

[58] The *Judicature Act*, R.S.N.S. 1989, c. 240 provides with respect to interest in section 41(i) and (k)

> 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.

[59] In *Willis v. Bernard L. Mailman Projects Ltd.* 2008 NSSC 94 the Court said in paras. 10 and 11:

> 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.

[60] The question, as in *Willis*, *supra*, is whether there was "undue delay." In *Willis*, the Court said in para. 12:

> 12 The question has been posed as "Is the delay ... excessive or unwarranted?" (Central Automatic Sprinkler Ltd. v. Trident Construction Co.)...

[61] I must therefore consider the circumstances of this case to determine if the delay of almost 13 years from the date of the accident to the date of trial was excessive or unwarranted.

[62] The action was commenced on August 14, 1998, but quite soon thereafter the plaintiff suffered the back injury (April 1999) which she alleged put her off work. After that time the two matters were intertwined (the motor vehicle accident and the WCB claim), at least as far as the plaintiff's claim in this matter was concerned. A Defence was filed on December 20, 2002.

[63] Although I have concluded that the motor vehicle accident did not contribute in any way to the workplace injuries, the position taken by the plaintiff throughout this litigation was that they were related. The question is whether it was reasonable to take that position. It must be viewed, in my opinion, as of that date, not in hindsight. In November 1997 Carolyn Marsh took a job as a cleaner, which is a physically demanding job. I have reviewed in my decision the work requirements of that job as Carolyn Marsh related them to Debra Vieth-Morse, an occupational therapist at the Halifax Work Hardening Centre.

[64] At trial Carolyn Marsh tried to downplay the level of her physical activity at work. However, her evidence to Debra Vieth-Morse contradicts that. The work activities reported to Ms. Vieth-Morse, in my view, presented a more realistic view of the work of a cleaner.

[65] By the date that employment commenced in November 1997, it was no longer reasonable for Carolyn Marsh to claim that the motor vehicle injuries were continuing as she claimed they were.

[66] I conclude that the defendants have established there was undue delay in bringing the matter to trial. The matter should have been advanced towards trial commencing no later than November 1997. Accordingly, I conclude that pre-judgment interest should be paid only for the usual period of four years as is set out in various decisions of this Court, including *Thomas-Canning v. Juteau* (1993), 122 N.S.R. (2d) 23 (S.C.); *Terry v. Lombardo* (1998), 167 N.S.R. (2d) 365 (S.C.), and others.

[67] The parties have agreed that the rate of interest is 2.5 per cent.

CONCLUSION

[68] The plaintiff made an exaggerated claim for minor injuries which had resolved within seven months. She continued with that claim in the face of substantial contradictory evidence. Her level of success in her claim was minor compared to the claims alleged. She made the unfortunate decision to pursue the exaggerated claims for a period of 12 years after the injuries had resolved. The cost of doing so was substantial not only in terms of financial costs, but in demands on the legal system. Her limited success has been recognized by a modest decrease in the costs to which the defendants would otherwise be entitled.

[69] The order of the Court is that the defendants are entitled to costs in the amount of $49,275 and its disbursements in the amount of $27,111.57. The defendants are also entitled to the return of the $25,000 paid into Court ($15,000 on June 30, 2005 and $10,000 paid into Court on May 21, 2009).

[70] The plaintiff is entitled to interest at 2.5 per cent on her damage award of $10,000 for the period commencing August 15, 1996 for four years.

J.