SUPREME COURT OF NOVA SCOTIA

Citation: Marshall v. Annapolis County District School Board, 2010 NSSC 179

Date: 20100504
Docket: Hfx. 123323
Registry: Halifax

Between:

Jonathan Marshall, an infant, represented by his Litigation Guardian, Gladys Hardwick

Plaintiff

v.

Annapolis County District School Board and Douglas Feener

Defendants

v.

Betty Acker and Vaughn Caldwell

Third Parties

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	April 13, 2010, in Halifax, Nova Scotia
Final Written Submissions:	Defendants' Submissions, February 19, 2010 and Plaintiff's Submissions, April 6, 2010
Written Decision:	May 4, 2010 (Decision on Costs)
Counsel:	Robert K. Dickson, Q.C., for the Plaintiff Scott Norton, Q.C. and Sara Scott, for the Defendants

By the Court:

[1] This jury trial arose out of a motor vehicle/pedestrian accident which occurred on April 12, 1994. The trial took place between September and November 2009. There were 25 lay witnesses and 17 expert witnesses called by the plaintiff, three lay witnesses and six expert witnesses called by the defendants. There were various motions heard and conferences held on various issues.

[2] On November 26, 2009 the jury returned a finding of no liability against Mr. Feener and, his employer, the Annapolis County District School Board. The defendants seek costs and disbursements in the amount of $346,895.16.

[3] As to costs, the defendants submit that the 2009 *Civil Procedure Rules* apply, albeit with reference to the 1989 tariff. The "amount involved", according to the defendants, is properly stated with reference to the amount claimed by the plaintiff at trial, approximately $4,300,000. Further, the defendants say that given the complexity and length of the trial, the extensive pre-trial procedures and, numerous motions brought during trial, the appropriate scale is Scale 4. As the defendants served an offer to settle, which was not accepted, the defendants say they are entitled to an increase in costs of twenty-five percent. The defendants claim disbursements as set out in an affidavit.

[4] The plaintiff submits the disbursements claimed by the defendants are unreasonable and seek to have these disbursements taxed. The plaintiff agrees the 2009 Rules apply and that the 1989 tariff provisions apply. They say Scale 2 should be applied and that the amount involved should be $500,000 with an agreed twenty-five percent increase.

[5] The issues, therefore, are as follows:

(1) Which *Civil Procedure Rules* apply to the issue of costs, 1972 or 2009?

(2) Which tariff applies to the determination of costs in this action?

(3) What is the "amount involved" for the purposes of the cost award?

(4) What is the appropriate Scale?

(5) What is the effect of the defendants' formal offer to settle made before trial?

(6) What is the appropriate amount for disbursements?

(7) Against whom are the costs and disbursements recoverable?

Issue #1: Which Rules of Civil Procedure Rules apply to the issue of costs, 1972 or 2009?

[6] I am satisfied that the 2009 Rules apply to the determination of costs. The parties agree.

[7] There is discretion to apply the 1972 Rules under Rule 92.08:

> **Directions to apply present or former Rules**
>
> 92.08(1) A judge who presides at a trial started before January 1, 2009 may direct which of these Rules and which of the Rules in the *Nova Scotia Civil Procedure Rules* (1972) apply to the trial.
>
> (2) A judge who is satisfied that the application of this Rule 92 to a proceeding started before January 1, 2009 causes one party to gain an unfair advantage over another party may order either of the following:
>
> (a) these Rules apply to the proceeding, or a part of the proceeding, despite Rules 92.02(2), 92.04, and 92.05(1);
>
> (b) the *Nova Scotia Civil Procedure Rules* (1972*)* apply to the proceeding or a part of the proceeding despite Rule 92.02(1).

[8] I am satisfied that there is no evidence that determining costs under the 2009 Rules would cause one party to gain an unfair advantage.

[9] The Costs Rule under the 2009 *Civil Procedure Rules* is Rule 77. The judge retains a general discretion to "make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05...." In service of that discretion the judge may "make any order about costs as the judge is

satisfied will do justice between the parties." (Rule 77.02). As to assessment of party-and-party costs according to tariff, Rules 77.06 and 77.07 provide, in part:

> **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.
>
> **Increasing or decreasing tariff amount**
>
> 77.07(1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
>
> (a) the amount claimed in relation to the amount recovered;
>
> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
>
> ...
>
> (e) conduct of a party affecting the speed or expense of the proceeding;
>
> (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
>
> (3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

Issue #2: Which tariff applies?

[10] The tariff of costs and fees that formed a schedule to the *Costs and Fees Act*, R.S.N.S. 1989 c. 104, when the action was commenced, was repealed by the

Financial Measures (2004) Act, S.N.S. 2004, c. 3, s. 15. The tariff was subsequently incorporated into Regulations under the *Costs and Fees Act.*

[11] The defendants submit and, the plaintiff concurs, that the court should apply the tariff that applied when the action was commenced.

[12] In *Bevis v. CTV Inc.*, 2004 NSSC 209, Moir J., in speaking of the 2004 tariff, held that the revised tariff cannot apply to an action commenced prior to the effective date of that revised tariff. At para. 7 he stated:

> ... 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.

[13] I am satisfied that, as this action was commenced prior to the adoption of the 2004 tariff, the 1989 Tariff A would apply.

Issue #3: What is the amount involved?

[14] To determine the amount of costs under the tariff, it is necessary to determine the “amount involved”. The tariff recognizes the “amount involved” as being:

> (b) where the main issue is a 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.

[15] Under Tariff A, where a monetary claim is dismissed, the court would look to the amount of damage provisionally assessed or the amount claimed. There was no provisional assessment of damages made in this case and, therefore, the defendants submit that the court should look to the amount claimed. The defendants submit that the plaintiff quantified damages in closing submissions to the jury at over $4,300,000. As well, the defendants submit that there were numerous motions, both before and during the trial, multiple discoveries and many witnesses. The defendants say the trial was complex. Significant future costs were being sought by the plaintiff and as set out in the defendants' brief, "the risk to the defendants was, quite frankly, enormous and the driving force behind their willingness to take this matter to trial and incur the extra costs involved".

[16] The defendants refer to *Landymore v. Hardy*, 1992 CarswellNS 90 (S.C.T.D.), where Justice Saunders (as he then was) discussed "the successful litigant's stake in the outcome":

> 24 There are, I think, other factors to address in arriving at the "amount involved" and before determining the appropriate scale to be applied. This should include some assessment of the successful litigant's stake in the outcome. What was at risk? Even where a substantial nonmonetary issue is involved, is there a value to the subject matter which was exposed to risk or about which the proceeding was contested? These are all features outlined as guiding principles for the setting of fees in the handbook "Legal Ethics and Professional Conduct" published by the Nova Scotia Barristers' Society.
>
> 25 Since the court must first be satisfied with the reasonableness of expenses before awarding costs to significantly contribute towards them, the court should assess the risk to which the successful party was exposed in deciding the "amount involved", and this should apply even in non-monetary cases. This is not in any way intended to encourage litigants to fictionalize the "amount involved" by trying to compare it to some other case where there was a monetary claim. Rather it is simply to recognize that the trial judge - who has presided and is therefore in the best position to comment on the proceedings - may choose to consider the risk and consequences to the litigants because such factors almost always affect the importance of the issues and will often dictate the complexity of a proceeding. A case that involves damages exceeding $500,000 will obviously generate more activity than one seeking recovery of $12,000. The outcome, in terms of success or failure, will be much more important in the former than in the latter and by

> virtue of that importance and (typically) complexity, will justify greater expenditures of time and fees.

[17] The defendants say that the "amount involved" ought to be set at $4,300,000.

[18] The plaintiff says that the appropriate "amount involved" is not necessarily the amount claimed by the plaintiff. The plaintiff submits the "amount involved" ought to be set at $500,000, which was the defendants' estimate of what the plaintiff would have recovered, taking into consideration a number of factors. A formal offer to settle in the amount of $500,000 was given to the plaintiff. The plaintiff says that the defendants argued throughout the trial that the plaintiff did not, in fact, sustain any head injury resulting in permanent brain damage, but rather suffered from a pre-existing cognitive impairment and was mentally challenged prior to the collision. Therefore, the plaintiff says that if this position was correct, the resulting damage award would have been solely in respect to multiple orthopaedic injuries and scarring and perhaps some loss of future income to reflect the decreased ability to work in physically demanding occupations as a result of hip and leg dysfunction. The plaintiff submits that in such an eventuality, the total award to the plaintiff would likely not have exceeded $200,000. While the plaintiff submits the amount offered by the defendants was $500,000 and that this figure ought to be the "amount involved", the plaintiff obviously did not accept this amount as reasonable having rejected the defendants' formal offer.

[19] The plaintiff says that the proceeding was not complex and that it involved issues of pedestrian/motor vehicle liability and causation of damages that have been dealt with in many previous cases.

[20] With respect, the trial was complex. There were seventeen experts called by the plaintiff and six by the defendants, many of whom were medical doctors. There were many issues raised by both parties that had to be resolved during the trial. There were issues surrounding the fact that Jonathan Marshall was a young child at the time of the accident and how this fact should be treated before the jury in respect of liability and/or contributory negligence. All of these decisions were made during the trial after submissions from counsel.

[21] Finally, the plaintiff submits that this court should assess and determine what a "realistic reasonable estimate of the plaintiff's recovery" is and make an

appropriate determination as to “amount involved”, taking into consideration the evidence presented and the arguments advanced by both parties. The plaintiff refers to *Little (Litigation Guardian of) v. Chignecto Central Regional Board* 2004 NSSC 265, 230 N.S.R. (2d) 1 (NSSC), where Goodfellow J. stated:

> 13 Guidance is provided in the Tariff as to the determination of the "amount involved" and there have been a series of decisions indicating that the "amount involved" can be equated with the amount claimed; or the amount recovered; or a reasonable estimate of the realistic exposure to damages. In cases of non-monetary claims, the court does its best to assess what would otherwise have been the exposure or risk - for example, in *Keating v. Bragg* (1997), 160 N.S.R. (2d) 363, (N.S.C.A.), the court of appeal approved of an estimate of $1,000,000.00 for a heavily involved Chambers matter. W. Augustus Richardson in his excellent paper, "Primer on Costs", dated February 23, 2003, deals extensively with the determination of "amount involved" and I commend his paper to counsel. Doing the best I can, I would think a realistic reasonable estimate of the Plaintiff's recovery for the injury he received would not likely exceed $70,000.00 and I fix that amount as the "amount involved". Using Scale II, this provides an award in the amount of $4,700.00.

[22] As a result the plaintiff suggests that when a realistic reasonable estimate of the plaintiff’s likely recovery is considered, then the “amount involved” should be assessed at $500,000.

[23] I am satisfied that a reasonable estimate of the plaintiff’s recovery would be in the $4,300,000 range as argued by the plaintiff to the jury and for the reasons stated by the defendants. Should the plaintiff have succeeded it would be likely that damages, as submitted by the plaintiff, would be in this range.

Issue # 4: What is the appropriate Scale?

[24] Tariff A offers 5 scales against which the “amount involved” is factored.

[25] The defendants submit the appropriate scale is Scale 4. The plaintiff suggests that the appropriate scale is Scale 2. The defendants say that this was a twenty-six day trial with additional days for argument. There were approximately fifty-one witnesses called and significant issues of liability and damages. There were numerous motions.

[26] The defendants were required to file written submissions to address the issues raised by the plaintiff. The plaintiff says that the conduct of the defendants resulted in considerable delay and lengthening of the trial through the defendants' position that all witnesses were required and, as a result of various objections and motions made by the defendants.

[27] The defendants says that the scheduling of witnesses called by the plaintiff unnecessarily lengthened the trial. I agree that there were several scheduling issues attributable to the plaintiff and, in particular, it was necessary to adjourn court early on several days and send the jury home. As to the many complaints raised in the plaintiff's brief as to the defendants' conduct, I suggest that many of these complaints are unfounded and, in most instances, the position taken by the defendants was justifiable and understandable as the trial proceeded. The defendants made efficient use of court time and were organized.

[28] I have considered the comments by both parties and I am satisfied that Scale 4 is appropriate. Scale 3 is the basic Scale. This was a complicated trial. There were many complicating issues and Scale 4 would be appropriate.

Issue #5: What is the effect of the defendants' formal offer to settle made before trial?

[29] The defendants seek to have the costs award increased by twenty-five percent, given that the jury dismissed the plaintiff's claim and that a formal offer to settle was made.

[30] The *Civil Procedure Rules* permit a successful party to receive an increased award of costs as a result of an offer to settle in certain circumstances. Rule 10 deals with settlement. Rule 10.09 provides, in part:

> **Determining costs if formal offer not accepted**
>
> 10.09(1) A party obtains a "favourable judgment" when each of the following have occurred:
>
> (a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third party claim, at least one week before a trial;

> (b) the offer is not withdrawn or accepted;
>
> (c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.
>
> (2) A judge many award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:
>
> (a) one hundred precent, if the offer is made less than twenty-five days after pleadings close;
>
> (b) seventy-five percent, if the offer is made more than twenty-five days after pleadings close and before setting down;
>
> (c) fifty percent, if the offer is made after setting down and before the finish date;
>
> (d) twenty-five percent, if the offer is made after the finish date.

[31] The defendants made a formal offer to settle on August 18, 2009 in the amount of $500,000, excluding costs and disbursements. They concede that the offer was made after the "finish date" required by Rule 10.09(1)(a). As a result, they submit, the costs award should be increased by twenty-five percent pursuant to Rule 10.09(2)(d) which applies to an "offer made after the finish date".

[32] The plaintiff has concurred that an increased award in the amount of twenty-five percent is appropriate and accords with the Rules. As a result, I will increase any costs award by twenty-five percent.

Conclusion on Costs:

[33] The defendants claim costs of $221,062.50. The defendants, by using the amount involved of $4,300,000 and Scale 4, have calculated an amount of $176,850. Increasing this amount by twenty-five percent ($44,212.50) results in a total amount claimed of $221,062.50. The defendants also claim HST on this amount.

[34] The plaintiff submits that the appropriate award is determined by an amount involved of $500,000 and applying Scale 2 with a twenty-five percent increase.

[35] I have determined that the amount involved is $4,3000,000 and that Scale 4 applies with a twenty-five percent increase. Therefore, the amount that the defendants are entitled to is $221,062.50. While the jurisprudence on this issue is divided, I am satisfied from the submissions of the plaintiff that HST is not applicable (see *Roose v. Hollett* (1996), 154 N.S.R. (2d) 161 (N.S.C.A.) and *Little (Litigation Guardian of) v. Chignecto Regional School Board, supra.*

Issue #6: What is the appropriate amount for disbursements?

[36] The defendants seek general disbursements of $97,094,53.

[37] The plaintiff claims that many of the disbursements claimed are unreasonable and that there are multiple issues that arise in respect of these disbursements and, therefore, a referral to an adjudicator to deal with recoverable disbursements would be most appropriate.

[38] Rule 77.16 permits the court to order the taxation of costs before an adjudicator:

> **Taxation of costs**
>
> 77.16(1) A judge who awards costs may fix the amount or order that the amount, or a part of the amount, be fixed by taxation before an adjudicator under the *Small Claims Court Act.*
>
> (2) A judge may order that the amount of fees and disbursements owing by a party to the party's counsel be fixed by taxation before an adjudicator.

[39] Given the multiple issues raised by the plaintiff as to the appropriateness of the disbursements claimed by the defendants and, to allow the defendants time to adequately explain these disbursements, I agree with the plaintiff that it is appropriate that the matter of disbursements and their amount be referred to an adjudicator under the *Small Claims Court Act.* I so order.

Issue #7: Against whom are the costs and disbursements recoverable?

[40] The defendants submit that costs and disbursements awarded are recoverable from the following persons:

1. Georgina Seymour - the plaintiff's original litigation guardian;

2. Gladys Hardwick - the plaintiff's second litigation guardian, and

3. the plaintiff himself.

[41] The plaintiff's position is that any order as to costs should be directed to be paid from the estate of Jonathan Marshall, an incompetent, and no amount is payable personally by any litigation guardian involved.

[42] The first question is which Rules apply to this issue. I am satisfied that the 2009 Rules apply.

[43] Rule 72.02(1) clearly sets out that costs can be awarded by the presiding judge in any manner so as to do justice between the parties. There is no evidence presented that either of the litigation guardians who have been involved in this action were abusive of the court's processes. The onus is on the defendants to establish that one or both of the litigation guardians was abusing the court's processes in some manner. This was not a frivolous action, given the severe nature of the injuries involved, and there were significant issues as to liability and damages. I am not satisfied that the defendants have provided evidence that either of the litigation guardians has abused the court's processes or provided other reasons why these individuals should be liable for these costs and, therefore, the order for costs will be against the estate of Jonathan Marshall, an incompetent person.

Pickup, J.