SUPREME COURT OF NOVA SCOTIA
Citation: ***Brocke Estate v Crowell***, 2013 NSSC 344

Date: 2013-10-22
Docket: Ken No. 310335
Registry: Kentville

Between:

Anna Gardner, *Administrator of the Estate of*
John Gary Joseph Brocke

Plaintiff

v.

Arthur Crowell *and* ***Gaye Crowell***

Defendants

Judge:	The Honourable Justice Pierre L. Muise
Heard:	September 10 and 11, 2013, in Kentville, Nova Scotia
Oral Decision:	September 11, 2013
Counsel:	**Brian Hebert**, Counsel for the Plaintiff
	Debbie Brown and **Franco Tarulli**, Counsel for the Defendants

By the Court:

[1] This is in the matter of Anna Gardner, as the Administrator of the Estate of John Brocke, versus Arthur and Gaye Crowell. It is a motion to determine the discount rate to be used, or, I should say, whether the prescribed 3.5% discount rate must be used.

[2] This motion is brought in the middle of a jury trial in relation to a fatal injury suffered in a motor vehicle accident. The actuarial report, submitted on behalf of the Plaintiff, used a discount rate of 0.8%, based on the difference between the average yield on long term Government of Canada bonds and the change in the Consumer Price Index ("CPI") from the end of 2011 to the end of 2012.

[3] Yesterday the Defendants objected to the use of that rate, following receipt of a revised actuarial report prepared after portions of that report, in its prior form, were excluded. The parties made some argument yesterday and the Defendants provided a brief late last evening. Some of the Plaintiff's supporting materials were received by e-mail at about 9:10 this morning. The brief and other supporting

materials were provided after the 9:30 a.m. start time but before 10:00 a.m., if I recall correctly.

[4] After review of those materials by the Defendants, and by the Court, there was some oral argument until shortly after 12:00 noon today. The issue in those arguments is the interpretation of s. 4(2) of the *Automobile Insurance Tort Recovery Limitation Regulations*, N.S. Reg. 182/2003, as amended.

[5] Section 4 of those regulations prescribes the discount rate for s. 113C of the *Insurance Act*, which states:

> 113C In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, under any enactment or rule of law, an award against the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, shall not be calculated using a discount rate less than the amount prescribed by the Governor in Council by regulation. 2003 (2nd Sess.), c. 1, s. 12.

[6] And, just for the record, that *Insurance Act* is c. 231 of the 1989 Revised Statutes of Nova Scotia and the regulations in questions are made pursuant to that *Act*.

[7] Section 4, including subsections 1 and 2, state:

> **Discount rate for calculating loss or damage from bodily injury or death**

> 4 (1) For the purpose of Section 113C, the discount rate for calculating loss or damage from bodily injury or death is 3.5%.
>
> (2) Effective January 1, 2005, the discount rate for each calendar year may be based on the difference between the rate set for Government of Canada bonds and the consumer price index for the previous 12 months.

[8] Section 4(2) does not say "in a particular case" or simply "the discount rate may be based". It specifically refers to a discount rate for each calendar year. That, in my view, reflects an intention that such a rate, if it was set, would be set for each calendar year, rather than determined by the Courts on a case-by-case basis or each year in the first case to come before it.

[9] This view is supported by the Hansard Debates in the first session of the 59th Assembly of the Nova Scotia Legislature held October 27, 2003. At Page 1691, the Honourable Michel Samson commented:

> We did raise concerns with the discount rate. The government was moving it from 2.5 per cent to 3.5 per cent. We were very concerned about that. Government came back and indicated it was something based on the formula as it exists today, it should be 3.5 per cent. In return, they did agree that they would have an annual review of the discount rate so that if there were any changes to it, those changes would be made on a yearly basis.

[10] And, at Page 1709, the Honourable Danny Graham commented: "There is a commitment to review the discount rate in 12 months, and to be reviewed on a regular basis."

[11] They, in my view, both refer to an annual review by the Government and not by the Courts.

[12] This is the same view expressed by Michael Coyle in a 2004 paper entitled, "Recent Changes to Nova Scotia's Insurance Laws, A Practical Legal Analysis." At Page 15, he stated:

> Another sweetener given to the insurance industry came in the form of an increase in the "discount rate" that all court awards for personal injury are subject to and a big change in who decides how much that "discount rate" will be from now on. . . . Prior to these changes, the discount rate was set by the Judges of the Supreme Court in the *Civil Procedure Rules* at 2.5%. Now it is set by Cabinet and you will lose 3.5%. From now on it will be raised annually by Cabinet, based on the difference between the Government Bond Rate and the CPI.

[13] It is noteworthy that those comments were made outside of the confines of a particular court case and were simply an assessment, unattached to any representation of any client.

[14] These regulations are part of legislation that was aimed at reforming the approach to damages in motor vehicles accidents, so as to limit recovery and facilitate insurers lowering premiums. That, in my view, is highlighted by s. 113C of the *Insurance Act*, which provides that you can use a discount rate higher than the prescribed discount rate, but not a lower one. The regulation provisions dealing with the discount rate also carry on, or continue, the purpose of avoiding

the expense of proving the discount rate. An authority for that purpose is *Corkum v. Sawatsky*, 126 NSR (2d) 317, a 1993 case of our Court of Appeal.

[15] The Plaintiff argues that s. 113C of the *Insurance Act* refers to a rate prescribed by regulations, such that if s. 4(2) is not interpreted as a mandatory rate prescribed by way of a formula, it is outside the authority of the *Act* and therefore makes no sense because the Government does not need a regulation giving it authority to make a regulation.

[16] In my view, if it had been intended that the formula in s. 4(2) be mandatory and automatically kick in after January 1, 2005, it would have been easy to word the regulation to reflect that. In addition, these regulations were amended in 2010 and any unintended wording could have been addressed at that time.

[17] In my view, the express intention of the regulation is to set out a formula upon which the discount rate is to be based if the Governor in Council decides to set a new rate and that such a rate would be for a calendar year only, barring which, the 3.5% would continue to apply. It would allow the Governor in Council to prescribe a different rate for each year, based on the formula, if it is wished.

[18] The Hansard Debates suggest the Government committed itself to doing that every year to address concerns regarding changes that might be necessary if the

prescribed rate did not reflect the changes in the economic situation. Those reviews have not happened. That is something which may be addressed in the political arena. However, the Debates are clear that it was intended to be done through a review by the Government, not by the application of a formula in a particular court case. In my view, the wording of s. 4(2) is consistent with that intention.

[19] I need not decide whether or not s. 4(2) is outside the authority of s. 113C if it is merely a permissive review formula because there has been no review to be challenged.

[20] It may seem unfair to be stuck with a rate which does not reflect the economic situation today. However, present valuations are to address losses occurring well into the future. Taking the economic circumstances existing today, during a depressed economy, and projecting them over a 20 year span, may well overcompensate a plaintiff in the long run. Discretion in relation to resetting rates for each calendar year allows the Governor in Council to take that into account and to refrain from doing so, which would also be in keeping with its overall objective of limiting tort recovery.

[21] In my view, since no discount rate other than 3.5% has been passed by Order in Council, the prescribed discount rate is still 3.5%.

Muise, J.