

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Windsor v. Adu Poku, 2003 NSSC 095

Date: 20030425

Docket: S.P. No. 02726

Registry: Pictou

Between:

Genevieve Windsor

Plaintiff

v.

Dr. Yaw Adu Poku

Defendant

DECISION

Judge:

The Honourable Justice Douglas L. MacLellan

**LAST WRITTEN
SUBMISSION:**

March 5, 2003

Counsel:

Roseanne Skoke, for the plaintiff
Colin Clarke, Esq., for the defendant

- [1] The parties to this action have not been able to agree on costs and therefore have made written submissions to me on that issue.
- [2] This action was commenced by the plaintiff against a number of defendants including the Aberdeen Hospital and a number of physicians including the present defendant. The action was dropped against the other defendants and continued against only the defendant who is a surgeon. It alleged malpractice on his part as a result of surgery he performed on the plaintiff.
- [3] Following the trial of the matter, I dismissed the action and awarded costs to the defendant. I did not assess damages on a provisional basis. I found that the plaintiff had not led any expert medical evidence which substantiated the plaintiff's allegation of negligence on the part of the defendant.
- [4] The defendant called a number of expert witnesses to testify that his treatment of the plaintiff was appropriate considering the circumstances that developed during the surgery.
- [5] Counsel for the defendant in his submission asks for party-and-party costs and a payment of disbursements, the most significant being fees paid to the expert witnesses to attend discovery and trial. His request is for costs in the amount of \$14,125.00 based on an amount involved of \$325,000.00 and disbursements of \$21,832.00.

Costs Generally - The amount involved

- [6] The defendant advises that prior to trial the plaintiff made a formal demand for settlement in the amount of \$300,516.00.
- [7] A number of times prior to the trial, the defendant offered to settle the action by agreeing to an order of dismissal and that he would not claim costs. That last offer was made in early February 2000. The trial was held in December, 2001.
- [8] The defendant suggested in his pre-trial brief that if the plaintiff was successful on liability the plaintiff should be entitled to damages only in the range of between \$12,000.00 to \$35,000.00. The plaintiff in her pre-trial brief argued that the court should consider an award of \$65,000.00 for post-traumatic stress disorder for the plaintiff.
- [9] I am satisfied that an appropriate amount for purposes of costs here would be \$50,000.00 to which Scale III should be applied resulting in costs of \$4,875.00.

Disbursements

- [10] The defendant claims disbursements of \$21,832.10 of which \$15,300.00 is to cover the costs of the attendance of two expert witnesses at trial.

- [11] Counsel for the plaintiff has acknowledged that she does not dispute the defendant's claim for these disbursements, however, she asked that the plaintiff be relieved of paying this because the plaintiff cannot afford to do so and also since she has costs of her own in attempting to prove her claim.
- [12] I am satisfied here that the two experts called by the defendant at the trial were essential to his defence of the case against him and that he would normally be entitled to be reimbursed his costs of having them testify at discovery and trial.
- [13] The plaintiff's counsel in her submission to me suggests that I should consider the fact that the plaintiff is a retired senior citizen on a fixed income of Canada Pension and Old Age Security and has no major assets. She has provided an affidavit from the plaintiff in which she indicates this and also indicates that her husband's income is comprised of Old Age Pension, Canada Pension, Workman's Compensation and some income from an R.R.S.P.
- [14] Counsel for the defendant suggests in his final brief that the plaintiff's financial circumstances should not affect the court's decision to award or not award costs or the amount of costs to award. He has provided me with a copy of the case *Gilfoy et al v. Kelloway et al* (2000), 184 N.S.R. (2d) 226.
- [15] I have also been provided with two cases from other provinces, namely *Orr v. Ontario Boaters Brokers Ltd*, [1991] O.J. No. 545 (Ontario General Division)

and *Plumb (Guardian ad litem of) v. Cowichan School District No. 65*, [1992] B.C.J. No. 2318 (S.C.).

- [16] I have reviewed Justice Goodfellow's decision in *Gilfoy et al v. Kelloway et al, supra*, and would note that his decision did not specifically deal with a claim for reduction in costs payable because of the financial circumstances of the affected party. That case dealt mainly with other issues. He did indicate however: [p. 234]

More importantly, the determination of costs with the rare exception of some exceptional family law situations has never been influenced by wealth, lack of wealth or impecuniosity of a party. The Registry of Deeds contains many judgments for and including costs and the collectability of costs is not a factor to be considered in the proper exercise of judicial discretion as to *entitlement to costs or indeed the quantum of costs*.

- [17] I would note that Justice Goodfellow did not consider the case of *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 where the Nova Scotia Court of Appeal dealt with an appeal from the Supreme Court not to award costs to a successful party based on the financial circumstances of the party against whom costs were awarded.

- [18] Macdonald, J.A. speaking for the court said:

I believe the law is clear that, if the awarding of costs would create an undue financial hardship, it would be proper exercise of the judicial discretion to refuse to

grant them: see **Sidmay Ltd. et al v. Wehttam Investments Ltd.**, [1966] 1 O.R. 457.

In the present case Mr. Justice Richard declined to award costs on the ground that the appellant had a superior income to that of the respondent and that the latter had to pay child maintenance in the amount of \$200.00 per month. In addition, it appears from certain comments made in the decision that Mr. Justice Richard perhaps felt that the appellant had exaggerated the extent of the respondent's cruelty to her and quite possibly she had also treated the respondent with some degree of mental cruelty.

As Mr. Justice Hallett pointed out in **Bennett v. Bennett** (1981), 23 R.F.L. (2d) 302, there must be a good reason not to award costs to a successful party in a matrimonial cause. I would but add such reason must be based on principle. Here Mr. Justice Richard obviously felt that the additional hardship of costs was a burden the respondent under the circumstances should not be called upon to bear.

In our opinion, this decision can be interpreted as denying costs on the ground of the respondent's impecuniosity. The trial judge made his decision after seeing and hearing both parties and other witnesses and we are not convinced that he erred in the exercise of his discretion.

[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.

[20] I find in this case that the plaintiff has some ability to respond to an order of costs and therefore I would order and direct that costs be payable by her in the amount of \$4,800.00 to cover party-and-party costs and an additional amount of \$5,200.00 towards the costs of the disbursements incurred by the defendant. This would result in total costs in the amount of \$10,000.00.

J.