

IN THE SUPREME COURT OF NOVA SCOTIA  
**Citation:** Little v. Chignecto, 2004 NSSC 265

**Date:** 20041216  
**Docket:** S.T. 08691(216435)  
**Registry:** Truro

**Between:**

Michael Dewayne Little, an infant represented  
by his litigation guardian, Wayne Little

Plaintiff

v.

Chignecto Central Regional School Board

Defendant

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**DECISION ON COSTS**

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**Judge:** The Honourable Justice Walter R. E. Goodfellow

**Heard:** October 4 and 5, 2004, in Truro, Nova Scotia  
Closing arguments October 6, 2004, in Halifax, Nova  
Scotia

**Final Written  
Submissions:** November 30, 2004

**Counsel:** Sean F. Layden and Rebecca LeBlanc, for the Plaintiff  
Scott C. Norton, Q.C. and John T. Shanks, for the  
Defendant

**By the Court:**

**BACKGROUND**

[1] Wayne Little, now 15, on November 22, 1999, while playing football at the school lunch hour, suffered a broken leg. Several versions of what allegedly transpired given by a number of students and schoolyard supervisor. Determination that Wayne Little suffered from this unfortunate accident when he jumped up to knock down a football pass being thrown by another student. An experienced school supervisor made her circuit through the field where the boys were playing football and at all times had a visible presence to all the students engaged in the game. The supervisor, with the exception of a brief 30 to 60 second period when she was answering an inquiry of a student, had the entire area in which the game was being played under her surveillance. Concluded principal and those responsible for the discipline and safety of the students had a clear disciplinary policy known to all staff and students and was communicated to parents. Wayne Little failed to establish the School Board had not met the high standard dictated by the *Education Act* with respect to safety of students and action dismissed.

[2] Counsel having been unable to agree on the issue of costs, required this determination.

***CIVIL PROCEDURE RULES***

**Costs in discretion of court**

**63.02 (1)** Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,

- (a) award a gross sum in lieu of, or in addition to any taxed costs;

- (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
- (c) direct whether or not any costs are to be set off.
- (2) The court in exercising its discretion as to costs may take into account,
  - (a) any payment into court and the amount of the payment;
  - (b) any offer of contribution.
- (3) The court may deal with costs at any stage of the proceeding.

**Party and party costs fixed by court**

**63.04 (1)** Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the “amount involved” shall be determined, for the purpose of the Tariffs, by the court.

- (2) In fixing costs, the court may also consider
  - (a) the amount claimed;
  - (b) the apportionment of liability;
  - (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
  - (d) the manner in which the proceeding was conducted;
  - (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;
  - (f) any step in the proceeding which was taken through over-caution, negligence or mistake;
  - (g) the neglect or refusal of any party to make an admission which should have been made;
  - (h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the

proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;

(i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and

(j) any other matter relevant to the question of costs.

### **Disbursements**

**63.10A** Unless the court otherwise orders, a party entitled to costs or a proportion of that party's costs is entitled on the same basis to that party's disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs.

## **TARIFFS OF COSTS AND FEES DETERMINED BY THE COSTS AND FEES COMMITTEE TO BE USED IN DETERMINING PARTY AND PARTY COSTS**

To be used in determining party and party costs in a proceeding commenced on or after January 1, 1989.

In these Tariffs, 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;

(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;
- (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
- (i) the complexity of the proceeding, and
  - (ii) the importance of the issues;
- (d) an amount agreed upon by the parties.

### ISSUES

1. **Which Tariff applies - the Tariff effective January 1, 1989 or the recently approved Tariff of September 29, 2004?**
2. **What weight should be given to the Plaintiff's offer of settlement?**
3. **What, if any, adjustment should be made for the disbursement relating to photocopying and travel mileage expense?**
4. **What is the determination of "amount involved"?**

### ISSUE NUMBER ONE

1. **Which Tariff applies - the Tariff effective January 1, 1989 or the recently approved Tariff of September 29, 2004?**

[3] This action was commenced by Originating Notice action on April 20, 2000. Counsel for Michael Little point out that the application of the new Tariff of September 29, 2004, contains significant changes and if applied, would result in substantially increased party and party costs. The argument that the new scheme that came into effect on the eve of trial did not provide a meaningful opportunity for parties to consider and address the changed possible exposure to costs has some merit. In addition, it appears that the communication of the *Amended Costs and*

*Fees Act* to the Bar Society membership, while in the Royal Gazette of September 29, 2004, it was not promulgated directly to the Bar until October 8, 2004, after the conclusion of this trial. As interesting and worthy of consideration are these arguments advanced by Mr. Little's counsel, the question is to be determined by the principles of interpretation that apply to any attempt to provide retroactivity to a change where that change itself is silent as to retroactivity or its date of commencement of application. The Tariffs of Costs and Fees is within the definition of enactment in s. 7(4) of the *Interpretation Act*, R.S.C. 235. The new Tariffs unfortunately do not state a date of application or address specifically whether the new Tariff applies to pre-existing litigation. There is a strong presumption that legislation is not intended to operate retroactively. There is nothing in the new Tariffs that would lead one to the conclusion that it was meant to apply to any litigation that had commenced prior to publication in the Royal Gazette on September 29, 2004.

[4] When the Tariff of January 1, 1989, came into being the issue of the statutory changes in the *Costs and Fees Act* that brought in the Tariff was addressed by the Nova Scotia Court of Appeal in *Royal Bank of Canada v. Woloszyn* (1992), 110 N.S.R. (2d) 72. Freeman, J.A. at p. 73 stated:

[5] The action was begun prior to the amendments to rule 63 of the *Civil Procedure Rules* introducing what are known as the new tariffs. These are applied to all proceedings commenced after January 1, 1989.

[6] The respondents argue that the new tariffs apply because the particular proceeding in question, the chambers application, was commenced after that date. In our view, interlocutory proceedings must take their date from the main action; the old *Rules* apply. The application was not a separate proceeding; it was simply an interlocutory proceeding in an existing action. The learned trial judge erred in applying the tariff.

[5] In Driedger on the Construction of Statutes, 3<sup>rd</sup> Edition, at p. 512 states:

### **The Retroactive Application of Law**

**The presumption against retroactive application.** It is strongly presumed that legislation is not intended to have a retroactive application. In *Gustavson Drilling (1964) Ltd. v. M.N.R.* Dickson, J. wrote:

The general rule is that statutes are not to be construed as having retrospective [retroactive] operation unless such a construction is expressly or by necessary implication required by the language of the *Act*.

[6] It is clear that this action which was commenced by Originating Notice (action) on April 20, 2000, is governed by the Tariff of costs of January 1, 1989. Cost determination is to be based on the date of commencement of the action. All interlocutory motions/applications in the action are governed as well by that date.

## ISSUE NUMBER TWO

### **2. What weight should be given to the Plaintiff's offer of settlement?**

[7] Post the decision finding no negligence on the part of Defendant, the Plaintiff disclosed to the court that a formal *C.P.R.* 41A.09 offer to settle; namely, the Plaintiff accepted he was fifty-one per cent (51%) liable for his injury and damages. Offers to settle are encouraged and can be taken into account even if they do not comply strictly with the *Civil Procedure Rules*. See *Annand v. Cox Enterprises* (1992), 111 N.S.R. (2d) 196, where the Defendant made an offer to settle two days before trial which matched the eventual judgment and warranted some consideration in costs. While offers to settle are encouraged and may be taken into account in the exercise of the trial judge's discretion, the purpose of making a formal offer to settle with possible costs benefit is to encourage the parties to make realistic offers in a timely fashion to settle by rewarding parties who make realistic offers.

[8] In this case, the offer was predicated upon the Defendant's being forty-nine per cent (49%) liable for the injury suffered by the Plaintiff and damages that flowed from that injury. The Plaintiff was unable to establish **any** degree of liability on the Defendant and therefore, the offer, while it might indicate a genuine desire to settle, such a desire may well have been motivated more from a position of weakness than anything else.

## ISSUE NUMBER THREE

### **3. What, if any, adjustment should be made for the disbursement relating to photocopying and travel mileage expense?**

[9] Defendant's counsel objects to the rate of .25 cents per page for photocopying and expresses the view that the Defendant's law firm does photocopying at an actual cost of approximately 2.5 cents per sheet. The issue of disbursements and particularly photocopying has been addressed by the court on a number of occasions and I refer counsel to *Cashen v. Donovan* (1999), 174 N.S.R. (2d) 320, para. 324; *Knox v. Inter-provincial Engineering Ltd. et al* (1993), 120 N.S.R. (2d) 288; *Hudgins v. Danka Business Systems Ltd.* (1998), N.S.J. No. 293; and *Day v. Day*, [1994] 3 R.F.L. (4<sup>th</sup>) 432. The claim for photocopying should be reduced from \$626.00 minus \$156.50 to \$469.50. The travel mileage at .36 cents per kilometre is reasonable and allowed.

## **ISSUE NUMBER FOUR**

### **4. What is the determination of "amount involved"?**

[10] Defendant's counsel advanced a claim under the new Tariff for a total cost award of \$15,188.00 plus disbursements. The disbursements claimed total \$1,136.17 and have been allowed in the amount of \$979.67 and HST is allowable on party and party disbursements.

[11] With respect to the appropriate Tariff, I have already determined the Tariff to be applied is the 1989 Tariff and the first consideration is that the trial here separated the issues of "liability" and "damages". This represented a substantial saving to their clients and in court time. There were no expert witnesses advanced and the total time involved was less than three full court days. The conclusion I reach is that, in these circumstances, it is appropriate to utilize Scale II instead of the basic Scale III.

[12] With respect to the "amount involved", it is a monetary claim although by virtue of separating the issues the court was not called upon to make a determination of the amount of damages. The Defendant takes the position that the "amount involved" should be the amount claimed of \$112,569.00 and notes that in the Plaintiff's brief there was a reference that new medical information might



increase the amount of the Plaintiff's claim. The legal issue before the court was not complex, although counsel indicate it is an issue of importance for students and schools across the Province.

[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 et al v. Bragg et al* (1997), 160 N.S.R. (2d) 363, 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.

### **CONCLUSION**

[14] There is no HST on the costs awarded on a party and party basis, but HST on disbursements is recoverable. *Roose v. Hollett et al* (1996), 154 N.S.R. (2d 161 (N.S.C.A. at p. 207).

[15] The Defendant's are to have their costs and disbursements taxed in the amount of \$4,700.00, plus disbursements of (\$979.67 plus 15% HST) totalling \$5,826.62.

J.