Date: 20001207
Docket: S.H. 157190

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Crawford v. Royal Flush Services Ltd., 2000 NSSC 80

Between:

TAMMY LYNN CRAWFORD

Plaintiff

- and -

ROYAL FLUSH SERVICES LTD. and ARTHUR VEITH

Defendants

DECISION ON COSTS

HEARD BEFORE: The Honourable Justice John M. Davison

PLACE HEARD: Halifax, Nova Scotia

Briefs Received: November 22 and 23, 2000

DECISION: December 7, 2000 WRITTEN RELEASE: December 7, 2000

COUNSEL: Kevin C. MacDonald, for the plaintiff
Michelle C. Awad, for the defendants

DAVISON, J.:

[1] This is a proceeding for the recovery of damages arising from a motor vehicle accident which occurred on February 27, 1998. In October 2000 the issues were tried by judge and jury. The jury found that negligence on the part of both parties caused or contributed to the plaintiff's damages and apportioned fault equally. The jury found damages as follows:

Damages to plaintiff's motor vehicle	$ 634
Loss of past income	$ 5248
General damages for pain and suffering and loss of enjoyment of life	$ 2000
Loss of housekeeping capacity	$ 600

[2] There is raised the question of costs. The plaintiff maintains she is entitled to 75% of her costs and disbursements and that the defendant is entitled to 25% of their costs and disbursements less any fees relating to the retention and work of an engineer, Grant Rhyno. The defendants take the position the plaintiff shall recover 50% of her costs and disbursements and the defendants should recover 50% of their costs and disbursements. In my view, quite properly the counsel for the defendants states in her written brief:

> The defendants will leave it to Your Lordship to decide whether they can recover the disbursement relating to Mr. Rhyno's field work, calculations and report.

[3] Although the briefs of counsel do not deal with it, I find that any costs to which the defendants are entitled are to be taxed in one bill.

[4] The primary rule on the apportionment of costs is *Civil Procedure Rule* 63.03(1) which reads:

> (1) Unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event.

[5] Counsel for the defendants point to this Rule and the case of *Tzagarakis v. Stevens* (1968), 3 N.S.R. 1965-69 in advancing the position each party was entitled to 50% of their costs. In that case Chief Justice Cowan stated at p. 461:

> I have made enquiries as to the practice recently followed by trial judges in this Division with regard to costs, where there is a division of fault and there is no counterclaim and in cases where there is a counterclaim.
>
> I find that the practice since Brewster v. Spicer, supra, has been to award the plaintiff who is found partly at fault a portion of his costs, such portion to be the same percentage recovery as is found with respect to damages, and to allow the defendant a portion of his costs, such portion being the same percentage as is found to be applicable to fault on the part of the plaintiff. This practice has, apparently, been sanctioned by the Appeal Division in the case of Langille v. Zwicker (1967), 66 D.L.R. (2d) 196; 3 N.S.R. 165-69 448, where, in an action by a pedestrian against the operator of a motor vehicle, the jury found that the operator was not at fault and judgment was entered for the defendant with costs. The Appeal Division allowed the appeal and apportioned fault 50/50 between the parties and Currie, C.J.N.S., said, at p. 199:

> "The costs should be based on 50% to each party, both as to the trial and the appeal."

This rule appears to apply whether there is a counterclaim or not.

[6] The *Tzagarakis* case was the culmination of a history of litigation in Nova Scotia on the question of costs.

[7] Costs have been with us since the *Statute of Gloucester* 6 Edw. 1, c. 1 which, together with other statutes, established that in common law, courts costs followed the event with no other discretion in the courts except that which existed in the Court of Chancery which was the only court that had discretion prior to the *Supreme Court Judicature Acts*, 1873-1875.

[8] In *Foster v. Great Western Railway Company* (1882), 8 Q.B.D. 515 the Court of Appeal pointed out the discretion which rested in the Court of Chancery did not extend to giving jurisdiction to the court to award costs to an unsuccessful plaintiff in the absence of improper conduct in the proceedings by the defendant or the introduction of irrelevant and scandalous matters. The court also stated that the Supreme Court Judicature Acts conferred the same discretion in all of the high courts as previously held by the Court of Chancery but did not enlarge on this discretion which must be exercised judicially.

[9] This same discretion was contained in the Rules of Court which existed in Nova Scotia prior to 1972 where Order 63 Rule 1 contained this proviso:

> Provided also that when any action, cause, matter or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter or issue is tried or the court otherwise orders.

This Rule was considered in *Hacket et al. v. Rorke et al. (1907-08)*, 42 N.S.R. 341 where the Supreme Court of Nova Scotia sitting *in banco* found the *Judicature* made no change in the power to award costs where ordinarily costs were not given before the enactment.

[10] Prior to the passing of the *Contributory Negligence Act* costs followed the event subject to the judge's discretion. This is the practise today, but it was not always so. For some years following *Mossman v. Gidney* (1956), 38 M.P.R. the court was awarding full costs to the plaintiff even where, by virtue of the *Contributory Negligence Act*, a portion of fault rested with the plaintiff.

[11] Prior to the passing of the *Contributory Negligence Act* little difficulty was experienced. There was usually a completely successful litigant and a completely unsuccessful litigant and, accordingly, except in unusual circumstances, the successful litigant as of right was awarded costs.

[12] The *Contributory Negligence Act* had a great impact on the law of negligence. Whereas, formerly, it was a complete defence to any action for negligence to allege and prove the plaintiff was also negligent and that that negligence also contributed to the damages, the *Act* changed this by providing that liability to make good damages shall be in proportion to fault found where two parties were at fault.

[13] The first *Contributory Negligence Act* passed in this Province was in 1925 which contained no provision with respect to costs. A year later we find Chapter 3 of the Acts of 1926 which bears the rather cumbersome title *An Act to Make Uniform for Damages for Negligence Where More Than One Party is at Fault.* There is little doubt as to the intention of the legislature with respect to costs. Section 4 read as follows:

> Unless the Judge otherwise directs, the liability for costs of the parties shall be in the same proportion as the liability to make good the loss or damage.

This section was retained in the *British Columbia Act*. It was also contained in the *Contributory Negligence Ordinance of the Yukon Territory.* In *Sorli v. Aubin* (1963), 38 D.L.R. (2d) 774, where liability was divided equally and there being no counterclaim, it was argued by counsel that the defendant was not entitled to any

costs. Mr. Justice Davey, sitting as a Judge of the Yukon Territory Court of Appeal, rejected this contention and said as follows:

> Historically, there is no support for that construction. Before the Act a plaintiff's contributory negligence would defeat his claim and judgment would to for the defendant with costs. The Act destroys that defence and makes a defendant liable for a proportionate part of the plaintiff's damage notwithstanding his contributory negligence. The defendant having proven a defence that would at common law have defeated the plaintiff's claim entirely and entitled the defendant to costs, I see no reason why he should not receive a proportionate part of his costs under the Act when his successful defence of contributory negligence now results in only reducing the plaintiff's claim proportionately.

[14] Our Appeal Court in *Forbes v. Sterling* (2) (1938-39) 13 M.P.R. 566 dealt with the same section. In that case, where there was no counterclaim the Appeal Court lumped the costs of both parties together and divided them in the same proportion as liability.

[15] In response to a request from the committee of the Canadian Bar Association on uniformity of legislation, our legislature in 1954 passed a new *Contributory Negligence Act* which included the present section 6:

> Where the damages are occasioned by the fault of more than one party, the court has power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just.

It was following this that Mr. Justice McDonald in *Mossman v. Gidney (supra)* decided, *inter alia*, that a plaintiff, in the absence of special circumstances was

prima facie entitled to his full costs if he succeeded in any degree. And, for the first time in our Province, the trend switched from the general rule of costs following the event.

[16] The Nova Scotia Courts followed the principle advanced in the *Mossman* case for a few years, but in 1959 the court sitting on an appeal in *Brewster v. Spicer* (1959), 42 M.P.R. 232 returned to a decision of costs in proportion to the success of the parties. Justice Patterson dealt directly with costs and awarded the plaintiff 35% of his costs and the defendant 65% of his costs.

[17] Other cases followed the reasoning in *Brewster v. Spicer (supra)* and I refer to cases emulating from the Appeal Court, *McKay's Transport Limited v. Rowlott* (1965-69) 5 N.S.R. 471, *Gregoir v. Carr* (1967) 63 D.L.R. (2d) 633, *Langille v. Zwicker* (1965) S.C. No. 5608 and *Wile v. Burgoine* (1967) S.C.No. 13435. After these cases, we have the comments of Chief Justice Cowan in *Tzagarakis v. Stevens (supra)* to which I have made previous reference.

[18] I have dealt at some length with the authorities on an historic basis only to emphasize that the principle set out in *Civil Procedure Rule* 63.03 (1) is well founded in Nova Scotia law. The rule states that costs shall follow the event unless the court orders otherwise. To order otherwise gives the court a

discretion which must be exercised judicially. Recourse to *The Annual Practise* (1957) at p. 1440 gives insight on how this discretion is to be exercised:

> 1. It must be exercised on fixed principles;
>
> 2. It must not be exercised according to private opinion or by reason of benevolence or sympathy;
>
> 3. The discretion must be justifiable and where a successful party doesn't mis-conduct himself he was entitled to costs as of right;
>
> 4. Where there is no material on which a Judge can exercise his discretion he is not justified of depriving a successful party of his costs. Such material must be evidence in the case and the Judge won't hear *viva voce* evidence after Judgment to influence costs;
>
> 5. If, however, there is any such material, the sufficiency of it is a matter for the Judge's discretion and his discretion in this regard won't be interfered with.

[19] In this proceeding I am informed by both counsel of settlement offers extended by both parties. There is a difference in that which was stated in the respective briefs, but it is clear that *Civil Procedure Rule* 41A.09(2) did not apply and the important rules for me to consider are 63.03(1) and 34.16 which reads:

> Unless, it is otherwise ordered, where a proceeding is tried with a jury, the costs shall follow the event.

[20] I am invited by both counsel to consider the negotiations in determining costs. I have considered them and determine the negotiations do not justify a departure from an equal sharing of costs and disbursements.

[21] Plaintiff's counsel has raised the question of the costs he incurred by reason of the report of Mr. Grant Rhyno of Walters Forensic Engineering submitted to the court by the defendants. Mr. MacDonald states in his brief as follows:

> In addition, a substantial amount of legal time was spent on the Defendant's expert report from Walters Forensic Engineering. Mr. Grant Rhyno was the author of that report. To accommodate the Defendants, an application prior to trial was scheduled regarding the admissibility of this report. Counsel appeared before Your Lordship in Chambers on the admissibility issue. At approximately 10:00 p.m. on the night before Mr. Rhyno was scheduled to testify I was advised by my learned friend that a decision had been made not to call Mr. Rhyno. To that point I had spent the evening preparing for a *voir dire* and a cross-examination. The time spent and the disbursements incurred relating to Mr. Rhyno's report was a waste.
>
> Mr. Rhyno's report was not in evidence and therefore the Defendants should not recover any portion of the fees or disbursements incurred as they relate to Mr. Rhyno's report.

[22] The court raised concern about the report at the pretrial conference. Defence counsel requested an early determination of the issue involving the admissibility of the report and of the evidence of Mr. Rhyno. It was stated that if the report or the evidence was not admitted, the defence would seek

an adjournment. Thus, there was raised two issues - the admissibility of the evidence and the request for an adjournment on an interlocutory matter.

[23] Counsel and the court met for a hearing, and it was determined the issues should be decided at trial after a proper *voir dire*. As trial opened, counsel for the defence advised the court Mr. Rhyno was not going to testify at trial.

[24] The court makes no comment which would relate to the two issues because it has not heard the submission of counsel. But I do find the plaintiff was put to additional expense as a result of the attempts to introduce the evidence including the preparation of a written memorandum, the attendance at court and the fact counsel for the plaintiff was not aware the engineer would not testify until late on the night before trial. I am prepared to award costs of the aborted motion to the plaintiff.

[25] In summary, cost of trial follows the event. The defendants are not entitled to any costs or disbursements relating to the services of Grant Rhyno or Walters Forensic Engineering. The plaintiff is entitled to the cost of the proposed applications to admit the engineering evidence and the adjournment. I seek submissions from counsel in writing as to an appropriate amount of these costs.

J.