

1985

S.H. 52709

**IN THE SUPREME COURT OF NOVA SCOTIA  
TRIAL DIVISION**

**Between:**

**PAMELA ANN UPHAM**

Plaintiff

- and

**C.K. YOU, M.D.**

Defendant

**HEARD:** At Halifax, Nova Scotia, before the Honourable Mr. Justice David W. Gruchy on September 6, 7, 10 and 11, 1990

**DECISION:** November 15, 1990

**COUNSEL:** William L. Ryan, Q.C., Solicitor for the Plaintiff  
Ronald J. Downie, Q.C., Solicitor for the Defendant

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This action came on for trial before a jury and was heard on September 6, 7, 10 and 11, 1990. At the conclusion of the trial, certain questions were posed to the jury. The only question and answer concerning us here was question 5 which I now set out:

"5. What damages did the Plaintiff suffer?

Special Damages:

General Damages:"

The jury answered:

"Because of the unacceptable degree of scarring, the plaintiff Suffered mental anguish.

No special damages.

General Damages - All legal and court costs to be assumed by the defendant and a sum of Six Thousand (\$6,000.00) to be awarded to the plaintiff."

The parties have been unable to agree on a form of order. The disagreement concerns costs. The plaintiff has asked that the matter of costs be addressed by the following:

"IT IS ORDERED that the defendant is liable to the plaintiff in both negligence and breach of contract and that the plaintiff is to have judgment against the defendant for general damages which includes all of her legal and court costs in the sum of \$6,000.00."

The defendant has asked that the same matter be addressed by the following:

"IT IS ORDERED that the plaintiff be at liberty to enter judgment against the defendant for the sum of Six Thousand Dollars (\$6,000.00) together with the plaintiff's costs of the proceeding to be taxed."

In an appearance before me, the plaintiff has made it clear that she is seeking solicitor and client costs. The

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defendant takes the position that party and party costs only ought to be awarded.

The relevant Civil Procedure Rules are 34.16 and 63.02. They read as follows:

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

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 a proceeding."

This action was commenced in 1985 and, accordingly, recent amendments to the rules with respect to costs do not apply.

I have been referred to Orkin's The Law of Costs,

(2nd.Ed.) and in particular to paragraphs 202.4 and 219. I have examined the various provisions of the Ontario Rules and the Nova Scotia Rules and have concluded that Orkin's statement that, "The jury has no right to make any recommendation as to costs, and such recommendation cannot be given effect to by the trial judge", is applicable to Nova Scotia.

The matter of solicitor and client costs was considered by the Appeal Division of this Court in *Lynch v. Mack (J.D.) Ltd.* (1983), 65 N.S.R.(2d) and 147 A.P.R., 417 at p.425 as follows:

"[44] The plaintiff submits that the circumstances of this case indicates that the court should give serious consideration to awarding costs on a solicitor-client basis. The Appeal Division of this court has made it very clear on several occasions that it is only in rare and exceptional cases that such costs should be ordered. On this issue reference is made to the following cases:

*Wournell v. Allan* (1980), 37 N.S.R.(2d) 125; 67 A.P.R. 125 (C.A.).

*Warner v. Arsenault* (1982), 53 N.S.R.(2d) 146; 109 A.P.R. 146 (C.A.).

[45] Reference is made in these cases to the *Law of Costs*, by Orkin, M.M., at page 53:

'in a dispute inter partes the court has a general discretionary power to award costs as between solicitor and client, although not by way of damages.' (Underlining mine)

[46] What should constitute 'rare and exceptional circumstances' should in my view be determined in the context of the length and complexity of the case itself. I find no merit in this application."

In examining *Orkin supra*, it is clear that the circumstances of this case are not such as should attract solicitor and client costs. In reaching this conclusion I have also had the benefit of examining the cases of *Weaver v. Sawyer and Company* (1889), XVI Ontario Appeal Reports, 422 at 428 and *Farquhar et al v. Robertson* (1889), XIII Ontario Practice Reports, 156 at 161-162. I am unable to conclude that a situation exists here as existed in *Schouls v. Canadian Meat Processing Corp. et al* (1983), 41 O.R.(2d) at 600. That is, there has been no suggestion at all that the defendant herein showed any disregard for the plaintiff.

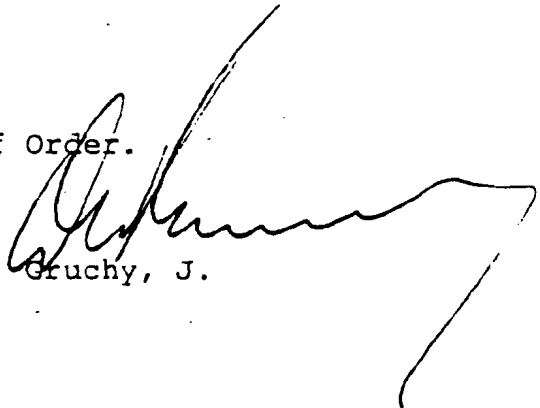
I conclude that there was no "good cause" for the jury to make the recommendation with respect to costs and I adopt the words of Rose, J. in *Farquhar v. Robertson* (*supra*) and choose not to abdicate my position by handing over my power to the jury and allow them to determine what was good cause and to dispose of the question of costs which must be my responsibility.

This case has been long and difficult and the award of damages relatively low. In my view, it is a case in which I may exercise my discretion and award a gross sum to the plaintiff in addition to party and party costs. The plaintiff was in the "exceptional circumstances" of having to proceed in a malpractice suit while apparently not being able to obtain expert medical opinions. Extremely careful preparation by

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plaintiff's counsel was required enabling the plaintiff to establish her case through the defendant's evidence. I have considered particularly the time, effort and responsibility involved in the trial and particularly, the relative ability of the parties to bear costs. I have considered the heavy burden placed upon plaintiff's counsel by the circumstances of the case. Accordingly, pursuant to Civil Procedure Rule 63.02(1)(a), I award the gross sum of \$3,000.00 in addition to any taxed party and party costs.

I have fixed the form of Order.



Gruchy, J.

Halifax, Nova Scotia

November 15, 1990