

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Dayem v. Clarke*, 2017 NSSC 183

**Date:** 2017-06-29

**Docket:** Hfx No 443681

**Registry:** Halifax

**Between:**

Khawla Abdel Dayem

Plaintiff

v.

Arthur Clarke and  
Royal Environmental Inc., a body corporate

Defendants

**Judge:** The Honourable Justice Gregory M. Warner

**Heard:** May 29 to 31, 2017, in Halifax, Nova Scotia

**Final Written  
Submissions:** June 12, 2017

**Counsel:** Godfred T. Chongatera, counsel for the plaintiff  
Wayne Francis, counsel for the defendants

**By the Court:**

[1] This is a costs decision.

[2] Khawla Dayem (“Ms. Dayem”) sued Royal Environmental Inc. and its driver for damages resulting from a motor vehicle accident that occurred on Larry Uteck Boulevard on February 20, 2014. The trial was held between May 29 and 31, 2017.

[3] The witnesses gave diametrically opposite versions of where and how the accident occurred. In an oral decision on May 31, 2017, the court dismissed Ms. Dayem’s action.

[4] The court invited submissions on costs. Plaintiff’s counsel advised that he was not ready. The court invited written submissions on costs, first within two weeks by counsel for the defendant, with reply submissions from the plaintiff within two weeks. The defendant has made written submission. The plaintiff has not. Defence counsel states in its brief that he understands plaintiff’s counsel was discharged shortly after trial and copies of the defendant’s submissions were forwarded both to counsel and directly to Ms. Dayem.

[5] The plaintiff’s total claim, in accordance with her pretrial brief, was \$133,570.00. Eight witnesses testified at the trial.

[6] *Civil Procedure Rule 77* govern costs award. *Civil Procedure Rule 77.02(1)* provides that a judge may make an order about costs as the judge is satisfied will do justice between the parties. Nothing in the *Rules* limits the general discretion. *Civil Procedure Rule 77.03(3)* provides that costs of a proceeding follow the result, unless a judge orders or a *Rule* provides otherwise. Stated differently, usually the loser pays.

[7] *Civil Procedure Rule 10.09(2)* provides that a judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the Tariffs increased by one of the following: “(c) fifty percent, if the offer is made after setting down and before the finish date;”.

[8] The usual starting point for costs following a decision or order in a proceeding is contained in Tariff A. It provides two bases for calculating costs. The first is a combination of the ‘amount involved’ applied to one of three scales. The second scale, Scale 2, is described as the basic scale. The second basis is the length of trial. \$2,000.00 is added to the amount calculated under Tariff A for each day of trial.

[9] Defence counsel acknowledges that there was nothing unusual about this proceeding that would suggest anything other than the application of Scale 2. Scale 2, applied the amount set out in the plaintiff's pretrial brief, provides for a costs award of \$16,750.00 plus \$5,000.00 for a two-and-a-half-day trial or, in total, \$21,750.00.

[10] Defence counsel says it made a formal offer to settle the plaintiff's claim pursuant to *CPR 10.05* on February 24, 2017, just prior to the finish date. The offer was \$15,000.00. The brief is not clear, but the court infers that the plaintiff did not accept the offer and that it was not withdrawn before the trial began.

[11] Defence counsel says the defendants obtained a "favourable judgment" per *CPR 10.09*.

[12] The defendants seek that the Tariff A amount be increased by 50%, or \$10,875.00, to \$32,625.00.

[13] In addition, the defendants have provided the court with an affidavit verifying its disbursements totalling \$2,075.00, most of which relates to attendance at discovery and obtaining a discovery transcript.

### **Analysis**

[14] Despite the plaintiff's pretrial brief claiming damages of \$133,570.00, it was very clear from the evidence at trial, and the court infers it must have been very clear to defence counsel after discovery of and disclosure by the plaintiff, that there was very little risk that the plaintiff's damage claim, if liability had been found against the defendants, would have been more than or much more than the formal offer of \$15,000.00. At trial, the plaintiff advanced very little evidence of any loss or damage.

[15] Realistically, based on the evidence heard at trial, the amount involved would not likely have exceeded \$40,000.00. Application of Tariff A to an award of \$40,000.00 would provide for a costs award of \$11,250.00 (\$6,250.00 plus \$5,000.00), to which, based on the formal offer and favourable judgment, the court may add 50%, bringing the award to \$16,875.00, plus disbursements.

[16] The purpose of costs is to provide a substantial contribution towards, but not complete indemnification of, the winner's reasonable legal costs.

[17] The defendants have not advanced evidence as to their actual and reasonable legal costs. (They are not obligated to do so.)

[18] In my view, it would be unjust to award costs of \$32,625.00 plus disbursements of \$2,075.00, absent any indication that the defendants' reasonable legal costs were not somewhat higher. Common sense and experience suggest such would not be the case.

[19] Costs should be awarded to the successful defendants on Tariff A, Scale 2, for a two-and-a-half-day trial, based on the plaintiff's claim of \$133,750.00 for a total of \$21,750.00, plus its proven disbursements of \$2,075.00, but without the *Rule 10.09* bump.

[20] Costs are awarded against the plaintiff in the sum of \$23,825.00.

Warner, J.