Goulding Estate v. Kendell & Crosbie

Kimberley Goulding, an infant by her Guardian Ad Litem, Hubert Goulding (plaintiff) v. Diane Cole (defendant)

Newfoundland Supreme Court (Trial Division)

O'Reilly, Master

Judgment: July 8, 1987
Docket: St. J. (T.D.) 926/85

Counsel: David C. Day, Q.C., for the Registrar of the Supreme Court of Newfoundland, Guardian of the Estate of Kimberley Goulding

Chesley Crosbie, of the Firm of Crosbie & Kendell

***O'Reilly, Master*:**

1 The solicitors for the plaintiff have submitted their "Bill of Plaintiff's Solicitor and Own Client Costs" to be taxed pursuant to the Order of Mr. Justice F.J. Aylward, dated December 17, 1986.

2 In order to dispose of the matter, it is necessary to examine some background. It appears that on the 8th day of October, 1986, the solicitors for the plaintiff, Messrs. Kendell & Crosbie, entered into a contingency fee agreement with Hubert Goulding, the father and guardian ad litem of the infant plaintiff pursuant to rule 55.17 of the *Rules of the Supreme Court*, 1986. Pursuant to this agreement the solicitors for the plaintiff would receive as their fee 13% of the total amount of compensation together with any costs awarded, contingent of course on success. It is my understanding that the entry into the formal contingency fee agreement merely reduced to writing, as was required by the rule, the agreement between the father of the infant plaintiff and the solicitors at the time of their original retention.

3 It further appears that the contingency fee agreement entered into met the requirements of rule 55, even to the extent that the father of the infant plaintiff, the guardian ad litem received independent legal advice on the effect of the agreement and his rights pursuant to rule 55.

4 The contingency fee agreement was to cover litigation involving a claim by the infant plaintiff, Kimberley Goulding, for severe personal injuries sustained by her when she was struck

by an automobile on August 28, 1983. The action was eventually settled prior to trial for the sum of $442,500.00.

5 Upon settlement being agreed between the parties, the solicitors for the plaintiffs made application to the Supreme Court on November 17, 1986, pursuant to rule 8.06 for approval of the compromise. It is interesting to note that paragraph (4) of the application for approval of the compromise requested an order "reviewing and approving the contingent fee agreement between the infant plaintiff by her guardian ad litem and her solicitor dated October 8, 1986 and filed with the court". On the 17th day of December, 1986, Mr. Justice F.J. Aylward approved the compromise of the plaintiff's claim in accordance with the Minutes of Settlement attached to the Order. Paragraph (2) of the Minutes of Settlement is, however, of significance and provides:

> On payment of the amounts stipulated ... together with the amount of $54,953.72 to Kendell & Crosbie, in trust, ... from which amount Kendell & Crosbie shall be paid their solicitor and own client account for fees upon taxation, not to exceed $54,953.22 the liability of the defendant ... shall be forever released...

6 It is obvious therefore that Mr. Justice Aylward refused to grant the order which requested a review and approval of the contingency fee agreement and instead directed taxation of the account of the solicitors for the plaintiff on a solicitor and own client basis.

7 On the 17th day of December, 1986, the Supreme Court of Newfoundland granted Letters of Guardianship of the Estate of the infant plaintiff to the Registrar of the Supreme Court.

8 Pursuant to the Order of Mr. Justice Aylward, the solicitors for the plaintiff have submitted for taxation their Bill of Costs in the amount of $54,953.22. The amount claimed is the exact amount as would have been received under the contingency fee agreement and is 13% of the negotiated settlement of $442,500.00, less the sum of $19,782.94 representing the account of the Department of Health with respect to which the plaintiff's solicitors have negotiated a separate agreement as to the amount of their fee.

9 At the taxation, counsel for the Registrar, Day, Q.C., argued that the account was too high. He argued that the bill submitted for taxation did not contain any particulars of the amount of time spent by the solicitors for the plaintiff in representing the interest of their client. He suggested a range of compensation in the order of 7 1/2% to 10%.

10 Mr. Crosbie argued that the sum claimed was both reasonable and justified. He described the work that was done in representing the interest of their client in the previous three and one-half years. He advised that the liability of the defendant was never admitted and that a settlement was arrived at just prior to the date set for the trial. He further stated that as the injuries sustained by his client were severe, considerable time and effort was expended in locating and instructing medical professionals who in his opinion were knowledgeable and competent in the field of traumatic medicine and the management of severe head injuries in particular, so that the monetary settlement could be structured in line with the prognosis of the medical management of

his client's injuries. He further stated that strict time records were not maintained as it was not felt that these would be necessary in light of the agreed method of compensation negotiated with the father of the plaintiff. Mr. Crosbie did however review his file and other records available to him and provided me with what he emphasized was an estimate only of 310 hours having been spent on the file from the date of the original retention by his firm.

11 Counsel for the registrar argues that accurate time records should have been kept even though the basis of compensation negotiated was not the amount of time expended on the file but on the quantum of award obtained as, he quite rightly points out, such an arrangement was still subject to taxation. While such may be true, it is not the practise in this jurisdiction for solicitors to maintain accurate time records when a contingency fee arrangement has been made in circumstances similar to this. The difficulty in which the solicitors for the plaintiff find themselves is that their account must be taxed and I must find a reasonable basis to carry out the order of the court in that respect. I do not feel that the omission of the solicitors for the plaintiff to keep accurate time records should disentitle them to compensation.

12 To return therefore to the order of Mr. Justice Aylward, he specifically ordered that the solicitors be paid "their solicitor and own client account for fees upon taxation, not to exceed $54,932.22".

13 In *Farrell v. Canadian Broadcasting Corporation* (1984), 51 Nfld. & P.E.I.R. 183, 150 A.P.R. 183, Steele, J., considered the distinction between "solicitor and client" costs and "solicitor and his own client" costs. At page 190 of his judgment, he stated:

> It is my understanding that when costs are to be taxed on the basis of a solicitor and his own client, the sole criterion or standard is one of reasonableness. Reasonableness denotes fairness or what is just in the circumstances. Reasonableness means an allowance that is fit and appropriate. In arriving at a sum or sums that are reasonable, the taxing master is guided by the evidence, precedent, experience and plain common sense together with all the other relevant considerations that bring about an equitable result.

14 Mr. Justice Steele continues on the same page:

> ...a taxation of a solicitor and his own client costs founded on what is reasonable lends itself to more flexibility and scope than a taxation of a solicitor and client bill of costs based on the scale of fees ... I am not saying that a taxation with the sole test being one of reasonableness will always be more generous than a taxation based on the scale but there exists that possibility.

15 Applying the reasoning of Steele, J., to the matter at hand, I will have discharged my duty if I am reasonable and what is reasonable is a function of the evidence, precedent, experience and common sense.

16 Applying these factors, the following points are noted:

1. Even though he is not the guardian of the estate, the father of the infant plaintiff, who was the guardian ad litem, agreed, after receiving independent legal advice to a scheme which would see the solicitors for his daughter compensated on the basis of 13% of the total amount of compensation received plus any costs awarded.

2. That at the time of entering into the contingency fee agreement both the question of liability and quantum of damages were unresolved.

3. While only an estimate of the number of hours expended by the solicitors for the plaintiff has been given, the evidence indicates that a considerable amount of time was expended in the prosecution of the plaintiff's claim and the arranging of an appropriate structured settlement.

4. That the trial judge approved the settlement in the full appreciation that the net amount received by the infant plaintiff might well be less the entire amount claimed under the contingency fee agreement of $54,953.22.

5. That of the total settlement approved there has been excluded from the amount used to calculate the amount of the fee, the sum of $19,782.94 being the account of the Department of Health for which the Department of Health will be charged a fee by the solicitors.

6. That of the total amount of the settlement approved, the sum of $16,250.00 was paid to one Edna Bland for nursing services and a fee of $750.00 was charged to her by the solicitors in respect of tax advice respecting same.

7. That of the total amount of the settlement approved, the sum of $10,750.00 was paid to Bride Goulding, the mother of the infant plaintiff, and a fee of $750.00 was charged to her in respect of income tax advice respecting same.

8. That of the total amount of the settlement approved, the sum of $1,599.45 was paid to the firm of Kendell & Crosbie as reimbursement to them of their disbursements incurred in the prosecuting of their client's claim.

17 The practise in this jurisdiction has long been to compensate solicitors engaged in this type of litigation on the basis of a percentage of the compensation obtained for their clients. In this case, a percentage of 13% was agreed with the father of the infant plaintiff based on the compensation awarded or negotiated. This I take it to mean compensation awarded to the infant plaintiff but excluding amounts which, as is stated in paragraphs (1)(c) and (1)(d) of the Minutes of Settlement attached to the Order of Aylward, J., were only claimed by the infant plaintiff "on behalf of" her aunt, Mrs. Edna Boland, and her mother, Mrs. Bride Goulding. Also, there should be excluded from the calculation, the sum of $1,599.45 being a recovery by the solicitors of their disbursements incurred in prosecuting their client's claim.

18 If one were to exclude from the total settlement negotiated at $442,500.00, the amount of $19,782.94 recovered on behalf of the Department of Health; the sum of $16,250.00 being the amount recovered "on behalf of" Edna Boland; the sum of $10,750.00 being the amount claimed "on behalf of" Mrs. Bride Goulding, the mother of the infant plaintiff, and the sum of $1,599.45 being the recovery by the solicitors "of their own disbursements" the total amount of compensation received by the plaintiff was $394,117.61.

19 Applying to this figure a factor of 13%, which in these particular circumstances I find reasonable, I arrive at the sum of $51,235.29, in which amount I tax the account of Messrs. Kendell & Crosbie on the basis of their solicitor and own client account for fees.

Order accordingly.

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