

UPDATE ON COSTS - LIFE AFTER THE GRID

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INDEX

<u>Topic</u>	<u>Page</u>
INTRODUCTION	1
STEPHEN v. STAWECKI	1
MONKS v. ING INSURANCE COMPANY OF CANADA	2
HENHAWK v. THE CITY OF BRANTFORD	4
CONCANNAN v. NASH	6
AUTHORSON v. THE ATTORNEY GENERAL OF CANADA	8
WALKER v. RITCHIE	9
LUKASHAL v. HASAN	11
DiBATTISTA v. WAWANESA MUTUAL INSURANCE COMPANY AND SERVICEMASTER OF OAKVILLE	12
CONCLUSION	14

INTRODUCTION

This paper is intended to present a cross-section of different types of costs awards that have been granted since the Costs Grid was abolished effective July 1, 2005. It is hoped that the eight cases outlined below appropriately gauge the pulse of the judiciary as it relates to costs and the new procedures established by the amendments to the costs regime that were implemented fifteen months ago.

STEPHEN v. STAWECKI¹

To my knowledge, this decision, along with the decision in *Monks v. ING*, represents the first award of costs at trial granted after the implementation of the new Costs Outline procedures that came into effect on July 1, 2005.

The main action was tried without a jury over four days, from June 27th to June 30th, 2005. It was a claim for damages arising as a result of a fatal motor vehicle accident. The issue at trial was whether the plaintiff, Lavonne Stephen, was a spouse of the deceased, within the meaning of the *Family Law Act*. Ms. Stephen and the deceased had not been married. They were cohabiting as spouses at the date of the accident. The issue was whether or not they had been cohabiting for three years or more before the accident, as required by section 29 of the *Family Law Act*. The plaintiff was successful at trial. The decision was rendered July 8, 2005.

The costs decision was released September 8, 2005.

Justice Little rejected the request that a premium be awarded, as, in his view, it was not an exceptional case. He determined that it was mainly a fact-driven case without legal complexity.

Justice Little acknowledged that the plaintiff facilitated the matter by preparing a trial brief, serving a Request to Admit, which was all but rejected, serving a reasonable offer to settle

which was not accepted, and providing the only expert evidence for the Court. Justice Little determined that the plaintiff was entitled to be awarded substantial indemnity costs from the date of the offer onward.

Justice Little applied the new Rule 57.01 and the considerations listed thereunder. He accepted the fact that junior counsel fees should be paid to the plaintiff, but reduced the total number of hours that were being claimed.

Up to the date of the offer to settle of March 1, 2005, costs were awarded in the amount of \$25,000.00. Following the offer and forward, including the duration of the trial, costs were awarded at \$80,000.00.

***MONKS v. ING INSURANCE COMPANY OF CANADA*²**

For a trial that lasted nearly six weeks, Justice Lalonde found, on June 24, 2005, that Suzanne Monks' December 1998 motor vehicle accident materially contributed to her catastrophic condition. The trial involved complex medical issues in the fields of neurology and neurosurgery. There were voluminous medical and hospital records, with numerous medical legal opinions. There were also complicated issues of causation as between multiple accidents and recovery from two different insurers under two different SABS regimes. Additionally, there was a lengthy and complicated accounting for all benefits received, in order to ensure that Ms. Monks was not obtaining double recovery. (She had received a \$1.5 million settlement from Zurich Insurance for injuries received in her second motor vehicle accident of 1995.)

The decision on costs totals 78 paragraphs in length. Total fees were awarded of \$470,330.82, including a \$75,000.00 premium. Disbursements were fixed at \$44,827.85.

¹ unreported decision of The Honourable Mr. Justice Little dated July 8, 2005, upheld by the Ontario Court of Appeal in an endorsement released June 14, 2006

² unreported decision of Lalonde J. on costs, released September 8, 2005

Justice Lalonde specifically directed his mind to the elimination of the Costs Grid that occurred on July 1, 2005. Because the decision to fix costs was made after July 1st, he did not rely upon the Costs Grid, even though the trial decision was rendered before July 1, 2005.

The plaintiff's counsel submitted a Bill of Costs on a partial indemnity basis totalling \$359,133.13 for fees. On a substantial indemnity basis, exclusive of a premium, it totalled \$553,350.53. It appears that counsel did not request substantial indemnity fees, based on the 1.5 times multiplier mandated by the change to the costs regime that came about on July 1, 2005. Nonetheless, the calculation was so close to the formula that Justice Lalonde did not see need to make an adjustment.

The plaintiff requested a \$150,000.00 premium, which was reduced to \$75,000.00 by Justice Lalonde.

Justice Lalonde allowed the plaintiff's counsel an hourly rate of \$240.00 for fees on a partial indemnity basis and \$300.00 in fees on a substantial indemnity basis. The plaintiff's counsel, Peter Cronyn, had been involved in civil litigation for 26 years. Justice Lalonde also noted that the defence counsel rates were either equivalent or higher. It was obvious to Justice Lalonde that the defendant expected to pay what the plaintiff had requested for costs, thereby directing his mind to one of the two new factors added to Rule 57.

Justice Lalonde awarded the cost of specific disbursements, such as faxes, long distance telephone charges, courier charges, legal research, binding tabs, binding materials, and LPIC civil litigation transaction levy surcharges. In awarding the \$75,000.00 premium, Justice Lalonde referred himself to *Corona v. Lac Minerals* and found that the case met the seven relevant principles that justify premium awards, namely, legal complexity, responsibility assumed, monetary value, importance of matter to client, degree of skill and competence, result achieved, and ability to pay.

HENHAWK v. THE CITY OF BRANTFORD³

The specific language of a plaintiff's retainer agreement was examined by the Court in deciding whether or not the Court should award an amount of costs that approached or exceeded the amount of damages awarded at trial.

The successful plaintiff argued, when seeking costs of the action, that she had retained her lawyer by way of a contingency arrangement. Justice Crane sought further submissions from the plaintiff's counsel, specifically asking that the terms of the contingency fee retainer be revealed, and also asking whether the plaintiff took the position that there could be more money awarded in costs than was awarded at trial for damages.

The plaintiff was granted judgment in the amount of \$64,868.23. The plaintiff asked for fees in the sum of \$63,856.53, plus disbursements in the amount of \$14,843.66.

The plaintiff had retained her lawyer by way of a contingency fee agreement that required her to pay "20% of the net damages received, plus GST, plus costs, plus disbursements". While the *Solicitors Act* does permit such an agreement to be entered into between counsel and clients, I have recommended against this practice in previous papers and lectures. The reason I recommend against this retainer arrangement is that the *Solicitors Act* specifically states:

A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless:

- (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
- (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a portion of them.

³ unreported decision of The Honourable Mr. Justice Crane dated January 5, 2006, involving OTLA member Charles Flaherty, the successful counsel for the plaintiff

It does not appear that the judge was made aware of Section 28.1 of the *Solicitors Act* when the decision was rendered. It does not appear that there was a joint application made by the solicitor and his client for an exemption under the *Solicitors Act*. The judge did not direct his mind to this issue. Consequently, there is some reason to doubt the greater precedential value of Justice Crane's decision. That being said, Justice Crane ultimately awarded the sum of \$25,000.00 for fees, and fixed disbursements in the amount of \$9,532.42, for a total costs award of \$34,532.42, plus GST where applicable.

My own practice is to enter into a contingency fee agreement (if ultimately it is decided that a contingent fee is the most appropriate retainer option) that is based on a global percentage, without regard for the amount of costs that might be contributed pursuant to a partial indemnity or substantial indemnity costs order. Typically, the percentages range from 30% to 40%, although they can be higher or lower, as circumstances may require.

In non-contingency fee agreements, it remains my standard practice to provide the client an estimate of the likely fee that will be rendered which does refer to the contribution that might be made by the losing party, plus an additional amount that represents the solicitor and client bill. The additional solicitor and client component is estimated to be in the range of 15% to 20% of the plaintiff's net recovery, including interest, or, alternatively, is estimated to be no more than 20% (or some other fixed percentage). The difference is that the client must understand that there could be a fee, even if the client is not successful in recovering money. My retainer agreements refer to the fact that there are a number of other factors, including the client's ability to pay, and the outcome that has been achieved, that go into the determination of the fee.

While the reality is that many lawyers will not pursue their client for a large legal bill, even when the case has been advanced pursuant to a non-contingency fee agreement, the language of this type of retainer agreement at least leaves open the option to have some modest contribution made by the client in the event of an unsuccessful trial outcome. My own view is that this non-

contingent fee retainer, which is a hybrid retainer agreement, does not trigger the need for a joint application by counsel and client, as mandated by s.28.1(3) of the *Solicitors Act*.

For my part, I do not want to be in the position of having to make an application, jointly with my client, before a Judge of the Superior Court of Justice, seeking approval of a retainer agreement that includes payment to me of the costs because of “exceptional circumstances”. Firstly, it is unclear what constitutes an “exceptional” circumstance. Secondly, there is more flexibility when there is no need for court approval.

To date, I remain unaware of any case that has been decided by the Superior Court of Justice under the revised provisions of Section 28.1 of the *Solicitors Act*. There was an opportunity for some comment to be made in *Henhawk v. Brantford*, but, unfortunately, the Judge made no reference to the *Solicitors Act* in his costs endorsement.

CONCANNAN v. NASH⁴

Justice Taylor of the London Superior Court of Justice recently fixed costs in this Bill 59 rear end motor vehicle collision at nearly three times more than the amount the jury awarded the plaintiff for general damages. The most contentious issue at trial was whether the plaintiff’s injuries met the threshold.

The plaintiff received a net judgment of \$50,000.00 plus interest for general damages which exceeded the plaintiff’s Rule 49 Offer to Settle. The plaintiff sought a cost award based on a combination of partial and substantial indemnity costs. The Bill of Costs submitted by the plaintiff exceeded \$200,000.00. The plaintiff argued that this was a complicated lawsuit in which every issue was vigorously contested by the defendant. The defence argued that the lawsuit

⁴ [unreported](#) decision of Justice Taylor, Judith Hull, OTLA Director, was the successful plaintiff’s counsel

I am indebted to new OTLA member, Kerry Figliomeni, who prepared this case summary for in-house educational purposes at my firm. While I have pilfered her case summary, virtually word for word, I do wish to acknowledge her involvement.

was straightforward, relatively uncomplicated and the time expended by plaintiff's counsel and staff exceeded what was reasonable.

In determining that the plaintiff was entitled to \$147,626.42 in costs, Justice Taylor considered the following Rule 57.01 factors: (a) the principle of indemnity, including the experience of plaintiff's counsel, the rates charged and the hours spent; (b) the costs that the defendant could reasonably expect to pay as costs of the proceeding; (c) the amount claimed and the amount recovered; (d) the complexity of the proceeding; and, (e) the importance of the issues.

Justice Taylor found that the issue of the jury's assessment of damages in relation to the injuries suffered was of extreme importance to the plaintiff since the financial consequences to her would have been disastrous if she had been unsuccessful. In relation to the complexity of the proceeding, Justice Taylor did not categorize the case as complicated, or simple, rather he acknowledged that the insurance regime for compensating injured parties involves technical rules and experienced counsel must properly present these types of claims. The plaintiff's early Offer to Settle made it clear that the case was not a huge claim; therefore, the judge did not consider that the amount claimed was unreasonable when compared to the amount recovered.

The most important considerations for Justice Taylor were the costs that the defendant could reasonably expect to pay if unsuccessful and the hours spent and rates claimed by plaintiff's counsel in her Bill of Costs. The defendant was an auto insurance company and an experienced litigant. As a result, the judge deemed the defendant to know the cost consequences that follow the unsuccessful defence of an action. Furthermore, he found that "insurers who elect to contest a case on the basis that it does not meet the threshold, must be prepared, in the event that they are unsuccessful, to accept the cost consequences that flow reasonably from that decision."

In reviewing the time spent by plaintiff's counsel and the hourly rates charged, Justice Taylor looked to the maximum hourly rates in the Guidelines and the experience of plaintiff's counsel. He recognized that plaintiff's counsel was highly competent and experienced, but did not consider her to be "the most experienced lawyer" or the case to be "the most complex and important". The judge was also concerned about the amount of clerk time keeping in mind that the maximum hourly rate for plaintiff's counsel was being claimed. Ultimately, the total fees for counsel and staff time was reduced from \$171,537.00 to \$120,000.00.

AUTHORSON v. THE ATTORNEY GENERAL OF CANADA⁵

In this class action proceeding, The Honourable Mr. Justice Brockenshire, on September 28, 2006, rejected the plaintiffs' request for costs in the amount of \$75 million as against the Crown. The class action concerned the claim of many thousands of war veterans, found to be incompetent to manage their own affairs, whose pensions were held for them by the federal government, acting as a trustee, without any statutory limit on its obligation in such a fiduciary position. Justice Brockenshire had found that the government failed to invest the funds that it held in trust. Justice Brockenshire assessed damages in the amount of \$4.6 billion, which is the largest damage award ever awarded in Canada.⁶

The plaintiffs specifically argued that, since July 1, 2005, under Rule 57.01 of the *Rules of Civil Procedure*, the Court now has specific authority to award not only partial indemnity and substantial indemnity costs, but also "costs in an amount that represents full indemnity".

It was Justice Brockenshire's finding that the facts, established from the Crown's own documentation, showed a massive breach of fiduciary obligation extending over some 70 years, despite repeated warnings, including those of the Auditor General, that what it was doing was wrong.

The Crown's position was that the request of \$75 million in costs was unprecedented and that it ignored all of the case law on costs that existed to this point in time. It vastly exceeded any amount of costs that an unsuccessful party could ever reasonably expect to pay. The Crown's position was that costs, according to the case decisions for the last 50 years, means "hours times hourly rates". The Crown submitted that an appropriate partial indemnity cost award would be just under \$1 million, and that substantial indemnity costs would be just under \$1.5 million, and that a claim for full indemnity costs could not go over \$2,000,000.00.

Justice Brockenshire made the following rulings:

- The claim for \$75 million as costs against the Crown, to indemnify against fees claimed to be owed under a contingency fee agreement, should not be allowed.
- Full indemnity costs is the scale applicable for costs to class counsel.
- The amount of such costs was fixed at the amount of \$2,171,877.00.
- A premium should be allowed over and above the full indemnity costs, given the unusual circumstances of the case, in the amount of \$1,000,000.00. Disbursements were allowed at \$992,222.89, plus GST.

WALKER v. RITCHIE⁷

OTLA Director Carl Fleck achieved outstanding trial success before The Honourable Mr. Justice Brockenshire, beating the plaintiffs' offer to settle at trial. Consequently, the plaintiffs were entitled to partial indemnity costs for the litigation up to the date of the offer, and substantial indemnity costs from the date of the offer forward. On the basis of the risk of non-payment to the plaintiffs' counsel, and the extraordinary result achieved, the trial Justice held that it was

⁵ unreported decision of The Honourable Mr. Justice Brockenshire, released September 28, 2006

⁶ These findings, however, have been appealed to the Ontario Court of Appeal, with the issues to be argued during a full week in April 2007.

appropriate to award a premium, and awarded \$192,600.00. The Ontario Court of Appeal upheld the risk premium awarded by the trial Justice.

Before the Supreme Court of Canada, the propriety of a risk premium between a lawyer and his own client was not challenged. At issue was whether the plaintiffs' costs award, payable by the unsuccessful defendants, should be increased to take into account the risk of non-payment to plaintiffs' counsel.

The judgment of the Court was delivered by Justice Rothstein. The Supreme Court of Canada determined that the risk of non-payment by an impecunious plaintiff to the plaintiff's counsel was not a relevant consideration within the costs scheme in place in Ontario at the time that costs were fixed. The Costs Grid was the governing regime at the time. The risk premium was set aside by the Supreme Court of Canada.

While indemnification is one of the cornerstones of a costs award, the Supreme Court of Canada noted that the Costs Grid did not provide for full indemnity, as is now the case. Rather, the quantum a party would receive as an indemnity was governed instead by the factors set out in Rule 57.01(1) and the Grid itself. The risk of non-payment to a plaintiff's counsel is not one of the enumerated factors under Rule 57. While the words "any other matter relevant to the question of costs", which is found in Rule 57, are broad, these words are not to be interpreted in an unlimited fashion. The Supreme Court of Canada determined that the drafters of Rule 57 did not intend the "any other relevant matter" subsection of the Rules to include the risk of nonpayment to plaintiff's counsel as a relevant factor to consider.

The Court held that unsuccessful defendants should expect to pay similar amounts by way of costs across similar pieces of litigation involving similar conduct and counsel, regardless of what arrangements the particular plaintiff may have concluded with counsel. A defendant has no

knowledge of these private arrangements, and thus has no means of measuring the risk of engaging in litigation. There is no basis for a difference in approach under Rule 49 to the issue of risk premium as between an award of partial and substantial indemnity costs.

The Supreme Court of Canada also specifically rejected the notion that the payment of a premium to the plaintiffs in a personal injury case ought to be justified on the theory of promoting access to justice. The opportunity for counsel to charge their own client a risk premium, or now a contingency fee, already encourages competent counsel to take on the cases of the impecunious client.

The Supreme Court of Canada noted that its reasons apply to the costs scheme that was in place at the time that the costs were fixed, namely the Costs Grid. The Costs Grid has now been abolished and replaced instead by the Costs Outline system. The Supreme Court of Canada did acknowledge that the costs scheme in Ontario has now been modified in a number of ways. It has left open the possibility for premiums under the current scheme by observing “whether or not the reasoning in this judgment applies to the costs scheme currently in place will be an issue for the Courts as the occasion arises”.

LUKASHAL v. HASAN⁸

This case illustrates the protocols followed on a fairly routine mid-level personal injury case.

After taking into account the requisite statutory deductibles, the jury’s verdict totalled \$154,836.33 for the injured plaintiff and *FLA* claimants. There were no relevant Rule 49 offers.

The plaintiffs were entitled to fair and reasonable costs on a partial indemnity scale in an amount that was within the reasonable expectations of the losing defendants.

⁸ unreported decision of The Honourable Mr. Justice Flynn dated February 23, 2006, 2006 CanLii 5306, Ontario Superior Court

The plaintiffs' Bill of Costs on a partial indemnity basis claimed \$300.00 per hour for plaintiffs' counsel who had 17 years of experience. This was the maximum amount that he could request for partial indemnity costs, according to the Guidelines published by the Rules Committee in July 2005, following the repeal of the Costs Grid.

Plaintiffs' counsel did not serve or deliver a Costs Outline in Form 57B, which is a practice now mandated by the amendments to the Rules that took effect July 1, 2005. The trial Justice used the rule of thumb that partial indemnity costs should represent about 60% of the full indemnity rate. On that basis, \$300.00 per hour as a partial indemnity rate would mean that the plaintiffs' counsel was actually charging the plaintiffs \$500.00 per hour. Justice Flynn found that would be excessive. Defence counsel did not complain about the requested rate, however, so, even though it was at the maximum end of the range, and was probably considered unreasonable by the trial Justice, the \$300.00 per hour amount was allowed.

Fair and reasonable costs were fixed in the amount of \$85,000.00, inclusive of fees, disbursements, and GST.

DiBATTISTA v. WAWANESA MUTUAL INSURANCE COMPANY AND SERVICEMASTER OF OAKVILLE⁹

The issue raised by this appeal was whether the Ministry of Health and Long-Term Care ("the Ministry") should pay the costs of the successful defendants following a trial by jury, in which the plaintiffs' claims against Wawanesa were dismissed.

On November 16, 1997, a fire severely damaged the plaintiffs' home. The home insurer was Wawanesa, which resolved the property damage claims through the appraisal process set out in the *Insurance Act*. Servicemaster and a construction company, Tuppen Construction, were hired to restore the plaintiffs' home and repair its contents. The plaintiffs had claimed in their

⁹ unreported decision of the Ontario Court of Appeal released October 5, 2006, CanLii 33544 (Ont.C.A.)

action damages against Wawanesa for negligent, unfair, and deceptive acts and practices in their adjustment of the insurance claim, aggravated damages arising from shoddy and negligent work of Servicemaster and Tuppen Construction in repairing the home and its contents, and punitive damages against Wawanesa.

The action was tried in Milton before a jury over 70 days. The jury found no liability on the defendants and assessed the damages at zero.

The trial Judge found that the defendants were entitled to costs on a substantial indemnity basis. Wawanesa's costs were fixed at \$564,998.73. The remaining defendants had their costs fixed at \$489,969.03.

The defendants sought to have the trial Judge award costs jointly and severally against the plaintiffs and the Ministry, but the trial Judge concluded that only the adult plaintiffs were jointly and severally responsible for the defendants' costs.

The plaintiffs had included in their claim the subrogated interest of the OHIP plan for the cost of insured services received by the plaintiffs following the fire. OHIP's subrogated interest only totalled \$8,057.98 plus interest. On the 43rd day of trial, the Ministry withdrew its claim against the defendants, with costs issues specifically reserved to the conclusion of the trial.

Ministry counsel did not attend the trial, nor participate in the trial in any way. No one from the Ministry gave evidence at trial. The Ministry never presented its subrogated claim at trial, and the jury was not asked to make any assessment of the Ministry's damages.

The Court of Appeal noted that, as a matter of common sense, it would be quite unreasonable to hold the Ministry, with a subrogated interest of just over \$8,000.00, liable for costs which totalled more than \$1,000,000.00.

The Court of Appeal was impressed by the fact that the regulation that triggers the Ministry's obligation to pay costs does not come into play where there has been no assessment of the Ministry's interest, and the plaintiffs' damages have been assessed at zero.

Ironically, in dismissing the appeal, the Ministry itself was awarded costs in the amount of \$8,500.00, all-inclusive, for having to deal with the application for leave to appeal and the appeal.

CONCLUSION

Recovering a proper costs award remains an important part of the advocacy skills that you need to possess in order to properly and fully represent your plaintiff clients. You should take the necessary time to familiarize yourself with the Costs Outline procedure, now mandated by the amendments to the *Rules of Civil Procedure*. You should always look for creative ways to recover costs. It is clear that the new amendment permitting "full indemnity" will continue to be litigated in the future. The Supreme Court of Canada has certainly left the door open for premiums to be awarded under the most recent costs regime. We have not yet seen the end of the ramifications triggered by the legalization of contingency fee arrangements in Ontario. We are only just now beginning to see some of the cases in which contingency fee agreements were executed, making their way to Court. Stay tuned for further clarification on the law over the months ahead.