BROCKVILLE COURT FILE NO.: 05-0083

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
DUSKA BARKLEY, PEYTON BARKLEY, MARATHA BARKLEY, by their Litigation Guardian, Valerie Barkley, STEVEN BARKLEY and VALERIE BARKLEY	)	Jonathan A. Schwartzman, for the Plaintiffs
Plaintiffs	)	
- and -	)	
MARIA VOGEL	)	Mitchell Kitagawa, for the Defendant
Defendant	)	
	)	**HEARD:** By Written Submissions

DECISION ON COSTS

McNamara J.

[1] This personal injury action arising out of a collision between a bicycle and a motor vehicle was tried before myself and a jury in Brockville over a period of 12 days. On October 22, 2008, the jury returned a verdict finding the Defendant, Maria Vogel, solely liable for the accident and awarded damages to the Plaintiff, Duska Barkley, in the gross amount of $140,000.00. The other Plaintiffs, who were all *Family Law Act* claimants, were not awarded any damages.

[2] Of the total damages awarded, $70,000.00 was on account of non-pecuniary general damages. That amount, of course, must be reduced by the Bill 198 statutory deductible of $30,000.00, leaving a net amount for general damages of $40,000.00. In the circumstances, Duska Barkley's net judgment is for $110,000.00 for all damages together with appropriate interest.

[3] At the conclusion of the trial, I directed that if counsel were unable to agree on costs they should make written submissions. They were not able to agree. I have received and reviewed their extensive submissions, and my ruling on costs follows.

[4] Both sides made offers to settle. The Defendant's offer most recent to trial was dated August 28, 2007 and was for payment to the Plaintiffs of $30,000.00 plus costs as agreed to or assessed. The Plaintiffs' offer to settle dated November 27, 2007 was for $100,000.00 for damages, plus pre-judgment interest as applicable, and costs as agreed upon or assessed. Both offers were open at the time the trial commenced.

[5] Clearly with that by way of background, on its face, the Plaintiffs' recovery was greater than the amount of their offer by some $40,000.00. Following the direction of the Court of Appeal in *Rider v. Dydyk*, [2007] O.J. No. 3837 when comparing recovery at trial with offers, for costs purposes there is to be no regard to deductible amounts. In those circumstances, then, pursuant to rule 49.10(1) the Plaintiff is entitled to partial indemnity costs to the date the offer was served and substantial indemnity costs thereafter, unless the Court orders otherwise. In the circumstances of this case, I see no reason whatsoever to deviate from the general direction given by the rule.

[6] The argument advanced by the Defendant is that, not only should costs not be awarded on a substantial indemnity scale but, in fact, no costs should be awarded. In support of that proposition, counsel argues that since the Plaintiffs' counsel has not disclosed his exact fee arrangement with his clients, there is no evidence of an obligation on the part of the client to pay their counsel anything. He argues that there must be some evidence or objective basis on which to determine fees and that the Plaintiff cannot simply expect to obtain the fees requested,

but must prove the arrangement that existed between the client and their lawyer so that the Court can be satisfied there is an obligation to pay those fees.

[7] I find that there is not the necessary factual basis to give effect to this argument. Having heard the evidence during this trial, I have no doubt whatsoever as to the arrangements that existed between the Plaintiffs and Mr. Schwartzman. It was very clear from the evidence that the Plaintiffs herein are people of very limited means. Thus, in order to have access to the justice system they were going to require the services of a counsel who was prepared to take the matter on with no guarantee of payment. There undoubtedly was and is an arrangement between the Plaintiffs and Mr. Schwartzman that if they were successful and damages were recovered at trial, there would be an obligation on the part of the clients to pay counsel a reasonable fee for his services. To that end, comprehensive dockets were kept which were supplied to the Defendant's counsel during the costs negotiations. Keeping in mind the uncertainties of this case in terms of result, no more specific arrangements than that would have been possible in my view. The principle of indemnity must, of course, be taken into account when addressing costs but I expect it is safe to assume plaintiffs' counsel would have, as is required, advised the Court if the amount claimed for costs exceeded the clients' liability to him.

[8] Having found that there is entitlement to costs and having determined the scale, I now turn to fixing appropriate partial and substantial indemnity rates. In exercising my discretion, I am, of course, mindful of my obligation to take into account all of the factors enumerated in rule 57.01(1), and I have done so.

[9] Regrettably, both counsel in their written submissions relating to the relevant factors, were critical of certain of the actions of the other in the manner in which the trial was conducted. In my view, both counsel presented their respective cases in a very clear and competent fashion. This was a jury case so of course it was necessary for counsel to go to certain lengths in presenting their positions that would not have been necessary if I were hearing the matter alone. Counsel were unfailingly courteous to the Court and there was an acceptable level of cooperation throughout the trial. In those circumstances, I have given no effect to the comments in this regard from either side.

[10] Returning now to the appropriate awards, I find that those suggested by Plaintiffs' counsel for both partial and substantial indemnity are excessive.

[11] In fixing an appropriate rate, at the end of the day, *quantum* must be guided by the overriding principle of reasonableness, that is, the reasonable expectation of both parties. The Plaintiffs have brought their action in Brockville, which is part of this court's east region. While I share the view of Plaintiffs' counsel that the Plaintiffs were entitled to retain any lawyer of their choice, principles of fairness would dictate that the parties would expect that things like hourly rates would bear some resemblance to what would be considered reasonable in the area where the case was tried. Throughout virtually all of the time for which partial indemnity costs are applicable, Mr. Schwartzman was a lawyer of less than 10 years experience. He suggests as an hourly rate for partial indemnity purposes, $225.00 per hour. Remembering that partial indemnity is roughly 60% of full indemnity, that translates into an hourly rate of $375.00 which, by no stretch, would have been either fair or reasonable in this region over the relevant time frame. In my experience, an average hourly rate of $300.00 on a full indemnity basis would not only be reasonable in his circumstances, but in fact generous. Sixty percent of that figure is, of course, $180.00 per hour which I fix as the partial indemnity rate.

[12] From November 21, 2007 onward, the Plaintiffs are entitled to costs on a substantial indemnity scale. By that point in time, Plaintiffs' counsel was now just beyond 10 years at the bar. An appropriate rate in this region as of that point would be $325.00 per hour. That would be on a full indemnity basis. This is not one of those very rare cases where costs on a full indemnity basis are appropriate. Substantial indemnity under the rules is 1.5 times partial indemnity, or approximately 90% of full indemnity. That makes the hourly rate on a substantial indemnity basis $292.50 an hour and I order that rate be applied from November 21, 2007 onward.

[13] Next, counsel for the defense suggests in his brief that for reasons outlined therein and relating to certain steps in the process (mediation and the first attendance at trial), not only should costs be denied to the Plaintiff but in fact his client ought to be awarded costs. Counsel for the Plaintiff has responded to these points and after due consideration of the competing arguments, I am of the view that there is no merit to the Defendant's position. Costs should flow

to the successful party in the absence of any contra indication or disposition with relation to costs at an earlier stage, and none of that exists here. I am not persuaded on this point that there is any reason to deviate from the general rule that to the successful party go the costs.

[14] The defence also submits that certain amounts in the Plaintiffs' bill of costs that relate to the Statutory Accident Benefits claims of the Plaintiffs should be carved out from the bill and disallowed. I share his views in this regard. The SAB's were not an issue in the matter before the Court and the relevant insurer was a stranger to this tort action. The costs of the work in negotiating and generally handling the SAB's claims is disallowed.

[15] The Defendant also suggests that the Plaintiffs' costs associated with a motion to strike the jury at the outset of the trial ought to be disallowed, and the Defendant be awarded costs in this regard.

[16] The Plaintiffs were, of course, at liberty to bring the motion and as is usually the case I ruled that I was not prepared to strike the jury at that point in time. It was my initial impression, however, that it was highly unlikely the jury would be struck as based on counsel's overview of the evidence during submissions, it seemed clear to me that this was not the type of case where a jury would have any difficulty at all following things. My impression in this regard was borne out by the fact that after a fairly long trial and with many issues to consider, it took the jury only a few hours to come to their verdict. While Plaintiffs had the right to bring the motion, it was of questionable merit and certainly based on my review of the dockets, far too much time was spent preparing for a very straight forward motion. In the circumstances, I will allow only 50% of the amount claimed in this area.

[17] Next I turn to the rates for the law clerk, Ms. Wesley. Her time spent in the areas where I have reduced or disallowed Mr. Schwartzman's time is also similarly reduced and disallowed. In terms of her rate, it should be reduced by the same percentage reduction I have applied to Mr. Schwartzman's rate over the relevant periods of partial and substantial indemnity.

[18] That then leaves the issue of disbursements. I have reviewed them as claimed and have considered Mr. Kitigawa's comments. I feel that in all the circumstances the disbursements are reasonable, and I allow them as claimed.

[19] Obviously, counsel will need to put their heads together and re-calculate costs in light of my ruling. That should be reasonably straight forward following the template I have set out, but if there are any issues I can be spoken to, perhaps by way of conference call.

[20] In light of the divided success in relation to the issues dealt with herein, there will be no costs awarded relating to the costs submissions.

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Mr. Justice James E. McNamara

Released: December 17, 2008

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B E T W E E N:

DUSKA BARKLEY, PEYTON BARKLEY, MARATHA BARKLEY, by their Litigation Guardian, Valerie Barkley, STEVEN BARKLEY and VALERIE BARKLEY

Plaintiffs

– and –

MARIA VOGEL

Defendant

DECISION ON COSTS

Mr. Justice James E. McNamara

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