CITATION: Herbert v. City of Brantford, 2010 ONSC
COURT FILE NO.: C04-12047
DATE: 2010/11/23

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
CLARA HERBERT, infant Under the age of 18 years by her Litigation by her Litigation Guardian, EVERILL MUIR, the said EVERILL MUIR, GARY MUIR, KIRI LYN MUIR, KEVIN MUIR and KELLY BAIRD	)	Mr. Robert Hooper and Mr. Lawrence Hatfield, counsel for the Plaintiffs
Plaintiffs	)	
- and -	)	
THE CITY OF BRANTFORD	)	Mr. C. Kirk Boggs and Mr. Stuart Zacharias, counsel for the Defendant
Defendant	)	

WHITTEN J.

COSTS JUDGMENT

[1] On May 7, 2010, this Court released its decision on liability in this matter. The Court found that the City had breached its duty to Mr. Muir under section 4 of the *Occupiers Liability Act*. The Court found Mr. Muir 60 % percent contributorily negligent. The parties had agreed upon the quantum of damages five months before trial.

[2] Accordingly a 40 % percent finding of liability on the part of the City would translate into an award of $1,116,220.70.

[3] The parties had also agreed that if Mr. Muir passed away before the conclusion of the matter, that the future care costs (which represented a significant portion of the agreed upon damages) would be capped. Tragically, Mr. Muir went into a coma on May 7, 2010 and passed away the following morning. Therefore as agreed, the judgment including prejudgment interest, became $557,380.37.

[4] The May 7, 2010 Judgment concluded with the standard invitation for written submissions as to costs. Those submissions have now been reviewed.

Applicable Law

[5] Section 131 of the *Courts of Justice Act* provides that costs are "in the discretion of the court". There is no issue as to the fact that the plaintiff is entitled to its costs from the City, it is simply a matter of the extent (or quantum) of those costs. The case law in the annotated version of the Statute, emphasizes the predominant principle that a costs award be both reasonable and fair. The level at which fees are set, whether it be on a partial indemnity or substantial indemnity basis reflects the basic principle. Case law with respect to the latter basis, suggests that it is something of an exception. The focus with respect to the imposition of a substantial indemnity level, is on the conduct of the party against whom such costs are sought. It is an exercise to determine the existence of behaviour during the litigation which has been described as outrageous, reprehensible or scandalous. Examples that emerge are: unsubstantiated allegations of fraud, misconduct, conspiracy, abuse of the process, litigation for tactical reasons, unduly aggressive litigation, bullying conduct or fraudulent litigation. These examples illustrate that this level of fees is preserved for the most extreme behaviour during the litigation. There was no evidence of such behaviour in the case at hand and as such the fee level will be calculated on the partial indemnity basis.

[6] Reference points for what is fair and reasonable are contained in *Rule* 57.01 of the *Rule of Practice*. The criteria enunciated reflect the principles which emerge in the case law which flows from section 131 of the *Courts of Justice Act*. Pertinent criteria for the matter at hand are: (O.a.) the principle of indemnity which notes, the experience of the lawyer of the party entitled to costs, the rates charged and the hours spent by the lawyer, (o.b.) the amount of costs that an unsuccessful party would *reasonably* be expected to pay, the apportionment of liability, the complexity of the proceedings, and conduct which affected the length of the proceedings.

Relevant Background:

[7] Original counsel for the plaintiff had a retainer agreement which no doubt would apply to the successor counsel. The agreement provided that counsel would receive the fees and costs paid by the insurance company plus 20% of the total recovery and any unpaid disbursements. In the event of no recover, the plaintiff would be responsible for the disbursements. The existence of such an agreement has no direct impact on the costs awarded, save and except that costs could not be awarded in excess of what the plaintiff actually pays. Given the actual costs sought, and

the agreement, there is little risk that a cost award would exceed what the client actually is charged pursuant to the agreement.

[8] Having said that, equally so the Court cannot be influenced by the fact that in accordance with the agreement, the plaintiff may have the damage award encroached upon in satisfying the account from counsel. That is literally between client and counsel.

[9] The City had offered in August 2008, $100,000 all inclusive of costs (i.e. all inclusive). Mr. Muir's counsel offered to fix contributory negligence at 51%.

[10] Relatively speaking, the judgement approached what the plaintiff offered in terms of contributory negligence. The application of the apportionment of liability to the agreed upon damage was far in excess of the terms of the original offer by the City, yet the City had in a way improved upon that position by agreeing to damages in the way that it did.

[11] Partial indemnity costs with G.S.T., counsel for Mr. Muir suggests could be $410,769.98. Total disbursements were described as being $169,957.60. Counsel for the City suggests that a more appropriate sum for costs would be $93,565.00 for legal fees inclusive of G.S.T. and disbursements in the amount of $96,000 inclusive of G.S.T.

Analysis
Disbursements

[12] The principal objections advanced by counsel for the City are: 1) the amount payable to medical experts for their attendance at trial; 2) the amount payable for the trial attendance of Raftery Engineering and Intus Road Safety experts; 3) interest on outstanding expert witness accounts and 4) various miscellaneous expenses included by counsel such as parking, mileage and meals. Counsel for the City prepared a table similar to Appendix "A" prepared by counsel for the plaintiff in which its counsel indicated what was acceptable or otherwise, or what was not claimable.

Trial Attendance Fees of Medical Witnesses

[13] Counsel for the City notes that the evidence of Dr. Lok and Dr. Rathbone was completed in one day. Counsel suggests that each doctor should be reimbursed $1000 each and that would include trial preparation. The attendance of a medical witness to give testimony or expert evidence does require pre-attendance preparation. The expert in question must isolate the pertinent reports, review those reports, meet with counsel to discuss the anticipated evidence and issues to be addressed.

[14] The Court attendance necessitates: the cancelling or rescheduling of other patients, the time required to travel (both doctors travelled to Brantford from either Hamilton or Burlington), waiting to be called upon and the actual time in the witness box. The compensation of expert medical witnesses has to reflect the loss of patient care and remuneration that a Court attendance

covers. Theoretically, counsel could pay the expert, the base witness fee, and disbursements. Obviously, the expert would not feel happy or enthusiastic in such circumstances, but given the nature of professionalism would probably be forthright. However, there is a respect due to expertise and generally, it is recognized that such witnesses can charge what they consider is appropriate. Tariff "A" speaks of payment of a "reasonable amount" not exceeding $350.00 a day, subject to increase "in the discretion of an assessment officer". The appropriate sum no doubt will vary with the degree of expertise and the time expended.

[15] Given all of the above, it is appropriate that Dr. Loh be paid $4,500.00 and Dr. Rathbone $5,500.00.

Trial Attendance Fees of Non-Medical Witnesses

[16] Counsel for Mr. Muir concedes that the amount claimed for Mr. Raftery should be reduced by $20,000 that being the sum previously allowed by Justice Hambly as costs in the motion for summary judgment heard October 19, 2006. With that reduction in mind, counsel for the City suggests $10,000 as an appropriate sum for Mr. Raftery's attendance at trial, as an advising expert and as a witness.

[17] As mentioned above, Tariff "A" is equally applicable to non-medical experts. One notes that it was the measurements of Mr. Raftery that played a significant role in his testimony and that of Mr. Forbes. Although at the end of the day, the actual construction of the recreational trail was not found to be negligent, it was still a genuine, reasonable issue before the Court. The City certainly treated it as such with in-depth presentation as to the problems presented by the trail being in the flood plane of the Grand River, and the history of the development of the trail. It was understandable that counsel would have Mr. Raftery present when others gave testimony, so that counsel would be better prepared for cross-examination. All in all, it would be appropriate that Mr. Raftery be paid $22,000 above and beyond the amount payable under the order of Justice Hambly.

[18] The total attributable to Intus Road Safety Engineering is that of $23,361.28. The City suggests that $10,000 is more appropriate given the fact that Mr. Forbes in effect built upon the work of Mr. Raftery. It is true that Mr. Forbes literally testified for days in both in-chief and extensive cross-examination. Again, even though the actual construction of the trail was not found to be a basis of liability, it was an issue that had to be dealt with. Mr. Forbes testified as to the limits of the trail from a transportation engineering point of view. The evidence had limited application in a way as this was a recreational trail, however, in the absence of specific engineering evidence as to such trails, the evidence of Mr. Forbes provided a frame of reference. It was still reasonable to proffer such evidence in a field where there is little evidence aside from an ad hoc approach to trail construction, which was ultimately found to be the "standard" by the Court. For all of the above, the Court fixes $19,000 as the appropriate remuneration for Intus.

Interest on Outstanding Expert Accounts

[19] The account of an expert is ultimately the responsibility of the client. Such accounts could be quite formidable with complex matters and serious injuries. Both situations existed in the matter at hand. Sometimes the firm representing the client will carry such expenses, however, that could become a significant burden to the firm. It would be especially so with a modest sized firm.

[20] Independent of whether or not a law firm carries the costs during the conduct of an action, for many citizens the legal fees alone will be an obstacle to the pursuit of their rights. Chief Justice McLaughlin in an address to the Canadian Bar Association delivered at St. John's Newfoundland, August 12, 2006 stated:

> …In order to maintain confidence in our legal system, it must be, and must be seen to be accessible to Canadian. Yet the time and cost it takes to get a matter to trial is moving beyond the resources of the average Canadian and the number of litigants who represent themselves in on the rise. We cannot allow this to continue.

On another occasion the Chief Justice in an address to the Faculty of Law of the Université de Moncton on October 23, 2007 stated:

> [TRANSLATION]
> The history of the Bar Association and of the judiciary in Canada is that of the struggle to provide Canadians with an efficient and affordable justice system. However, the cost of legal services today is unfortunately a factor which limits access to justice for many Canadians. For the wealthy, and for large companies, access to justice is not a problem. T he same applies to the very poor; despite the shortcomings which exist in some regions, they have access to legal aid, at least in cases of serious criminal charges which could lead to jail time. Rather, it is the most numerous group, that of middle-class Canadians, which is most affected. This is because these people have a certain income. They have a few assets, maybe a small house, and this disqualifies them for legal aid. The choices they have are none too encouraging: they can exhaust the family assets in a trial, represent themselves, or simply give up. The cost of justice, which could represent taking out a second mortgage on the house or using money saved for retirement or for the children's education, should not be so high.

[21] These quotations were reproduced by Justice Cyr of the New Brunswick Court of Queen's Bench in *Bourgoin v. Ouellette et al* (2009) N.B.R. (2d) T.B. Ed. FE. 013. In that matter, Justice Cyr allowed as a disbursement the interest on monies advance to the plaintiff by a

private corporation which provides temporary financing to victims of personal injury while they are awaiting insurance claim settlements. The particular plaintiff had been turned down by his bank for a loan to carry on with the litigation.

[22] In a way, *Bourgoin v. Ouellette et al* illustrates the ways in which citizens fund litigation. Legal Aid in the Province does not provide for the cost civil litigation of the nature of the matter before the Court. The Budget realities do not allow for that. In point of fact, few if any lawyers would be prepared to work at legal aid rates. Contingency fee arrangements such as existed in this case are the norm. However, even with such fee arrangements, the disbursements can be back breaking.

[23] It is permissible pursuant to Section 33(1) of the *Solicitor's Act* R.S.O. 1990 CS. 15, for interest to be charged on a solicitor's account. Is it not comparable that interest be charged on expert's accounts? The understanding that interest will be charged on unpaid expert amounts is in a way, an additional means of financing the litigation. Without that financing, there would be difficulty in citizens accessing justice as the Chief Justice observed. Litigants may very well not be able to be afford otherwise pertinent expert opinions and testimony.

[24] Therefore, although interest on outstanding expert reports and reviews is not specifically provided for in the Tariffs and Rules, it will be allowed in litigation of this magnitude.

[25] The calculation of the interest on the amounts found to be appropriate by the Court will be left to counsel. In the unlikely event that those sums cannot be agreed upon, written submissions are to be exchanged and submitted to the Court.

Miscellaneous Expenses Incurred by Counsel:

[26] Some expenses, such as meals will likely be incurred by counsel, no matter what they are doing. Counsel for the plaintiff correctly concedes that such expenses total $1000 approximately should be deducted from the disbursements claimed.

Fees:

[27] With many counsel involved on a file, the concern for duplication of effort arises. The fact that a litigant changes law firms is not of consequence to the payor, the litigant has to bear whatever transitional fees are incurred.

[28] In this matter, the plaintiff was represented by a well established, well organized firm. That representation continued through discoveries, which in this firm was conducted by an experienced counsel, and up to the conclusion of a pre-trial, at which time, Mr. Hatfield announced that independent counsel was responsible for the trial.

[29] As was mentioned, the City moved unsuccessfully for summary judgment . Justice Hambly awarded costs in the amount of $19,000. That award was during the tenure of the

original firm. The firm had actually claimed $27,050 on a substantial indemnity basis. Justice Hambly was somewhat mystified as to how those figures were arrived at. To some extent, the same mysterious air prevails as to the amounts submitted under the headings before this Court.

[30] It is appropriate that the Court commence with what is directly experienced: namely, the trial. The trial took 20 days. A court day is typically five hours exclusive of breaks. For example, two and a half hours in the morning and the same in the afternoon. Preparation is obviously required for the time one is on one's feet or listening intensely to a witness. Some writers on advocacy have estimated that one should factor four hours of preparation for each hour one is in court. In that regard, the calculations by counsel for the City as to the amount of effort extended by Mr. Hooper, the lead trial counsel who performed virtually all of the examination in-chief and cross-examination, are helpful. This is especially the case given that Mr. Hooper did not docket. The offer to do so after-the-fact would simply prolong resolution in this matter.

[31] The calculation of counsel for the City assumes an eight hour work day $260.00 per hour. The hourly rate given Mr. Hooper's experience and the immensity of the task before him can be safely increased to $300.00 per hour. The use of an eight hour court day is an appropriate means of recognizing the unique and demanding nature of trial advocacy.

[32] Counsel in the past, would charge a counsel fee for a day in court. This fee would be greater than the time multiplied by the hourly rate to reflect the different demands upon counsel actually in the courtroom. By assuming an eight hour day the uniqueness of the task is acknowledged.

[33] The total attributed by counsel for the City, for Mr. Hooper is 280 hours. The Court consider it is appropriate that he be compensated for 400 hours at $300 per hour, which makes for a total of $120,000. This is especially so given the negotiation necessary to obtain the damage settlement.

[34] Mr. Hatfield sat in the second chair for the plaintiff throughout the trial. He is junior to Mr. Hooper and an appropriate hourly rate would be $225.00. As indicated in the Bill of Costs provided, Mr. Hatfield was involved from the pleadings onward and save and except for the examination for discovery. The amounts attributable to him for the pleadings and affidavit of documents are quite high. Counsel for the City suggests a total of 350 hours for Mr. Hatfield. That is an appropriate suggestion. Accordingly, the fees attributable for Mr. Hatfield are set at $78,750.

[35] Mr.Kemeny was responsible for the examination for discovery. It is hard to see how he would be involved in the preparation for trial, save and except any follow up of undertakings coming out of the discoveries. Counsel for the City agrees with the hourly rate attributable for Mr. Kemeny, but limits his involvement to 20 hours. The Bill of Costs speaks of Mr. Kemeny spending 24.3 hours alone on the discoveries and 27 hours in trial preparation. A reasonable

number of hours in the opinion of this Court is 45 hours which would make for $11,325 in fees attributable to Mr. Kemeny.

[36] Ms. Lagoo was the most junior of the counsel involved. Her attendance at the trial proper, appeared to be as a co-ordinator, facilitator of witnesses etc. Counsel for the City suggests that her involvement was of the overall of 250 hours. It is not appropriate that Ms. Lagoo be compensated at the rate of $60 per hour. A more appropriate hourly rate is that of $125 per hour. Therefore, the total attributable to Ms. Lagoo is that of $31,250.

[37] No doubt Mr. Morris the founder of the firm, played a supervisory and consultative role in this litigation. The Bill of Costs speaks of him having 14 hours worth of involvement at a partial indemnity hourly rate of $400. The hourly rate is beyond question given the experience of this counsel. A reasonable number of hours for Mr. Morris in his role would be 7 hours making for a fee of $2800.

[38] The Bill of Costs allocated approximately $27,000 in the involvement of law clerks and articling students. The former are charged out at a rate of $80 per hour, the latter at $100. In light of the involvement of Ms. Lagoo and the specialized involvement of Mr. Kemeny, and given a lack of specificity as to what exact tasks were performed by these persons, the Court attributes the sum of $5,875.

[39] Therefore, the total fees payable are $250,000. I do not agree that there should be any reduction applied given the apportionment of liability. Contributory negligence on the part of the plaintiff was always a reality. Witness the offer of 51% liability offered by the counsel for the plaintiff.

[40] The agreement as to damages was a monumental achievement. However, the trial as broad ranging as it was, in terms of touching upon the standards applicable to recreational trails, was inevitable. This is not a well defined subject area of the law. It is not appropriate to apply hindsight based on the result, to determine the breadth of this litigation.

[41] It is left to counsel to calculate the applicable G.S.T. on the fees and expert accounts found by the Court, along with the interest on outstanding expert accounts.

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Whitten J.

Released: November 23, 2010

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

CLARA HERBERT, infant Under the age of 18 years by her Litigation by her Litigation Guardian, EVERILL MUIR, the said EVERILL MUIR, GARY MUIR, KIRI LYN MUIR, KEVIN MUIR and KELLY BAIRD

Plaintiffs

- and -

THE CITY OF BRANTFORD

Defendant

REASONS FOR JUDGMENT

WHITTEN J.

Released: November 23, 2010