COURT FILE NO.: O.S. 1167/00
DATE: January 26, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
EDWARD VAN DYKE and DOROTHY VAN DYKE	)	RICHARD BOGOROCH, LINDA WOLANSKI and TRISTA CHANDLER, for the Plaintiffs
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
THE GREY BRUCE REGIONAL HEALTH CENTRE, ALEXANDER MARSH. J. OSTRANDER. JOHN DOE, GREY-BRUCE HOME CARE PROGRAM and VON GREY-BRUCE BRANCH	)	JONATHAN LISUS and THOMAS SUTTON, for the Defendants. Dr. Marsh and Dr. Ostrander and HUGH BROWN and ANN MITCHELL for the Defendant VON GREY-BRUCE BRANCH
	)	
Defendants	)	
	)	
	)	**HEARD:** January 7-10, 13, 14, 15, 17, 20-24, 27-31. February 3, 17, March 24, 25, 2003.

ENDORSEMENT RE TOTAL DAMAGES AND COSTS

VAN MELLE. J.

TOTAL DAMAGES

[1] Further to my Judgment dated July 16, 2004, I asked the Plaintiffs and Defendants to provide me with additional information from their experts. (Mr.

Segal for the plaintiffs and Professor Pesando for the defendants.) The calculations presented at trial were made as of September 23, 2002. I asked for additional information so that the calculations could be made as at July 16, 2003.

[2] Regarding the Past and Future Loss of Earnings calculation, I accept Professor Pestando's calculation. His calculation uses the more detailed approached referred to by Mr. Segal, but actually carried out by Professor Pesando.

[3] I find that Mr. Van Dyke's past loss of earnings is $233,213.00 and his future loss is $503,226.00 both as at July 16, 2003. (Note that Mr. Segal's calculation was $207,185.00 and $530,138.00.)

[4] Mr. Segal calculated the July 16, 2003 value of the Future Care costs assuming a start date of September 23, 2002. Professor Pesando's figure assumes a start date of July 16, 2003, the day of the Judgment. In my view, the Future Care costs should be calculated as at the date of trial, which is the date the evidence as to Future Care costs was adduced. I have taken calculations into account and by applying a pro rata formula, find that the increase should be $3,500.00 for a total of $260,908.00.

[5] Mr. Segal and Professor Pesando agree that the tax gross-up should be expressed as a percentage of the award for the future costs of care. The gross up would therefore be $67,835.00.

[6] The total award pursuant to my Judgment of July 16, 2003 is as follows:

General damages	$	100,000.00
FLA claim	$	20,000.00
Past loss of earnings	$	233,213.00
Future loss of earnings	$	503,226.00
Future care costs	$	260,908.00
Gross up	$	67,835.00
OHIP	$	3,881.86
TOTAL:	**$**	**1,189,063.80**

[7] Pre- and post-judgment interest will go in accordance with the *Courts of Justice Act.*

COSTS

[8] I have received and reviewed a great deal of material form all of the parties on costs. After receiving the plaintiff's reply, submissions to the defendant doctors and to the VON I received some additional submissions from the

Defendant doctors. I did not review those submissions as they were not properly before me.

[9] The plaintiffs' position is that I should award costs as follows:

1	Up to August 8th, 2002 on a partial indemnity scale	$	14,036.00
2	On a substantial indemnity basis after August 8th, 2002:	$	254,557.80
3	Correspondence sent and received (letters sent 109 x $35.00 per letter = $3,815.00 and letters received 65 x $25.00=$1,625.):	$	5,444.00
4	Total fees to March 28th, 2003	$	274,037.80
5	G.S.T.	$	19,182.65
6	Disbursements	$	93,086.26
7	Costs of Experts' Reports	$	40,063.39
8	Premium for risk and result	$	200,000.00
	TOTAL:	**$**	**626,370.10**

[10] The defendant doctors submit that the amount claimed by the plaintiffs is manifestly excessive. They take issue with the claim for a premium of $200,000, a $40,000 disbursement to Hillel David of Aylesworth, Thompson, Phelan, O'Brien, the scale of costs claimed, hourly and counsel rates.

[11] The defendant, Dr. Ostrander, seeks his costs against the plaintiffs on the grounds that he offered to settle the action on the basis of the consent dismissal without costs, with the express understanding that if his advice to Dr. Marsh was found to have been below the standard of care, Dr. Marsh would nonetheless have been liable to the plaintiffs. Dr. Ostrander is seeking his costs in the amount of $93,565.50 plus GST $33,373.42 for disbursements plus GST where applicable, and $10,000 for the costs submissions.

[12] The defendant doctors submit that the plaintiffs' costs payable by Dr. Marsh should be fixed on a partial indemnity scale in the amount of $109,433.20 plus GST, and $42,453.15 for disbursements plus GST where applicable.

PLAINTIFF'S OFFER TO SETTLE

[13] The plaintiffs made an offer to settle on August 9th, 2002. The offer was open for acceptance until five minutes following the commencement of the trial. The offer sought payment of $900,000.00 on account of damages, inclusive of prejudgment interest from Drs. Marsh, Ostrander and the VON. The offer sought costs on a partial indemnity basis and assessable disbursements.

[14] Given that my final award exceeds $1,000,000.00, the offer to settle is more favourable to the defendants than my award. As a result I find form the date of the offer to settle the plaintiffs should have their costs on a substantial

indemnity basis. I do not accept the defendant doctor's submission that the plaintiffs are not entitled to costs on a substantial indemnity basis on the grounds that they made serious, unfounded and gratuitous allegations that Dr. Marsh fabricated his operative report and misrepresented his surgical findings in an attempt to mislead the patient, subsequent treating physicians and the court. The plaintiffs had every right to question Dr. Marsh on his operative report particularly given that the date on the report indicated that the report had been dictated a month after the operation had been performed.

[15] The vigorous cross-examination that took place on this particular point did not approach the conduct that would be necessary to disentitle the plaintiffs from substantial indemnity costs in light of the offer to settle.

[16] The fact that the offer to settle was a global offer made to all the defendants does not affect my decision in this regard. The offer could have been accepted by any one defendant or the defendants could have apportioned liability amongst themselves. See *Rooney (Litigation Guardian of) v. Graham, 53 O.R. (3d) 658 (C.A.)* and *Waxman v. Waxman (Trustee of), (2003-01-10) ONSC 33234-88.*

APPLICATION OF THE COST GRID

[17] The plaintiffs' request for the application of the cost grid, despite the fact that some of the services were carried out before the costs grid came into effect is not opposed by the defendants and indeed is supported by the case law.

[18] Justice Quinn said at paragraph 28 of *Dybongco-Rimando Estate v. Jackiewicz*, (2003-02-20) ONSC 34-478-94:

> The act of fixing costs "is not an assessment item by item according to the Tariffs as would be done by an assessment officer; it is rather the judge's determination of what the services …are worth…Where the award specifies the solicitor-and-client scale, the judge's function is to achieve full indemnity for the party for his solicitor's bill except for 'extra' charges beyond the reasonable scope of the litigation, and the preparation and presentation of the client's case"; see *Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd., supra*, at p. 326. This passage received approval in *Murano v Bank of Montreal, supra*, at p. 248, except the Court added the view that, "claims for solicitor-and-client costs in any matter of complexity are invariably broken down into items describing the services performed and the amounts charged for them [and t]hese must be reviewed by the judge, as must their total." The Court endorsed the following passage from *Worsely Estate v. Lichong*, [1994] O.J. No. 614 (Ont. Gen. Div.), at para. 5:
>
> …the fixing of costs still requires a critical examination of the work undertaken in order to determine that the costs claimed have been reasonably incurred and reflect what the court considers to be proper and appropriate in the circumstances given the complexity and significance of the proceedings held up against the backdrop of the full indemnification.

[19] The plaintiffs' counsel seeks the highest hourly rates in accordance with Tariff "A" to the *Rules of Civil Procedure*. The plaintiffs seek the cost of two senior counsel and one junior counsel throughout.

[20] Mr. Bogoroch had primary carriage of this matter. He was called to the bar in Ontario in 1983 and claims an hourly rate of $300.00 on a partial

indemnity basis and $400.00 on a substantial indemnity basis. His associate, Ms. Wolanski, was called to the bar in 1985. She claims an hourly rate of $200.00 on a partial indemnity basis and $300.00 on a substantial indemnity basis. Mr. Bogoroch's junior associate, Ms. Chandler, was called to the bar in 2001. An hourly rate of $120.00 is claimed for her on a partial indemnity basis and $175.00 on a substantial indemnity basis.

[21] The defendant doctors submit that the plaintiffs are not entitled to have their hourly rates set at the highest rate allowed under Tariff "A"; that the use of two senior counsel, five associates, five law clerks and assorted students-at-law is grossly excessive; that the Plaintiffs are not entitled to counsel fees for the attendance of three lawyers at trial when the junior lawyer played no function other than keeping notes and occasionally retrieving documents.

[22] As far as the hour rates themselves are concerned, they are not unreasonable. Both Mr. Bogoroch and Ms. Wolanski are senior, experienced counsel and are entitled to the hourly rates claimed. The rate for Ms. Chandler is, in my view, appropriate to her year of call.

[23] The issue of the quantum in general, and whether or not services were billed which were not actually performed, is a different question. I agree with the defendant doctors' submissions that they should not have to pay for Ms.

Chandler's services for note keeping particularly when transcripts of much of the evidence adduced at trial were ordered by the parties throughout. I am therefore reducing the account by much, although not all, of the time Ms. Chandler spent at trial.

[24] I am also reducing the account by subtracting the time that Ms. Chandler spent preparing charts that were not used at trial. I am also reducing the account by the time that was spent on any aspect of the issue relating to the Mary Carter Agreement and costs associated with the Mary Carter Agreement issue. I have calculated this reduction comes to $40,000.00

[25] On the whole, I am satisfied that, apart from the reduction for the above, it was entirely appropriate for the plaintiffs to have two senior counsel acting for them throughout. As well, given the nature of the case and the extensive medical records, it was appropriate for the plaintiffs to have the assistance of various associate lawyers, law clerks and students.

[26] In reviewing the dockets, I note that there are a few docketed entries for attendances that did not occur (e.g. March 2, 2003 which was a Sunday) and some duplication of effort that I would not classify as collaboration. Given that the nature of the issues, and the fact that the trial lasted 21 days, I find that an appropriate amount for fees is $225,000.00 plus GST of $15,750.00.

DISBURSEMENTS AND EXPERTS' REPORTS

[27] The plaintiffs claim a disbursement in the amount of $40,000.00 paid to Aylesworth Thompson Phelan O'Brien for services of Mr. Hillel David. In my view, these fees should be reviewed in the same manner as any lawyer's fees would be. However, there is no indication in the account, or in the affidavit in support of the costs submissions, to show how this amount was arrived at. Ms. Wolanski states simply as follows:

> Mr. David's expertise was called upon to assist in the preparation of the final submissions. He was called to the Bar in 1974 and is a recognized authority in Civil Litigation and Appellate Advocacy.
>
> His counsel and advise greatly assisted the Plaintiffs in their final submissions to the Court.

There is no indication as to Mr. David's hourly rate or the amount of time spent in preparing final submissions. However, I have reviewed the docket entries and note that Mr. Bogoroch and Ms. Wolanski did not spend much time preparing the submissions. I accept that Mr. David did assist in this regard and I am prepared to allow $20,000.00.

[28] The cost of experts reports should be reduced somewhat to take into account the fact that Dr. Rutka did not testify at trial and the fact that I did not allow Dr. Mazulli to testify in Reply. I am therefore reducing the amount claimed for experts' reports to $37,000.00.

[29] Regarding the disbursements claimed, I am reducing these by $4,000.00 to take into account some minor items that should not have been billed including a disbursement for Sign-O-Rama for the preparation of demonstrative aids which were not used at trial. The total amount allowed for disbursements (exclusive of experts' reports) is $69,086.26.

PLAINTIFFS' CLAIM FOR PREMIUM

[30] The plaintiffs have claimed an amount of $200,000.00 as a premium for risk and result.

[31] The plaintiffs rely on *Dybongco, supra*, in support of their claim for a premium. The defendant doctors submit that I should not follow *Dybongco* because the fact situation giving rise in *Dybongco* were seeking leave to appeal the issue of the costs premium and the granting of 100% recovery on their solicitor-and-client account. Although the leave application was pending when the defendant doctors prepared their submissions on costs, the leave application has now been dismissed.

[32] A premium has been awarded in cases where the Court felt that meritorious litigation should be prosecuted but was out of reach of clients of modest means. The courts have held that it is important for this kind of work to

be undertaken by counsel so as to provide access to the court for legitimate claims. One way to ensure this is to include a premium in the costs to be awarded to the successful plaintiff.

[33] In addition to ensuring the prosecution of meritorious litigation, the case law, in my view, stands for the proposition that to be entitled to a premium there must also be a very real risk of an adverse finding on the issue of liability.

[34] In this case, the plaintiffs could not fund the litigation. The plaintiffs submit that counsel's fees remain unpaid since the inception of this matter which means that the work in progress was carried for more than six years with substantial amounts expended by counsel for disbursements.

[35] I accept that there should be a premium to recognize that the plaintiffs' counsel's fees remain unpaid since the inception of this matter. The work in progress has therefore been carried over a period of six years with substantial amounts expended by counsel for disbursements. The plaintiffs should receive a premium to recognize the burden carried by the plaintiffs' counsel, to recognize that the plaintiff's lawyers' fees are unpaid to date; to recognize there was a real prospect that the plaintiffs would not be able to pay their costs if unsuccessful; to recognize that the courts have endorsed the social utility of encouraging law firms to carry "deserving" plaintiffs through to judgment without payment,

counting on recovery when the case is over; to recognize the need to encourage counsel to provide access to justice for the impecunious plaintiff by assuming the risk of delayed as well as possible non-payment; to recognize the degree of responsibility assumed by the solicitors; to recognize the uncertainty of the outcome and the assumption of risk as long as liability was not admitted.

[36] The plaintiffs claim a premium in the amount of $200,000.00. In *Dybongco*, Justice Quinn, in explaining how he arrived at the amount of the premium, wrote:

> [73] It would be disingenuous of me to suggest that there is some formulaic approach to fixing the amount of a premium. There is no pattern or consistency in the cases. Out of curiosity, one always does the arithmetic to determine what percentage the premium is of the total fees – here it is 29%. But the percentage is not particularly relevant. Although the approach that I took to this issue involved a consideration of all the circumstances of the case, I found myself particularly influenced by the magnitude of the risk counsel assumed (they took on a case that was headed for failure) and the result achieved (which included developing a fresh theory of liability).

[37] The amount of costs that I have awarded to the plaintiffs is not as high as those in *Dybongco*. As well as the magnitude of the risk assumed by counsel in the case at bar does not approach the magnitude of the risk assumed by counsel in *Dybongco*, particularly since Mr. Bogoroch did not have to develop a fresh theory of liability. As such there is no basis for awarding a premium that is higher than the premium in *Dybongco*. I find that a premium of $50,000.00 is appropriate.

DR. OSTRANDER'S COSTS

[38] Dr. Ostrander is seeking his costs against the plaintiffs. On September 11, 2002 Dr. Ostrander's counsel confirmed in writing that: "We are prepared to agree that if any liability is to attach to one of the defendant physicians it would fall on Dr. Marsh." On September 12, 2002, plaintiffs' counsel wrote: "I am also prepared, and anticipate to receive instructions, to allow Dr. Ostrander to retire from litigation in light of your admission that if any liability is to attach to one of the defendant physicians it would fall on Dr. Marsh." On September 13, 2002 the defendants' counsel provided the plaintiffs' counsel with a full and final release and a draft Order for the dismissal of the action against Dr. Ostrander."

[39] The plaintiffs ultimately did not agree to dismiss the action against Dr. Ostrander.

[40] At trial no findings of negligence were made against Dr. Ostrander. In any event, even if there had been, the defendant doctors were prepared to agree that any liability would fall on Dr. Marsh. There was no reason for the plaintiffs not to have accepted this Offer. They kept Dr. Ostrander in the litigation unnecessarily and as a result should pay his costs.

[41] Dr. Ostrander is claiming legal fees of $93,973.00 plus GST and disbursements of $33,373.42 plus GST were applicable. Compared to Dr.

Marsh, Dr. Ostrander had a minor role in the litigation. As such he is entitled to costs, payable by the plaintiffs, in the amount of $85,000.00 inclusive of fees, disbursements and GST.

COSTS OF THE VON

[42] The defendant, the VON, seeks its costs on a substantial indemnity basis in the amount of $280,567.27. In the alternative, it seeks partial indemnity costs up to September 26, 2002 and substantial indemnity cost thereafter. In the further alternative it seeks partial indemnity costs throughout.

[43] The VON seeks costs on a substantial indemnity basis as there were a number of settlement offers and no evidence was lead against the VON that could have resulted in a finding of liability.

[44] Included in the bill of costs of the VON, on both a substantial and partial indemnity basis, is a claim for a premium of $25,000.00.

[45] There is nothing in the case law to support the award of a premium in these circumstances. The VON was a successful defendant, but the result achieved was not an extraordinary one. Counsel for the VON did not assume any degree of financial risk – they did not act without the guarantee of payment.

[46] The VON is entitled to its costs on a partial indemnity basis throughout. An Offer to Settle was served, howeve it was withdrawn on June 30, 2002. I have reviewed the Bill of Costs and find that an appropriate amount for fees, given the role of the VON in this litigation, is $100,000.00 plus G.S.T. The VON is also entitled to its disbursements of $12,523.41 inclusive of G.S.T.

[47] The defendant doctors submit that the plaintiffs should pay the costs of the VON. In light of the defendant doctors' cross-claim against the VON I am unable to accept this submission. The defendant doctors submit that a "soft" cross claim was notionally maintained on the face of the pleadings only because of the plaintiffs' position advanced at discovery and never corrected that Mr. Van Dyke was experiencing symptoms of ototoxicity which was immediately reported to the VON and which was ignored, which version of events would have established liability on the part of the VON.

[48] While I do accept that a cross-claim can be "notionally maintained" and that the defendant doctors' pleadings support this submission, it is the note that two letters (September 11, 2002 and September 13, 2002) were sent from McCarthy Tetrault on behalf of the defendant doctors, to the plaintiffs' solicitors Bogoroch and Associates. Both contained the following:

> However, the trial must also consider the issue of whether the care and treatment provided by the VON either caused or contributed to the development of or the extent of

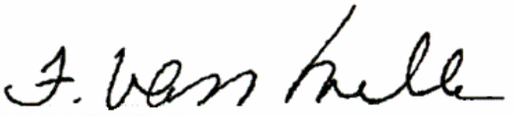
> the bilateral peripheral vestibular loss. The issue of whether or not the VON met the standard of care remains a live one.

[49] In addition to the above, the letter of September 13, 2002 set out: "Please note that Dr. Marsh is maintaining his cross-claim against the VON."

[50] I accept that it is appropriate and reasonable for the plaintiffs to sue the parties named as defendants and order the defendant, Dr. Marsh, to pay the VON's costs directly.

[51] The costs awards that I have made include the cost of preparing costs submissions.

[52] In the result, the plaintiffs are awarded their costs in the amount of $397,186.26 payable by Dr. Marsh; the VON is awarded its costs in the amount of $119,523.41 payable by Dr. Marsh; and Dr. Ostrander is awarded his costs in the amount of $85,000.00 payable by the plaintiffs.



VAN MELLE, J.

Released: January 26, 2004

COURT FILE NO.: O.S.1167/00
DATE: January 26, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

EDWARD VAN DYKE and DOROTHY VANDYKE

Plaintiffs

- and -

THE GREY BRUCE REGIONAL HEALTH CENTRE, ALEXANDER MARSH, J. OSTRANDER et al.

Defendants

REASONS FOR JUDGMENT

VAN MELLE. J.

Released: January 26, 2004