What's in YOUR Legal Bill?

You may not be paying what you think you are for your legal representation. By the time the costs of holding our insurer accountable come due and payable many auto accident victims are on their second or even third lawyer. Often the invoices for legal services are without detail and we are simply told what we are supposed to pay without adequate explanation.

According to the most recent data available 78% of Ontario's legal bills are reduced at an assessment hearing. It's a clear indication that something is very wrong when better than half of all legal bills (not just auto accident claims) are found to be excessive. Over 25% of these fees-for service accounts are reviewed and then reduced by 50% or more at a hearing so if you don't understand what's in your legal bill it may be worth the trip to court to find out.

It might come as a surprise to most people that it's legal and accepted by our courts to increase the hourly rate without advising you, or to round up hours to a higher amount, or add on a 'premium' for a lawyer's success in court to a client's bill.

A recent assessment of costs case, Wilson v Edward, with no written retainer or contingency agreement documents "a $100,000 premium for significant success" for a plaintiff's legal representative. The judge also allowed the lawyer to increase his hourly wage from $300/hr to $500/hr without informing the client saying "it would be patently unreasonable to find any client so naïve as to believe that an applicable hourly rate would not escalate over the passage of 149 months". The lawyer was also able to round up his hours and add on an additional $2000 in legal fees to the client which the court also found "satisfactory".

In the civil litigation world 'premiums' may be added to an award of costs for a variety of reasons including extraordinary result, ingenuity of preparation and presentation of a case or exposure to risk in pursuing the action. Such premiums are supposed to be rarely awarded.

Often the bonus or premium is coming directly out of the pockets of the victims who have no prior knowledge that they are at risk of paying this hidden bonus from funds awarded. It seems to have become a common practice that with "significant success, a premium of 10% of the recovery could be expected". The numerous cases below indicate that this may be happening more often and these all-too-common self-awarded 10% bonuses (whether itemized as a "premium" or not) is an additional cost/deduction coming from the money intended to cover auto accident victims' future medical expenses and income replacement. So when a lawyer grabs a bonus it means that's less dollars in treatment and income replacement that the claimant has left for her/his disabled future.

Whether it is padded or flat-out fraudulent disbursements, double billing, or charges per hour increases, or inflated Contingency Fee Agreements (CFAs) or indiscriminate self-awarded premiums, claimants need to pay attention to what they are being charged for. If it sounds unfair or excessive there is an option to request a Solicitor-and-Client Assessment. This is a court procedure where you and/or your lawyer may have the legal bill reviewed at an assessment hearing in the Ontario Superior Court of Justice. This option has always been there but isn't often taken advantage of because too few people are aware that they can, and often should, challenge their legal bill.

Below are links to web pages, articles and legal decisions with information that may be helpful.

How Do I Get a Lawyer's Bill Reviewed Getting a lawyer's bill reviewed is called a Solicitor-and-Client Assessment. This is a court procedure where a client and/or a lawyer may have his or her legal bill reviewed at an assessment hearing in the Ontario Superior Court of Justice.
https://www.lawhelpontario.org/lawsuits-disputes/superior-court/how-to-guides-superior/get-lawyers-bill-reviewed/

The **forms and notices** you will need to file for an Assessment of Costs can be found at:
http://www.ontariocourtforms.on.ca/english/civil
You may also find this link helpful: http://www.ontariocourts.ca/scj/additional-resources/

Solicitor/Client Assessments How to try and Avoid and What to Know if Unavoidable
http://www.oba.org/en/pdf/sec_news_fam_feb12_Solicitor_Client_Schipper.pdf

Contesting legal fees can be a slow process BY ALAN SHANOFF, TORONTO SUN
Access to justice requires fair legal fees. That makes the right to question a lawyer's bill and have it reviewed an essential component of access to justice.
Clients have the right to have their lawyers' bills reviewed by a court official. These reviews are called assessments. But most clients don't know they have this right and very few utilise it.
http://www.torontosun.com/2013/02/01/contesting-legal-fees-can-be-a-slow-process

Class action targets law firm's fees
A Toronto personal injury lawyer is facing a class action spearheaded by a former client who won $150,000 as a settlement award but alleges she ended up keeping only $8,000 of it.
http://www.lawtimesnews.com/201301212131/headline-news/class-action-targets-law-firms-fees

Hodge v. Neinstein, 2014 ONSC 4503 (CanLII), <http://canlii.ca/t/g87st

Certification of class action over legal fees rejected
About 6,000 clients of Neinstein and Associates LLP, spearheaded by Cassie Hodge of Brooklin, Ont., took the personal injury law firm to court on the basis that it unlawfully included costs in its contingency-fee payment arrangements among other alleged breaches of the Solicitors Act. None of the allegations have been proven in court.. http://www.lawtimesnews.com/201408114129/headline-news/certification-of-class-action-over-legal-fees-rejected

Solicitors Act, RSO 1990, c S.15, <http://canlii.ca/t/524zk
Earlier Acts https://www.canlii.org/en/on/laws/stat/rso-1990-c-s15/latest/rso-1990-c-s15.html

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Wilson v Edward, 2015 ONSC 596 (CanLII), <http://canlii.ca/t/gg347

[2] While a number of accounts were before the assessment officer, the only dispute that I am to deal with relates to an account dated October 17, 2009. This account was for services performed by Mr. Wilson for Ms. Edward relating to litigation with Allstate Insurance Company of Canada. The account in total, inclusive of fees and disbursements, was $336,626.13. After assessment, the account was reduced to $205,376.13.

[3] Mr. Wilson says that the assessment officer was wrong in that determination.

Background

[4] Ms. Edward retained Mr. Wilson with respect to her claim for motor vehicle accident benefits. He had taken over the file from an earlier lawyer. That lawyer had been able to obtain a proposed settlement from Allstate in the amount of $50,000 plus costs of $7,500 plus GST and disbursements. Ms. Edward responded to that offer advising "try to get more, otherwise we accept this offer". That settlement did not proceed and Ms. Edward changed lawyers. After further extensive work carried out by Mr. Wilson, the matter was settled by Allstate paying $800,000 in addition to $252,000 for costs.

[5] Following the settlement, Mr. Wilson delivered a summary account in the amount of $300,000 plus GST of $15,000, plus a disbursement account of $20,632.46, plus GST for a total account of $336,626.13. In his evidence before the assessment officer, Mr. Wilson said that one part of that account was a $100,000 premium for significant success on his part.

[28] The only written document pertaining to fees was a May 5, 1997 letter sent to Ms. Edward's spouse. At that time, Mr. Wilson was acting for both. In that letter he indicated that his fees were based on an hourly rate of $300.00 an hour, plus a correspondence fee of $20.00 per letter sent and $10.00 per letter received.

[29] With respect to this issue, the assessment officer said:

While a client may have a right to rely on the general terms of a retainer to continue to apply until a new agreement is reached or, at least, notice of a change is given, it would be unreasonable to believe that an hourly rate will continue to apply for 12 ½ hours. It might be argues that it was an error in principle to allow increases in an hourly rate where there has been no notice, even to the extent of escalating rates being disclosed in a series of interim bills. However, it would be patently unreasonable to find any client so naïve as to believe that an applicable hourly rate would not escalate over the passage of 149 months.

[30] The assessment officer went on, as set out above, to allow Mr. Wilson the rate of $500.00 per hour. In my view, he was not wrong in finding that to be a reasonable expectation of the client.

[31] It is clear that Mr. Wilson did not provide Ms. Edward with any assessment as to what the premium might be. The assessment officer did find that "for outstanding success", $50,000.00 was the appropriate amount.

[32] That amount, to one surviving on public assistance, is a staggering premium. While it may be that Mr. Wilson would have a reasonable expectation of a $100,000 premium, that is not the test. If he expects such a premium, he has an obligation to bring that to the attention of the client, preferably in writing. For his own reasons, as set out in his evidence, he generally does not use a written retainer. That may be honourable, but it is bad business in these circumstances.

[33] I do accept the evidence of Mr. Wilson that a premium was discussed; the evidence of Ms. Edward and her spouse cannot be relied upon. Given that the assessment officer allowed for a premium, he too did not accept their evidence on this point. In light of the significant success, a premium of 10% of the recovery could be expected. See: *Treyes v. Ontario Lottery and Gaming*

Corporation (2007) 49 C.P.C. (6th) 400 (Ont. S.C.J.). The premium is allowed at $100,000. Accordingly, the fee is determined to be $250,000.

[34] The report and certificate of the assessment officer dated April 24, 2014 is otherwise confirmed.

Law Society of Upper Canada v. Khan, 2015 ONLSTH 7 (CanLII), <http://canlii.ca/t/gfzgg

Summary:

KHAN – Professional Misconduct – Findings and Penalty – Based on an agreed statement of facts (ASF) and the Lawyer's admission, he was found to have engaged in professional misconduct as alleged – The particulars of the misconduct were very serious and included: a failure to properly supervise his staff which resulted in the false endorsement of a number of settlement cheques, extensive and continuing failure to maintain proper books and records, including the failure to deposit hundreds of thousands of dollars into trust and significant shortages in his trust accounts, as well as a number of instances of failure to conduct himself with integrity by falsely executing releases and charging his client for disbursements for which he had already been paid by the insurer – Mitigating factors were that the Lawyer: co-operated with the Society's investigation; entered into the ASF; consistently admitted his wrongdoing, and indicated a desire to address his deficiencies; made restitution to his clients for the overcharging of the disbursements; and accepted extensive remedial terms, thus showing insight into the problems in his practice – The Lawyer was suspended for six months – Extensive restrictions and conditions were ordered with respect to his resumption of practice – The Lawyer was to pay costs of $15,000.

[20] Accordingly, on November 25, 2014, the panel made the following order:

1) The respondent shall be suspended for a period of six months, to commence on February 15, 2015.

2) Mr. Khan shall comply fully with the terms of the Law Society's *Guidelines for Lawyers Who Are Suspended or Who Have Given an Undertaking Not to Practise* while suspended.

3) If the respondent resumes the practice of law following this suspension, he is restricted for the first two years to practising as an employee on the following conditions:

a) The respondent must confirm his employment plans to the Law Society before commencing his employment and must give notice of this Decision and Order and the Agreed Statement of Facts to his employer;

b) Any employer the respondent proposes must be acceptable to the Executive Director of Professional Regulation of the Law Society and the respondent must obtain the approval of the Executive Director of Professional Regulation of the Law Society prior to commencing his employment;

c) The respondent must confirm any changes in his employment plans by providing the Law Society with (30) thirty days' notice, and such notice is to include the name and contact number of the prospective new employer; and,

d) The respondent will not operate or have access to a trust account or have any banking or bookkeeping responsibilities during his employment.

4) Following his two-year employment restriction, the respondent shall participate in a practice review in accordance with s. 42 of the *Law Society Act*, at his own expense. The costs for the practice review will be $1500 per attendance plus travel costs and disbursements to a maximum amount of $500. There will also be a cost of $500 for any cancellations within 4 weeks of the attendance.

5) The respondent shall cooperate with the practice reviewer and implement forthwith any recommendations made as a result of the practice review. The respondent shall also participate in a second practice review (6) six months after the date of the first practice review, the purpose of which will be, largely but not exclusively, to assess the degree to which the respondent implemented the recommendations in the first practice review.

6) Following his two-year employment restriction, if the respondent practises as a sole practitioner or partner in a law firm, he shall participate in a spot audit in accordance with s. 49.2 of the *Law Society Act* at his own expense. The costs for the audit will be $1500 per attendance plus travel costs and disbursements to a maximum amount of $500. There will also be a cost of $500 for any cancellations within four weeks of the attendance.

7) The Respondent shall obtain a date for a spot auditor to attend at his office and ensure that the attendance takes place within one (1) year of the conclusion of the practice restriction referenced in paragraph 3 above.

8) The Respondent shall cooperate with the spot auditor at all times and implement forthwith any recommendations made as a result of the spot audit to bring his books and records fully into compliance with By-Law 9.

9) Following his two-year employment restriction, if the respondent practises as a sole practitioner or partner in a law firm, the respondent must provide the Law Society each month with a monthly trust comparison, including the supporting documents detailed in section 18(8) of By-law 9, for the previous month for his trust account(s) and shall continue in this practice for twenty-four (24) months.

10) Before December 31, 2015, the respondent shall enroll and participate in ten (10) hours of continuing legal education, at his own expense, in the area of professional ethics or accounting for lawyers. These hours are above and beyond what is otherwise required of licensees on an annual basis.

11) The respondent shall pay the costs of the Law Society in the amount of $15,000.00 within (6) six months of the termination of the above suspension.

12) Starting the day following the deadline for the payment of costs, interest shall accrue on any unpaid part of those costs, at a rate of 3%*per annum*.

Doolittle v. Overbeek et al., 2015 ONSC 719 (CanLII), <http://canlii.ca/t/gg4wk

[44] In this case, for example, the $158,760.27 in costs sought by the plaintiffs obviously exceeds the jury's preliminary total damage assessment of $120,700, and greatly exceeds, (by a factor of five), the plaintiffs' actual judgment for $31,300. However, I think it completely unrealistic to think that a claim of this nature could be properly advanced through to completion of a two week trial without incurring total partial indemnified legal costs, (including disbursements), well in excess of $31,300.

[45] While disproportionality between expenditure and result therefore must not be ignored, (e.g., because doing so would eliminate an important incentive for litigants to engage in ongoing cost-benefit analysis, risk assessment and self-restraint), it also cannot be elevated to a decisive and controlling concern without implications for access to justice.

[46] As for other concerns relating to the "hours spent" by plaintiff counsel, I am mindful of the general admonition, voiced by Justice Nordheimer in *Basedo v. University Health Network*, [2002] O.J. No. 597 (S.C.J.), but embraced by our Court of Appeal in *Boucher v. Public Accountants Council (Ontario), supra*, at paragraph 27, that "it is not the role of the court to second-guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered".

[47] In that regard, I am not troubled by a number of criticisms advanced by defence counsel. For example:

- I think the involvement of junior counsel before and at trial was reasonable, for a case of this nature, and no doubt helped to move the matter forward in a much more efficient and organized manner. (Based on my observations at trial, I agree with the plaintiffs' submission that their claims generally were advanced in an expeditious, clear and concise manner. Examinations and cross-examinations were focused and to the point, which in no small measure helped to complete the trial in less than its allocated time.)

- Similarly, the total amount sought in relation to copying charges does not strike me as being unreasonable in the circumstances, even if plaintiff counsel failed to supply precise mathematical calculations.

[48] However, it seems to me that **there are some legitimate concerns about a degree of effective over-lawyering** inherent in one senior counsel (Mr Mays) assuming carriage of the matter from other senior counsel (Ms Foreman). In particular:

- a review of the time dockets provided by plaintiff counsel indicates that Ms Foreman was the lawyer principally responsible for the file over a period of four years, (from August of 2010 to August of 2014), without any involvement whatsoever of Mr Mays;

- apart from isolated docket entries on August 13 and 14, 2014, (totaling only 1.9 hours of time), Mr Mays apparently spent no time whatsoever on the file until September 3, 2014, which was the last day on which Mr Mays seems to have docketed any time to the matter; and

- in my view, that transfer of carriage from one senior lawyer to another almost certainly did not take place without duplication of effort as Mr Mays worked to acquire familiarity with the file before the scheduled trial date in October of 2014; familiarity already developed and possessed by Ms Foreman during more than four years of working on the matter.

[49] There no doubt may be an entirely reasonable explanation as to why Mr Mays assumed carriage of the file from Ms Foreman, shortly before trial, but it seems to me that the remaining defendants should not have to pay for duplication of effort inherent in the transfer, and no allowance seems to have been made for that.

[50] I also am troubled by numerous indications that, in preparation of the plaintiffs' bill of costs, less than adequate care seems to have been taken to confine the current claim for costs to fees and disbursements incurred in pursuit of the plaintiffs' tort claims against the remaining defendants.

[51] For example, time docket entries making up the total of $112,334.00 in partial indemnity legal fees sought from the remaining defendants include many entries relating to:

- an apparently extended dispute between the plaintiffs and their own accident benefits insurer, including time spent on communications with an adjuster and counsel representing the accident benefit insurer, completion of a FSCO arbitration, (with a corresponding disbursement also included in the plaintiffs' current claim for costs), settlement negotiations, and settlement documentation; and

- pursuit of the plaintiffs' separate claim against their own insurer pursuant to the "uninsured driver" of their own motor vehicle accident policy, (a claim simultaneously advanced in this same tort action against the remaining defendants but settled a month before trial), including communications with the insurer's counsel, settlement negotiations, and settlement documentation.[2]

[52] It is difficult to quantify the extent of such entries with precision, as the time dockets are sometimes specific but also frequently make generic reference to "counsel" and "opposing counsel", but it seems clear to me that any and all costs of this nature should not be sought from the remaining defendants. Those defendants should be held accountable for the costs incurred by the plaintiffs in having to pursue a claim against those defendants, but not for the costs incurred by the plaintiffs primarily in pursuit of claims against others.

[53] A review of the time dockets offered in support of the plaintiffs' cost claims raises other concerns as well, such as the thousands of dollars in time apparently devoted to research, discussion and preparation of a motion to strike the jury notice; a motion that was never advanced before or at trial. I feel to see why the remaining defendants reasonably should be obliged to pay for such costs.

[54] For the above reasons, I am not inclined to accept the time dockets or associated claim for legal fees at face value, in terms of justifying the plaintiffs' cost claims against the remaining defendants.

[55] With the exception of the FSCO arbitration disbursement, the other disbursements incurred by the plaintiffs nevertheless seem properly sought from the remaining defendants. Moreover, apart from

the copying charges, they were not really questioned or challenged by the remaining defendants, apart from general and overriding concerns expressed about proportionality and reasonable expectations

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Sawhney v. Persaud, 2008 CanLII 49164 (ON SC), <http://canlii.ca/t/20zg0

[8] The six accounts rendered by the solicitor totaled $137,054.58. They were assessed at $6,500.00, a reduction of more than $124,000.00. Because of the amounts paid on the interim accounts, the clients are entitled to a refund of $56,021.10 which includes $10,000.00 for the costs of the assessment itself. The assessment took place over the course of four days, the first two of which were attended by the solicitor, but the last two proceeding in his absence.

[9] The solicitor now asserts that the Assessment Officer misconceived the entire case and gave generic reasons not particular to the case at hand. He submits that the reasons are deficient because they do not explain the credibility finding against the solicitor.

[10] I am not persuaded the Assessment Officer ignored or misapprehended the evidence. With respect to the credibility or reliability of the solicitor's evidence, the Assessment Officer's reasons state:

> "With regard to Mr. Sawhney's credibility, his inability to explain his actions, his inability to provide proper notes, his total lack of recall, give me serious, serious concerns with regard to the accuracy of his evidence."

It is also clear that the Assessment Officer turned his attention to the nine factors listed by the Court of Appeal in *Cohen v. Kealey and Blaney* (1985) CarswellOnt 376 as a kind of checklist. He connected that checklist to the particular circumstances and evidence before him during the course of the 4 days of the assessment. It is not incumbent upon the Assessment Officer to comment on the evidence at length, particularly in a case such as this where it is not so much the time spent by the solicitor that determines the appropriate result. Here, the focus of the assessment emphasized the time that ought to have been spent, the time that was productively spent, the results and benefit to the client, and other factors which far over-shadowed the solicitor's investment of time as the appropriate way to fairly assess the accounts for services. On the evidence before the Assessment Officer, he had good reason to question the skill and competence demonstrated by the solicitor in this particular file and the lack of any meaningful "success" or benefit for the client. Though the court ultimately accepted Mr. Sawhney's application to have the case brought under case management, it was essentially still at the pleadings stage when the matter was taken over by a new counsel.

[11] There is no evidence that demonstrates bias or a reasonable apprehension of bias on the part of the Assessment Officer. The particular allegations of the solicitor in that regard fall well below what needs to be established to rebut the presumption the Assessment Officer is free from bias. A reasonable apprehension of bias must be measured objectively, not according to the subjective views of a person who may feel insulted in some manner or other.

[12] Turning to a different issue, counsel for the clients seeks an Order that is unopposed by the solicitor, namely that all of the communications between the solicitor and his former clients presented as evidence at the assessment hearing be sealed, including specifically 110 pages of emails. The litigation is ongoing and it is appropriate. So Ordered.

[13] The solicitor will pay to the respondents, costs of this motion fixed in the amount of $5,000.00 all-inclusive.

Mujku and State Farm https://www5.fsco.gov.on.ca/AD/4000
Decision Date: **2013-06-13**, **FSCO 4000**.

Mrs. Mujku says that only criteria 1 and 2 are relevant. She argues that she was completely successful in the arbitration, and she made an offer to settle on the same terms as the result she achieved. She claims entitlement to all of her expenses, plus a premium.

State Farm submits that criteria 4 and 5 are also relevant and should be applied to reduce the amount awarded. It concedes that Mrs. Mujku was successful on the only issue in the hearing, but argues that time was wasted on other issues she withdrew on the eve of the hearing. State Farm also submits that Mrs. Mujku engaged in improper conduct by failing to comply with her obligation to produce documents and provide information.

I reject State Farm's submissions. I find that the only relevant criteria are degree of success and offer to settle. I find that Mrs. Mujku was completely successful and made an offer to settle that would have rendered the hearing unnecessary, had State Farm accepted it. I find that the withdrawn issues and the misconduct State Farm alleges have no bearing on this decision. I find no jurisdiction to award the premium Mrs. Mujku claims. She is entitled to her reasonable expenses of the hearing as permitted by the *Expense Regulation.*

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Mrs. Mujku claims $55,550.10, plus HST, for legal fees. The claim includes $18,516.70, described as an award for consequences for failing to beat the offer to settle. This represents 50% of the fees otherwise claimed. No authority or precedent for such an award is cited. I find no jurisdiction to make such an award. No authority to do so is found in the *Insurance Act,* the *Schedule,* the *Expense Regulation*, or the *Dispute Resolution Practice Code.*

Without the premium, the claim for fees is $37,033.40, plus HST. The hearing took place over 6 days. The claim for fees includes 238.85 hours for 3 lawyers working on the file, and 31.9 hours by law clerks and a law student. The bill accurately attributes 29.75 hours to attendance at the hearing. When converted to a ratio, preparation time to hearing time is about 9:1. Looked at in another way, the claim for fees suggests that a combination of lawyers, law clerks and a student worked on this file for 6 weeks, full-time, 40 hours per week, before the hearing.

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In the result, I have ordered State Farm to pay Mrs. Mujku fees of $22,867.81, plus disbursements of $6,023.05 = $28,890.86, inclusive of HST, for her expenses of the hearing.

Adler v. State Farm Mutual Automobile Insurance Company, 2009 CanLII 25306 (ON SC), <http://canlii.ca/t/23lkh

[1] Aylesworth LLP (also the Firm), counsel for the Applicant, brings this Application for approval of the Firm's solicitor-client fees and disbursements to be paid from the settlement of an accident benefits (AB) claim on behalf of Michal Adler, a party under a disability. At the age of 22, Mr. Adler sustained serious injuries in a single vehicle accident on June 18, 2005. He will need 24-hour care and supervision throughout his lifetime as a result of his disabilities. Furthermore, the Office of the Public Guardian and Trustee determined that Mr. Adler is not capable of managing his own property and a statutory appointment of his brother, Marcin Adler, as statutory guardian of property was made on January 20, 2006. Michal Adler's mother, Bozena Adler was added as a statutory guardian on March 11, 2008.

[36] Mr. Falconeri is asking for approval of a premium of approximately $105,000. In absolute terms this amount almost doubles the Firm's docketed time of about $58,000. In my view given the value of the docketed time on an hourly rate basis, and all of the other factors I have referred to, such apremium is significantly too high. Although there is no doubt the Firm achieved an excellent result in settling the AB claim, in my view, the amount of apremium over the docketed time spent by the Firm that could be justified in these circumstances must necessarily be a much smaller percentage relative to the docketed time as compared to a firm that achieves an excellent result well into a tort action where there are difficult liability and damages issues and the firm is carrying significant unpaid time and disbursements. As Mr. Falconeri deposes in his affidavit there are significant liability issues in the outstanding tort action and the financial risk to the Firm in pursuing that action on a contingency basis is substantially different from their decision to do so with respect to the AB claim.

Disposition

[37] For these reasons I am prepared to approve a premium of $50,000, which in my view fairly compensates the Firm, considering all of the factors that I have referred to. On this basis I approve the fees of the Firm, including the fees of the other firms (subject to assessment if the Firm chooses to do so) in the amount of $125,000 ($74,726.44 rounded up plus the premium of $50,000). Disbursements are approved of in the amount of $19,000 as requested. Applicable GST in an amount to be recalculated by counsel in light of the reduced fees is also approved. The Firm is authorized to take these amounts from the funds it holds in trust for the Applicant. The balance of the funds held in trust including all interest shall be paid into court to the credit of Michal Adler, to be included in the next management plan submitted for approval to the PGT.

Marcoccia v. Ford Credit Canada Limited, 2007 CanLII 51528 (ON SC), <http://canlii.ca/t/1txzv

[4] The plaintiff brought this action claiming damages arising from a motor vehicle accident that occurred on 8 June 2000. The plaintiff suffered serious and permanent personal injuries, including a brain injury of catastrophic proportion.

[5] In the interval between the accident and the trial, the plaintiff's medical and rehabilitation management produced some gains but also a consensus that he would never recover from the sequelae of this accident. There was no contest remaining at trial but that the plaintiff will never work in a competitive position and that he still requires various therapies and assistance with daily activities and ongoing, extensive supervision extending some distance, at least, into the future.

[6] In short, the parties agree that this plaintiff suffered a life altering injury. They disagreed on the extent to which optimism for future gains remains and, in large measure, the view each party maintained for the plaintiff's future fuelled their differing approaches to the assessment of damages.

[15] As to substantial indemnity costs, the plaintiff requests that those be fixed at $559,489.00 for the time between 6 January and 19 September 2007.

[16] The plaintiff seeks to recover $43,840.56 for GST on the above costs components.

[17] In addition, the plaintiff requests an award of something described in his submissions as a "Discretionary Costs Premium". $350,000.00 is soughtfor this item.

[18] Disbursements of $128, 514.44 are claimed.

[19] Finally, the plaintiff submits that carrying costs on unpaid time and disbursements should be considered and, if considered on the basis proposed by the plaintiff, would be $206,458.00.

[20] From the plaintiff's perspective, then, the total amount of money fairly involved in this claim for costs to be paid by Ford Credit is ***$1,459,489.00***.

[21] The defendant submits that the costs claimed by the plaintiff should be reduced and that the total amount to be paid should become ***$438,178.93***.

[33] The plaintiff seeks an additional award in the nature of a premium payable in addition to the costs otherwise applicable. In this regard, the submissions include:

Rule 57.01 defines the factors to be taken into account in determining the costs payable by the defendants. Time spent is only one factor to be taken into account. The costs awarded to the Plaintiffs should not be limited to a mathematical calculation of time spent times docketed hours. It is submitted that upon consideration of the other enumerated factors, an increased costs award is appropriate in the present case.

To be clear, the Plaintiffs do not seek a "risk" premium payable by the unsuccessful Defendant.

The ruling of the Supreme Court of Canada is narrowly confined to the risk of non-payment to the plaintiff's lawyer is not a relevant factor in determining the unsuccessful defendant's liability for costs. (The plaintiff refers to ***Walker v. Ritchie*** **2006 SCC 45 (CanLII), [2006] 2 S.C.R. 428)**

It is submitted that this reasoning implies that the defence can and should anticipate their costs exposure based on the factors in Rule 57.01 and the way they are applied in practice and by the court to similar cases with similar conduct and counsel. Those costs should not be either inflated or decreased by a contract between the plaintiff and his own counsel.

The Plaintiffs state that Rule 57.01 makes it clear that time spent is only one factor to be taken into account in determining costs payable by the defendant. When the Supreme Court of Canada determined that a premium for risk should not be allowed against the defendants, they did not by that judgment eliminate the other prescribed factors for determining costs payable by the defendants. They explicitly state that the other factors under the rule had already been taken into account in the fixing of the amount of the costs and what was under appeal was just the risk premium.

[34] The plaintiff's point is that the Supreme Court has not specifically ruled out a premium of any kind being added to costs payable by a defendant, only a risk premium.

Premium

[60] The plaintiff's submissions recognize the fact that risk premiums were awarded in a limited number of appropriate cases in recent years but that the Supreme Court of Canada has ordered a stop to that practice for the reasons given in *Walker v. Ritchie* [2006] S.C.R. 428. As noted above, the plaintiff does not seek a risk premium in the instant case but does seek a premium based upon matters outside the ambit of those that courts had previously considered to support a risk based award.

[61] Imbedded within the premium at issue in *Walker* were a variety of supporting factors, some having to do with risk and others either overlapping or having solely to do with the factors that should properly be taken into account by a court when it fixes costs. Factors to be considered include complexity, length, result and any failure to admit (see *Walker, supra* at para. 36). These and other factors are enumerated in Rule 57.01(1).

[62] Having considered the factors listed in Rule 57.01 and having set aside factors not listed in that rule, the exercise is complete. It is not appropriate, in my view, to then add on a costs premium driven by a re-consideration of factors enumerated within Rule 57.01. In the words of Rothstein J. in *Walker, supra* (at para. 36):

> Compensating for these factors again through the addition of a risk premium arguably constitutes a double count in the costs award against the unsuccessful defendant.

[63] In my view, the logic applies equally where, as is here the case, the plaintiff seeks any premium, not only a risk premium, in addition to the costs fixed and awarded against the unsuccessful defendant.

[64] None of the cases relied upon by the plaintiff contain a breakdown of the premium awarded into its component parts. Factors considered are many and the range in the overall size of premiums awarded is wide.

[65] In *Ward v. Manulife Financial,* 2007 O.J. No. 37 (S.C.J.), Power J. noted that changes were made to the provisions of Rule 57.01, changes that were not in place and relevant in *Walker.*

[66] In *Ward,* the court determined that the defendant's conduct had been self-serving, malicious, arbitrary and high-handed. Further, the court decided that an award of costs on a substantial indemnity basis was warranted, in addition to its award of punitive damages. Further, the court accepted the plaintiff's submission that :

> As a sophisticated litigant, Manulife would be aware of the cost implications of making unproven allegations of fraud and dishonesty, failing to accept an Offer to Settle, and increasing the risk to the litigants through over-documentary production and an aggressive defence.

[67] That Power J. decided to award a premium upon the particular findings he made relating, in part at least, to the conduct of the defence and that he determined the appropriate premium to be $50,000.00 is not instructive to the determination of the plaintiff's claims in this case.

[68] I have no evidence suggesting, let alone establishing, that the defendant acted inappropriately at any time during the many years that this case was ongoing. I saw nothing but civility and spirited advocacy practiced at high levels for both parties during the trial of the action. The defendant may now regret that it declined the plaintiff's settlement overtures and/or that it put the plaintiff to the strict proof of both damages and liability issues but that was its right. A litigant has the right to be wrong; that said however, there may well be cost consequences for decisions wrongly made. The costs implications of the defendant's decisions in this case will be appropriately dealt with both by the award of costs on a substantial indemnity

basis, as agreed, and through my consideration of the factors listed in Rule 57.01. This is not a case calling for a costs premium.

[78] In this case, the plaintiff does not seek a risk premium. By seeking an award of carrying costs compensation, however, the plaintiff seeks indirectly that which he declines directly. I am not prepared to award a carrying costs premium.

Monks v. ING Insurance Co., 2005 CanLII 31991 (ON SC), <http://canlii.ca/t/1lkts

Civil procedure -- Costs -- Counsel fee -- Grid permitting additional fee for junior counsel at trial but total counsel fee for both counsel not to exceed maximum counsel fee set out in grid.

Civil procedure -- Costs -- Disbursements -- Disbursements for faxes, long distance charges, couriers, legal research, binding tabs, binding materials and LPIC civil litigation transaction levy surcharges allowed.

Civil procedure -- Costs -- Premium -- Plaintiff successful in action against insurer for declaration that motor vehicle accident contributed to her catastrophic condition -- Case complex and lengthy -- Plaintiff not having financial means to fund litigation -- Plaintiff awarded premium in amount of $75,000.

The plaintiff commenced an action against Zurich in 1998, and the defendant ING had itself added as an intervenor in 2001. The plaintiff amended the pleadings in the Zurich Action to add a claim against the defendant for a declaration that her injuries in a 1998 motor vehicle accident were catastrophic. In 2002, the plaintiff settled her claim in the Zurich Action, discontinued that action and commenced a new action against the defendant. She made an offer to settle the ING action in December 2004. The defendant did not accept that offer, and the plaintiff was successful at trial. She was granted a declaration that the 1998 accident materially contributed to her catastrophic condition. The case was a complex one involving issues of causation as between two accidents and recovery from two different insurers under two different Statutory Accident Benefit Schemes ("SABS") regimes. The parties agreed that costs should be fixed by the trial judge.

Held, the plaintiff should be awarded costs on a partial indemnity basis to the date of her offer to settle and substantial indemnity costs thereafter.

The plaintiff was awarded a premium in the amount of $75,000. The plaintiff did not have the financial means to fund this lengthy and complex litigation despite the merit of her claim. Had she been unsuccessful at trial, it was unlikely that she would have been able to pay for her fees and disbursements. There is a need to encourage lawyers to take on complex cases for indigent litigants. This case met the relevant principles that justify premium awards: legal complexity, responsibility assumed, monetary value, importance of matter to client, degree of skill and competence, results achieved and ability to pay.

(3) Are the plaintiffs entitled to a $150,000 premium?

(4) Are the plaintiffs' counsel entitled to their hourly rate for preparation for trial over and above counsel fee for the day?

(5) Disbursement Issues: Should the disbursement of Dr. Anik Vanderwaetere totalling $15,775 and the account of Sandy Guest Poulin, case manager and therapist, totalling $16,259.50 be reduced?

(6) Are bank charges, binding tabs, binding materials, stationary, LPIC civil litigation transaction levy surcharges and database searches considered overhead and are they incorporated as part of the lawyers hourly fee rate?

Plaintiff's Requests for a Premium

[29] Counsel for the plaintiff is requesting a premium of $150,000 because the plaintiff did not have the financial means to fund this lengthy and complex litigation despite the merit of her claim. Had the plaintiff been unsuccessful at trial he submitted that the plaintiff would not have been able to pay for her fees and disbursements. He recalled the evidence given at trial that the plaintiff would have been financially destitute had she attempted to pay her counsel's fees and disbursements. The plaintiff's previous settlement was rolled in a structured settlement and thus not available to fund her litigation. The plaintiff argued that she would have had to abandon her claim against the defendant. Her counsel's firm spent $66,316.07 in disbursements.
Counsel for the plaintiff cited the following decision as legal precedents where this court has awarded premiums to [a] successful party in complex and protracted litigation cases, over and above substantial indemnity and/or partial indemnity costs awarded:

In Lurtz v. Duchesne, 2005 CanLII 5080 (ON CA), [2005] O.J. No. 354, 194 O.A.C. 119 (C.A.), the Court of Appeal agreed with the trial judge that it was appropriate to award a premium over and above substantial indemnity costs but reduced the premium to $75,000 based on the risk assumed and the result achieved.

In Roberts v. Morana (2000), 2000 CanLII 2950 (ON CA), 49 O.R. (3d) 157, [2000] O.J. No. 2688 (C.A.), the Court of Appeal unanimously approved a $150,000 premium, plus GST over and above the costs award of $775,584. This amount consisted of a pre-Rule 49 Offer party-party portion and a post-Rule 49 Offer solicitor- client portion. This was a 20 per cent premium over and above the trial judge's cost assessment. Thepremium was awarded on the basis of the result achieved and the risk taken by plaintiff's counsel.

Similarly, in Dybongco-Rimando Estate v. Lee, [2003] O.J. No. 534 (S.C.J.), the court awarded a $150,000 risk plus result premium over and above the costs and disbursements assessed by the judge at $685,985.21 in an action requiring a total of 33 days at trial.

In Hodgson v. Canadian Newapapers Co. (2003), 2003 CanLII 44877 (ON SC), 65 O.R. (3d) 626, [2003] O.J. No. 2760, 228 D.L.R. (4th) 732 (S.C.J.), the [page624] court also awarded a 15 per

cent premium over and above the costs awarded to account for the success achieved and the risks taken by the plaintiff's counsel.

At the high-end of the scale, Lane J. awarded a premium of $350,000 for a total fee and premium of nearly $1.5 million as a fair and reasonable amount to be paid by the unsuccessful parties in Banihashem-Bakhtiari v. Axes Investments Inc. (2003), 2003 CanLII 32527 (ON SC), 66 O.R. (3d) 284, [2003] O.J. No. 3071 (S.C.J.). The Court of Appeal unanimously approved the award of the premium based on the risk assumed by plaintiff's counsel and the result achieved.

The Premium

[68] I am awarding counsel for the plaintiff a premium in the amount of $75,000. In comparison with Lurtz v. Duchesne, supra, the medical evidence was shorter although a dozen doctors were involved to analyze the evolution of the plaintiff's symptoms following three distinct motor vehicle accidents and the determination of what caused the plaintiff to become an incomplete paraplegic. The court heard the testimony and read the reports of several neurologists, neurosurgeons, physiatrists, and family medicine specialists.

[69] The costs also dealt with the interplay of accident benefits received for the 1995 accident and how that settlement would affect benefits owing the 1998 third accident. Two different policies were involved and two insurance regimes. The argument that the plaintiff should have held back moneys from her Zurich Insurance settlement to fund her litigation against ING Insurance does not meet with any favours with me though it is clear from the evidence I heard at trial that, had the plaintiff not been successful in her claim against this defendant, she would have [page638] been in dire financial straights. She simply would not have had sufficient funds on hand to meet her ongoing needs. In good conscience had counsel for the plaintiff held a retainer, I agree that had the plaintiff been unsuccessful at trial, he would have had to return the retainer to the plaintiff.

[70] Mr. Justice Rosenberg in Lurtz v. Duchesne, supra, addressed the identical situation. He stated at paras. 33, 34 and 35 the following:

In awarding the premium the trial judge also took into account a number of other factors including the risk assumed by the plaintiffs counsel and the result achieved. As indicated, the appellants make the broad submission that no premium should be awarded where, as here, solicitor and client costs have been awarded because the judgment exceed an offer to settle. They rely upon this court's decision in Finlayson v. Roberts (2000), 2000 CanLII 16890 (ON CA), 136 O.A.C. 271 (C.A.).

In my view, this states the principle in Finlayson too broadly. Both before and after Finlayson this court has approved the award of substantial premiumson top of solicitor and client costs. See for example Roberts v. Morana (2000), 2000 CanLII 2950 (ON CA), 49 O.R. (3d) 157 (C.A.) and Jack (Litigation Guardian of) v. Kirkrude, 2002 CanLII 9922 (ON CA), [2002] O.J. No. 192 (C.A.). I agree with the analysis of

Finlayson by the trial judge (Kurisko J.) in Jack [2000 CarswellOnt 4969 (S.C.J.)] at paragraphs 74 to 78. As Kurisko J. points out, there is no mention in Finlayson of the degree of risk assumed. To the contrary, in Finlayson, liability was admitted and the only issue was the amount of damages. Further, the only basis for the claim for a premium in Finlayson would seem to have been the private arrangement between the plaintiff and her solicitor. There was no such arrangement in Jack or in this case. This court upheld the decision of Kurisko J.

In my view, it is open to a trial judge to award a premium on solicitor and client costs in a proper case because of the risk assumed and the result achieved. This is such a case. It is the kind of case that counsel undertake at some financial risk to provide impecunious plaintiffs access to the courts. This respondent was impecunious. Her counsel received no fees whatsoever through trial. They carried significant disbursements from the outset of the litigation. The case was complex and counsel achieved an outstanding result. This was, therefore, a proper case to award some premium. In my view, a reasonable premium is $75,000.

[71] The case at bar is similar. The plaintiff had moneys in a structured settlement that could not be there other than for her medical needs and the evidence showed that such needs were inadequately met. There is a need to encourage lawyers to take on complex cases for indigenous litigants. Such counsel accepts the risk of delayed payment as well as non-payment and law firms have to support disbursements for a long period of time.

[72] This case meets the seven relevant principles that justify premium awards; legal complexity, responsibility assumed, monetary value, importance of matter to client, degree of skill and [page639] competence, results achieved and ability to pay: International Corona Resources Ltd. v. Lac Minerals Ltd.,[1989] O.J. No. 1324 (S.C.), at para. 21. Other Disbursements

[77] The total fees I award are:

-- Intervenor Period $ 44,000

-- From Start Of Action To Offer $151,615.57

-- From Offer To Trial $ 34,946.75

-- For Trial And Preparation $164,768.50

-- For Premium $ 75,000

Total Fees: $470,330.82

Monks v. ING Insurance Company of Canada, 2008 ONCA 269 (CanLII), <http://canlii.ca/t/1wjdn

Civil procedure -- Costs -- Risk premium -- Trial judge erring in awarding risk premium in favour of successful plaintiff's counsel -- Risk premium may not be passed on to unsuccessful defendant as part of costs award under Rules of Civil Procedure -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

The trial judge erred in awarding the risk premium. A risk premium may not be passed on to an unsuccessful defendant as part of a costs award under theRules of Civil Procedure

[4] Following almost two months of trial, Lalonde J. of the Superior Court of Justice declared that Ms. Monks had suffered a catastrophic impairment as a result of the third accident and that she was entitled to receive from ING the statutory accident benefits to which a catastrophically impaired person is entitled under the SABS. He also granted specific declarations regarding her entitlement to income replacement benefits, past and ongoing medical, rehabilitation and attendant care benefits, and housekeeping and home modification expenses. In addition, he awarded Ms. Monks $50,000 in aggravated damages, plus interest and costs. He also awarded her counsel a $75,000 risk premium.

[5] ING appeals on several grounds. Its main submission is that the trial judge made numerous errors of fact and law, the cumulative effect of which ING claims gave rise to a result at trial that is "so tainted that the only just remedy is a new trial". In particular, ING challenges the grant of declaratory relief relating to ongoing accident benefits and the trial judge's awards of aggravated damages and a risk premium.

[6] For the reasons that follow, I would allow the appeal in part, by setting aside the risk premium awarded by the trial judge. In all other respects, I would dismiss the appeal. Facts

The risk premium issue

[118] In his ruling on costs dated September 8, 2005, the trial judge allowed a $75,000 premium to Ms. Monks' counsel, in addition to the costs awarded to Ms. Monks, on account of the risk assumed by counsel in undertaking this case. At the time of this ruling, the decisions of the Supreme Court of Canada in Walker v. Ritchie, 2006 SCC 45 (CanLII), [2006] 2 S.C.R. 428, [2006] S.C.J. No. 45 and of this court in Manufacturers Life Insurance Co. v. Ward, [2007] O.J. No. 4882, 2007 ONCA 881 (CanLII) were not available. Those cases hold that a risk premium may not be passed on to an unsuccessful defendant as part of a costs award under Ontario's Rules of Civil Procedure, R.R.O. 1990, Reg. 194 as in force today (Manufacturers Life) and at the time costs were fixed in this case (Walker). Accordingly, the $75,000 risk premium awarded by the trial judge cannot stand. Disposition

[119] For the reasons given, I would allow the appeal in part, by setting aside the $75,000 risk premium awarded by the trial judge. In all other respects, I would dismiss the appeal. As Ms. Monks has been almost entirely successful on appeal, she is entitled to some costs of the appeal on the partial indemnity scale. I would fix those costs in the amount of $35,000, inclusive of disbursements and GST.

Brown v. Flaharty, 2005 CanLII 2042 (ON SC), <http://canlii.ca/t/1jp6g

[4] Counsel for the plaintiffs are seeking total fees prior to trial on a partial indemnity basis of $145,487.50. They seek counsel fees of $68,400.00 plus an allowance for the attendance to argue the issue of costs. In addition they contend that the plaintiffs are entitled to a premium of $65,000.00.

[19] The inadequacy of the limit for counsel fees under the *Banihashem-Bakhtiari* interpretation could easily be remedied by allowing the successfulparties a premium. Since premiums should be reserved for exceptional cases, I find that that is not an appropriate remedy. I am therefore satisfied that in cases where a junior counsel fee is warranted, the trial judge may exceed the limit of $9,500 per week.

Premiums

[20] In the text, the *Law of Costs*, (2d) by Mark Orkin, he says at pp. 3-57:

If by the exercise of ingenuity and imagination, a solicitor can achieve an outstanding result for the client, he may be entitled to a bonus or premium in excess of the ordinary value of the time expended, but not for merely acting competently or achieving a result, that while satisfactory, is not spectacular.

[21] In addition to the foregoing, there are seven factors that are ordinarily considered when a premium is requested. They are as follows:

1) The legal complexity of the case.

2) The responsibility assumed.

3) The monetary value in issue.

4) The importance of the matter to the client

5) The degree of skill and competence in the legal services rendered.

6) The result achieved.

7) The ability of the client to pay.

This case was relatively complex and had a monetary value of over $800,000.00. It was, of course, important for the client who was seriously injured in the accident. As a result of great skill the counsel for the plaintiffs achieved a good result. In addition, there was considerable

financial risk as they had to carry this case for approximately seven years due to the client's inability to pay interim accounts.

[22] In spite of the foregoing, I cannot say that the result achieved was "spectacular" or that this is an exceptional case. Consequently, this is not a case in which a premium should be awarded.

Lahay v. Henderson, 2005 CanLII 31586 (ON SC), <http://canlii.ca/t/1lkbb

[1] Counsel agree that it is appropriate that I fix costs in this matter. They also agree that costs should be fixed on a partial indemnity basis up to March 24, 2005, the date of the plaintiffs offer to settle, and on a substantial indemnity basis thereafter. There remain three major areas of dispute. The first is whether plaintiff's counsel are entitled to the maximum allowable rate under the tariff. The second is whether the disbursements charged are reasonable in the circumstances. The third is whether the plaintiffs are entitled to a risk premium given the circumstances of the case.

Risk Premium

[10] Plaintiff's counsel seek a risk premium on the bill of costs. In the recent decision of the Court of Appeal *Walker v Ritchie,*2005 CanLII 13776 (ON CA), [2005] O.J. No 1600 (C.A.) Gillese & Lang JJA at paragraph 108.the Court sets out the following guideline.

…… a premium thought to occur only rarely and only when both factors risk end result-cry out for an award in excess of substantial indemnity costs. The risk must be based on evidence that the plaintiff lacked the financial resources to fund a lengthy and complex litigation, plaintiffs counsel finance the litigation, the defendant contested liability and the plaintiffs counsel assumed the risk not only of delayed but of possible non-payment of fees. In our view, it is not necessary that the plaintiff be proved to be impecunious but it must be shown that the litigation was beyond the plaintiffs financial means. While risk must be present, it alone does not justify a premium-counsel for the plaintiff must also achieve an outstanding result

[11] There is no doubt that the results achieved by the plaintiff in this case was extremely good. There is also no doubt that some risk was involved as the issue of whether the plaintiffs injuries met the threshold test was a live one. The unfortunate reality of litigation is that no person of modest means such as Mr. LaHaye can afford to finance it. For this reason the vast majority of personal injury cases are undertaking on a contingency fee basis with the risk being assumed by counsel.

[12] While the factors set out in the *Walker v Ritchie* test are present, I am mindful of the caution contained at the beginning of the quotation set out above that "…..a premium thought to occur only rarely…….". In my view the risk assumed by counsel for the plaintiff did not exceed

that normally undertaken in this type of litigation. Therefore notwithstanding the excellent result a premium is not justified.

Finlayson v. Roberts, 2000 CanLII 16890 (ON CA), <http://canlii.ca/t/1fbd3

[1] Andrea Finlayson was injured in a motor vehicle accident in 1987. She was 27 years of age. She suffered a Lisfranc fracture of her right foot, which involved multiple fractures and dislocations. Her injury was treated by closed reduction and pinning. Five months later Ms. Finlayson began working as an ICU nurse at the Wellesley Hospital. Later, she transferred to the Special Care Unit at the Credit Valley Hospital, where she was still employed at the time of the trial. In addition, she worked weekends at the Wellesley Hospital. Since her accident, Ms. Finlayson testified that with the exception of two pregnancy leaves, she had not missed a day of work.

(iii) <u>The trial judge erred in his assessment of costs:</u>

[23] Because costs may be an issue at the new trial, I will comment on their disposition by Sutherland J. The plaintiff filed an affidavit stating that at the outset, Torkin Manes agreed to act on the basis of deferring fees and disbursements in return for a substantial premium at the close of the case. This premium was to be in recognition of the risks taken by counsel and the results achieved. An offer to settle was made by the plaintiffs prior to trial, which proved to be less than the damages awarded by Sutherland J. Rule 49 therefore called for the defendant to pay solicitor and client costs following the date of the offer. Mr. Manes presented a substantial bill which included a rate per hour of $583.00 during trial. He also asked for a premium over all hourly rates. In addition to the hourly rate, the trial judge added 50% as a premium for risk andsuccess.

[24] For some years, the contingency-like fees approach has been condoned by the courts, particularly in negligence claims. However, apremium above the normal fee is a private matter between a client and her solicitor. A premium fee will vary from client to client, and with risk and expense from action to action. Such a fee is agreed to at the outset of the proceeding, and reflects the circumstances at that date.

[25] A premium fee does not fit with Rule 49 concerns and is unfair to a defendant. On the date of an offer to settle, the risk of refusal is of future costs which can be measured against general experience. A defendant has no knowledge of private arrangements between the plaintiff and her counsel, and thus has no means of measuring the risk of refusing the plaintiff's offer. Moreover, when the original arrangement is madefor a premium, it is expected that it will be paid out of the recovery and added on to party-and-party costs. That understanding with the client can remain intact when the opposite party pays solicitor client costs by adding a less substantial premium to the client's bill. To inflict it upon the defendant under Rule 49 turns the rule from one that induces and encourages settlements, to a rule that penalizes a defendant for not accepting an offer by imposing what may be a totally unexpected obligation in

an unknown amount. It also introduces the added difficulty presented by typical plaintiffs who would happily agree to any amount of premium that an insurer pays to counsel.

[26] The modern standard for the assessment of solicitor and client costs as between the parties was stated by Henry J. in *Apotex Inc. v. Egis Pharmaceuticals,* 1991 CanLII 2729 (ON SC), [1991] O.J. No. 1232. These costs are intended to fully indemnify the beneficiary, while excluding costs not reasonably necessary to fully and fairly prosecute or defend the action. In Apotex there was no issue of a premium. Nevertheless, in the instant case Sutherland J. applied that approach to justify recovery of the premium owed to the client.

[27] In *Job v. Re/Max Metro-City Realty Ltd.,* [2000] O.J. No. 1449, Panet J. at p. 5 stated:

The Plaintiff has referred to the decision in *Equity Waste Management of Canada Corp. v. Halton Hills (Town)*(1995) 1995 CanLII 7182 (ON SC), 22 O.R. (3d) 796, in which it was indicated that, in appropriate circumstances, a premium can be a proper component of a party and party bill assessable on a solicitor-client basis. In my view, the financial arrangements between solicitor and client, unless illegal or improper in some way, are entirely a matter between those parties. The burden or benefit of any such arrangement should not form part of the considerations in fixing costs as between that party and the other party in litigation. The fact that counsel for the Plaintiff took on this case on some form of a contingency basis is not a proper component of a bill assessable on a solicitor and client basis which is to be paid for by the other party. I conclude therefore that no premium should be included and awarded to the Plaintiff in fixing the costs on a solicitor and client basis in this case.

[28] I agree with Panet J. to the extent his reasoning applies to assessments flowing from a Rule 49 offer to settle. Full indemnity may be justified in the exercise of a court's discretion where, for instance, solicitor and client costs are awarded because of a defendant's misconduct. However, in order to maintain the integrity of the offer to settle machinery, the Rule 49 considerations referred to above compel a more restrictive approach. I therefore conclude that what is commonly known as a "risk premium" should not be included in a solicitor and client assessment under Rule 49.

Roberts v. Morana, 1997 CanLII 16230 (ON SC), <http://canlii.ca/t/g1f6m

[QL Ed. note: Original reasons for judgment in this decision were released July 24, 1997. See 1997 CanLII 12257 (ON SC), 34 O.R. (3d) 647. In the paper version, the three supplementary decisions of O'Brien J. were published together at 1997 CanLII 16227 (ON SC), 37 O.R. (3d) 333. The second supplementary reasons re costs begin on page 342. The three decisions have been separated in the online version to enable linking to citators. The following headnote was published on the combined case and applies to all three decisions. See 37 O.R. (3d) 333 for supplementary reasons dated October 28, 1997. See 1998 CanLII 18856 (ON SC), 37 O.R. (3d) 353 for supplementary reasons dated February 10, 1998.]

Damages -- Personal injuries -- Structured settlement -- Cost of future care -- Automobile accident -- Catastrophic injuries including brain injury -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 116.

Civil procedure -- Costs -- Party-and-party costs -- Premium -- Trial judge fixing costs -- Premium may be added to award of costs -- Factors favouringpremium including extraordinary result, ingenuity of preparation and presentation, and exposure to risk in pursuing the action.

A judgment awarded $3.8 million for the plaintiff's future care costs. Before the plaintiff made a request for a gross-up, the defendants proposed a structure that could be purchased for prices that varied from $3.04 million to $3.23 million. The parties differed on whether the defendant would be entitled to the costs savings of purchasing such a structure. The parties moved for a ruling on this question and several others including questions with respect to the award of costs and a claim for a premium for the plaintiff's counsel fees.

Held, the full amount of the future costs award was required for a structured settlement; the plaintiff's counsel was entitled to total fees of $1,045,538 including GST and a premium of $120,000 chargeable to the defendants.

The Plaintiff's Costs

The plaintiff served a settlement offer April 6, 1997, shortly after a pre-trial conference, for the amount of $2.5 million inclusive of pre-judgment interest and costs. It was not accepted. The defendants made settlement offers which were much less than the eventual recovery and are not relevant for purposes of rule 49.10. The plaintiff's total recovery at trial was $4,459,229. It is agreed the plaintiff is therefore entitled to an order of party-party costs to April 6 and solicitor-client costs thereafter.

Additional offers to settle were made which have some bearing on the question of premium and the amount of solicitor-client costs to be fixed. On April 7 the plaintiff offered to settle for $1,528,285; on May 6 an offer of $1,978,300 was made and finally on May 8, an offer for $2,240,000 was made. None of those offers was accepted. The trial continued for six weeks thereafter.

Premium Claimed on Solicitor-Client Fees

Plaintiff's counsel submitted this was a most unusual case in which a very substantial premium should be awarded. He referred to the cases I have outlined above and suggested a premium of $322,260. This was based on a rather complicated approach which considered a percentage of net recovery and then an apportionment of that premium between the plaintiff, personally, and the defendants, based on fees incurred before and after the settlement offer of April 7.

Plaintiff's counsel computed 79 per cent of the time on the file was incurred after the settlement offer. In dealing with the premium, which I award, I round that off to 20 per cent to the plaintiff personally and 80 per cent to the defendants.

I have commented above on the meticulous, ingenious preparation and presentation of this case; the financial risk incurred by plaintiff's counsel and the extraordinary result which I am satisfied would be far beyond the normal expectations of the client in this case. I conclude a premium in the amount of $150,000 is justified in this case. I apportion it $30,000 to the plaintiff and $120,000 to the defendants. G.S.T. on the amount to be charged to the defendants at 7 per cent is $8,400.

The total fees fixed are:

Fees and disbursements $141,554 (including GST) to April 7/97

Fees and disbursements from April 7 $775,584 to Oct. 29/97 (including G.S.T.)

Premium charged to defendants $128,400 (including G.S.T.) ---------- TOTAL $1,045,538

Plaintiff's counsel made submissions as to the total fees which should be charged to the plaintiff in this case. The apportionment of premium will be $30,000. As there has been a litigation guardian appointed I will have to consider the total fees to her but will do so after the matter dealing with the proposed structure has been submitted and decided and final fees can then be considered.

Hartwick v. Simser, 2004 CanLII 48676 (ON SC), <http://canlii.ca/t/1jhw3

[1] The plaintiffs commenced this action to recover damages for loss sustained by them as a consequence of a motor vehicle accident which occurred on May 1, 1999.

Should a Premium be Awarded?

[18] The plaintiffs contend that a premium should be awarded on the basis that an aggressive strategy by the defendants involving extensive review of the pre-accident medical history of the two main plaintiffs complicated the case on threshold and damages. The plaintiffs submit that an appropriatepremium could be awarded by increasing the fees awarded from the current hourly rate of the plaintiffs' senior counsel of $350.00 per hour to $500.00 per hour on a substantial indemnity basis and, if the circumstances apply, from $290.00 per hour to $440.00 per hour on partial indemnity basis.

[19] While the experience of senior counsel in this case is unquestioned by the defence, it must be reiterated that the case involved a rear-end collision where the plaintiffs were not at risk insofar as liability is concerned. The defendants' strategy on threshold, particularly having

regard for the contents of their experts' reports, did not present a serious risk of non-recovery. Indeed, this would appear to be apparent from the defendants' offers to settle. Where the "crumbling skull" argument is concerned, the defendants paid for the plaintiffs' medical and other records prior to trial, and shouldered the burden of their position at trial, with the result that they succeeded to establish circumstances which justified a discount of the awards for gross general damages.

[20] This case is therefore distinguishable on its facts from those cases cited by the plaintiffs in support of a premium, including *Banihashem-Bakhtiari*v *Axes Investment Inc.* (2004), 2004 CanLII 36112 (ON CA), 69 O.R. (3d) 671 (Ont. C.A.); *Re: Christian Brothers of Ireland in Canada* 2003 CanLII 18327 (ON CA), [2003], O.J. No. 4249 (Ont. C.A.); *1018202 Ontario Ltd.* v *Hamilton Township Farmers' Mutual Fire Insurance Co.,* [2004] O.J. No. 3335 (S.C.J.); and *Russett* v *Bujold, supra.*

[21] It does not go without note that the plaintiffs' counsel fully funded this litigation by agreeing to take on the action on a time spent and results achieved basis, while also paying disbursements in excess of $51,400.00. This was no doubt of great benefit to the plaintiffs who testified as to the difficult financial circumstances they faced in the immediate post-accident period while they awaited the commencement of no-fault benefits, and while Karen Hartwick remained out of the workforce until in or about December 2002. On the other hand, these plaintiffs could hardly be described as impecunious, particularly after that date, when Karen secured full-time employment with the Ontario Métis Aboriginal Association earning a salary in excess of that which she enjoyed prior to the accident. Her husband, Darrell, remained employed full-time throughout the litigation.

[22] The defendants have also properly observed in their review of the plaintiffs' dockets that, by the date of the plaintiffs' first formal offer to settle on April 21, 2004, as they approached the eve of trial, the total value of the plaintiffs' work in progress at their full hourly rate was less than $30,000.00 exclusive of GST, reflecting financial risks well below those involved in *Banihashem-Bakhtiari* v *Axes Investments Inc.; Christian Brothers of Ireland in Canada* and *Russett v Bujold, supra.*

[23] A premium should not be awarded in every instance where counsel has funded protracted litigation in the absence of other extenuating circumstances, such as high risk of non-recovery due to liability or other concerns. To do otherwise, would result in the award of premiums in almost every case where counsel funds successful litigation, and may in some instances result in the subsidy by the losing party of a lucrative contingency fee arrangement. This could not have been contemplated in the exercise of a court's discretion in awarding costs under s.131 of the *Courts of Justice Act*. The potential award of costs up to the maximum range of the substantial indemnity scale already addresses to some extent the expenditure of a greater degree of skill and effort of counsel in the achievement of a particularly good result. As was observed in *Russett* v *Bujold, supra,* the upper limit of the Tariff is reserved for the most complicated of cases with the most experienced of counsel.

[24] It also appears that in the most recent appellate decisions on the exercise of judicial discretion in the fixing of costs, an approach based upon "gross up" of hourly rates actually charged to a client has been discouraged for its potential to result in a windfall to the successful party unforeseen by the loser: see *TransCanada Pipelines Ltd.* v *Potter Station Power Limited Partnership* (2003), 2003 CanLII 32897 (ON CA), 172 O.A.C. 379 (C.A.); *StellarbridgeManagement Inc.* v *Magna International (Canada) Inc.,* 2004 CanLII 9852 (ON CA), [2004] O.J. No. 2102 (C.A.).

[25] The latest word from the Court of Appeal in B*oucher* v *Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 48 C.P.C. (5th) 56, and *Moon* v *Sher,* 2004 CanLII 39005 (ON CA), [2004] O.J. No. 4651 (C.A.), on the fixing of costs under Rule 57 echoes the moderate approach sanctioned in *Zesta Engineering Ltd.* v *Cloutier* (2002) 22 C.C.E.L. (3d) 161 (Ont.C.A.). It is clear that, at the end of the day, the assessment of costs must be guided by the overriding principle of reasonableness, that is, the reasonable expectations of *both* parties.

[26] In the result, a reasonable award of costs in this case having regard for all of the circumstances, the investment of both skill and funding by plaintiffs' counsel and the result achieved, do not justify a premium, but rather substantiate the fixing of costs at the high end of the range of both partial and substantial indemnity scales applicable to this case, as will be detailed later on in these Reasons.

Law Society of Upper Canada v. Joseph Omer Jean-Michel Farant, 2005 ONLSHP 1 (CanLII), <http://canlii.ca/t/1jvb0>

Professional misconduct – Misappropriation of funds – Elements of offence – Intent

Professional misconduct – Misappropriation of funds – Standard of proof – Intent – Clear and convincing proof on cogent evidence

Professional misconduct – Overbilling – Fair and reasonable fee – Vulnerable client

Two of the several particulars of professional misconduct alleged against the member by the Society were set out as alternatives to each other. One stated that the member had misappropriated funds, which were held in trust for a client, in the amount of $154,600. The second stated that, alternatively, the member had charged fees that were excessive and unreasonable, contrary to Rule 2.08(1) of the *Rules of Professional Conduc*t. Submissions at the hearing were made on the basis of an agreed statement of facts.

The member performed work for a client who was vulnerable in that he could not read or write and had only a rudimentary comprehension of money. He achieved a total settlement of $330,000 for the client's personal injury claim. The member had five years of experience as a lawyer at the time. He took total fees of $193,000. Written accounts were prepared for all but

$79,000 of the fees charged, but no written accounts were actually sent to the client. The docketed time was for only $46,000. This figure did not take into account any premium billing to which the member might have been entitled, did not analyze any standard percentage that might be taken in personal injury cases of this type, and did not arise from any formal assessment of the account. New lawyers, retained by the client to complete his settlement, had a Litigation Guardian appointed.

The member admitted that he had overbilled this client under Rule 2.08(1). The issue was whether, on the facts agreed to, there was sufficient evidence to draw the inference that the member had misappropriated the client's money.

Kerns v. Charland, 2011 ONSC 2961 (CanLII), <http://canlii.ca/t/flmvs

[1] This is an application to approve of settlements proposed on claims asserted on behalf of Joshua Kerns (Joshua), a person under disability.

[2] In particular, the court is asked to approve of a settlement proposed in a tort action on Joshua's behalf and payment of solicitor and client legal fees and disbursements arising therefrom.

[3] Also, the court is asked to consider and approve of settlements of all past, present and future Statutory Accident Benefit claims on Joshua's behalf and payment of solicitor and client legal fees and disbursements incurred in respect of such claims.

BACKGROUND

[4] The matters in issue in these actions arise from a motorbike/motor vehicle collision that occurred on September 12, 1998. At that time, Joshua was a passenger on a motorbike that came into collision with a motor vehicle. Joshua was born on June 6, 1985 and was 13 years of age at the time of this accident. He had been a normal active child who attended school and participated in activities with children of his age.

39] On her analysis of available information, Ms. Redden found no records identifying time dockets, summaries of work completed on accident benefits or tort claims nor hourly rates associated with individual timekeepers. Nevertheless, upon the assumption that time spent was appropriate to Joshua's needs and that the rates charged were reasonable, the amounts claimed for fees and associated taxes thereon total $345,185.09

[40] Ms. Redden compared hourly rate based fees, disbursements and taxes (totaling $360,857.03) to the total amount claimed by counsel ($552,500.00) and noted a premium of 53% claimed over the value of actual time spent.

[41] To the extent that the retainer is relevant, I note that it is silent on whether or in what circumstances a premium might be payable or how it should be calculated in the best interests of a person under disability, particularly one whose financial needs are not met by the proposed settlement. As well, the retainer is silent on the percentage amount by which legal expenses should compare to overall recovery in circumstances where no party and party costs are paid by any party, the impression one must take from a fair reading of paragraph 31 of Ms. Bent's affidavit (of 13 May, 2010).

[69] Having referred to the Cogan factors and those outlined in rule 57, Hackland J. allowed a fee equivalent to 15% of the settlement of accident benefits claims and 25% for fees in the tort settlement before him in the Aywas[5] case. In that case, the retainer agreement called for a 35% contingency fee on both tort and accident benefits claims and the legal expenses claimed equated to a premium of $142,195 over docketed time of $226,350. His Honour saw a good settlement in a matter of average complexity. The risk assumed by counsel was determined to be moderate and related mainly to the causation aspects of the plaintiff's injuries. He determined not to apply the same contingency fee to accident benefit and to tort-based settlements.

[70] I too prefer to separate accident benefits related claims from tort related claims settled at mediation, for purposes of fixing legal fees. In this case, I fix the fees payable in the accident benefits settlement at an amount equivalent to the costs to be paid by Dominion ($120,887.82 plus G.S.T. of $6,044.39). This award of fees approximates 11% of the lump sum settlement of benefits claims, an appropriate amount in the circumstances.

[71] The net settlement funds remaining after deducting legal fees and associated taxes in the accident benefits settlement becomes $1,058,067.79. Disbursements will be deducted and paid from that sum, leaving a new net of $1,012,395.85 for distribution.

[72] The risk and real complexity in this matter arose in the context of the tort and uninsured motorist claims. In my view compensation for counsel there should be more generous than that applicable to the accident benefits claims. I fix fees in both of these remaining, settled claims at party and party costs payable of $126,931.82, inclusive of G.S.T. plus an additional amount equivalent to 15% of the settlement less costs (15% of $898,068.18 = $134,710.23 plus G.S.T. thereon of $6,735.51) or $141,445.74 for a total of tort/uninsured coverage fees and tax of $268,377.56.

[73] The total of fees, G.S.T. and disbursements therefore payable to counsel is **$440,981.32.** This total is less than the amount sought but greater than the total would be if driven solely by reference to docketed time, taxes and disbursements.[6]

[74] The settlement funds available for distribution from the three settlements together and net of legal expenses payable to counsel becomes ($2,210,000.00 – 440,981.32) **$1,769,018.68.**

Senack v. Garay, 2005 CanLII 35228 (ON SC), <http://canlii.ca/t/1lq05

Brief Summary of the Relevant Facts

[4] The solicitor's June 25, 2001 retainer by the client arose out of injuries sustained by the client and his spouse in a motor vehicle accident which occurred on September 5, 2000. The client had earlier retained another law firm to represent him; however, as aforesaid, in June of 2001, he switched to Mr. Garay's office. Mr. Garay is an experienced litigator.

[5] On August 2, 2002, Mr. Garay commenced a tort action and on December 1, 2003, a Statutory Accident Benefits action following the insurer's termination of the statutory benefits.

[6] On January 6, 2004, the tort action was settled following a mediation. The settlement was for a total sum of $31,000. From this sum, the client received $14,000 and the solicitor received a total of $17,000 on account of legal fees and disbursements.

[7] Following this settlement, the client again changed lawyers and, subsequently, on February 10, 2005, obtained an order for the assessment of the solicitor's account. The solicitor then delivered two accounts – the original $17,000 account and a further account for $34,088.56 (i.e., $51,088.56 in all). The statutory benefits proceeding is still pending. While the claim is fairly substantial, it is being opposed.

[8] The first account is dated January 16, 2004, and the second is dated January 10, 2005. The file reference on both accounts is "MVA-September 5, 2000".

[9] The first account states the fee as follows:

TO OUR PARTIAL FEE	$10,495.60
ADD: GST @ 7%	$ 734.72
TO OUR TOTAL FEE TO YOU	$11,230.32

(Underlining mine)

[10] Disbursements, together with G.S.T. totalled $5,769.68. Therefore, the total fees and disbursements were, as aforesaid, $17,000.

[11] The January 10, 2005 account shows the fees as follows:

TO OUR FINAL FEES TO YOU	$31,622.20
ADD: GST @ 7%	$ 2,213.55
TO OUR TOTAL FEE TO YOU	$33,835.75

(Underlining mine)

[14] Mr. Murphy, the solicitor representing the client in the motion before me, represented the client on the hearing and, as on the motion, Mr. Garay represented himself.
The assessment officer found as a fact that Mr. Garay billed the client at an hourly rate beginning at the amount of $330 but that the rate was subsequently, without notice to the client, increased to $440.62.

[15] He found that the unwritten retainer involved a "fairly straightforward matter" and that the number of timekeepers was "quite an incredible number". He said, "that there was an overlap and duplication of services is an understatement" and he also held that the matters "on hand were not overly complex."

[16] The assessment officer found that correspondence was billed at 12 minutes each, and that this was excessive since, when Mr. Garay's hourly rate was increased to $440 in 2002, the cost to the client of each letter was approximately $90.

[17] He also held that "the solicitor never demonstrated an exceptional level of responsibility with respect to this matter and that level decreased as both the clients and their case grew more problematic." He also held that communication between the solicitor and client was wanting and he found that "even the most basic facets of his retainer" were not discussed.

[18] The assessment officer further found that the claims or demands of the client were fairly substantial, and he found that the arrangements between the client and the solicitor were such that, without positive results, "they (the clients) would only be responsible for his (the solicitor's) disbursements." (I pause to again note that the statutory benefits' claim is still in dispute and that, therefore, neither the assessment officer nor I had/have any idea of what the eventual recovery will be.)

[19] The assessment officer had "no real problems" with the level of skill and competence demonstrated in the solicitor's prosecution of the actions. He found, however, that with respect to billing practices, the client was "not handled in a skilled or competent way."

[20] There was contradictory evidence before the assessment officer regarding the scope of the $31,000 settlement. The client's evidence was that no one told him the settlement was a "bad deal" and the solicitor's evidence was that he advised against the settlement, but that the client insisted going ahead because he was desperate for money. There was also a dispute in the evidence regarding just what claims were encompassed in the settlement.
Theassessment officer decided this dispute in favour of the solicitor and concluded that the results achieved "while not optimal for the client, are attributable mainly to the client's own need for some quick and immediate cash" in his pocket.

[21] He held that the client, throughout the retainer, was impecunious. The solicitor testified at the hearing that if he was unsuccessful in prosecuting the client's claim and obtaining a settlement "then too bad for me".

[22] The assessment officer found that the arrangement between the solicitor and the client was a contingency fee arrangement. The evidence supports a finding that the "contingency" was that the quantum of legal fees depended on whether a settlement or judgment would be obtained. The arrangement was not the type of contingency arrangement whereby an agreed upon percentage was to be calculated on the recovery. However, the assessment officer's comments in his reasons for decision establish that he considered the arrangement to be of the latter kind. At the bottom of page 7 of his reasons he said:

The client's expectation as to the amount of the fee

There was no retainer entered into or even discussed between the parties with respect to this matter. It was a contingency fee arrangement before those types of arrangements were generally accepted in Ontario. Unfortunately for Mr. Garay he had not prepared for the situation which arose, wherein the clients left the relationship before enough funds were recovered to satisfy his account or indeed any way to determine the extent of that account. Mr. Garay then took it upon himself to impose a figure on the clients in order to share in some of the settlement funds, based upon his docketed time. I am of the opinion that that time has value, notwithstanding the contingency arrangement, and should be reimbursed accordingly.

I interpret this, as do counsel, to be a finding that the fees and disbursements were assessed on a *quantum meruit* basis notwithstanding that, at the hearing, the client testified that his understanding was that he would be required to pay between 25 and 30 percent of any recovery. However, the client also testified that he hired Mr. Garay because of his advertisement in the yellow pages of the phonebook that said something to this effect "no result, no charge." The solicitor's position was, and is, that the no result/no charge arrangement is exactly what was his practice at the time and represented the arrangement in this particular situation. At page 8 of his reasons for decision the assessment officer said:

…I am of the opinion that while fee discussion remained vague or even non-existent, the clients had a pretty good idea of what they were involved in and how the ultimate costs were to be determined.

Mr. Garay testified that the clients were told of his and Carol Thomson's hourly rates at the initial meeting and that those rates would be "adjusted from time to time". Six months later those rates rose by approximately 30%. In a contingency fee situation this would have little effect as the final accounting is a percentage of the gross, but in a docket-type accounting, that increase is significant. No such increase can be allowed onassessment without proving that the clients were aware of it and consented to it. In this case they were not and it will not be allowed.

…

[23] The assessment officer found that Mr. Senack was a difficult client. In the result, as aforesaid, he reduced the total fees by $17,303.50 to an amount of $29,968 plus G.S.T. of $2,097.76. He also reduced the disbursements. The net result, after correction of some

mathematical errors, is a reduction from a total of $51,088.56 to $31,589.55 less the $17,000 payment made at the time of settlement of the tort claim all of which results in a net due to the solicitor of $14,589.55.

[24] In supplementary reasons dated June 21, 2005, the assessment officer decided that there should be no costs awarded to either party. He found that neither party beat his respective Offer to Settle; that the accounts were excessive; and that the solicitor was subject to criticism on a number of the "usual factors".

Summary of the Client's Argument

[25] The client's argument may be summarized as follows:

(a) The assessment officer did not make a reduction for work done following the termination of the retainer;

(b) The assessment officer misinterpreted the client's offer to settle

(c) The assessment officer erred in accepting the evidence of the solicitor as to the extent and value of the work of others who purportedly worked on the file without either such person or persons being called to give evidence and/or in the absence of a s.35 notice with respect to business records;

(d) The assessment officer made several findings of fact not borne out by the evidence;

(e) The hourly rate charged by Mr. Garay was excessive and, in any event, the increase in hourly rates was never agreed to by the client;

(f) The assessment officer assessed the two accounts as one; and

(g) A costs award on the assessment hearing should have been made in favor of the client.

Summary of the Solicitor's Argument

[26] Mr. Garay argues that the assessment officer made no error in principle. He submits that there was no need, on his part, to call witnesses to give evidence in addition to his own testimony because he was in charge of all work (i.e., he had the carriage of the file). He argues that Ms. Thomson, the other principal solicitor who worked on the files, was present at the assessment hearing and, therefore, could have been cross-examined by Mr. Murphy notwithstanding that she did not testify in support of the accounts. With respect to the s. 35 notice concerning business records, Mr. Garay argued that, since full production was made by him prior to the hearing, the client suffered no prejudice.

Decision

[27] Given the finding of the assessment officer that the nature of the arrangement between the solicitor and client was a contingent one in the sense that if no favourable settlement of the statutory benefits' action is made then "too bad for me", it seems to me that he should not have made a finalassessment of either account because, quite simply, he could not make an informed decision without particulars of the final disposition of the statutory benefits' claim. In my opinion, his decision is premature. In making this conclusion, I am aware that this argument was, apparently, not made to theassessment officer and, indeed, the argument was not made before me. However, as aforesaid, the amount of which the accounts were assessed cannot, given the uncertainty of the recovery, be properly rationalized. The principles of reasonableness and proportionality must be taken into consideration whenassessing solicitors' accounts. How can this be done, without knowledge of the recovery made by the client?

[28] I should add that I also find the reasons for decision somewhat confusing as to whether there was a finding that there was, indeed, a contingency arrangement. It seems to me that there was such a finding; however, the assessment officer proceeded to assess the fees and disbursements of a *quantum meruit* basis which, of course, contradicts the finding. In my opinion, the assessment officer committed a fundamental error in principle. (See *Schwisberg v. Kennedy*, 2004 CarswellOnt 3445, (Ont. S.C.J.); *Kelleher v. Knipfel*, 1982 CarswellOnt 417 (C.A.); and *Macmaster Poolman & De Vries v. Parssi*, 1995 CarswellOnt 4663 (Gen. Div.))

[29] It is also my opinion that the decision with respect to costs is also incorrect, and represents a fundamental error on the assessment officer's part in that it was based, to a large extent, on the rationale for the conclusions on the assessment.

[30] The foregoing conclusions, therefore, justify a decision by me to refuse to confirm the certificate of the assessment officer. The motion, therefore, is granted.

[31] I should say that, in the alternative, even if I had not concluded that the decision of the assessment officer was not premature, I would, nevertheless, still have refused to confirm his certificate. In my opinion, Mr. Garay's testimony at the assessment hearing regarding the work done by others was fatally flawed. In the absence of a s. 35 notice concerning business records and given the lack of detail in Mr. Garay's evidence, the assessmentofficer was wrong to make a finding that the hours worked by others, were, indeed, worked, that the billing rates were appropriate, and that the work advanced the client's interests. Mr. Garay, during his testimony on the assessment hearing, said "I'm going to have to leave it up to Mr. Murphy (the client's counsel) to dispute any of the entries…we'll be here five days if I have to go through every entry. It's up to Mr. Murphy to ask me or to point out which entries are wrong, which work we say was done that wasn't done. With the greatest of respect, Mr. Garay is wrong – the burden of proof was on him." (See *Foster v. Kemptster*, [2000] O.J. No. 5022; *Lash, Johnston v. Wells*, [1982] O.J. No. 2250; and *Bassel, Sullivan & Leake v. Burton*, [1991] O.J. No. 489).

[32] In my opinion, nothing can be gained by sending this matter back to the assessment officer, or to another assessment officer, at this time because a final decision on what is appropriate cannot be made until the statutory benefits' claim is concluded.

[33] It is my understanding that an arrangement was reached between Mr. Garay's firm and the Beament firm which protects Mr. Garay's account, or claim.

[34] Accordingly, any assessment of the solicitor's account must await the outcome of the disposition of the outstanding claim for the statutory benefits.
