COURT FILE NO.: 00-CV-189420

DATE: 2006-07-18

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nathan Anthony Resch, Robert Higham, Ashley Higham, Ashley Crayden, Shannon Crayden, minors under the age of 18 years by their Litigation Guardian, Annette Crayden v. Canadian Tire Corporation Limited, Mills-Roy Enterprises Ltd, Gestion R.A.D. Inc., Procycle Group Inc.

BEFORE: Madam Justice N. J. Spies

COUNSEL: Craig Brown & Darcy Merkur, for the Plaintiffs
Mark Edwards & Aaron Murray, for the Defendants Canadian Tire Corporation Limited, Gestion R.A.D. Inc., and Procycle Group Inc
Peter Trebuss, for the Defendant Mills-Roy Enterprises Ltd.

HEARD: April 5, 2006 and by way of written submissions

REASONS FOR DECISION ON COSTS

Background

[1] The trial of this action took place over 27 days, between January 23 and March 3, 2006, when the jury delivered its verdict in favour of the plaintiffs. The claim alleged liability of the defendants on grounds of negligence and breach of contract (the Sale of Goods Act)[1]). The action involved what was ultimately admitted to be a defective CCM bicycle that was manufactured by the defendant Procycle Group Inc., sold to the distributor Canadian Tire Corporation Limited, who supplied the bicycle to the defendant Mills-Roy Enterprises Limited, a Canadian Tire franchise store in Fort Erie, Ontario, where Nathan Resch's father purchased the bicycle.

[2] The jury found the defendants Procycle and Canadian Tire (the "Procycle defendants"), and Mills-Roy for injuries suffered by Nathan, when the front fork on the bicycle failed while he was riding, causing him to suffer facial and brain injuries. The jury found no liability against the

[1] R.S.O. 1990, Chapter S.1

plaintiffs, 55% liability against the defendant, Procycle, 35% against Canadian Tire, and 10% against Mills-Roy. The jury's findings on some of Nathan Resch's future care needs required subsequent present value calculations by Professor Jack Carr. Those calculations were completed and confirmed and taking those calculations into account, the jury awarded the plaintiffs damages in excess of $3.5 million, inclusive of prejudgment interest.

[3] With respect to the claims advanced, the plaintiffs submit that the amounts recovered represent a significant success. The following table reflects the amounts claimed and recovered by the plaintiffs in this action:

Party	**Amount Claimed**	**Amount Recovered (Inclusive of PJI)**
Nathan Resch	$5,000,000 plus punitive damages of $1,000,000 and interest	**$3,332,152.23** (inclusive of total punitive damages of **$192,000.00** as against Canadian Tire and Procycle)
Annette Crayden	$100,000 each plus interest	**$110,604.78**
Mark Crayden		**$27,772.76**
Robert Higham		**$6,943.19**
Ashley Higham		**$6,943.19**
Ashley Crayden		**$6,943.19**
Shannon Crayden		**$6,943.19**
Joan Crayden		**$3,471.59**
John Crayden		**$3,471.59**
	TOTAL	**$3,505,245.71**

[4] Days prior to the commencement of trial, the plaintiffs entered into a Mary Carter Agreement with the Mills-Roy defendant, whereby Mills-Roy agreed to pay the plaintiffs a sum of money for settlement of the Mills-Roy claim. By the agreement, the parties also agreed to co-operate on a number of issues.

[5] The amount payable by the Procycle defendants, inclusive of prejudgment interest, is $3,173,921.14 (i.e. 90 per cent of the total damages awarded against all defendants, plus punitive damages against Procycle in the amount of $32,000 and against Canadian Tire in the amount of $160,000).

[6] The plaintiffs seek payment of their costs on a partial indemnity scale to January 12, 2006, when an Offer to Settle was served by them and on a substantial indemnity scale after that date, from the Procycle defendants. The plaintiffs also seek an award of a risk premium.

[7] A summary of the plaintiffs' revised Bill of Costs[2] is as follows:

(a) Total corrected fees of $521,611.00;
(b) Total disbursements of $150,390.91;
(c) Total corrected GST on fees and applicable disbursements $46,984.48;
(d) Total corrected fees, disbursements and GST $718,986.39;
(e) Premium requested $125,000.00;
(f) GST on premium $8,750.00;
(g) Total corrected fees, disbursements, premium, GST on premium $852,736.39.

[8] Mills-Roy claims costs in the amount of $38,613.48 on a partial indemnity scale and $72,052.49 on a substantial indemnity scale, for a total amount of $110,665.97.

Issues

[9] All counsel agree that as the trial judge, I should fix the costs rather than order that costs be assessed. The Procycle defendants acknowledge that the plaintiffs and Mills-Roy are entitled to some of their costs arising out of the legal proceedings. They do not take issue with the disbursements claimed but do submit that the fee amounts claimed by the plaintiffs and Mills-Roy are not fair or reasonable in the circumstances and should be substantially reduced.

[10] The issues that I must decide are as follows:

(a) What is the appropriate amount to be awarded to the plaintiffs for partial and substantial indemnity costs? In considering the appropriate amount, the Procycle defendants raise the following issues:

    (i) Are the hours claimed reasonable?

    (ii) What are the appropriate rates to be claimed by counsel?

    (iii) What is the appropriate counsel fee for trial?

(b) Is Mills-Roy entitled to costs on a substantial indemnity scale following its Offer to Contribute?

(c) What is the appropriate amount to be awarded to Mills-Roy for costs?

(d) Are the plaintiffs entitled to a risk premium?

(e) Is Mills-Roy entitled to a risk premium?

[2] These revisions were explained in a letter from Mr. Brown dated April 10, 2006

Analysis

What is the appropriate amount to be awarded to the plaintiffs for partial and substantial indemnity costs?

The Law

[11] There is no real dispute on the law that applies on this issue but there is a vigorous dispute as to how that law should be applied to the facts and circumstances of this case.

[12] Counsel for the plaintiffs served an Offer to Settle on the defendants in this action, for the purposes of Rule 49.10 of the Rules of Civil Procedure, on January 12, 2006. The terms of that offer included a term that the defendants would pay to the plaintiffs the sum of $1.6 million for claims, inclusive of prejudgment interest, and pay to the plaintiffs their partial indemnity costs of this action, as agreed upon or assessed, together with their assessable disbursements.

[13] The Procycle defendants accept that the plaintiffs' offer complies with Rule 49.10 but submit that although strict application of Rule 49.10 confers costs consequences upon an unsuccessful defendant when a plaintiff obtains judgment in excess of an offer to settle, the court is given an overriding discretion to award costs, and is not constrained by rigid calculations of hours spent and rates charged. If the suggestion is that I should deprive the plaintiffs costs on a substantial indemnity basis in this case, I disagree. Although I do have the power to order otherwise, I would not do so in this case. The plaintiffs' Offer to Settle reflected a huge discount from the amount of damages claimed-it was less than half the amount awarded by the jury, and demonstrated a serious willingness to compromise and settle.

[14] Counsel for the Procycle defendants is very experienced and he represents an insurer who is also sophisticated in these matters. There were two pre-trials in December 2005, just before the Offer to Settle was served. The Procycle defendants reasonably should have expected to pay the plaintiffs' costs on a substantial indemnity basis, in the event that the plaintiffs were successful at trial and recovered more than their Offer to Settle. That was an informed risk that they took and although the Procycle defendants should not be "punished" for not accepting that offer, I see no absolutely no basis upon which to deprive the plaintiffs of the benefit of that offer and so the reasonable hours spent thereafter, which I consider below, shall be awarded on a substantial indemnity basis.

[15] Ontario Regulation 42/05 eliminated the former costs grid on July 1, 2005. The grid has been replaced by the following with respect to allowable fees:

> The fee for any step in a proceeding authorized by the Rules of Civil Procedure and the counsel fee for motions, applications, trials, references and appeals shall be determined in accordance with sections 131 of the Courts of Justice Act and the factors set out in subrule 57.01(1).

[16] Section 131(1) of the Courts of Justice Act provides:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[17] The parties agree that Rule 57.01 provides a list of factors that the court may consider in exercising its discretion to award costs, which include the complexity of the proceeding, the importance of the issues and as a result of the amendments last July 2005, the principle of indemnity and a consideration of the amount that an unsuccessful party could reasonably expect to pay.

[18] It is also important to note Rule 57.01(4), which provides that nothing in Rule 57 affects the authority of the court under section 131 of the Courts of Justice Act, to among other things, award all or part of the costs on a substantial indemnity basis and to award costs in an amount that represents full indemnity.

[19] Our Court of Appeal has extensively dealt with the approach that I must take in fixing costs and these recent decisions have made it clear that I should not apply a rigid approach to the calculation of costs and that I must fix costs considering the overriding principles of fairness and reasonableness, in light of all the circumstances of each particular case.[3]

[20] In relation to the fair and reasonable approach, the Court of Appeal in Boucher stated:

> While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. (at para. 24)

[21] The Court in Boucher also stated:

> The express language of Rule 57.01(3) makes it clear that the fixing of costs is not a mechanical exercise. In particular, the rule makes it clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in Rule 57.01. Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant. (at para. 26)

[3] Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC, 2005 CanLll 1042 (O.C.A.) at para.8, Boucher v. Public Accountants Council for the Province of Ontario, 2004 CanLll 14579 (O.C.A.) at paras. 16-38, Moon v Sher, 2004 CanLll 39005 (O C.A.) at paras. 25-35,

Hourly Rates

[22] The rates of Craig Brown, the principal counsel for the plaintiffs, and Darcy Merkur, co-counsel for the plaintiffs at trial, together with those of other senior partners, associate lawyers, students-at-law and clerks are set out in the Bill of Costs of the plaintiffs. The fees requested by the plaintiffs for partial indemnity costs reflect the maximum rates published as a guideline by the Costs Subcommittee of the Civil Rules Committee in the Ontario Reports on July 8, 2005 (the "Costs Guideline"). The time claimed spans the years 1999 to 2006. The substantial indemnity rates claimed by the plaintiffs are based on 1.5 times the partial indemnity rates, which is in accordance with the definition of "substantial indemnity costs" under Rule 1.03.

[23] The plaintiffs submit that the Costs Guideline, while instructive, in no way binds the discretion of this court to determine the appropriate fees under Tariff A. "Partial indemnity costs" is now defined under the Rules to mean costs awarded in accordance with Part I of Tariff A, and Part I does not proscribe any particular rate for counsel, students or clerks and, instead, leaves that to the court's discretion under section 131 of the Courts of Justice Act and Rule 57.01. The Tariff itself makes no reference to the Costs Guideline.

[24] The plaintiffs submit that the rates claimed are reasonable given the year of call of counsel, and when weighed against those of other counsel and firms in the Toronto area and based on the skill exhibited and result achieved.

[25] Craig Brown was called to the Bar in Ontario in 1980, and since that time has been engaged exclusively in personal injury litigation, acting mostly for plaintiffs. Darcy Merkur was called to the Bar in Ontario in 2000, and since then has also been engaged in personal injury litigation, acting mostly for plaintiffs.

[26] The Procycle defendants acknowledge that the Costs Guideline may provide an appropriate measure of maximum partial indemnity rates but submit that in this case the plaintiffs' rates are unreasonable and unfair. They submit that the plaintiffs have failed to justify an award of the maximum rates which should not be applicable simply because they are lower than the firm's internal rates.

[27] The Procycle defendants rely on a comparison between the partial indemnity and substantial indemnity rates claimed by the plaintiffs of $350 and $500/hour for Mr. Brown and $225 and $325/hour for Mr. Merkur and the substantial indemnity rates claimed by Mr. Trebuss, who was called to the Bar in 1981 of $300/ hour and Mr. Ahmed (called in 2002) of $170/hour. They submit that it is difficult to reconcile a substantial indemnity rate for Mr. Merkur that is more that the rate charged by Mr. Trebuss who has almost 20 years more experience.

[28] The Procycle defendants submit that since both Mr. Trebuss and Mr. Brown were called to the bar roughly 26 years ago and have been practicing civil litigation for the duration of their careers to date, the substantial indemnity hourly rate submitted by Mr. Trebuss is a more reasonable, fair and appropriate substantial indemnity rate to be applied to the case at hand.

[29] The Procycle defendants also rely on the decision of Monks v. ING Insurance Co. of Canada[4] on costs and submit that the partial indemnity and substantial indemnity rates awarded in Monks are similarly applicable to the case at hand. Plaintiff's counsel in Monks had been practicing for the same number of years and in the same area as Mr. Brown and Mr. Trebuss and the court found:

> After considering these principles, I accept the hourly rates set out by the Plaintiff in paragraph 3(d) of this decision. I am entitled to inspire myself to fix hourly rates on the former costs grid and adjust the hourly rate accordingly. Peter Cronyn has been involved in civil litigation cases for the past 26 years. His rate of $240 in fees on a partial indemnity basis and $300 in fees on a substantial indemnity basis are reasonable and represent an amount an unsuccessful party could reasonably expect to pay. (at para. 61)

[30] The Procycle defendants submit that the partial indemnity rate of $200/hour and the substantial indemnity rate of $300/hour would be much more reasonable rates for Mr. Trebuss and Mr. Brown than the rates submitted by the plaintiffs. They also submit that the substantial indemnity rate of $170/hour claimed by Mills-Roy for Mr. Ahmed is a fair and reasonable rate for junior counsel for a case such as this and that while Mr. Merkur was called to the bar two years prior to Mr. Ahmed, the difference of $155/hour is unreasonable. As such, it is submitted that a fair and reasonable substantial hourly rate for Mr. Merkur would be $200/hour and that the partial indemnity rates of $115/hour for Mr. Ahmed and $135/hour for Mr. Merkur would be fair and reasonable hourly rates in the present case.

[31] Counsel for the plaintiffs submit that this is an unfair comparison that, if viewed in isolation, fails to take into consideration the multiple factors to be considered by this court in awarding costs, as recently highlighted by the majority of the Court of Appeal in Celanese Canada Inc. v. Canadian National Railway Co..[5] There, discussing the partial indemnity rate claimed by senior counsel with 20 years' experience (in that case, Mr. William G. Scott of McCarthy Tétrault LLP, called to the Bar in 1983), Feldman and Simmons JJ.A. held as follows:

> We do not agree with our colleague that the hourly rate claimed by senior counsel should be reduced by $100. In our view he was entitled to claim the top rate of $350 per hour on the partial indemnity scale and the trial judge made no error in accepting the rate claimed…
>
> With respect to the partial indemnity rate for senior counsel, in our view the trial judge made no error in accepting the full $350 hourly rate claimed by senior counsel, Mr. Scott. As Borins J.A. noted, the trial judge specifically found that it was due to counsels' skill and determination that this case was won for their client.
>
> Although there is case law from the Superior Court that suggests that the maximum rate in the costs grid is reserved for the most experienced counsel and

[4] [2005] O.J. No. 3749 (S.C.J.)
[5] 2005 CanLII 8663

> the most important cases, we do not agree that only a small, elite group of lawyers in the province arguing the most financially significant cases is entitled to that rate. Instead, the trial judge is to assess the seniority of counsel and the significance of the case in monetary, jurisprudential and procedural terms, and to decide on a case-by-case basis the appropriate rate for senior and junior counsel on the applicable scale. (at paras. 59-61)

[32] This conclusion is even more compelling now that the costs grid has been eliminated.

[33] The plaintiffs also rely on the recent decision of Justice Lax in Snushall v. Fulsang,[6] who applied these factors in a case she described as "reasonably complicated personal injury" and allowed the maximum hourly rate to plaintiffs' counsel (in that case Mr. Jeffrey Strype, called to the Bar in 1979) of similar experience to Mr. Brown.

[34] It is also submitted by counsel for the plaintiffs, that it is unfair to contrast hourly rates of personal injury defence counsel with plaintiffs' personal injury counsel. They argue that defence counsel, such as Mr. Trebuss, typically are paid agreed-upon hourly rates based on volume of work from large insurance company clients. They invoice their clients regularly, and are paid whether successful or not. On the other hand, plaintiffs' personal injury counsel typically bear their clients' cost and expense of a proceeding (as in this case) where payment of fees is not guaranteed.

[35] I do not have any evidence concerning how Mr. Trebuss determined his billing rate, although he did not dispute the accuracy of these submissions. Given the cases referred to by the plaintiffs and my experience in fixing costs, I must say that his rates are low which may or may not be for the reason suggested by Mr. Brown. I note that his partial indemnity rate is lower than the counsel in the Monks case relied upon by the Procycle defendants. Although I see from his brief that he was able to interim bill his client, I do not see that as a relevant factor in determining the hourly rate for counsel.

[36] In the cases relied upon by the plaintiffs, the court considered the hourly rates of counsel practicing in Toronto. Counsel in the Monks decision practices in Ottawa. For that reason I find the cases relied upon by the plaintiffs to be more relevant. I agree with the submission of the plaintiffs that the Cost Guideline does not bind this court. It is a guideline only but does assist judges in ensuring some consistency in costs awards, which is important.

[37] In the written submissions of counsel for the plaintiffs it is stated, "in most instances, our firm's internal rates are substantially higher than the maximum rates recommended under the Costs Guideline (especially concerning our students-at-law, and some senior clerks who offer a quarter-century of experience)." I requested that I receive the firm's internal hourly rates, which were provided.

[38] Although not referred to in the written submissions of the Procycle defendants, one of their briefs of authorities included the decisions of Quinn J. in Dybongco-Rimando Estate v.

[6] [2006] O.J. No. 1057 (S.C.J.), at paras. 18-23

Jackiewicz[7] and Wilson J. in Ross v. Welsh.[8] In both cases the court commented on the need for evidence of the actual billing rates charged. In the decision of Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.[9], referred to in the Ross case, Nordheimer J. noted that a direct consequence of the application of the indemnity principle when fixing costs is that the court should fix those rates at a level that is proportionate to the actual rate being charged to the client and that it is not appropriate for counsel to seek rates that are higher than those being charged to the client.

[39] Mr. Brown is a senior counsel and very experienced in personal injury litigation. I have no difficulty in allowing an hourly rate for Mr. Brown on a partial indemnity scale of $350/hour for the time spent since 2005, when his actual billing rate was $500/ hour. This is consistent with the rates of Toronto counsel and the principles enunciated by the majority in the Celanese decision. I note that in Celanese, the judgment was for just over $300,000 and the primary consideration of the court appears to have been the finding of the trial judge that it was due to counsels' skill and determination that the case was won.

[40] In the case at bar, the financial stakes were much higher and the amount of the judgment speaks for itself. This case was complicated, involving difficult liability and damages issues and the monetary amount in issue was significant. Mr. Brown did an outstanding job for his clients. Although I would not say that it was only the skill of counsel that won this case, given the compelling evidence in favour of the plaintiffs, I certainly have to hesitation in concluding that the skill of Mr. Brown and the manner in which he presented the plaintiffs' case and conducted the defence put the plaintiffs' case in the best light possible and resulted in a very favourable jury verdict. Although I appreciate that the "maximum" rate in the Costs Guideline is not binding on me, if senior counsel in the circumstances of this case could not command this "maximum" rate, there would be few cases that could justify it. That, as I understand from the majority decision in Celanese, is not the way in which the Cost Guideline should be applied.

[41] In the years prior to 2005 however, Mr. Brown's actual hourly rates ranged from $350 in 1999 to $425 in 2004. Notwithstanding that variation, the $350 partial indemnity rate has been claimed throughout. Given the principles already stated, I find that an appropriate rate in those years on the partial indemnity scale should range from $250 in 1999 to 2001 and $275 in 2002 to 2004.

[42] It is not possible to calculate a precise deduction to reflect these reduced rates given the manner in which the plaintiffs prepared their Bill of Costs. This adjustment has some impact on the amount claimed for the pleadings, the discoveries and I presume the mediation. In the other categories the time of counsel is not significant. The time impacted is that of Mr. Brown's as he was the senior counsel working on the file throughout. Considering his time before 2005, as best I can estimate it, and the rate reductions, I reduce the partial indemnity fees claimed by Mr. Brown by $11,000.

---

[7] 2003 CanLII 7541 (S.C.J.)
[8] 2003 CanLII 3292 (S.C.J.)
[9] (2002) 17 C.P.C. (5th) 334 (S.C.J.)

[43] As for Mr. Merkur, it was clear to me during the course of the trial that Mr. Brown heavily relied upon the assistance of Mr. Merkur at trial, which is of course understandable given its length and complexity. Furthermore, Mr. Merkur was responsible for leading some of the evidence and conducting some of the cross-examination of the witnesses. Although by the time of the trial he had been called to the Bar for only 6 years, it was evident that he has gained a great deal of expertise in personal injury litigation. No doubt this meant that Mr. Brown was able delegate effectively, thus reducing the overall cost.

[44] A partial indemnity rate at the "maximum" for counsel with less than 10 years experience in the amount of $225 has been claimed for Mr. Merkur for services rendered in 2005. I note that in the Snushell case, relied on by the plaintiffs, "junior counsel" was allowed at $150 per hour although they did not attend the trial. In the Celanese case, counsel with two years experience who attended the trial was allowed at the rate of $150 on a partial indemnity basis and at the rate of $200 on a substantial indemnity scale. Mr. Merkur's actual rate in 2006 was $325/hour. I have not been given his rate for 2005 but assume it was probably $300/hour. This is when most of the work claimed for partial indemnity costs by Mr. Merkur was done. In light of his actual billing rate and considering these recent cases involving Toronto counsel, I fix Mr. Merkur's partial indemnity rate at $200 per hour.

[45] No specific complaint was made about the partial indemnity rates charged by others who worked on the file. Most of that time was incurred by senior and junior clerks who have all been billed at the maximum rate set out in the Cost Guideline of $80 per hour, notwithstanding that their experience varies from between 6 to 25 years. The actual billing rates in 2005 for the law clerks range from $200 for the clerk with 25 years experience to $150 for the clerk with 6 years experience. I considered whether or not something less should be allowed for a junior clerk. Given that the actual billing rates were never lower than $100/hour, and as such were always significantly higher than the "maximum" permitted by the Cost Guideline, which is not binding on me in any event, I decided not to do so. As for the rates charged for the others who worked on the file, I see no reason to adjust them.

[46] Having accepted that $350 per hour is a reasonable rate claimed for Mr. Brown in 2005, then it follows that his substantial indemnity rate will be 1.5 times the partial indemnity rate in accordance with Rule 1.03 (although the plaintiffs have reduced the substantial indemnity rate claimed for Mr. Brown to $500 per hour). I note that in 2006 his actual hourly rate was $550/hour. Similarly that calculation would result in a substantial indemnity hourly rate for Mr. Merkur in the amount of $300/hour (versus the claimed rate of $325), which is also lower than his actual rate.

[47] In my view these rates are fair and reasonable, and consistent with the reasoning of Justices Feldman and Simmons (and the wording of Rule 57.01), when one considers the experience of counsel, the excellent result achieved for the plaintiffs through the efforts of their counsel, and the significance of this case in monetary, jurisprudential and procedural terms.

Number of Hours

[48] In the plaintiffs' Bill of Costs, they break down the time claimed into various categories and by lawyer or clerk. The time claimed includes two motions, one on March 26, 2002 and the other on May 20, 2004. I asked counsel if any costs orders were made on those motions and was provided with a copy of the orders. The order of May 20, 2004 addressed costs and so the plaintiffs have abandoned their claim for costs for that motion. As for the motion of March 26, 2002, the order of Master Cork makes no reference whatsoever to costs. The plaintiffs maintain their request for costs associated with this motion of $828 but in my view, if there was no disposition with respect to costs, it is too late to ask for costs of that motion now. I note that costs had been requested in the relief sought. Where an order does not refer to costs this is tantamount to an order that no costs are payable.[10] I therefore disallow that amount.

[49] As for the rest of the Bill, based on the calculations by counsel for the Procycle defendants, the total number of hours claimed by the plaintiffs (after deducting the hours claimed for the two motions) is 1861.1 hours.

[50] The plaintiffs submit that the Procycle defendants reasonably would have expected the costs of this case to be extremely high, based on the duration of this action, (this action was commenced in April 2000 and so by the start of trial, litigation had been ongoing for nearly six years), their own legal fees in the six years leading to trial, and the anticipated trial length. They also rely on the fact that with respect to the claims advanced, the amounts awarded by the jury represent a significant success. Furthermore, despite asserting a vigorous defence that attempted to establish contributory negligence on the part of the plaintiff Nathan Resch, the Procycle defendants were found 90 per cent liable for his injuries, with no finding of contributory negligence.

[51] The plaintiffs submit that the Procycle defendants had to have understood that the costs of going to trial would be substantial and, if unsuccessful at trial, they would face a substantial costs award. They submit that that is underscored by the following:

a) the parties' respective offers to settle came in the wake of a final pre-trial hearing on December 14, 2005, or less than six weeks before the scheduled start of trial, at a time when the complexity of the issues were clearly understood by the defendants;

b) the defendants each are represented by senior counsel, who reasonably could have been expected to explain to their clients both the actual cost of going to trial together with the attendant risk flowing from the Offer to Settle that was served by the plaintiffs;

[10] Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc., [2002] O.J. No. 3729 (O.C.A.)

c) but for the Mary Carter Agreement, the trial could have been expected to last longer than it actually did. The defendants must have anticipated that the trial of this action, as a jury trial, would have lasted longer than it actually did; and

d) the Procycle defendants themselves had two counsel present at trial throughout (confirming the reasonableness of the plaintiffs having two counsel at the trial throughout).

[52] All of these submissions have merit save that with respect to the estimated duration of the trial, I was assured immediately before the trial commenced, by all counsel that the trial would easily be finished within 5 weeks and it only became obvious as the trial progressed that that was not the case.

[53] Counsel for the plaintiffs also emphasizes the complexity of this proceeding and relies on the following:

(a) the parties collectively called 29 witnesses at trial and filed 45 exhibits in total, including the evidence of 9 experts;
(b) the case turned on technical evidence regarding failure of Nathan's bicycle; substantial medical evidence about his injuries; and expert testimony regarding the plaintiff's past and future income loss and care needs and the valuation of those heads of damages; and
(c) there were numerous evidentiary and legal issue motions brought in the course of trial.

[54] The Procycle defendants submit that the quantum of hours claimed by the plaintiffs is unreasonable and unfair given all the circumstances of the proceedings at issue. In their written submissions they included a chart to illustrate the differences in the quantum of hours claimed by counsel for the plaintiffs and Mills-Roy for comparable time periods throughout the proceedings. The difference in hours docketed is substantial, in the range of 1300 hours.

[55] The plaintiffs submit that such a comparison is unreasonable given the differences in the relative positions of the plaintiffs and Mills-Roy and their respective roles at trial. The plaintiffs bore the onus of proving their claims in the face of a vigorous defence by the Procycle defendants on all issues. Mills-Roy, meanwhile, by virtue of its Mary Carter Agreement with the plaintiffs, did not contest the issue of damages at trial. The trial, and the bulk of expert evidence at trial, focused largely on the issue of damages. The plaintiffs submit that therefore there should be no surprise that the overall hours of Mr. Trebuss for Mills-Roy (especially for trial preparation) are significantly less than those of plaintiffs' counsel. The plaintiffs maintain that the hours worked by their counsel are fair and reasonable given the nature and complexity of this action.

[56] I accept the submissions of counsel for the plaintiffs that a comparison to the time spent by counsel for Mills-Roy, particularly in terms of the time spent in preparing for trial and

conducting the trial is not very helpful. Clearly the Mary Carter Agreement reduced the number of hours required by Mr. Trebuss attending the trial as he had only a limited role on the liability issues as they affected Mills-Roy and he did not cross-examine at all on damages. He was often not present, leaving Mr. Ahmed in attendance.

[57] As for the time spent prior to the trial, Mr. Trebuss' Bill of Costs is not broken down by category but rather by billing periods and so it is not possible for me to compare for example, how much time he spent on the discoveries as compared to counsel for the plaintiffs. I note that Mr. Edwards did not provide evidence of the time that he incurred both before and during the trial, in support of this argument, but Aaron Murray assisted him throughout at trial and certainly during the course of the trial, counsel for the plaintiffs and the Procycle defendants were working very hard.

[58] Although I have a description of the various categories of costs claimed by the plaintiffs, it is not very detailed. I have the dockets but it is not the role of the court to conduct a detailed analysis of the dockets. I therefore considered the hours claimed by the plaintiffs for the time spent prior to the trial based on my experience and knowledge of the issues in this case. In that regard I have come to the following conclusions:

(a) 75 hours are claimed for the pleadings stage and of that 31 hours were spent by senior counsel. I find this excessive particularly given the expertise of counsel for the plaintiffs, although I note that this category includes investigation and assessment of the case. As far as pleadings are concerned, plaintiffs' counsel had to prepare the claim and a reply. I reduce the fee claimed in this category by approximately one quarter, in the amount of $3500. In this regard I have not double counted given that I have already reduced Mr. Brown's hourly rate;

(b) 116 hours were spent on documentary discovery which in my view is reasonable particularly as almost all of that time was spent by law clerks;

(c) 217.5 hours are claimed for the examinations for discovery. Of that 94 hours is time for senior counsel who I assume was Mr. Brown and that he conducted all of the discoveries with the assistance of a law clerk. The discoveries proceeded over 6 days and the time claimed includes preparation of answers to undertakings which I presume were substantial in number given the nature of the case. The days were all full days. Only a few were the usual 6 hours however, as the discoveries were not all in Toronto. Mr. Brown docketed 16 hours on October 15, 2001 for the discoveries of the plaintiffs and the Mills-Roy representatives in St. Catherines, 14 hours on October 17, 2001 of the Procycle defendants in Montreal, 17 hours for the discovery of Procycle defendants on April 3, 2003, also in Montreal and 10 hours for the discovery of the Procycle defendants on April 8, 2005 in Quebec City. Given the time spent travelling, I find the total time claimed is reasonable;

(d) 95 hours are claimed for mediation and settlement conferences of which 29 hours is by senior counsel. Unfortunately no details are provided with respect to the time claimed for this category. I do not even have dates in order to check dockets, which in any event is the responsibility of counsel to provide. Apart from assuming that there was a mandatory mediation, I have no way to assess the reasonableness of the time claimed. Mr. Trebuss' Bill is a little more detailed and based on it and his written submittsion it seems the mediation was cancelled on short notice by the Procycle defendants and then I presume was rescheduled. Certainly on its face the time claimed is high and without more information from the plaintiffs in support, I have no alternative but to conclude that the time should be reduced and accordingly I will discount this category by $5,000. Again I have not double counted given the reduction in the hourly rates for Mr. Brown;

(e) In addition 57 hours are claimed for two pre-trial conferences in December 2005, all for senior and junior counsel. It appears that this is when Mr. Merkur began to work on the file. Given that there were two attendances before Justice Spiegel, I can reasonaably infer that the parties were making serious efforts to settle the case and in this light the time claimed by the plaintiffs is reasonable;

(f) Finally for trial preparation pre-Offer to Settle, 134 hours are claimed of which only 8.4 hours is by senior counsel. It is difficult to consider this category on its own. I prefer to consider it at the end as part of the total fees claimed for trial preparation in making my final decision concerning the reasonableness of the amount that I will fix.

[59] The Procycle defendants also submit that the hours claimed by the plaintiffs for trial preparation, post-Offer to Settle are particularly unreasonable and unfair. These hours represent the time submitted for substantial indemnity costs from the time of the plaintiffs' Offer to settle and the Procycle defendants submit that since the Offer to Settle was made on January 12, 2006 and the trial commenced on January 23, 2006, the total number of hours in the eleven day period at issue is 264. This would mean that the hours of 239.4 claimed by junior counsel would require roughly 21.8 hours each day in trial preparation and the hours claimed by senior counsel of 334.5 hours would require roughly 30.4 hours of trial preparation each day. Obviously this would be impossible.

[60] In reply counsel for the plaintiffs submits that the Procycle defendants have mistakenly suggested that all of the time claimed for trial preparation by the plaintiffs' counsel is to be attributed to those 11 days. They submit that the plaintiffs have properly claimed time for trial preparation by their counsel during the course of trial and that this was reflected in the description in the plaintiffs' Bill of Costs, under the heading "Trial Preparation", which included references to such steps that reasonably took place during the course of trial such as consulting with and briefing witnesses and experts, compiling documents, preparing examinations, preparing opening and closing statements, and preparing submissions.

[61] Based on the dockets filed, counsel for the plaintiffs explain that Mr. Brown's total time claimed for trial preparation, of 334.5 hours post-Offer to Settle, includes 84.5 hours worked

prior to the start of trial, and 250 hours during the course of trial outside of court time (including evenings, weekends and non-sitting days). Similarly, Mr. Merkur's total time of 239.4 hours is comprised of 71.6 hours prior to the start of trial, after the delivery of the plaintiffs' offer, and 167.8 hours during trial.

[62] Counsel for the Procycle defendants anticipated that the plaintiffs might explain the hours in this way and submitted that a claim for trial preparation during the course of the trial is not properly assessable in conjunction with the hourly dockets provided by the plaintiffs. They submit that the dockets listed by the plaintiffs for each day of trial appear to be joint dockets including "preparation and attendance". As such, no proper hourly assessment can be made. In addition, it is submitted that the plaintiffs may not properly claim these hours, as they are bound by the counsel fee maximum limitations, as prescribed by recent jurisprudence. I discuss this issue below.

[63] In response to this submission counsel for the plaintiffs state that the time under such entries in the plaintiffs' Bill of Costs has been broken down (for most trial days) on the assumption that a day at trial involves 6 hours of court time, with the remainder of the time recorded for that day then allocated in the Bill of Costs to trial preparation. I accept that explanation and will assess the fees claimed on that basis.

[64] The thrust of the argument advanced by the Procycle defendants is that whatever I assess in terms of a reasonable counsel fee for trial, will necessarily include preparation time and that accordingly the fees claimed for preparation for trial during the trial are not recoverable.

[65] It is the position of the plaintiffs that the former weekly limits on counsel fees at trial, under the costs grid, no longer apply under the current costs regime and they submit that if this is accepted by the court, nothing turns on the distinction that the Procycle defendants have attempted to draw between time claimed for trial preparation during the course of trial and for attendance at trial.

[66] Counsel for the plaintiffs also rely on the decision of Borins J. A. in Celanese where he awarded costs to counsel for mid-trial preparation, above and beyond the counsel fee at trial. He stated: "I am satisfied that it was necessary for counsel to engage in this mid-trial preparation and to claim costs for doing so." (at para. 53). The majority did not disagree with this conclusion.

[67] I would add that Lax J. in the Snushell case considered all of the time on a simple hourly basis rather than a fixed amount for counsel fee at trial and a fee for trial preparation based on hours spent. She considered the matter based on hours spent preparing for the trial and then the hours spent attending the trial and further preparation during the trial including weekends.

[68] I prefer this approach and given my conclusion with respect to the application of the principles under the old costs grid in terms of counsel fee at trial, as set out below, I agree that in principle, counsel for the plaintiffs can recover costs for time spent preparing for trial during the course of the trial itself, provided that time does not overlap actual trial attendance. It would be most unfair to deprive the plaintiffs of these costs, provided that they are reasonable, as there is no doubt that even during a trial that only lasts a few days, a great deal of time can be properly

spent by counsel for trial preparation. That is particularly true in a trial like this that lasted six weeks. I accept that counsel for the plaintiffs needed to work in the evenings and on weekends to prepare witnesses, to prepare to cross-examine witnesses, to deal with the various procedural and legal issues that arose and to prepare for closing submissions to the jury.

[69] The question then is whether or not the total time claimed for trial preparation is reasonable. Before the Offer to Settle, 134 hours are claimed, of which I presume 8.4 hours was spent by Mr. Brown, and the balance by his law clerks. Mr. Brown has claimed 334.5 hours and Mr. Merkur has claimed 239.4 hours, post-Offer to Settle. This does not include the post-Offer to Settle time of the student-at-law and the senior clerk which combined is another 210 hours and another unidentified junior counsel for 52.6 hours.

[70] It is clear, since the Offer to Settle was made only 11 days before trial, and given that Mr. Brown has personally claimed only a few hours of time for preparing for trial before the offer and Mr. Merkur only began to work on the file about the time that the offer was made, that the very short range preparation for trial was very intensive and that that continued during the course of the trial.

[71] Considering the fact that the trial was 27 days long, and included 5 weekends and approximately 4 non sit days, Mr. Brown's 250 hours during the course of trial outside of court time translates into 6 hours per weekend day/non sit day (84 hours) and approximately 6 hours per day of trial, which combined with attendance would mean a 12 hour days. Similarly, Mr. Merkur's 167.8 hours during trial translates into 6 hours per weekend day/non sit day and 3 hours per day of trial. This is an arbitrary distribution of the time; I have not done this on the basis of the dockets filed. It does assist me in assessing the reasonableness of the time claimed for preparation by Messrs. Brown and Merkur during the trial.

[72] Given that most of the preparation by counsel was left to be done in the eleven days before trial, I am not surprised that there is a great deal of preparation time during the trial. Based on a cursory review of the dockets it appears that Mr. Brown was routinely docketing 12 to 14 hours per day. Similarly Mr. Merkur was routinely docketing 10 to 12 hours per day. I am not surprised that Mr. Brown was spending more time on trial preparation, as although he delegated to Mr. Merkur where he could. Given what was at stake, his clients would naturally expect him to conduct the key examinations. To do so well, as he did, requires a great deal of "burning the midnight oil" during the course of a trial. I therefore would not interfere with either his time or Mr. Merkur's.

[73] I must also consider the post-Offer to Settle time of Mr. Brown of 84.5 hours prior to the start of trial, and Mr. Merkur's 71.6 hours prior to the start of trial as well as the student-at-law and the senior clerk which combined is another 210 hours and another unidentified junior counsel for 52.6 hours. This is a total of 418.7 hours. This covers the eleven days before trial of everyone and dockets during the trial of everyone except Messrs. Brown or Merkur. Given the complexity of the case and given how hard Mr. Brown and Mr. Merkur were working, I am not surprised that they needed to enlist the help of others for trial preparation. I must however consider this time in addition to the 134 claimed for trial preparation before the Offer to Settle.

This means that 552.7 hours were spent on trial preparation, not including the trial preparation of Messrs. Brown and Merkur during the trial.

[74] I have no doubt, nor does Mr. Edwards suggest, that all of this time was not docketed. I am also mindful of the fact that most of this time is claimed on the substantial indemnity scale. Furthermore, clearly counsel for the plaintiffs achieved an excellent result for their clients and their thorough preparation was obviously important in obtaining this. Senior counsel represents the Procycle defendants, and as I have said, they represent a sophisticated client who should have some appreciation for the actual cost of going to trial in a case like this. Nevertheless I find that the total time spent on preparation is high and all of it cannot be claimed from the Procycle defendants. I reduce the claim for trial preparation before the Offer to Settle by $3,000 and post Offer to Settle by $30,000. I am mindful that in making the second deduction I must not double count since I have reduced Mr. Merkur's substantial indemnity rate.

Counsel Fee for Attendance at Trial

[75] The plaintiffs have claimed $135,050 as counsel fee for the attendance at trial of senior counsel Mr. Brown, and junior counsel, Mr. Merkur. The Procycle defendants submit that this amount is unfair and unreasonable in the circumstances of this case.

[76] The plaintiffs have claimed 170 hours for Mr. Brown for 26 days attended, at the rate of $500/hour, for a total of $85,000. This represents on average 6.5-hour days and a counsel fee of $3269 per day. They have also claimed 154 hours for Mr. Merkur for 24 days attended, at $325/hour for a total of $50,050, which represents on average 6.4-hour days and a counsel fee of approximately $2085 per day. I consider this to be a reasonable estimate of the actual time spent by counsel in attendance at trial as most days we sat after the jury retired at 4:00 or 4:30. The issue then is the amount of money claimed for this time. There needs to be an adjustment in any event given the reduction in the substantial indemnity rate I have allowed Mr. Merkur.

[77] The former costs grid provided for maximum daily and weekly substantial indemnity counsel fees for trial, at $4,000 daily and $17,500 weekly. The decisions of Celanese and Walker v. Ritchie[11] stand for the proposition that fees for a second counsel are permissible under the cost grid but that the aggregate of counsel fees cannot exceed the maximum permitted under the costs grid.

[78] Counsel for the Procycle defendants submits that although the costs grid has been eliminated subsequent to the decisions of Celanese and Walker, the same approach has been adopted in the post-grid era, as evidenced in the recent Monks decision. The court in Monks stated:

[11] [2005] O.J. No. 1600 (O.C.A.)

> As to the amount chargeable for the two counsel who attended at trial, that fee is not governed by the hourly rate, but by "counsel fees at trial" it can look at what the grid allowed prior to July 1, 2005 and allow "up to" $4,000 per day or $17,500 per week for substantial indemnity costs. Here, again, the maximum is reserved for the most experienced lawyer in the most difficult and important case. (at para. 62)

[79] The Procycle defendants submit that the counsel fee submitted by the plaintiffs should be reduced from $135,050 to $104,000 (26 days at $4,000/day).

[80] The plaintiffs respond that the costs grid has no application in this case and that the maximum per-week block fees for trial counsel under the costs grid no longer apply. They point out that in Monks, Lalonde J. noted (at para. 62) that, prior to the costs grid, there was a discretion to permit an additional fee for junior counsel where warranted and submit that, given the growing length and complexity of trials in recent years, second counsel are seen today more frequently.

[81] In Celanese, Borins J. A. noted that historically a fee for a second counsel was awarded in appropriate cases and was deserved. He held: "the omission from the costs grid of a discrete fee for a second counsel at trial, as well as on appeal, likely reflects an oversight on the part of the Civil Rules Committee that should be corrected." (at paras. 50-52)

[82] As counsel for the plaintiffs point out, the Costs Guideline does not restrict the ability of parties to claim a second counsel fee at trial. The maximum rates suggested address hourly fees only and, unlike the costs grid, there is no mention of block weekly trial fees. As I have already stated, the approach taken by Lax J. in Snushell was simply to consider the hours spent in preparation and attendance.

[83] The plaintiffs submit that the Civil Rules Committee has corrected the oversight perceived by Justice Borins, with a return to the traditional approach of allowing a second counsel fee at trial in appropriate circumstances. Whether that was intended or not by the Costs Guidelines, as the cost grid has been abolished I see no reason not to consider the counsel fee for trial on the basis of hours spent in attendance provided that it is reasonable for the plaintiffs to recover for both Mr. Brown and Mr. Merkur.

[84] Given that the Procycle defendants had two counsel at trial, and given the complexity and length of the trial, the significance of the case to the parties, and the active role played by Mr. Merkur during the course of the trial, in my view the claim of a second counsel fee for Mr. Merkur is appropriate. I would therefore not adjust the counsel fee claimed in terms of the hours claimed for attendance at trial. There will however be an adjustment to the rate claimed by Mr. Merkur.

Reduction for Success on Legal Issues

[85] The Procycle defendants submit that the overall costs claimed by the plaintiffs should be reduced in recognition of the legal issues that were argued throughout the trial proceedings which the Procycle defendants were successful on, including, contributory negligence under the Sale of Goods Act, contract privity, admissibility of video surveillance evidence, whether or not questions regarding contributory negligence of the plaintiff Nathan Resch concerning helmet and speed issues could be put to the jury; and whether or not the contributory negligence of Nathan should be put to the jury in the form of separate questions concerning damages and liability.

[86] I accept that these issues required time to perform the necessary research, prepare materials (including factums and briefs of authorities), and prepare legal arguments. In addition, argument of the legal issues encompassed court time, and had the effect of prolonging the completion of the trial, although I note that the issue of privity of contract only occurred to the defence well into the trial and I was the one who raised the issues that arose from an application of the Court of Appeal's decision in Snushell.

[87] Counsel for the Procycle defendants rely on recent Ontario Court of Appeal and Superior Court of Justice decisions that have considered parties' mixed success on various issues as a factor in reducing costs award to successful parties.[12]

[88] The Ontario Court of Appeal in Stewart stated:

> In my opinion, this does not contravene the ratio in Skye v. Matthews … that offers should not be viewed on an issue by issue basis. While a distributive costs order was held to be inappropriate, the Court of Appeal's specifically noted that the Assessment Officer could take into account the amount of time spent at trial on issues where the plaintiff was unsuccessful. I therefore understand the ratio in Skye to be this: the issue of entitlement to costs when an offer has been made should not be determined on an issue by issue basis, but the quantum of costs to which a party is entitled may be determined by an issue by issue analysis of the merits.

[89] The plaintiffs submit that each of the cases relied upon by the Procycle defendants involved a reduction of costs awarded where success had been divided among the parties relating to the merits of the action and not with respect to isolated legal issues argued in the course of trial. They submit that they were overwhelmingly successful on the merits of this action and so the outcome concerning the legal issues relied upon by the Procycle defendants should have no bearing on any overall award of costs.

[90] In Adatia, the applicants lost on a major issue; a claim for a set-off, that took the bulk of the time at trial, in Stewart the plaintiff had very limited success and a small recovery and in Skye the Court of Appeal considered the appellant's limited success in that she raised two general issues on the appeal and only succeeded on one.

---

[12] Adatia v. A Farber Ltd., 2005 CanLll 5345 (S.C.J.) at para.12, Stewart v. Canadian Broadcasting Corp., [1997] O.J. No. 4077 (O C.J.Gen Div.) at para. 32, Skye v. Matthews, [1996] O.J. No. 44 (O.C.A, at para. 21.

[91] In this case, the only significant issues going to ultimate liability that the plaintiffs lost on were the Sale of Goods Act issues and in particular the issue of privity of contract, when I found that Nathan was not the buyer of the bicycle and therefore could not assert his claim under the Sale of Goods Act. That issue arose late in the trial, after argument about contributory negligence in contract, when it is clear that as a result of some of the authorities argued on that issue that it occurred to counsel for the Procycle defendants that such a defence was possibly available. This issue did consume some time but was not in my view a major issue in terms of time, in the context of a 6-week trial that would justify a reduction in costs awarded. The claim in contract under the Sale of Goods Act was concurrent with the claim in negligence and when I ruled at the end that Nathan was not a buyer and as a result the Sale of Goods Act claim did not go before the jury, this did not significantly alter the liability claim of the plaintiffs. The same is true for my earlier ruling against the plaintiffs that I would put the issue of contributory fault in contract to the jury, in that the charge on that aspect of the case would have been identical to the charge I gave on the issue of Nathan's alleged contributory negligence in tort.

[92] Furthermore, as counsel for the plaintiffs points out, there were a number of legal issues that arose that were decided in favour of the plaintiffs, including the admissibility of the U.S. recall notice, the inability to file the discovery excerpts from Tanner Thomas' examination, and the denial of two mistrial motions brought by the Procycle defendants. They rely as well on the fact the helmet issue required an amendment to the statement of defence, and ultimately was an unsuccessful defence according to the jury. I do not consider this submission relevant to the quantification of costs since the plaintiffs have included these issues in their Bill of Costs. However this submission does make the point that it would make assessing costs difficult if we have to "keep score" of who wins on the types of issues that arise during the course of a lengthy and complex jury trial in order to fix costs of the trial.

[93] For these reasons I would not make any reduction of the plaintiffs' counsel's time on this basis.

Conclusion on the Plaintiffs' Fees

[94] In summary, I have concluded, by examining the plaintiffs' Bill of Costs and considering the issues raised by the Procycle defendants, that I should make the following reductions to the fees claimed:

(a) $828 for the motion;
(b) $11,000 for the time claimed for Mr. Brown on a partial indemnity scale prior to 2005 because of the reductions I have made to his partial indemnity rates;
(c) $25/hour for the time claimed for Mr. Merkur on a partial indemnity scale in the amount of $140 based on 5.6 hours;
(d) $25/hour for the time claimed for Mr. Merkur on a substantial indemnity scale in the amount of $9,835 based on 393.4 hours;
(e) $3500 for pleadings;
(f) $5,000 for the mediation;

(g) $33,000 for trial preparation;
(h) Total reductions of $63,303.

[95] This reduction brings the amount claimed for fees by the plaintiffs down from $521,611 to $458,308 before GST.

[96] Having determined the fee produced by the raw calculation of hours spent times hourly rates, I must now stand back from the fee produced and assess the reasonableness of the counsel fee from the perspective of the reasonable expectations of the losing party, the Procycle defendants.

[97] I accept the submission of the plaintiffs that the Procycle defendants reasonably would have expected the costs of this case to be high, based on the duration of this action leading to trial, and the anticipated trial length. They must have understood that the costs of going to trial would be substantial and, if unsuccessful at trial, they would face a substantial costs award in favour of the plaintiffs. This was a complex jury trial with difficult liability and damages issues. Many experts were called and the questions for the jury alone demonstrate the complexity of the case.

[98] The stakes were high. With respect to the claims advanced, the amounts awarded by the jury represent a significant win for the plaintiffs. Despite asserting a vigorous defence that attempted to establish that Nathan Resch or Mills Roy were 100% responsible for the accident or at least contributorily negligent, the Procycle defendants were found 90 per cent liable for Nathan's injuries, with no finding of contributory negligence against him.

[99] In my opinion the fees of counsel for the plaintiffs as already adjusted represent a fair and reasonable amount that the Procycle defendants could have reasonably expected to pay in all of the circumstances. Accordingly I find that the plaintiffs are entitled to their fees in the amount of $458,308 which, with GST of $27,498, (I have used 6% as the plaintiffs have not yet paid much of the fees) for total fees of $485,806. With the disbursements of $150,391 plus GST of $10,527 (at 7% as I presume these have been paid by Thomson Rogers) for total disbursements of $160,918 the plaintiffs are awarded for total fees and disbursements of the action the amount of $646,724 payable by the Procycle defendants.

Is Mills-Roy entitled to costs on a substantial indemnity scale following its Offer to Contribute?

[100] Mills-Roy claims its costs from the Procycle defendants from November 10, 2005 on a substantial indemnity basis. On that date Mills-Roy made an Offer to Settle, pursuant to "Rule 49" addressed to Mr. Brown, offering to settle the plaintiffs' claims by offering to contribute the sum of $300,000 plus 25% of the plaintiffs' combined costs and disbursements. This offer was copied to Mr. Edwards, counsel for the Procycle defendants.

[101] On December 23, 2005, Mills-Roy served an Offer to Contribute on both Mr. Brown and Mr. Edwards, which included a liability apportionment split of 25%/75% as between Mills-Roy and the Procycle defendants and a 15% contributory negligence factor as against the plaintiff Nathan Resch. Mills-Roy further agreed to contribute $350,000 toward a settlement of all the plaintiffs' claims, plus $43,500 plus GST toward costs and $17,500 toward disbursements. In the alternative, Mills-Roy offered to pay all the above sums to the Procycle defendants in exchange for their agreement to take over the defence of the action.

[102] The Procycle defendants did not accept either of these offers.

[103] Rule 49.12 states:

> (1) Where two or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim, any defendant may serve on any other defendant an offer to contribute (Form 49D) toward a settlement of the claim.
> (2) The court may take an offer to contribute into account in determining whether another defendant should be ordered,
> (a) to pay the costs of the defendant who made the offer; or
> (b) to indemnify the defendant who made the offer for any costs that defendant is liable to pay to the plaintiff, or to do both.
> (3) Rules 49.04, 49.05, 49.06 and 49.13 apply to an offer to contribute as if it were an offer to settle.

[104] Rule 49.13 states that despite "rules 49.03, 49.10 and 49.11", the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

[105] The Procycle defendants do not dispute the fact that Mills-Roy "beat" its offers but disagree with the submission of counsel for Mills-Roy that according to Rules 49.12 and 49.13, an Offer to Contribute between co-defendants is subject to the same costs consequences as a plaintiff's Rule 49.10 offer to settle. They submit that Rule 49.12(3) does not state that Rule 49.10 applies to an offer to contribute as if it were an offer to settle and that Rule 49.10 is the rule that dictates entitlement to substantial indemnity costs from the date of a plaintiff's offer to settle

[106] In addition the Procycle defendants submit that Rule 49.13 simply confers discretion upon the court in awarding costs, despite Rule 49.10. They argue that Rule 49.13 has no relevance to the proposition advanced by Mills-Roy in support of the claim for substantial indemnity costs from the date of the offer to contribute. As such, it is submitted by the Procycle defendants that Mills-Roy is not entitled to costs on a substantial indemnity basis as a result of its Offer to Settle. They do not dispute that they must pay Mills-Roy's reasonable partial indemnity costs for the entire action.

[107] Counsel for Mills-Roy relies on the case of Tellier v. G. & L. Stevenson Transport Ltd.,[13] where Thomson J. considered the omission of Rule 49.10 in Rule 49.12(3). He approved of the decision of Denzler v. Aull[14] where Kurisko J. concluded that this omission "was not intended to deprive the court of the discretion under Rule 49.12(2) to impose the same cost consequences for a successful offer to contribute as is available when there has been a successful offer to settle." (at para. 11)

[108] Kurisko J. considered this issue at length and concluded on the facts of his case that if he were wrong in awarding solicitor-and-client costs under Rule 49.12, he had discretion under Rule 57.01 to do so.

[109] Although Rules 49.12 and 49.13 do not refer to Rule 49.10, it is important to note that because of the Offer to Contribute I have the power, pursuant to Rule 49.12 (2) (a) to order that the Procycle defendants pay "the costs" of the Mills-Roy defendant. The rule does not specify the scale upon which those costs should be fixed but certainly does not preclude awarding those costs on a substantial indemnity basis. Furthermore, the court has discretion outside Rule 49.10 to award costs on a substantial indemnity basis.[15]

[110] The Procycle defendants argue that they could not have reasonably expected to pay Mills-Roy its costs following the offer on a substantial indemnity basis. I disagree. Certainly the Procycle defendants should have expected to pay the costs of Mills-Roy on a partial indemnity basis and in all of the circumstances, ought reasonably to have expected, given the court's discretion and the cases that have considered offers to contribute, that they were at risk to pay substantial indemnity costs if Mills-Roy beat its offer.

[111] Although I do not disagree with the conclusions reached in the Denzler and Tellier cases, I prefer to consider this issue as part of my discretion under Rule 57.01(4) to order costs on a substantial indemnity basis.

[112] Counsel for Mills-Roy submits that there are other reasons why costs on a substantial indemnity scale are appropriate. In addition to his two formal offers he relies on the following:[16]

(a) In June 2001, Mills-Roy proposed that the co-defendants Gestion R.A.D. Inc. and Procycle share in a 50%/50% settlement split of the plaintiffs' claims.

(b) In September 2001, Mills-Roy arranged a meeting with Procycle for the purpose of discussing a settlement of this matter. Procycle rejected Mills-Roys's proposal and insisted that liability be split 75%/25% in their favour and that the plaintiff Nathan Resch admit a 25% contributory negligence factor.

---

[13] [2000] CarswellOnt 3543 (S.C.J.)
[14] (1994), 19 O.R. (3d) 507 (Ont. Gen. Div.)
[15] See Rule 57.01(4)(c) and S.A. Strasser Ltd. v. Town of Richmond Hill [1990] CarswellOnt 435 (C.A.) at para 11
[16] This information was provided to the court in written submissions, not evidence but the factual accuracy of these submissions was not challenged by counsel for the Procycle defendants in his submissions filed one month later.

(c) Procycle insisted that the examinations for discovery of Procycle take place in Montreal rather than Toronto which would have resulted in a significant costs savings for all parties.

(d) In July, 2003, Mills-Roy again proposed a settlement meeting with Procycle to which Procycle did not respond.

(e) In the spring of 2004, all parties agreed to attend mediation. A mediator was selected and the date of March 9, 2004 was mutually selected and confirmed by all parties. On March 8, 2004, Procycle suddenly and without prior notice indicated that they would not attend the mediation as previously agreed.

(f) From April 24, 2001 to December 6, 2005, counsel for the plaintiffs wrote 17 letters to counsel for Procycle requesting their statement of defence, requesting production of documents, attempting to establish a timetable for the conduct of the litigation, requesting mediation, requesting fulfillment of undertakings and attempting to arrange discoveries. Procycle failed to respond to the plaintiffs' numerous requests and efforts to conduct the action in an expeditious manner. The plaintiffs were eventually forced to bring a motion to compel responses to undertakings.

(g) Just prior to trial, Mills-Roy entered into a Mary Carter agreement with the plaintiffs, whereby Mills-Roy agreed to pay to the plaintiffs sums certain for claims and costs and whereby Mills-Roy and the plaintiffs agreed to co-operate on a number of issues.

[113] Certainly the continued efforts of Mills-Roy to settle the case and the fact that Mills-Roy made two formal offers to settle either the entire action or at least their part in the action is a strong factor in favour of ordering substantial indemnity costs. Although the Court of Appeal in Bifolshi v. Sherar (Litigation Administrator of)[17] considered a costs decision under appeal where an offer to settle that fell within the provisions of Rule 49.10 was being considered, the court stated that the judge erred in failing to consider the substance of those offers which demonstrated a genuine and continuing effort to settle the case and that this should have figured prominently in the determination of the appropriate order as to costs. (at para. 20)

[114] Rule 57.01(1)(e) also states that a court may take into account the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding. Certainly the court should give weight to efforts by counsel to expedite the conduct of the trial.[18]

[115] Considering the conduct relied upon by Mills-Roy as set out above, apart from the aborted mediation and the fact that the discoveries of the Procycle defendants were held in Montreal, the conduct of the Procycle defendants appears to have impacted primarily on the costs of counsel for the plaintiffs who needed to pursue the Procycle defendants to keep the action moving forward. I do not know why the mediation was cancelled on short notice but it appears that it was rescheduled and then did proceed. As for the locations of the discoveries, that

[17] [1998] CarswellOnt 1463 (C.A.)
[18] See Bifolshi supra at para 22

was something that the Procycle defendants could insist upon and I have permitted counsel travel time so in my view is not a reason to award costs on the substantial indemnity scale.

[116] I do however consider the fact that Mills-Roy entered into a Mary Carter agreement with the plaintiffs to be relevant. Although it certainly added procedural complexity to the trial given the number of rulings I was asked to make, overall the agreement clearly did decrease the length of the trial. As a result of the Mary Carter agreement, counsel for Mills-Roy played a very limited role in the action. He did not cross-examine any of the witnesses called on the issue of damages. He called two witnesses on liability issues and his cross-examinations on the witnesses called on liability issues were limited to the role of Mills-Roy. Notwithstanding the time taken to deal with the procedural issues caused by the Mary Carter agreement, overall the length of the trial was no doubt reduced substantially.

[117] As I said in my opening remarks to the jury, there is nothing improper about a Mary Carter agreement, so long as it is promptly and properly disclosed to the court as it was in this case. These types of settlements have been found to be legal and ethical by the courts.

[118] It is not unusual for there to be multiple defendants named in an action who are potentially liable to the plaintiff on a joint and several basis. These cases can be more difficult to settle because there are issues of how liability should be shared. That was certainly this case. Where in such a case a defendant makes an offer to contribute that is more favourable than the final decision, there are policy reasons in favour of the court awarding partial indemnity costs to the defendant up to the date of the offer and substantial indemnity costs thereafter. These offers are to be encouraged where they represent a true effort to compromise and settle to avoid the expense of litigation. To deny substantial indemnity costs in these circumstances would defeat that purpose.

[119] Because of the continued efforts by Mills-Roy to settle the action, including its two formal Offers, and its agreement to enter into the Mary Carter agreement, in exercising my discretion under Rule 57.01(4) I find that Mills-Roy is entitled to its reasonable costs on a substantial indemnity scale. The first offer was directed to the plaintiffs and it was only in its second offer that a formal Offer to Contribute was made, that clearly fell within Rule 49.12, and so Mills-Roy's entitlement to costs on that scale will commence after December 23, 2005.

What is the appropriate amount to be awarded to Mills-Roy for costs?

[120] Mills Roy claims costs in the amount of $38,613.48 on a partial indemnity scale and $72,052.49 on a substantial indemnity scale, from the date of its first offer of November 10, 2005, for a total amount of $110,665.97

[121] Mr. Trebuss was called to the Ontario Bar in 1981 and has claimed costs on the basis of hourly rates he actually charged Mills-Roy's insurer throughout 1999 to 2006. His actual billing rate was close to or at $300/hour. He was assisted by Ms Rapley (1995 call) whose actual billing rate to their client in 2005 was $240/hour, Ms Smith (2001 call), whose actual billing rate to their client in 2001, 2002 and 2003 was $105/hour, Mr. Ahmed (2002 call), whose actual

billing rate to their client in 2003, 2004 and 2005 was $170/hour, law clerks who claim costs on the basis of hourly rates they charged their client in 1999 to 2006 ranging from $95 to $125/hour, and a student-at-law who was billed to the client in 2006 at the rate of $150/hour.

[122] Mills-Roy has claimed counsel fees for the trial in the amount of $58,512. This amount represents costs on substantial indemnity hourly rates (which appear to be the actual rates charged) for Mr. Trebuss (senior counsel) for 173.2 hours at $300/hour, Mr. Ahmed (Junior Counsel) for 21.9 hours at $170/hour, Mr. Cormier (student-at-law) for 11.1 hours at $150.00/hour, and a "Law Clerk" for 9.7 hours at $120/hour. Mills-Roy has included both preparation and attendance costs in this category.

[123] The Procycle defendants do not take issue with the quantum of hours submitted by Mills-Roy nor is any issue taken with the actual/substantial indemnity hourly rates submitted by Mills-Roy. However, the Procycle defendants submit that the hourly rates of Mills-Roy have been improperly claimed since no amount was listed in the Bill of Costs as a partial indemnity hourly rate. As they point out, the actual rates appear to have been simply discounted without any indication of a basis or formula for the reduction.

[124] The Bill is separated between the time before and after the first offer. The actual amounts charged to the client with disbursements for the period up to November 10, 2005 is calculated at $59,405.35 and then an amount of $38,613.48 on a partial indemnity scale is claimed. Of this amount $7661.75 is for disbursements. On this basis the actual fees up to the first offer are in the amount of $51,743.60 and the fees claimed on a partial indemnity basis are $30,951.73. As there is no issue with the disbursements, the amount claimed for fees prior to the first offer by my calculations represents approximately a 40% reduction of fees.

[125] The Procycle defendants submit that Mills-Roy is entitled to partial indemnity costs for the entire proceedings and that as such, the trial preparation/counsel fee costs claimed should be adjusted accordingly from the substantial indemnity/actual rates submitted by Mills-Roy. The Procycle defendants submit a calculation of partial indemnity rates at approximately 2/3 of the actual/substantial indemnity rates. Since Mills-Roy has reduced its actual rates by 40% there is no reason to make any further reduction.

Conclusion on the fees of Mills-Roy

[126] As I have found that Mills-Roy is entitled to its costs after the second offer on a substantial indemnity basis, and as there is no challenge to the hours or substantial indemnity rates claimed by Mills-Roy, the only adjustment I must make is to reduce the fees claimed on a substantial indemnity basis between the two offers to partial indemnity rates. Between the first offer on November 10, 2005 and December 29, 2005, the Mills-Roy Bill of Costs claims $7,678 on a substantial indemnity basis. There was virtually no time docketed between the date of the second offer of December 23rd and December 29th and so this adjustment will be in the amount of one third of this sum, namely $2,500.

[127] No other issues have been raised by the Procycle defendants with respect to the Mills-Roy Bill of Costs. Given my earlier finding that the hourly rates charged by counsel for Mills-Roy are relatively low, I conclude that save for the adjustment to the substantial indemnity rates of $2,500, the costs claimed are reasonable. Accordingly Mills-Roy is entitled to its costs of the action in the amount of $108,165.97 payable by the Procycle defendants.

Are the plaintiffs entitled to a premium?

The Law

[128] In the present case, plaintiffs' counsel have requested a risk premium of $125,000.

[129] The test for an award of a premium on solicitor client costs has been considered in two recent decisions of the Court of Appeal: Lurtz v. Duchesne[19] and Walker v. Ritchie.[20] In both instances, the court acknowledged that although a premium should only be awarded rarely, it is open to a trial judge to award a premium on substantial indemnity costs because of the risk assumed by counsel **and** where counsel have achieved an outstanding result. Both conditions must be present. In terms of risk assumed, the plaintiff need not be impecunious. but to justify the award of a premium the risk must be based on evidence that the plaintiff lacked the financial resources to fund lengthy and complex litigation, plaintiff's counsel financed the litigation, the defendant contested liability and plaintiff's counsel assumed the risk not only of delayed but possible non-payment of fees.

[130] The plaintiffs submit that the following passage from the decision of Rosenberg J.A. in Lurtz is instructive:

> 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. (at para. 27-35)

[131] The plaintiffs submit that such reasoning is consistent with Rule 57.01(4) (d), which affirms the authority of the court to award costs "in an amount that represents full indemnity". Further, given the recent amendment to the definition of "substantial indemnity costs", which fixes an upper limit of 1.5 times the partial indemnity rate, plaintiffs' counsel submits that there will be circumstances where the court ought to exercise its discretion to award

[19] Reasons of the Court of Appeal, released February 4, 2005 at paras. 27 – 35
[20] Supra at para. 104-109

costs that exceed that substantial indemnity scale. I note here that the internal rates of Messrs. Brown and Merkur were higher than the substantial indemnity rates I have allowed.

[132] It is important to emphasize that awarding a premium ought to occur only rarely. As the court in Walker stated:

> We hasten to add that awarding a premium ought to occur only rarely and only when both factors- risk and 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 lengthy and complex litigation, plaintiff's counsel financed the litigation, the defendant contested liability and plaintiff's counsel assumed the risk not only of delayed but 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 plaintiff's financial means. While the risk must be present, it alone does not justify a premium- counsel for the plaintiff must also achieve an outstanding result. (at para. 108)

[133] Counsel for the Procycle defendants referred to a passage from the Ontario Court of Appeal in Finlayson v. Roberts,[21] which articulated policy reasons against the award of a risk premium as against an unsuccessful defendant. (at para. 25) Pursuant to Finlayson, the Procycle defendants submit that it is unfair to shift the burden of a risk premium onto an unsuccessful defendant, who bears no responsibility for the existence of the premium in the first place. They submit that to shift the burden onto the unsuccessful defendants in the present case would be unfair and unreasonable.

[134] The Finlayson decision was distinguished by Rosenberg J.A. in Lurtz and so in my opinion the views of the court expressed in the later decisions of Lurtz and Walker are binding upon me.

[135] The Procycle defendants also rely upon the Court of Appeal in Foulis et al. v. Robinson[22] for the proposition that unsuccessful defendants should not be punished unfairly by a costs award simply because they failed to take a plaintiff's offer to settle. The availability of a premium where the basis of the costs award is the operation of Rule 49.10 is not to punish the losing party but to recognize the result achieved and the financial risk undertaken by counsel for litigants of limited financial means. There need not be any wrongdoing or misconduct on the part of a losing party before a premium will be awarded[23].

[136] Finally the Procycle defendants submit that even when a plaintiff is entitled to substantial indemnity costs, this does not justify an award for full indemnification and rely appellate authority that costs awards should not be increased for the purpose of ensuring that a damages award reaches a plaintiff intact. Again however, the decision of Mortimer v. Cameron[24]

---

[21] [2000] O.J. No. 3798 (O.C.A)
[22] (1978), 21 O.R. (2d) 769 (O.C.A)
[23] Walker, supra at para.106
[24] (1994), 17 O.R. (3d) 1 (O.C.A.)

was considered in Walker and it was determined that the principles in that case would be offended if the court were to award a premium in addition to partial indemnity costs. That is not this case as I have awarded costs on a substantial indemnity basis..

Should a premium be awarded?

[137] The plaintiffs submit that this is a proper case for a premium for the following reasons:

(a) Plaintiffs' financial resources: The jury made specific findings with respect to Nathan Resch's lost past and future income resulting from his injuries and heard evidence about the plaintiffs' financial inability to bear the cost of litigating Nathan's case. In contrast, the docketed fees in this action have exceeded $500,000 through the trial, while total disbursements have exceeded $150,000. The plaintiffs submit that it is clear from these figures that the litigation of this action was beyond the plaintiffs' financial means.

(b) Litigation expense borne by plaintiffs' counsel: To date, the expense of this litigation including all disbursements (which, as noted above, have exceeded $150,000) largely has been borne by Thomson, Rogers.

(c) Defendants contested liability: The Procycle defendants continued to assert through trial that Nathan Resch was contributorily negligent and that they were not liable but rather Mills-Roy was completely responsible. This defence was rejected by the jury, with 90 per cent of liability apportioned to the Procycle defendants (and punitive damages awarded against them).

(d) Risk assumed by plaintiffs' counsel: The position of the Procycle defendants with respect to liability, gave rise to a substantial risk that was assumed by Thomson, Rogers. Payment of Thomson, Rogers' fees by the plaintiffs largely has been deferred pending the outcome of this litigation. When one considers both the risk of an adverse finding on liability (given the vigorous defence asserted by the Procycle defendants), together with the plaintiff's limited capacity to pay Thomson, Rogers' fees had he been unsuccessful at trial, it is submitted that Thomson, Rogers assumed a substantial risk in bearing the expense of this litigation.

(e) Result: The defences asserted by the Procycle defendants against the plaintiffs were completely rejected by the jury and they were found to be 90 per cent liable for the plaintiffs' losses (with the remaining 10 per cent attributed to Mills-Roy). As noted above, the jury determined that the plaintiffs' damages have exceeded $3.5 million (inclusive of prejudgment interest). This should be compared to the Offer to Settle of the Procycle defendants, which valued their responsibility for the plaintiffs' total damages at $500,000 (before prejudgment interest). In other words, the jury assessed the Procycle defendants' liability as being six times the amount offered by the Procycle defendants. The plaintiffs submit that this was an outstanding result for the plaintiffs, which substantially exceeded their own offer to settle of $1.6 million.

[138] The Procycle defendants submit that the plaintiffs have failed to demonstrate that the case at hand is one of the rare cases, where the factors "cry out" for an award in excess of the substantial indemnity costs and that plaintiffs' counsel has failed to demonstrate that they were ever at risk for "non-payment" of fees to justify the award of a premium. In addition, they argue that the plaintiffs have failed to show that the plaintiffs lacked the financial means necessary to fund the litigation. Counsel also refers to the plaintiffs written "retainer" agreement, which does not contain any terms respecting payment of fees. They argue that the plaintiffs have also failed to disclose any oral agreements or discussions respecting the payment of legal fees, in order to provide evidence of the risk taken on by plaintiffs' counsel.

[139] In considering the entitlement of the plaintiffs to a premium, in light of the admonishment by our Court of Appeal that a premium should only be awarded rarely, I must keep in mind, as submitted by the plaintiffs, that plaintiffs' personal injury counsel typically bear their clients' cost and expense of a proceeding where payment of fees is not guaranteed. Accordingly there must be something in this case that distinguishes it from the typical plaintiffs' personal injury case where the plaintiffs succeed at trial, such that both the factors of risk and result "cry out" for an award in excess of substantial indemnity costs.

The Result

[140] Liability was vigorously contested by the Procycle defendants who argued that Nathan Resch should be wholly responsible for his injuries or at least contributorily negligent because he continued to ride his bicycle even after he knew of the defect and knew his bicycle had not been fixed by Mills-Roy. In the alternative they argued that his damages should be discounted on the basis that he was not wearing a helmet and was riding too quickly. Clearly the jury rejected all of these arguments.

[141] With respect to damages, Nathan's general damages and the Family Law Reform Act claims were agreed upon. As for the balance of the plaintiffs' claims, the jury largely accepted the position of the plaintiffs. For Nathan Resch's past loss of income, he claimed $90,992 and was awarded $58,899.71. The Procycle defendants had submitted that this amount should be $25,000-$50,000. For future loss of income Nathan claimed one of six scenarios calculated by Professor Carr ranging from $1,078,514 to $1,623,289 He was awarded $1,144,970, a middle ground in the scenarios that assumed Nathan would work for his entire working life. The Procycle defendants had suggested a range of $160,000-$320,000.

[142] With respect to Nathan's future care costs the jury accepted, to the penny, the claims asserted by Nathan for future surgical procedures and a transitional living program. There was a serious dispute about this program. For the balance of the future care costs claimed by Nathan, the jury awarded a total with management fee of $1,523,343.14 compared to the $2,306,842.56 claimed by the plaintiffs (I note that the "worst case scenario" was not pushed by counsel for the plaintiffs) as compared to $652,942.30 submitted by the Procycle defendants, which did not include a 5% management fee, although there was no dispute that one should be

added. Finally Annette Crayden claimed $87,180 for care for Nathan and was awarded $57,728. The Procycle defendants had suggested $10,000 to $20,000 as the appropriate number.

[143] The claim for punitive damages was hotly contested and the plaintiffs succeeded in this regard as well. Specific amounts were not suggested to the jury although I charged them that any amount awarded should be modest.

[144] Were I only considering the compensatory damages awarded, I would have some hesitation in awarding a premium because the jury did significantly discount some of the plaintiffs' claims, particularly Nathan's claim for future care. However when compared to the amounts that were suggested by the Procycle defendants, clearly the amounts awarded by the jury were generally much closer to the position of the plaintiffs and it can certainly be said that the result was very favourable. Furthermore, compared to the plaintiffs' Offer to Settle, the overall result is more than double the amount that the plaintiffs were willing to settle the action for. In comparison to the Offer to Settle by the Procycle defendants of $500,000, the jury assessed the Procycle defendants' liability as being six times the amount they offered. This in my mind is the most compelling factor in judging the overall success and result achieved by the plaintiffs. Given the liability issues and the claim for punitive damages and the overall success on damages claimed, and the amount awarded compared to the plaintiffs' Offer to Settle, I have no difficulty if finding that plaintiffs' counsel achieved an outstanding result in this case.

The Risk

[145] The Mary Carter agreement entered into shortly before the trial, which I will consider separately, complicates a consideration of this criterion.

[146] The Procycle defendants disputed liability and so that aspect of the risk factor has been met. The real issue then is whether or not plaintiffs' counsel assumed the risk of not only delayed but also possible non-payment of fees.

[147] Although there is no evidence before me specifically concerning the arrangements counsel made with the plaintiffs concerning fees, I do not understand the submission of the Procycle defendants as a challenge to the representation made by counsel to the plaintiffs that to date, the expense of this litigation including all disbursements (which, as noted above, have exceeded $150,000) "largely has been borne by Thomson, Rogers". In oral submissions Mr. Edwards stated that he accepted that the firm carried the cost of the trial. On this basis I conclude that Thomson Rogers "largely" financed the litigation.

[148] Mr. Edwards demanded that the retainer agreement with the plaintiffs be disclosed. Mr. Brown objected on the basis that it was subject to solicitor and client privilege. Mr. Brown made the representation in court that there was no contingency agreement with the plaintiffs but notwithstanding Mr. Edwards wanted disclosure. I decided that the retainer agreement would be disclosed to me in the first instance, which was done. After I reviewed it I advised Mr. Edwards that the retainer is merely an authorization to Thomson Rogers to act on

behalf of the plaintiffs and does not deal in any way with fees, disbursements or premium nor does it deal with recovery of any fees, disbursements or premium in the action. As submitted by the Procycle defendants, the Retainer agreement disclosed to me by the plaintiffs in accordance with my order of April 5, 2006 does not deal with fees. It is clearly not relevant to the issues raised by the plaintiffs' request for costs and a premium and therefore I did not order that it be disclosed to Mr. Edwards.

[149] The question then is whether on the evidence I do have I can conclude that plaintiffs' counsel assumed the risk not only of delayed but "**possible** non-payment of fees"[25].

[150] The court in Walker stated that it is not necessary that the plaintiff be proved to be impecunious but it must be shown that the litigation was beyond the plaintiff's financial means. (at para. 108)

[151] In considering this part of the test, the submissions of the plaintiffs focused on Nathan's inability to pay for the litigation. Based on the evidence of his past income loss, and his prospects for the future, I have no difficulty in concluding that Nathan was and is unable to pay for this litigation. Although for much of the period of the action Nathan was no longer a minor and as such his parents would not have been legally responsible for his legal fees, there may have been an understanding or agreement by them that they pay for the costs to the extent they were able, as on the submission of plaintiffs' counsel they must have paid some of the fees of the firm to date. I have no specific evidence of this one and as the onus is on the plaintiffs I have approached this issue by considering the evidence I have of the financial means of Nathan's parents. I have not included the other family members named as plaintiffs as their financial stake in the litigation was not significant.

[152] Although based on the evidence at trial, I could not conclude that Mark and Annette Crayden are impecunious, as they both work; I have no difficulty in concluding that the plaintiffs lacked the financial resources to fund this litigation. There was no dispute that the plaintiffs were unable to pay for rehabilitation treatments for Nathan Resch, which were recommended well before the trial by Martha Binstock, because of a lack of funding. The disbursements that were necessary to present this case exceeded $150,000 and the legal fees were substantial.

[153] Given that the plaintiffs are not impecunious, I could not conclude on the evidence before me that Thomson Rogers was at risk for non-payment of all of their fees. Given the requirements set out by the Court of Appeal however, counsel for the plaintiffs do not have to establish they were completely at risk. Certainly given the evidence of the financial means of Nathan's parents and given the evidence that the jury accepted concerning Nathan's past income loss and future earning potential and given the quantum of fees and disbursements incurred, I have no difficulty in concluding that, apart from the Mary Carter agreement, counsel for the plaintiffs were at risk of possible non-payment of their fees and a real risk that they would be unable to recover the bulk of their fees and disbursements from Nathan or his parents.

[25] Walker, supra at para. 108

[154] For these reasons, apart from considering the Mary Carter agreement, I would conclude that the plaintiffs meet the risk criterion.

[155] The Procycle defendants submit that the Mary Carter agreement entered into between the plaintiffs and Mills-Roy on January 19, 2006 (four days prior to the trial of this action), mitigated any possible risk associated with non-payment of legal fees borne by the plaintiffs to the date of the agreement. Pursuant to my order of April 5, 2006, certain portions of the Mary Carter agreement were disclosed on terms to counsel for the Procycle defendants. Mr. Edwards submits that pursuant to the terms of the agreement, Mills-Roy paid the plaintiffs "substantial sums" in settlement of the matter. The agreement specifically provided, in addition to the general settlement figure, particular sums to be paid to the plaintiffs for partial indemnity costs and disbursements including during the trial. As such, the Procycle defendants argue that the Mary Carter agreement disentitles the plaintiffs to a risk premium.

[156] In reply, the plaintiffs note that under the agreement, Mills-Roy paid only a portion of the plaintiffs' partial indemnity costs and disbursements and agreed to pay the plaintiffs' partial indemnity costs plus disbursements of the trial (not the plaintiffs' substantial indemnity costs). They submit that they still bore significant risk, heading into a lengthy trial, of a significant shortfall between the partial indemnity fees guaranteed by Mills-Roy, and the actual fees likely to be incurred at trial.

[157] In addition, the plaintiffs rely on the fact that the Mary Carter agreement contemplated that the sums paid to the plaintiffs by Mills-Roy could be structured through McKellar Structured Settlements Inc. While the Mary Carter funds had yet to be structured as of the trial of this action, they rely on the Monks case, where the plaintiff had received settlement funds prior to trial that were rolled in a structured settlement. The unsuccessful defendant at trial argued that the plaintiff was not entitled to a risk premium, because the plaintiff should have held back monies from her settlement to fund the continuing litigation. Lalonde J. rejected that argument, noting that there was evidence at trial that, had the plaintiff not been successful at trial, she would have been in dire financial straights and unable to meet her ongoing needs. He ruled:

> The Plaintiff had monies 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 [sic] 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. (at paras. 71-75)

[158] In considering the impact of the Mary Carter agreement, I have considered the policy considerations in favour of courts granting premiums. I agree with the comments of Lalonde J. in the Monks case, as set out above. The possibility, albeit rare, of a premium being granted by the court, will encourage plaintiffs' counsel to provide access to the courts to plaintiffs who have meritorious cases and who could not otherwise afford to come to court, by counsel financing the litigation and accepting the risk of possible non-payment of fees and

disbursements, which in these types of cases can be quite substantial as they were in this case. Furthermore, given that a premium is only awarded when liability is disputed and an outstanding result has been achieved and that it in effect requires plaintiffs to make a reasonable offer to settle (since a premium can only be awarded, absent misconduct by the defendant, on the basis of a substantial indemnity award), the requirements that must be met before the court can consider awarding a premium ensure that it is well deserved.

Conclusion on the award of a premium to the plaintiffs

[159] No cases have been cited before me where a premium has been considered by the court in a case where there was a Mary Carter agreement. Given that the Mary Carter agreement was reached four days prior to the start of trial and Thomson Rogers' involvement on behalf of the plaintiffs commenced in September 1998, I am not prepared to accept the submission of the Procycle defendants that as a result of the Mary Carter agreement the plaintiffs are not entitled to any premium. Certainly for a considerable period of time they met the requirements that justify such an award.

[160] Furthermore, once the Mary Carter agreement was entered into, plaintiffs' counsel were at risk for at least the differential between partial indemnity costs and substantial indemnity costs. Although it was submitted that the amount that Mills-Roy agreed to pay for partial indemnity costs was less than the amount claimed for partial indemnity costs, I have no evidence of that, as the numbers were not disclosed to me. However there is no doubt that Mills-Roy did not agree to pay the difference between partial and substantial indemnity costs. On this basis, from the time of the Mary Carter agreement, the risk of possible non-payment of fees continued but was reduced.

[161] Given the position taken by the Procycle defendants, Nathan could have been found completely responsible for the accident in that it was argued that he failed to heed a warning that the bicycle was unsafe and continued to ride it. If that had occurred, the plaintiffs not only would not have recovered any costs, they would have been liable to the Procycle defendants for 50% of their costs pursuant to the Mary Carter agreement. This would have put at risk the money paid by Mills-Roy for the plaintiffs' costs. In this sense, as well, notwithstanding the Mary Carter agreement, plaintiffs' counsel continued to be at risk for possible non-payment of fees.

[162] I therefore find that the plaintiffs still meet the risk criterion notwithstanding the execution of the Mary Carter agreement. I do however accept the alternative argument of the Procycle defendants, that the premium that I might otherwise award should be reduced given the mitigation of risk of non-payment of fees resulting from the Mary Carter agreement.

[163] For these reasons I conclude that the plaintiffs have met both the risk and result requirements to justify an award of a premium. In all of the circumstances, given the significant costs that the firm financed to bring this case to trial, the excellence demonstrated by counsel in

the manner in which the case was presented at trial and the outstanding result achieved, I am satisfied that this is one of those rare cases where a risk premium is appropriate.

[164] Although there are several examples of cases where a premium has been awarded, there is no guiding principle as to how the quantum of a premium ought to be determined. In a recent decision of this court,[26] Horkins J. was asked to grant a $1 million premium and considered a chart prepared by counsel for the plaintiffs, which compared the various decisions where risk premiums have been granted. She rejected the proposition that the premium should be based on a percentage to the award as the result does not take into account the financial risk that counsel carried through the action. Based on that chart Justice Horkins concluded:

> The mathematical exercise set out in the chart, shows that there is no consistency among the cases in how the premium is determined. The premiums run from a low of $75,000 in Lurtz to a high of $350,000 in Bakhtiari. As a percentage of the fees incurred, the premiums vary from a low of 18.99% (Monks…) to a high of 69.19% (Walker). (at para. 47)

[165] I agree with Horkins J. that using a percentage of the award is not an appropriate comparison. The amount awarded, even if substantial, does not necessarily mean that the result was outstanding and has no direct bearing on the risk factor. She concluded, in awarding a premium of $350,000, that the overriding principles in Boucher in fixing costs of reasonableness ought to apply, although she did note that on the basis of what percentage it represented of the costs that had been agreed upon, the premium she awarded fell within the percentage of fees (31.25%) in the Bakhtiari case.[27]

[166] Unlike the Bakhtiari case, there is no evidence before me of the actual cost to the firm of carrying the fees and disbursements in this case. In fact, I do not know precisely the amount that has been carried save that the costs have been "largely" carried by Thomson Rogers. Given the quantum of the disbursements and fees and the period of time since the action commenced, I can however, conclude that there was a significant cost to the firm in addition to the risk of possible non-payment.

[167] Based on the firm's internal billing rates, the actual billing rate of Mr. Brown was $550 versus the $500 rate awarded, and for Mr. Merkur, $325 versus the $300 rate that I have awarded for substantial indemnity costs. In my opinion it is important for the court, in fixing the quantum of a premium, to determine how much of the premium will bring the costs awarded up to the amount actually charged/incurred based on the firm's internal billing rates and how much is beyond those actual costs. The premium awarded should bear some proportion to the differential between the amount awarded for substantial indemnity costs and the actual costs on a full indemnity basis. In this regard I would consider only the portion of the costs awarded on a substantial indemnity basis, as that is what attracts the premium.

---

[26] Sandhu v. Wellington Place Apartments released June 16, 2006
[27] Bakhtiari v. Axes Investments Inc. (2004), 69 O.R. (3d) 671 (O.C.A.)

[168] That part of the premium that goes beyond full indemnity is granted to compensate counsel for the plaintiffs for the carrying costs of financing the litigation and of course the risk of possible non-payment. In my view less regard should be had to the outstanding result in fixing the quantum of a premium, as the overriding principle is one of indemnity with respect to costs. There are no policy reasons to reward plaintiffs' counsel by a payment from the losing party because an outstanding result was achieved, even though result is a criterion that must be met before a premium can be considered. In my view, the goal in fixing the quantum of the premium should be to compensate counsel for the risk factor.

[169] The premium requested in this case is $125,000. Counsel for the plaintiffs has not made any submission as to how that amount was determined. It represents a little less than 20% of the amount awarded for costs. The differential between substantial indemnity costs and full indemnity for the post Offer to Settle portion of the plaintiffs' Bill of Costs for Messrs. Brown and Merkur is $35,060. I cannot be precise with the others who worked on the file in this period because I have actual rates by name but the Bill uses generic titles. I would therefore estimate that the full differential is in the range of $50,000.

[170] Considering the differential between substantial indemnity costs and full indemnity, the quantum of fees and disbursements carried by the firm and the time to trial and the risk factor, I conclude that the premium requested by the plaintiffs is reasonable, save for considering the impact of the Mary Carter agreement. In coming to this conclusion I have also considered the fact that the plaintiffs were not totally impecunious. Furthermore, given the timing of the Mary Carter agreement and the impact that it had on the risk factor, I would reduce this amount to $100,000 plus GST, for a total premium of $106,000.

Is Mills-Roy entitled to a premium?

[171] Mills-Roy has requested a risk premium in the amount of $30,000. The Procycle defendants submit that Mills-Roy is not entitled to a premium, and that it would unfair and unreasonable to award a premium to them in the circumstances of the case at hand.

[172] Counsel for Mills-Roy has relied on some cases that I have not already referred to in dealing with the claim by the plaintiffs to a premium, but in reviewing them they do not add or change any of the law that I must apply as already set out.

[173] Counsel for Mills-Roy submits that as a result of the Mary Carter agreement, Mills-Roy assumed a real and substantial risk in proceeding with this action. He submits that Mills-Roy paid to the plaintiffs sums certain for claims and costs, thereby underwriting the conduct of the trial, despite the very real risk that Mills-Roy might not recover any amounts paid under the agreement, and incurred the risk of substantial costs risks with respect to the Procycle defendants. Mills-Roy requests a premium of $30,000 over and above any costs award.

[174] As set out above, even if I were satisfied that Mills-Roy had obtained an outstanding result; Mills-Roy must also meet the risk criterion. In that regard I accept the submission of the Procycle defendants that Mills-Roy has failed to provide any evidence of risk or lack of financial means. The fact that Mills-Roy might not recover any amounts paid for costs under the agreement is not a case where counsel for Mills-Roy assumed the risk of delayed and possible non-payment of fees. The costs submissions of Mills-Roy not surprisingly, show that counsel was interim billing an insurer and clearly it cannot be said that the insurer lacked the financial resources to fund the defence of lengthy and complex litigation. Clearly the risk criterion of the test has not been met. For these reasons I am not prepared to award Mills-Roy a risk premium.

Disposition

[175] In accordance with these reasons my disposition as to costs and premium is as follows:

(a) the plaintiffs are entitled to costs of the action in the amount of $646,724 payable by the Procycle defendants;
(b) the plaintiffs are also entitled to a premium in the amount of $106,000 payable by the Procycle defendants;
(c) Mills-Roy is entitled to its costs of the action in the amount of $108,165.97 payable by the Procycle defendants.

_____

Spies J.

Released: July 18, 2006