

# CONTINGENCY FEES

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## INTRODUCTION

Personal injury lawyers in Ontario have long charged what amounted to contingency fees for their services. Without such arrangements many, and perhaps most, personal injury cases would not have seen the light of day. Such informal arrangements were sometimes unsatisfactory, not only to some clients who may, on occasion, have been charged more than was fair and reasonable, but also to some lawyers who, when assessed, were not permitted reasonable fees having regard to the degree of risk, skill and various other considerations that ought to have been taken into account by the assessment officer.

The courts, the Legislature, and the Law Society of Upper Canada, have all recently had their say on this subject. This discussion is intended to help ensure that the fee charged is fair and reasonable for you and your client. I will first review recent developments which have formalized contingency fee arrangements for all civil proceedings in Ontario, other than family proceedings, and then discuss what you should have in your formal contingency fee agreement. The object is to protect yourself as best you can, bearing in mind that recent amendments to the *Solicitors Act*, consistent with the Rules of Professional Conduct of the Law

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\* Colin P. Stevenson would like to acknowledge the research assistance of his associate, Lauren Sukerman.

Society of Upper Canada, ultimately allow a judge of the Ontario Superior Court of Justice to determine whether the contingent fee is fair and reasonable.

## THE COURTS

The courts finally considered the propriety of contingency fees under the old provisions of the *Solicitors Act* in *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257. The specific question was whether a contingency agreement to allow a widow to sue “big tobacco” for the wrongful death of her late husband was prohibited by the 1897 *Champerty Act*. The Court of Appeal held that a contingency agreement was not prohibited by the *Champerty Act*, provided there was no improper motive on the part of the lawyers. The court emphasized that motive would depend upon the fairness and reasonableness of the fee structure in each particular arrangement. The court concluded that s. 28 of the *Solicitors Act*, as it then stood, said nothing more than that contingency fee agreements were precluded by the *Solicitors Act* if they were not otherwise permitted.

In *McIntyre Estate* the client agreed (see p. 262) to pay her lawyers:

- (a) 33% of compensatory damages;
- (b) 40% of punitive, aggravated or exemplary damages;
- (c) 100% of costs recovered; and
- (d) 100% of any disbursements not otherwise recovered from the defendants.

Having stated that the contingency agreement by itself was not improper, O'Connor A.C.J.O. expressed his concern, however, that the fee arrangement did not take into account various factors, including:

- (a) the amount of time spent by the lawyers;
- (b) the quality of the legal services;
- (c) the many other factors that would normally be taken into consideration when determining the appropriateness of the lawyer's fee; and
- (d) there was no upper limit on the amount that may be required to be paid.

The court concluded that it was premature at that stage to assess whether the fees payable would be fair and reasonable.

The Court of Appeal was again asked to consider a contingency fee agreement in *Raphael Partners v. Lam*, 61 O.R. (3d) 417 (Ont. C.A.). Lam was rendered quadriplegic following a sporting injury at the University of Windsor. The case settled at mediation for \$2,500,000 plus \$200,000 costs and \$50,000 for disbursements. The lawyers' correspondence with the client, on numerous occasions prior to mediation, had stated that the fee would be calculated as 15% on the first \$1,000,000 and 10% for each million thereafter. The fee was not dependent on the time spent by the solicitors. The lawyers' partial records suggested that the docketed time was worth \$97,000. At the mediation the solicitor told Lam that his fees would be \$500,000, inclusive of GST. The client accepted this sum at the mediation but later sought to reconsider.

The assessment officer reduced the fee to \$230,000 plus GST. The motions judge, on the motion opposing confirmation, further reduced the fees to \$206,300. The Court of Appeal, however, upheld the original agreement and the fees billed.

The Court of Appeal emphasized that the appropriate test was whether the fees were reasonable and fair. The court did not distinguish between damages and costs and did not pay any significant attention to s. 20(1) of the *Solicitors Act*, which provides that costs are the property of the client and not the lawyer. Thus, it appears from the decision that, under the old regime, while costs may belong to the client, it was fair to include them with damages in calculating the quantum of the ultimate fees to be charged to the client. It should be noted, however, that the Court of Appeal looked at the percentage of the fee in comparison to the net damages: thus, the fees of \$461,313.62 (before GST) are 18.5% of the settlement amount of \$2,500,000 without any reference to the costs award.

## **THE LAW SOCIETY**

After the *McIntyre Estate* decision, the Law Society of Upper Canada amended rule 2.08 of the Rules of Professional Conduct to facilitate contingent fees and contingent fee agreements. A copy of rule 2.08(3) and the commentary dealing with the contingent fee agreement is attached as schedule “A”. These rule amendments came into force on October 30, 2002 and, again, use the mantra “fair and reasonable” as the basis for determining whether a fee or disbursement complies with the rules.

This rule emphasizes that the fees and disbursements must be disclosed on a timely basis. It is worth noting that the commentary to rule 2.08 contemplates that a contingent fee agreement may contain a provision that the costs award is to be paid to the lawyer, in which case, a smaller percentage of the award than would otherwise be agreed upon for the contingent fee, after considering all relevant factors, will generally be appropriate. This is inconsistent with the recent amendments to the *Solicitors' Act* and related regulations, which came into effect on October 1, 2004 and are discussed below.

An important practical point is that a written contingent fee agreement should be concluded at the beginning of any retainer, after full and candid discussion of all material facts. Apart from now being required by law, this is only prudent in any event as a client is more likely to recognize a “reasonable” proposal before, rather than after, the work has been done and a settlement negotiated.

The commentary to the Law Society’s rules and, indeed, the cases in the courts, emphasize that a number of factors will assist in determining whether a fee is fair and reasonable.

These factors include:

- (a) the likelihood of success;
- (b) the nature and complexity of the claim;
- (c) the expense and risk of pursuing it;
- (d) the amount of the expected recovery; and

- (e) who is to receive an award of costs (although this no longer appears to be negotiable in light of the legislative amendments discussed below).

One upshot of the case law, taken in conjunction with the Law Society's rules, is that one must look at a contingent fee agreement on a case by case basis. The precedents included with these seminar materials should be modified on a case by case basis to reflect the different circumstances of any situation. Although it is not necessary, you may wish in appropriate circumstances, to send the client for independent legal advice before an agreement is signed.

## **THE LEGISLATURE**

A private member's bill, bill 213, to facilitate contingency fees, had its first reading on November 26, 2002. Pursuant to the *Justice Statute Law Amendment Act, 2002*, S.O. 2002, c. 24 this bill ultimately received Royal assent on December 9, 2002 and came into force on October 1, 2004, at which time Ontario became the last Canadian jurisdiction to permit contingency fees in a civil action (not including the *Class Proceedings Act, 1992*) (copy attached as schedule "B"). The Act, of course, permits fees which are contingent, in whole or in part, on the successful disposition or completion of the matter and requires contingency fee agreements to be in writing.

The Act also contemplates that the amount of the fee may be capped by regulation. However, the regulations, proclaimed in force alongside the Act on October 1, 2004, do not impose a maximum percentage, thereby allowing the appropriate percentage to be determined on a case by case basis. This is consistent with the approach taken in all other provinces, apart from B.C., which has a maximum 33⅓% for personal injury or wrongful death in motor vehicle accident cases and 40% for other personal injury or wrongful death cases. (Note that the Law Society's October 10, 2002 report to Convocation proposed a 20% limit but the lawyer should receive the award of costs.)

The Act and regulations do provide that contingency fee agreements are not to include awards of costs without court order. It appears necessary, therefore, to base the fee on an appropriate percentage of the net damages award, without regard to costs, in order to set a fair and reasonable fee. This does, however, raise the spectre of a case involving a relatively low damage award (and hence a relatively low contingency fee) but a significant partial indemnity or substantial indemnity costs award, because there were "good" offers to settle or because of the judge's view of the manner in which the case was litigated.

In such a case, if one wants a contingency fee agreement to calculate the fee based on costs as well as net damages, it will require the solicitor and client jointly to apply to a judge for approval because of exceptional circumstances (s. 28.1(8)).

Alternatively, one might argue that the Act is not clear on whether one can still calculate a percentage fee based on the total recovery, i.e., net damages plus costs. This approach would be consistent with the approach implicit in *Raphael Partners*, but appears to be inconsistent with the wording of the amendments to the *Solicitors Act* and the recent regulation (O. Reg. 195/04, in force October 1, 2004, attached as schedule “C”. Thus, to be prudent, a lawyer should take a higher percentage based on the net damages award **and** avoid taking cases in which the net damages award will not likely be adequate to provide fair compensation to the solicitor.

The changes to the *Solicitors Act* make it clear that the courts shall not reduce the award of costs because of a contingency fee agreement. Although the courts have not yet considered any of the new statutory provisions the following cases will be of some relevance.

In *Banihashen-Bakhtiari et al. v. Axes Investments Inc., et al.* (2004), 69 O.R. (3d) 671 (Ont. C.A.), the Court of Appeal confirmed the trial judge’s award of costs on a substantial indemnity basis, including an award of a premium of \$350,000. The trial judge’s endorsement as to costs is reported at (2003), 66 O.R. (3d) 284. The Court of Appeal accepted the trial judge’s rationale for an award of substantial indemnity costs. They quoted the trial judge, who stated:

“ . . . there is another factor: the need to encourage counsel to provide access to justice for the impecunious plaintiff by assuming the risk of delayed as well as possible non payment.

In my view the delay in payment for 8 years with possibly 2 or more years to come as the appeal process continues, is a risk that was assumed by counsel for the plaintiffs in fulfilment of the duty to provide access to justice for the legitimate

claims for impecunious parties. Combined with the uncertainty so long as liability was not admitted, it is a basis for a premium to recognize the very real cost of carrying the plaintiffs for that time. I am therefore of a view that a premium is called for.”

(From the trial judge’s decision at paragraphs 32 and 34.)

The Court of Appeal has confirmed in *Re Winding Up of the Christian Brothers of Ireland in Canada*, (Ont. C.A.) November 13, 2003, docket C39421, that the financial risk assumed by the law firm alone can support a large premium (paragraph 24).

In light of the new provisions of the *Solicitors’ Act* precluding the barrister from taking costs awards as part of a fee, it is inevitable, however, that counsel on a contingency fee agreement will look at the question of costs differently than they did in the past.

Finally, in *1018202 Ontario Ltd. v. Hamilton Township Farmers Mutual Fire Insurance Co.*, [2004] O.J. No. 3335 (Tucker J.), August 12, 2004, the defendant disputed the plaintiff’s request for a premium on the substantial indemnity costs awarded. The defence argued that plaintiff’s counsel should not receive a premium because it assumed he was charging on the basis of a contingency rate. The defence submitted that given a contingency rate of 30% on the \$4,000,000 verdict, plaintiff’s counsel would receive \$1,200,000 and there should be no premium on top of that sum. The defence also noted that the plaintiff in that case was not impecunious, as is usually the case in a personal injury case.

The trial judge rejected the defendant's arguments and awarded a premium of \$250,000. In so doing, the trial judge expressly referred to the risks undertaken by plaintiff's counsel, in circumstances where it took 10 years for the matter to reach trial and 2 months to try it with a jury. There was no discussion about the new provisions of the *Solicitors' Act*.

### **COSTS GRID**

The costs grid is a good reason to ensure that you keep good dockets of the time you spend on any personal injury or other file. If you succeed on a motion or at trial, you will only get a good costs award if you have been rigorous in your docket keeping. Another good reason is that the court will continue to be concerned about the amount of time you have spent on the matter in determining whether a fee is fair and reasonable. Notwithstanding concerns that hourly rates lead to exaggeration or cases that are dragged out, the fact is that many judges, especially those with a commercial litigation or similar background, are more familiar with the lodestar method of fee calculation than with contingency fees.

The costs grid came into force on January 1, 2002 pursuant to O. Reg. 284/01. Substantial awards have been given in many cases based on time records (see, for example, \$75,000 for dismissal of the defendant's summary dismissal motion in a class action, *Risorto v. State Farm*, [2003] 64 O.R. (3d) 135). While the Court of Appeal in *Zesta Engineering Ltd. v. David Cloutier*, [2002] O.J. No. 4495 and *Boucher v. Public Accountants Council for the*

*Province of Ontario*, [2004] O.J. No.2 634 did not rely on hourly rates, the fact is that such rates are considered essential by many judges in the Ontario Superior Court of Justice.

### **CONTINGENCY FEE AGREEMENTS: PRACTICAL CONSIDERATIONS**

The most important consideration is not specified by the courts, the Legislature or the Law Society of Upper Canada. It is the economic basis on which you select your cases. No matter how well drafted your contingency fee agreement, it will be of little use if the value of the case does not warrant the amount of work involved. Consequently, one must engage in a detailed analysis and investigation of the facts before taking any case: personal injury, commercial or otherwise. The client must be told the value of the case and the value of the anticipated fees at the earliest opportunity. Of course, the agreement should set out a simple example of how the fee will be calculated (see the commentary to rule 2 of the rules of the Law Society of Upper Canada and article 2.6 of O. Reg. 195/04). The agreement should be signed at the outset of the retainer not only because this is now required but also to avoid the risk that the client may complain that they only agreed to the fee under undue pressure, as was alleged happened at the mediation in *Raphael Partners v. Lam*.

It would seem reasonable to have sliding scales for the fees based on the amounts recovered. The lawyers in the *Lam* case only asked for 15% of the first million dollars and 10% of each million dollars thereafter. This scale seems reasonable and, for practical purposes, indeed, would probably only be acceptable for a large case. Each case will have to be assessed to

determine what would be a fair percentage in the circumstances. Many plaintiff's counsel will charge 30% or 33% of the entire amount recovered. If one can no longer calculate the percentage based on any costs contribution, the percentage may well have to be higher.

In the contingent fee agreement it is essential that you deal with how costs are to be paid if they are awarded against the client, how costs are to be dealt with if awarded in favour of the client, how disbursements are to be paid and by whom, and whether any retainer is required. Some lawyers will fund all of the disbursements, while others, particularly in medical malpractice cases, will require the disbursements to be paid in advance, if the client is able to afford same. The latest regulation sets out in detail what must be included in the agreement (O. Reg. 195/04).

The rules of the Law Society of Upper Canada, as well as regulation 195/04, require a statement setting out the circumstances in which an agreement may be terminated by the lawyer or by the client and the consequences of termination, including how the lawyer's fee is to be determined in such circumstances. Irrespective of the rules, this only makes common sense for your own protection.

It is also essential to deal with the eventuality where your client refuses to accept a reasonable offer to settle or, for that matter, refuses to give reasonable instructions on making offers to settle, or other tactical issues. A draft agreement attached as schedule "D". This has just been rewritten in an attempt to satisfy regulation 195/04.

It is also important to consider carefully the “difficult” client who has hired and fired one or more lawyers before you were retained. Not only must you consider the eventuality that you may join the line of terminated solicitors (and you have to protect yourself for such an eventuality) but you must also ensure that the client understands that the previous lawyers still have to be paid. Again, clauses are included in the precedent agreement for your consideration.

Finally, you will have to deal with the possibility that any settlement sum may be paid out over time, perhaps in the form of a structured settlement. This should be explained to the client at the outset and, again, it is not only prudent but it is now necessary to include a clause dealing with how the contingency fee will work in these circumstances (O. Reg. 195/04, article 2.7).