

## Court approves \$4.2-million contingency fee in birth injury case

Take a risk with disabled plaintiffs

By Gretchen Drummie | Publication Date: Monday, 28 April 2008

Don't be afraid to take a risk and sign up for cases with contingency fees on behalf of disabled plaintiffs, says Toronto lawyer **Kirk Stevens**.



'The focus is going to be on access to justice for more people, as opposed to just maximizing the recovery for a particular injured plaintiff,' says **Kirk Stevens**.

"That's because if they are successful and achieve excellent results, then there can be rewards," Stevens tells Law Times, referring to a recent decision tackling the issue of contingency fees charged to persons under a legal disability.

"And the courts are not going to or should not take an unduly restrictive approach to fees which would discourage lawyers from taking on those cases. The focus is going to be on access to justice for more people, as opposed to just maximizing the recovery for a particular injured plaintiff."

That's the bottom line in *Re Cogan*, a decision of Justice Robert Smith in Ottawa, says Stevens, a partner at Lerner LLP. "I think it's a good signal for access to justice. It tells to the plaintiff's bar that they should be willing to take risks, that counsel should be rewarded for assuming those risks, and that the reward should be commensurate with the risk."

Smith approved \$4.2 million in legal fees in the cerebral palsy case that settled for \$12.5 million.

Stevens says a key question answered in *Cogan* is: how is a judge supposed to approach the issue of what should the fee of a plaintiff's lawyer be when the plaintiff is under disability, either because they are a minor or someone who is brain injured?

Smith found that while it's up to the court to approve such fee arrangements with disabled plaintiffs, "substantial weight" should be given to them when they have been entered into by a sophisticated party who acted in the plaintiff's best interests.

“The issue arises in two situations: infant settlements or settlements on behalf of people with disability,” says Stevens. “Of course, court approval is required under rule 7.08 of the Rules of Civil Procedure, because a settlement isn’t binding until approved by a court. It also arises in the context of after an action has been tried and the minor plaintiff succeeds, and the court then has to decide what would a reasonable fee for the solicitor be.”

Underlying rule 7.08 is the courts’ parens patriae jurisdiction to ensure that the rights of people under disability are protected and that they’re not taken advantage of, says Stevens. Naturally, in any litigation in these circumstances the person instructing the lawyer is the litigation guardian, who as such enters into the agreement with the lawyer.

There may be a formal contingency fee agreement, an understanding, or a retainer agreement that provides the lawyer will get his or her hourly rate plus a premium in the event of success.

In these cases, the lawyers are typically not getting paid as they go along and, consequently, the lawyer is assuming a risk, in fact, sometimes quite a bit of a risk, and is putting money out of their own pocket funding disbursements for expert reports for example, says Stevens.

In Cogan, the minor plaintiff MF was born with cerebral palsy. The obstetrician was sued, with the issue being whether a 12-minute delay during the baby’s delivery caused the brain damage. Stevens says the parents were both chartered accountants and “quite sophisticated people” who had retained a lawyer and began the action in 1999.

The lawyer did not operate on the contingency fee basis and so they paid as they went, incurring \$168,000 in legal fees. The case had not advanced much, and was in fact on the verge of being dismissed when noted Ottawa lawyer J. Arthur Cogan was retained and got the case back on the rails. They settled on the eve of trial.

Cogan sought approval of the contingency fee agreement that he had with the mother, who was the child’s litigation guardian.

The fee arrangement said that he would receive his docketed time, plus 33 1/3 per cent of total recovery, which in this case would result in a fee to him of \$4.2 million, leaving \$7.2 million to the child. His docketed time on the file at competitive rates was \$540,000.

Then, of the \$7.5 million, \$5.3 million was put into a structured settlement which would generate about \$15 million for the child over the course of his life, and another \$2.2 million was to be held in trust invested to meet additional needs.

The Office of the Children’s Lawyer became involved to advise the court as to their opinion on the appropriateness of the settlement, from the point of view of the child, and recommended the fee be based on the hourly time plus a \$1-million premium.

The court rejected the approach of the Children's Lawyer.

Stevens says the first thing Smith looked at was whether \$7.5 million was enough to ensure the child's future care needs are met, and he was satisfied.

"Obviously the fee of the lawyer will eat into the child's damages, so I do know that in some cases the court looks at the cost of future care and focuses on that and asks itself if that award is going to be impaired," says Stevens.

Then Smith looked at *Cohen v. Kealey and Blaney*, a 1985 decision setting out what constitutes a fair fee for a solicitor. This was decided before Ontario allowed contingency fees, and Smith said the law society's rule 2.08 (3) should be given "more weight than the traditional factors which do not deal with a contingency fee agreement." Until now the court was guided by *Cohen*, but Cogan says contingency and the new regime needs to be taken into account.

Smith noted the contingency fee agreement still has to be approved by the court. Smith noted the legislature has approved contingency fees, the law society's Rules of Professional Conduct set out how such agreements are to be arrived at, and that they were approved because they ensure access to justice, because otherwise you won't get highly competent counsel who are undertaking risks for people to take on these cases.

He went on to note, "When a contingency fee agreement is being presented for approval by the court, the following factors must be considered: a) the financial risk assumed by the lawyer, which is included under likelihood of success, the nature and complexity of the claim, and the expense and risk of pursuing it; b) the results achieved and the amount recovered; c) the expectations of the party; d) who is to receive an award of costs; and e) achievement of the social objective of providing access to justice for injured parties, including injured children and parties under disability. I find that these factors must be accorded much greater weight than the time spent by the lawyer."

Stevens says the court also said, "The focus should not only be on this child before the court, but the court has to bear in mind that its regulation of solicitor's fees should not impair access to justice for other people, and if you're going to cut back on a lawyer's fee just because you feel it's too high, then you may be doing an injustice to others."

Said Smith: "This factor was not considered by the Court of Appeal, in *Raphael Partners*, but I find that it is an important factor to ensure that injured children have access to the courts to recover damages for injuries suffered, which were caused by some other person's negligence.

I find that contingency fees promote this valid objective and this is a factor favouring approval of the contingency fee agreement, which was entered into by knowledgeable sophisticated accountants, acting in their child's best interests, and where the percentage agreed upon was reasonable.

“In this case, the contingency fee arrangement allowed a birth injured child to obtain access to the court to obtain financial compensation in order to meet all of his future care needs. The child’s parents and litigation guardian were unable to assume the financial risk of paying for the expert witnesses and Mr. Cogan’s legal fees on an hourly rate.

The litigation guardian and parents chose to reduce their exposure to the risk of paying legal costs and expert witness fees and to preserve their financial resources in order to provide the required care for their child, in the event the action was not successful.”

“I think that is the correct approach,” says **Stevens**, adding that Smith factored in the financial risk assumed by Cogan; the likelihood of success (so the harder the case, the higher of a percentage recovery would be justified); the nature and complexity of the case; expense and risk of pursuing the claim; the results achieved; and the amount recovered.

He adds that Smith also looked at the way the agreement was negotiated and in this case the parents were “very sophisticated people,” and because they had already exhausted funds on another lawyer weren’t able to afford this kind of litigation so they “entered into an agreement with the full knowledge of what it was, and they had independent legal advice. He found the agreement was made in a fair way.”

“I find that where a substantial recovery of damages has been obtained by the efforts of the solicitor in a situation where following the contingency fee agreement results in the recovery of a large fee for the solicitor, in circumstances where the result obtained was outstanding, where the best interests and future care needs of the child have been met, where substantial financial risk has been assumed by the law firm, where a vulnerable party has obtained access to justice and been fairly compensated for injuries suffered, then in those circumstances where the percentage is reasonable and the agreement was fairly entered into, I find that the contingency agreement should be approved even if the recovery by the law firm is very high,” wrote Smith.

“It’s a case that is well reasoned,” says Stevens. “It broadens the perspective instead of just bringing the subjective approach to the individual case.”