

High court makes winners pick up the tip

Losers no longer have to pay victorious lawyers' bonuses

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It's a question that seems more fitting for an etiquette class than the Supreme Court of Canada: Who should pay the "gratuity" on a legal bill when a litigator goes the extra mile for a client?

In a decision that has captivated trial lawyers across the country, the high court last Friday ruled that victorious plaintiffs, not losing defendants, must pay so-called risk premiums awarded when successful lawyers bet their own bank accounts on highly speculative and protracted trials.

The unanimous decision -- which spells particular relief for insurers and public companies facing the growing threat of class-action suits -- reverses a controversial trend in Ontario during the past 10 years of forcing the losing side to cover bonus payments to lawyers over and above standard legal costs. Many trial lawyers had viewed that practice as discriminatory because, they say, it exacts an extra pound of flesh from defeated parties for something beyond their control, namely a job well done by the winning legal team.

"It's the defendant paying the plaintiff's lawyers directly what is, in essence, a tip," said Mark Gelowitz, a partner in the litigation department at Osler Hoskin & Harcourt LLP. "It adds insult to injury to have to reward someone for having successfully sued you."



Lawyers Earl Cherniak of Lerner, left, and Ronald Slaght of Lenczner Slaght Royce Smith Griffin are photographed in Toronto. Cherniak's firm just won a supreme court case on the issue of 'risk premiums.' (Kevin Van Paassen/*The Globe and Mail*)

The issue came before the Supreme Court in a case known as Walker v. Ritchie, involving a 1997 accident in Sarnia, Ont., between a van and a tractor trailer that left the van's driver, 17-year-old Stephanie Walker, with crippling physical injuries and neurological damage. In a 2003 trial decision, a judge awarded Ms. Walker more than \$5-million in damages plus about \$500,000 in legal expenses. In addition, the judge decided Ms. Walker's lawyer, Carl Fleck, deserved a cost bonus of \$192,600 from the defendant because he had vigorously fought the case for four years without remuneration in what is known as a contingency-fee arrangement, which allows lawyers

to take on cases on condition that he or she will be paid only in the event of success. The judge noted Mr. Fleck even paid \$130,000 for expert witnesses and other disbursements out of his own pocket.

Such premiums, while rare, are within a judge's discretion in Canada. The aim is to promote access to justice by compensating enterprising lawyers who champion worthy cases for victims who otherwise can't afford legal representation.

But the judge in the Walker case, rather than taking the bonus out of the plaintiff's award -- as had been the custom for decades in Ontario -- insisted the defendant's insurer, Zurich Insurance Co., chip in the premium on top of Ms. Walker's legal bill.

That's where Zurich drew the line. After losing the main case again before the Ontario Court of Appeal, the company hired veteran litigator Earl Cherniak, a partner at Lerner LLP, to challenge the specific issue of the risk premium. The issue has become something of a personal mission for Mr. Cherniak, who says the notion that losers should pay the premium on top of regular legal costs had inexplicably become common practice in Ontario since the 1990s.

"One judge did it, another judge did it, and a bunch of them just kept doing it," said Mr. Cherniak, who has worked for plaintiffs as well as defendants in numerous contingency-fee cases. "The idea that the defendant should have to pay the premium because the plaintiff's lawyer took the risk just offended me. I thought it was a very important principle that the Ontario courts got completely wrong."

In its 13-page decision, the Supreme Court noted that the prospect of being forced to pay a risk premium "would incline defendants with meritorious defences to settle." That, in turn, would encourage plaintiffs to bring forward frivolous suits on the expectation a defendant will be more likely to throw in the towel and settle rather than risk going to trial.

Gordon McKee, a litigator at Blake Cassels & Graydon LLP, says the Supreme Court's decision also underscores an important legal principle, that defendants should be entitled to calculate their exposure to legal costs. "The private arrangement between a plaintiff and his counsel isn't under your control," Mr. McKee said.

Not all lawyers agree. "We believed it was a reasonable position that trial judges should retain the discretion to award a premium, or additional costs, where judges feel it is warranted in a given case," said Ronald Slaght of Lenczner Slaght Royce Smith Griffin LLP, who represented Ms. Walker at the Supreme Court. "So that is one discretionary weapon that judges will no longer have."

Friday's ruling, which affects virtually all lawsuits involving contingency-fee arrangements, has broad implications not just for personal injury and medical malpractice lawsuits but also for the burgeoning area of shareholder class actions. Coincidentally, the largest risk premium awarded in a shareholder class-action case -- \$1-million -- was assessed earlier this year against Danier Leather Inc. on behalf of investors who alleged the Toronto-based company published improper sales projections. That decision, although overturned on appeal in December, is headed to the Supreme Court in March.

Friday's decision now makes it highly unlikely the risk premium against Danier will be restored regardless of how the high court rules on other issues in the case. And in an ironic twist, Mr. Cherniak's victory on the Walker premium case is therefore likely to translate into a \$1-million dollar premium loss for his firm, Lerner, whose partners George Glezos and Peter Jervis act for the Danier shareholders and initially won the premium at trial.

"I'm just a lawyer, I just argue the cases the best I can," Mr. Cherniak said, adding with a laugh: "I saw George Glezos today. He's still talking to me."

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