

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** RAYMOND LAHAY, APRIL LAHAY and RAYMOND LAHAY JR., JOSHUA LAHAY AND SAMANTHA LAHAY, minors under the age of 18 years being represented by their Litigation Guardian, April Lahay

Plaintiffs

- and -

JOSHUA HENDERSON and ROBERT HENDERSON

Defendants

**BEFORE:** The Honourable Mr. Justice T.M. Wood

**COUNSEL:** J. Vigmond and B. Cameron, for the Plaintiffs

D.K. Carroll, Q.C., for the Defendants

**HEARD:** August 25, 2005 in Barrie

**ENDORSEMENT ON COSTS**

**WOOD J.:**

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

**Appropriate Rate**

[2] The plaintiff's draft bill of costs sets Mr. Vigmond's hourly rate at \$350 on the partial indemnity scale and \$450 on the substantial indemnity scale. These are the maximum allowable rates for a lawyer of his experience under the tariff. Mr. Cameron's rates are \$225 and \$300 respectively. These are also the maximum allowable rates for lawyer of his experience.

[3] The plaintiffs argue that the complexity of this case and the success achieved justify an award at this level. The defendants contend that this was not a particularly complex or difficult case and that notwithstanding the results achieved the maximum level should not be allowed.

[4] This was a soft tissue injury case. As such it required considerable expert evidence and a thorough examination of the plaintiff and his life both prior to and after the injury. There was nothing particularly out of the ordinary however. Nor was it significant in terms of the law.

[5] The plaintiff was very successful. The award made at trial greatly exceeded the amount sought in his offer. This excess must be borne in mind particularly since the defendant made no meaningful counter offer at any time.

[6] There is no question that Mr. Vigmond is highly experienced counsel who has proved himself capable of taking on the most complex and difficult cases successfully. Mr. Cameron as his associate for the last four years is similarly near the top of his peer group in the personal injury litigation bar. This case was excellently presented in a thoroughly professional manner and there is no doubt that this presentation contributed to the success of the plaintiff. However as stated above there is no particular factor which might distinguish it from other soft tissue injury cases which often present similar difficulties.

[7] The Court of Appeal has stated “it is now accepted that ‘the maximum rate is reserved for the most experienced counsel doing the most important cases’ “*Celanese Canada Inc. v Canadian National Railway Company*(2005) CanLII 8663 (ON C.A.) Borins J.A. at paragraph 38.

[8] While counsel come within the first part of this requirement the case does not fall within the second. In my view a fair and reasonable rate for Mr. Vigmond would be 300 per hour on the partial indemnity scale and 400 on the substantial indemnity scale. Similarly Mr. Cameron should receive 175 and 250 respectively.

[9] In assessing whether the costs requested are fair and reasonable I must consider not only the rate charged but the hours expended. Given the nature of the injury, the evidence needed to establish it, and the time required for trial, I am satisfied that the hours set out in the plaintiffs bill of costs are fair and reasonable.

### **Risk Premium**

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

..... a premium thought to occur only rarely and only when both factors risk end result-cry out for an award in excess of substantial indemnity costs. The risk must be based on evidence that the plaintiff lacked the financial resources to fund a lengthy and complex litigation, plaintiffs counsel finance the litigation, the defendant contested liability and the plaintiffs counsel assumed the risk not only of delayed but of possible non-payment

of fees. In our view, it is not necessary that the plaintiff be proved to be impecunious but it must be shown that the litigation was beyond the plaintiffs financial means. While risk must be present, it alone does not justify a premium-counsel for the plaintiff must also achieve an outstanding result

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

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

### **Disbursements**

[13] Following discussion at the cost hearing the plaintiffs conceded that some disbursements should be revised. A new plaintiffs bill of costs was filed reflecting these concessions.

[14] Some time was spent by the defense arguing the reasonableness of photocopy charges. However my offer to adjourn the matter to allow the plaintiffs counsel's records to be reviewed in this matter was declined. I am not inclined to question that this counsel on either the need for or the number of photocopies.

[15] The time billed to "assistants" was also challenged. Terry O'Sullivan was present in court and clearly functioned as a law clerk. Her hours are allowed. The other assistants I assume were doing secretarial work not included in the tariff.

[16] The specialist account rendered by Dr. Billing is excessive in my view. It will be reduced to \$3000. Similarly Dr Billings report is reduced to 2,500.00.

[17] The large medical illustrations were not justified in a judge alone trial. Reference could have been made to standard medical texts the accounts from Artery Studios and Signz n' Designz are disallowed. I find the other disbursements charged appropriate.

### **Costs of the Day**

[18] The plaintiffs have submitted a bill of costs for today's argument in the amount of \$13596.93 of which 11,860.95 is counsel fee for preparation and attendance. In my view a reasonable counsel fee for preparation and argument today is \$4500.00. The disbursements charged in connection with the costs argument are appropriate.

**Costs Award**

[19] Attached hereto as Schedule A is the plaintiff's bill of costs as taxed and allowed at \$211,693.80.

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Justice T.M. Wood

**DATE:** August 31, 2005

Schedule A

Court File No.: 04-B7771

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

RAYMOND LAHAY, APRIL LAHAY, and RAYMOND LAHAY JR.,  
JOSHUA LAHAY AND SAMANTHA LAHAY, minors under the age of 18  
years being represented by their Litigation Guardian, April Lahay

Plaintiffs

- and -

JOSHUA HENDERSON and ROBERT HENDERSON

Defendants

**BILL OF COSTS OF THE PLAINTIFFS**

Partial Indemnity - June 5, 2001 to March 24, 2005 (preparation before offer)

James L. Vigmond	12.7 hrs x 300.00	=	\$ 3,810.00
Brian M. Cameron	46.8 hrs x 175.00	=	8910.00
Stacey Stevens (articling student)	0.7 hrs x 60.00	=	42.00
Mark Taborowski	20.40 hrs x 125.00	=	2,550.00
Terry O'Sullivan (Assistant)	2.0 hrs x 50.00	=	100.00
Liliana Amato (Assistant/Law Clerk)	1.6 hrs x 50.00	=	80.00
Abby Vimalachandran (articling student)	6.50 hrs x 60.00	=	585.00
			\$16,077.00
	GST	=	<u>1125.39</u>
			\$ 17202.39

Substantial Indemnity - March 25, 2005 to April 10, 2005 (preparation time, before trial)

James L. Vigmond	50.5 hrs x 400.00	=	\$20,200.00
Brian M. Cameron	65.4 hrs x 250.00	=	16,350.00
Stacey Stevens (articling student)	60.4 hrs x 90.00	=	5,436.00

Terry O'Sullivan (Assistant)	16 hrs x 50.00	=	800.00
Lily Amato (Clerk)	0.1hrs x 125.00	=	<u>12.50</u>
			\$42798.50
	GST	=	<u>2995.90</u>
			\$45794.40

Substantial Indemnity - April 11, 2005 to April 22, 2005 (preparation time, during trial)

James L. Vigmond	66 hrs x 400.00	=	\$26,400.00
Brian M. Cameron	61.9 hrs x 250.00	=	15,475.00
Stacey Stevens (articling student)	35.3 hrs x 90.00	=	3,177.00
Terry O'Sullivan (Assistant)	17.2 hrs x 50.00	=	<u>860.00</u>
			\$45,912.00
	GST	=	<u>3,213.84</u>
			\$49,125.84

Substantial Indemnity - April 11, 2005 to April 22, 2005 (attendance at trial)

Counsel	Apr 11 - 15/05 (full week)	=	\$ 17,500.00
Counsel	Apr 18 - 22/05 (3 full days & ½ day)	=	<u>14,500.00</u>
			\$ 32,000.00
	GST		<u>2,240.00</u>
			\$ 34,240.00

Substantial Indemnity Counsel fee on cost hearing

Block counsel fee			\$4,500.00
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**TOTAL:** \$150,862.63

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**DISBURSEMENTS:**

**Taxable Disbursements:**

**Hospital Records**

Orillia Soldiers' Memorial - Feb 28, 2002	135.00
Orillia Soldiers' Memorial - x-rays - March 16, 2005	192.00
Orillia Soldiers' Memorial - March 16, 2005	150.00

**Clinical Notes and Records**

Bryan Physical Therapy - January 28, 2002	50.00
Dr. George Ray - Jan 30, 2002	132.00
Orillia X-Ray - January 31, 2002	20.00
Dr. S. Soriano - February 20, 2002	50.00

Dr. John Toye - April 19, 2002	40.00
Dr. Greg Armstrong - December 3, 2004	225.00

**Medical Reports**

Dr. Brian Alpert - Nov 29, 2002	2,500.00
Dr. Peter Watson - May 26, 2004	800.00
Dr. K.S. Billing - September 9, 2004	2500.00
Dr. Brian Alpert - September 29, 2004	2,500.00
Dr. Brian Hoffman - December 15, 2004	2,800.00
Dr. N.C.S. Doxey - December 28, 2004	3,000.00
Dr. Peter Watson - March 1, 2005	250.00
Dr. N.C.S. Doxey - March 4, 2005	400.00
Dr. K.S. Billing - March 4, 2005	500.00

**Expert Reports**

Ronald Smith & Associates - April 3, 2005	2,611.00
Ronald Smith & Associates - April 26, 2005	1,217.00

**Examinations for Discovery & Transcripts**

Legal Reporting Services - Dec 10, 2001	41.00
Legal Reporting Services - May 31, 2004	763.90
Cathy Knelsen - April 20, 2005	137.60
Cathy Knelsen - April 21, 2005	224.00

**Attendance at Court - Experts & Lay Witnesses**

Wayne Johnson	89.79
Brenda Livingston	64.00
Lamonte Lahay	70.51
Dr. Neville Doxey - April 14, 2005	4,040.00
Dr. G. Armstrong - April 18, 2005	1,750.00
Dr. Brian Alpert - April 18, 2005	2,400.00
Dr. Peter Watson - April 19, 2005	1,200.00
Dr. Brian Hoffman - April 19, 2005	3,000.00
Rosealee McLean - April 19, 2005	360.82
Dr. K.S. Billing - April 21, 2005	3,000.00
Dr. Craig Markle - April 26, 2005	1,000.00
Ronald Smith & Associates - April 26, 2005	4,121.00
Shirlene Wells	394.72

**Miscellaneous Expenses**

Process Service	15.00
Copies - November 19, 2001	56.75
County of Simcoe - March 22, 2002	16.00
Ben's Pharmacy - January 25, 2002	50.00

Northway Photomap - March 10, 2005	96.03
Steingard-Taylor Made Video - March 30, 2005	734.40
Ontario Court Agents - March 31, 2005	265.00
Ontario Court Agents - March 31, 2005	230.00
Rosealee McLean - Bryan Physical Therapy	110.00
Ontario Court Agents - April 5, 2005	206.00

Ontario Court Agents - April 6, 2005	90.00
Projector Rental - Duocom	1,856.40
Mileage	416.47
Parking	65.42
Copy to CD	40.00
Long Distance Phone Calls	34.68
Postage Charges	93.24
Courier Charges	320.51
Photocopies	5,798.50
Fax Charges	128.54
Quicklaw	452.30

Taxable Disbursements on Cost Hearing

Photocopies	\$219.50
Fax Charges	\$7.07
Quicklaw Research	\$700.00
Long distance Calls	\$0.32

<b>Sub-Total</b>	<b>54,731.47</b>
<b>G.S.T.</b>	<b>3831.20</b>
<b>Total Taxable Disbursements and G.S.T.</b>	<b>\$58,562.67</b>

Non-Taxable Disbursements

Transaction Levy Surcharge	50.00
Issue Statement of Claim	78.50
OHIP Summary - Raymond - November 12, 2001	140.00
File Trial Record	293.00
OHIP Summary - Raymond - November 3, 2004	80.00
Summons to Witness	22.00

<b>Sub-Total</b>	<b>663.50</b>
<b>TOTAL ASSESSABLE DISBURSEMENTS</b>	<b>\$59,226.17</b>



<b>TOTAL COSTS</b>	<b>\$150,862.63</b>
<b>TOTAL DISBURSEMENTS</b>	<b><u>60,831.17</u></b>
<b>TOTAL</b>	<b>\$210,088.80</b>