Case Name:

Lee (Guardian ad litem of) v. Richmond Hospital Society (c.o.b. Richmond Hospital)

Between
Allen Lee by his Guardian ad litem, Winnie Lee, plaintiff, and
Richmond Hospital Society as operators of the Richmond Hospital, defendant

[2002] B.C.J. No. 1270

2002 BCSC 862

Vancouver Registry No. C973656

British Columbia Supreme Court
Vancouver, British Columbia

Wong J.

Heard: May 6 - 8, 2002.
Judgment: June 7, 2002.

(97 paras.)

Damage awards -- General damage awards -- Cost of future care and treatment -- Cost of future household and property maintenance -- Practice -- Costs -- Party and party costs -- Special orders -- Increase in scale of costs.

Determination of consequential issues arising from an award of damages in favour of the plaintiff Lee. Lee also sought to have the judge increase a previous award for present value of future wage loss by taking out any negative contingencies contained in that assessment because the judgment stated that there was no need to adjust for potential negative or positive contingencies. At issue was the cost of future care, tax gross-up, management and committee fees, claim for legal costs gross-up, and costs. Lee's economist used the mortality ratio approach to determine the cost of future care at $2,412.772. The defendant Richmond Hospital's economist, used the excess death rate approach for reduced life expectancy to arrive at a figure of $2,345,350. Lee's economist agreed that this was an accepted method of calculation. The tax gross-up was calculated at $133,692 using the life certain approach and $376,450 using the probabilistic approach. Lee's action against Houston was un-

successful. He failed to adduce any evidence of medical negligence on Houston's part. Lee sought to have Richmond pay Houston's costs through a Bullock or Sanderson order. Richmond did not cause Lee to maintain his case against Houston. There was a great disparity between the costs that would be awarded under the tariff and the costs that Lee was responsible for under a contingency agreement. The trial took 22 days and the damages were reasonably complex. Many issues were vigorously contested.

HELD: The future wage loss claim was not altered as the cited phrase was read out of context. The cost of future care was set using the excess death rate approach at $2,345,350. The life certain approach was used to determine the tax gross-up as that approach considered the actual annual amounts required to be withdrawn for care. The amount was to be recalculated to include Canada Pension disability benefits as part of first dollar income, to deduct net legal fees, and with Lee assumed eligible for disabled medical expense tax credits under the Income Tax Act. Management fees were fixed at $158,123. Committee fees were a duplication and unnecessary. Lee's claim for a legal cost gross-up on his future care award was denied. Bullock or Sanderson orders were inappropriate given Lee's conduct of the litigation against Houston. Lee was entitled to increased costs at 65 per cent of special costs.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 57(18), Appendix B, s. 7.

Income Tax Act.

Counsel:

R.D. **Gibbens** and E. Lyszkiewicz, for the plaintiff.

J.D. Truscott, Q.C., and J.A. McJannet, for the defendant.

WONG J.:--

INTRODUCTION

1 In Reasons for Judgment dated April 2, 2002, I awarded damages in the following categories:

1. General or non-pecuniary damages: $282,000.00;
2. Special damages (inclusive of interest): $65,000.00;
3. Past wage loss: $170,091.85;
4. Future wage loss: $1,335,300.00;
5. Past wage loss held in trust for the Plaintiff's mother Mrs. Winnie Lee: $166,485.00;
6. Cost of future care to be re-calculated by counsel and subject to confirmation by the Court;
7. Court Order Interest on the claims for past wage loss; and
8. Costs.

2 Consequential issues relating to methodology for calculating costs of future care, costs of investment management, tax gross-up and scale of the Court costs remain to be decided. Further evidence and argument on those issues were presented.

3 Plaintiff's counsel also requested that I increase the previous award of $1,335,300.00 for present value of future wage loss by taking out any negative contingencies contained in that assessment because I stated in paragraph 51 of my judgment under the sub-heading "Future Wage Loss", "accordingly, I see no need to adjust for potential negative or positive contingencies as they balance out".

4 It should be remembered that my reference in that remark was to Allen Lee's mortality risk and not to the economic contingencies of the labour market. I accepted the defence economist's lump sum number in my assessment of Mr. Lee's loss of income earning opportunity and see no need to change my previous assessment.

COST OF FUTURE CARE

5 The Plaintiff's economist, Mr. Struthers, used the Mortality Ratio Approach to determine the cost of future care multiplier for use in calculating the present value of future cost of care for Mr. Lee's reduced life expectancy. He came up with the value of $2,412,772.00.

6 The Defendants' economist, Mr. Hildebrand, used the Excess Death Rate Approach for reduced life expectancy for the cost of care multiplier in calculating the present value. He arrived at a figure of $2,345,350.00, a difference of three percent.

7 Mr. Hildebrand testified that the Mortality Ratio Approach underestimates the chances of mortality in the early years.

8 In his evidence on November 30, 2001, Mr. Struthers was asked in cross-examination whether the Excess Death Rate Approach used by Mr. Hildebrand is an accepted method of calculation and his answer was: "oh certainly, yes I wouldn't disagree with that".

9 Accordingly, I prefer the Excess Death Rate Approach and fix the present value for future cost of care at $2,345,350.00.

TAX GROSS-UP

10 The case of Tucker (Public Trustee of) v. Asleson (1991), 62 B.C.L.R. (2d) 78 (B.C.S.C.), sets out the relevant principles as follows at pp. 87 and 88:

1. Where the evidence supports such an award, an allowance should be made to compensate a plaintiff for the income tax payable on income earned by an award for the cost of future care.
2. Damages, including allowances for tax gross-up, are to be "assessed" and not "calculated".
3. The tax structure at the time of the award is a useable model for calculating future income tax payable.
4. Income earned from other awards (apart from the cost of future care) is a reality affecting tax rates which must be taken into account in calculating the tax gross-up on the award for cost of future care.
5. No tax gross-up is allowable for the tax payable on the income earned by other awards such as future loss of earnings, non-pecuniary damages, etc.

6. Gross-up for the income tax payable on income earned by the award for the cost of future care should be calculated after all other income has been subjected to tax. In other words, income earned from the various pools is to be "stacked" as opposed to being "commingled" with income from other investment pools.

1. PROBABILISTIC OR LIFE CERTAIN APPROACH?

11 Mr. Struthers applying a "probabilistic" approach to his tax gross-up calculation in which withdrawals from the fund are assumed to occur to about age 100 arrived at a figure of $376,450.00.

12 Mr. Hildebrand applying a "life certain" approach, with different assumptions, came up with a significantly different figure of $133,692.00.

13 Mr. Hildebrand explained the reasoning behind his preference and use of the life certain method in his April 24, 2002 report, exhibit 16, at appendix A:

> Mr. Struthers applies a survival-adjusted withdrawal pattern (referred to as the probabilistic approach) in calculating income tax gross-up, whereas our own calculations adopts a life-certain approach. In this appendix, we compare these two methods, and explain why we generally would favour a life-certain approach.
>
> Tax gross-up calculations are intended to estimate a top-up amount to offset taxes payable on investment income resulting from the future cost of care award. Because the level of taxable investment income depends - to a large extent - on the remaining fund balance in each year, a critical step relates to determining the withdrawals in each year.
>
> Under a life-certain approach, we assume that annual withdrawals will exactly match the care needs established at trial. Assuming that the future care award reflects the cost of specified items during the Plaintiff's life expectancy, the life-certain withdrawals lead to fund depletion at approximately the Plaintiff's life expectancy. Consequently, no investment income (or taxes) are generated in years beyond life expectancy.
>
> By contrast, a probabilistic approach would assume somewhat lesser annual withdrawals. That is, the care needs established at trial are adjusted downward to reflect mortality risks in each year. By assuming smaller annual withdrawals, the future care award fund is assumed to last well beyond life expectancy (i.e., to approximately age 100 in this case). The probabilistic approach results in a larger fund balance in each year, and hence a higher level of taxable investment income.
>
> We maintain that the preferable method to calculating tax gross-up is the life-certain approach. The probabilistic approach faces a number of inherent difficulties, as noted below:

For future years, the probabilistic approach will necessarily overstate the fund balance (and hence will overstate the amount of taxable investment income). To illustrate, we note that the Plaintiff will only pay taxes in Year 5 if he is alive in Year 5. This, in turn, implies that the Plaintiff must have been alive in Years 1 through 4, and therefore must have made full (unadjusted) withdrawals in those years. By contrast, the probabilistic approach assumes survival-adjusted withdrawals only for Years 1 through 4. This will necessarily overstate the fund balance in year 5.

As noted above, a cost of future care award is set to cover specified costs during the Plaintiff's expected remaining life. Assuming that the full withdrawals will be required in every year, the fund will necessarily exhaust at around life expectancy. That is, the probability of taxable investment income being generated beyond life expectancy is zero. By allowing for remaining fund balances well beyond the Plaintiff's life expectancy, proponents of the probabilistic approach are (incorrectly) suggesting that there exists some chance that investment income will be generated in years beyond the Plaintiff's life expectancy.

It has been suggested that there may be an inconsistency in combining a probabilistic future care award with a life-certain tax gross-up approach. We disagree. In terms of calculating the future care award, the annual adjustment for survival recognizes the probability of being alive in each future year, including those well beyond the Plaintiff's life expectancy. The application of annual survival adjustments is appropriate in calculating the present value of future care, because the resulting annual values reflect the expected value of costs incurred in each year. This method of calculating the future care award is used by almost all economists, including Mr. Struthers.

In calculating cost of future care, expenses for a given year are independent of those in prior years. By contrast, in calculating future taxes, there is a strong interdependence between taxes payable in a given year and the fund balance which, in turn, is a function of the actual fund withdrawals in prior years. Due to this interdependence, the practice of survival-adjusting cost of care withdrawals in a tax gross-up will yield annual results that overstate expected taxes payable in corresponding years.

Indeed, the analytically correct timing for application of the survival contingency is after the income taxes payable have been calculated. The key flaw, therefore, with the probabilistic approach is that it applies the survival contingency at the wrong stage. The probabilistic approach applies survival adjustment to the care withdrawals (i.e., before taxes are calculated) which extends the fund drawdown well beyond life expectancy; the preferred approach is to apply the survival contingency after taxes are calculated.

14 As the life-certain method considers the actual annual amounts required to be withdrawn for care, I think it makes more logical sense and I would adopt that approach.

15 Life-certain approach was also endorsed by Williamson, J. in Sammartino (Guardian at Litem of) v. Hiebert, [1996] B.C.J. No. 2650 (S.C.) at para. 17.

2. DEDUCTION OF LEGAL FEES FROM THE INVESTMENT FUND FOR THE PURPOSES OF DETERMINING THE SIZE OF THE FUND SUBJECT TO:

A. Gross-up for tax on future care,

and

B. Management fees.

16 The initial authority for the deduction of legal fees from the size of the investment fund for the purpose of determining the size of the funds to be managed was the Court of Appeal decision of Bracey (Committee of) v. Jahnke (1997), 34 B.C.L.R. (3d) 191 (C.A.). Southin, J.A., in dealing with the issue of the award at trial for financial management of $65,000.00 said at paras. 51-2:

> But is it correct to so calculate this head when we know that the Public Trustee will not receive that sum? It would be pretending not to know what we do know, namely, that in accordance with her usual practice, the Public Trustee will have entered into, on behalf of her patient, a contract for the conduct of this litigation by solicitors under which fees will have to be paid to the solicitors. Where, therefore, a plaintiff is represented in litigation by the Public Trustee, it is right that the court should know is assessing damages what the net sum will be in the hands of the Public Trustee to make calculations of management fees on that net sum.
>
> Therefore I consider it appropriate to require the Public Trustee to submit to this Court her contract for the conduct of this litigation so that the Court can make a proper assessment.

and at para. 56:

> As to the item for tax gross-up, it is for counsel to make the adjustments necessary in light of the other determinations in this appeal.

17 The principle arising out of the decision is that the Court should deal with the actual amount of the investment funds and not deal with hypothetical amounts only.

18 Although Her Ladyship dealt specifically on the issue of management fees, she did advise counsel to make the adjustments necessary to tax gross-up and logically one of those adjustments would be to consider the actual amount of future care costs in the investment fund that would be subject to tax gross-up, and not just the notional number set out in the award.

19 In Robulack v. Heidecker, [1997] B.C.J. No. 2405 (S.C.), Pitfield, J. concluded that the Bracey decision was not confined to cases involving the Public Trustee, but applied to all cases where the issue of financial management is before the Court.

20 Although Pitfield, J. concluded that the comments of Shaw, J. in Morrison v. Hicks, [1990] B.C.J. No. 2400 (S.C.) at p. 4 should be restricted to the computation of the income tax gross-up,

there is no logical distinction between the principle of net investment fund that should be applied for management fee determination, and the principle that should be applied for tax gross-up fee determination. They both depend upon the net size of the fund and if legal fees reduce the size of that fund, and in the case of tax gross-up specifically reduce the size of the cost of care award portion of that fund, then it is the net size of the fund and the cost of care award within that fund that should be considered for the purpose of management fees and tax gross-up fees.

21 With great respect to Mr. Justice Shaw's opinion in Morrison v. Hicks, supra, it is not a question of the responsibility of the defendant which is at issue, but simply the actual size of the fund that is going to be subject to management fees and tax gross-up fees.

22 In O'Brien (Guardian ad Litem of) v. Anderson, [1999] B.C.J. No. 1519 (S.C.) at para. 27, Quijano, J. applied the principle of net investment fund to both the management fees and tax gross-up.

23 Net investment fund is the amount remaining after net legal fees and disbursements are deducted. Net legal fees and disbursements is the difference between the actual amount of legal fees and disbursements paid by the plaintiff to his counsel less the amount recovered as award of cost in the action.

24 I agree with defendants' counsel that O'Brien, supra, should be followed.

3. SOURCE OF PAYMENT OF PLAINTIFF'S LEGAL FEES

25 Plaintiff's counsel submitted that net legal fees should be considered as being paid first from all other damages before the award for future care costs.

26 The plaintiff's contingency fee contract, however, makes no distinction between or amongst the damages received, for payment of the legal fees. It simply provides that legal fees of 35% are payable from whatever is recovered as a whole.

27 Accordingly, I agree with defendant's counsel that it is completely artificial to consider that the fees are payable out of one source and not the other; the reality is that the fees will be paid out of all of the recovered damages, including the cost of future care award.

28 I would ask counsel to recalculate tax gross-up on cost of future care taking into account the following factors:

1. Use of the life-certain approach;
2. Inclusion of Canada Pension disability benefits as part of "first dollar" income;
3. Plaintiff's net legal fees are to be deducted;
4. Plaintiff is assumed to be eligible for disabled medical expense tax credits under the Income Tax Act.

MANAGEMENT FEES AND COMMITTEE FEES

1. CONSTITUTION OF THE INVESTMENT FUND FOR MANAGEMENT FEES AND COMMITTEE FEES.

29 The plaintiff says the investment fund will consist of not only the award for future care costs, the award for loss of income-earning capacity, and the award for tax gross-up, all of which must be

invested to create an assumed income stream, but also the other damages awarded consisting of general damages, special damages and past wage loss.

30 The defendants submitted that these other damages are not subject to tax gross-up nor should they be included in the investment fund for the purpose of determining the award for fund management fees or committee fees for which the defendant has responsibility.

31 The defendant is responsible for the awards for future care costs and future loss on income earning capacity, and because they are funds which must be invested to produce a stream of income, the defendant therefore must be responsible for the fees that will be incurred to produce the income expected.

32 However, the other damages are not based on any present value analysis, and the defendant should not have to assume any management fee nor committee fee associated with any investment of these funds, which are not required to be invested to produce any income stream.

33 Townsend v. Kroppmanns, [2000] B.C.J. No. 1352 (S.C.) at para. 48, is authority supporting the defendants' position and I would follow it.

2. THE APPROPRIATE AWARD FOR FUND MANAGEMENT FEES

34 It is Mr. Hildebrand's evidence that history shows a properly-managed investment fund can receive better than 3.5% real return so that the excess earnings pay themselves for the costs of the management fee: Hildebrand Report, April 25, 2002, p. 4 (Ex. 16).

35 Mr. Struthers likewise refers to this historical evidence in his first report of October 24, 2001, dealing with fund management fees (Ex. 14).

36 There is ample judicial authority for awarding only a portion of calculated management fees, see: MacDonald (Guardian ad Litem of) v. Neufeld (1993), 85 B.C.L.R. (2d) 129 (C.A.) pp. 154-159; Sammartino, supra, paras. 19-21; Mann v. Maccaig-Ross, [1998] B.C.J. No. 2444 (S.C.) paras. 8-13; O'Brien, supra; Townsend v. Kroppmanns, [2000] B.C.J. No. 1352 (S.C.), paras. 28, 33, 34, 55, 58 and 59; Reilly v. Lynn, [2000] B.C.J. No. 2409 (S.C.) paras. 40-41.

37 Using schedule of fees charged by the Office of the Public Guardian and Trustee, Mr. Hildebrand in his April 25, 2002, report (Exhibit 16) at page 5 stated that assuming either a one percent or five percent initial capital charge on the net investment fund and a 50% reduction for excess return arrived at management awards of $130,380.00 and $185,866.00 respectively. He observed that a fifty percent reduction for an excess return is equivalent to assuming an actual rate of return of between 3.75% and 4% above price inflation.

38 I think an average of the two estimates amounting to $158,123.00 would be a fair and reasonable amount for management fees and I would so order.

3. COMMITTEE FEES?

39 The plaintiff also asked for committee fees on top of investment management fees.

40 Mr. Struthers said the Public Trustee may allow professional management fees on top of committee fees.

41 Mr. Struthers agrees that the Public Trustee's office offers committee services as well as professional fund management services for the three funds Mr. Hildebrand has identified.

42 Mr. Hildebrand said that the Public Trustee's fees already include full costs for professional fund management, in his report of April 25, 2002 (Ex. 16).

43 Defence Counsel submitted that if the Public Trustee provides committee services and professional fund management services all for the same fee, why should the estate of Mr. Lee pay what basically amounts to twice that fee, one for professional fund management, and one for committee services, when that would be unnecessary if the Public Trustee performed both services.

44 In turn, why should the defendant pay double the cost because there is now a private committee (Dr. James Lee, Mr. Lee's older brother) and presumably a private fund manager would be retained? It was submitted the defendant should not be put to that extra cost.

45 Mr. Struthers' report of April 18, 2002, estimates fund management fees of over $400,000.00, on the size of the fund he has assumed, and in his report of April 19, on committee fees estimates those fees at even more, $500,000.00.

46 As the Hildebrand estimate was based on Public Trustee charge rates, which incorporates both committee and management services, I see no need to include an additional amount for committee work as the amount awarded above should be sufficient to also cover that purpose.

CLAIMS FOR LEGAL COSTS GROSS-UP

47 Plaintiff's counsel submitted given that the legal fees of the plaintiff will greatly exceed taxable costs recovered, the plaintiff's award for future care will be inadequate to meet his needs for his predicted lifespan, another 37.7 years. Unless the impact of legal fees is taken into account with respect to future care awards, the fund will not be sufficient to meet the minimum future care needs the Court has identified Mr. Lee requires.

48 Therefore a sum, or "costs gross-up", must be added to the award for future care for the amount spent by the plaintiff on legal fees, just as an amount must be added to the future care award for income tax (tax gross-up) and management fees to ensure that the award after paying for taxes and management fees still remains large enough to pay the cost of care the court determined the plaintiff needed and was entitled to.

49 It was submitted that the solution of "grossing-up" the future care award, is in line with the Supreme Court of Canada decisions in the Trilogy regarding pecuniary restitutio in integrum: Andrews v. Grand & Toy, [1978] 2 S.C.R. 229 at 241; Arnold v. Teno (1978), 83 D.L.R. (3d) 609 at 630; Lewis v. Todd, [1980] 2 S.C.R. 694.

50 The result will be that legal fees will not reduce the tax gross-up award or the amount to be invested for the calculation of the management fee. Further the "costs gross-up" is not only consistent with but strengthens the paramountcy of care principle and the court's mandate to protect the integrity of the "medicine money".

51 There is no reported legal precedent to support a claim of legal cost gross-up to account for a plaintiff's contingency fee.

52 To accede to that request would render nugatory cost provisions found in the Rules of Court and there would be no point in having a cost tariff in place.

53 However, I am sympathetic to the reality that part of Mr. Lee's future care award will be infringed upon by his net legal fees to his counsel. Perhaps the appropriate and proper solution is for

plaintiff's counsel to reduce his contingency fee amount on his client's future care award as there is already a sizable charge for the other pecuniary and non-pecuniary awards.

COSTS

Issues

1. Plaintiff's counsel requested a Bullock or Sanderson order; he said the circumstances of this case justify an order that the costs of Dr. Houston (against whom the plaintiff's claim was dismissed) be borne by the unsuccessful defendant, Richmond Hospital Society.
2. Plaintiff's counsel also submitted that increased costs should be awarded in these proceedings.

ANALYSIS

1. Responsibility for Costs of the successful defendant, Dr. Houston

54 The plaintiff said that Dr. Houston's costs that the plaintiff is legally obliged to pay ought to be recoverable from the Hospital, in the form of a "Bullock" or "Sanderson" order. The Court is granted the discretion to make such an order pursuant to Rule 57(18):

> 57(18) Where the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include these costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.

55 The application of Rule 57(18) is discretionary, in that the Court may order payment of the successful defendant's costs directly or indirectly where those costs ought to be paid by another defendant.

56 In determining whether a Bullock or Sanderson order ought to be made, the Court must answer the following threshold question: "...was it a reasonable thing for the plaintiff in his action against a man who ultimately turns out to be in fact the wrong-doer to join the other defendant in order that the matter might be thoroughly threshed out?": Robertson v. North Island College (1980), 119 D.L.R. (3d) 17 (B.C.C.A.) citing with approval Besterman v. Br. Motor Cab Co. Ltd., [1914] 3 K.B. 181 at 186 (C.A.) at p. 23.

57 The Court, in determining whether such an order is appropriate in the circumstances, must exercise its discretion judicially:

> Once the threshold question is answered affirmatively then the discretion of the trial Judge arises. Of course, he may exercise it either way. It is a true discretion. Whether he grants a Bullock order, or not, must depend on his assessment of the circumstances of the case. In my opinion it is inappropriate to trammel that discretion by endeavouring to extract principles from those cases where the discretion was exercised and from those cases where it was refused. The threshold

> question must be answered affirmatively; the discretion must be exercised judicially; and that is all.

Robertson, supra, at p. 24

58 A further consideration for the Court when exercising its discretion is whether it was appropriate for a plaintiff to maintain his or her action against the successful defendant, where it becomes apparent during the course of litigation that the claims against that party have no reasonable prospect of success. An unsuccessful defendant ought not to bear the costs of a successful defendant where it was clear that the action against the latter had no reasonable prospect of success: Cominco Ltd. v. Westinghouse Canada Limited (1981), 33 B.C.L.R. 202, [1981] B.C.J. No. 1711 (B.C.S.C.) at para. 40; Smith v. Horizon Aero Sports, [1982] 4 W.W.R. 431, [1982] B.C.J. No. 1499 (B.C.S.C.) at para. 5; Cullinane v. Prince George (City), [2001] B.C.J. No. 138 (B.C.S.C.) at para. 9.

59 A review of the determination of Mr. Lee's case against Dr. Houston is appropriate, in light of these principles.

60 At Dr. Houston's summary trial application, heard October 26, 2001 (and continued on November 5, 2001), the claim against the physician was dismissed. The findings of Mr. Justice Crawford in his November 5, 2001 judgment are critical to the issue of reasonableness regarding the joinder of Dr. Houston. It is the Hospital's position that the Reasons for Judgment disclose that there was no prospect of success as to Mr. Lee's claim against the doctor. In this regard, reference was made to the following points from the judgment:

(a) With respect to the issue of prescription by Dr. Houston, the Court held (at paragraph 15) the "...evidence seems plain that Mr. Lee, who was in his mid-20s, was apparently healthy, and there were no contraindications to the medications that were prescribed by Dr. Houston."

(b) As to the evidence adduced by the plaintiff in support of his allegations against Dr. Houston, the Court noted at paragraph 24 that "[t]he plaintiff has no reports from general surgeons dealing with the standard of care in the circumstances of the plaintiff's."

(c) With respect to the issue of post-operative monitoring, Crawford J. held that the evidence of the general surgeons who swore affidavits in support of the application was that Dr. Houston met the appropriate standard of care (paragraph 50). That evidence was apparently uncontradicted at the application. The Court went on to state at paragraph 51: "I suppose it is common experience that, by and large, once the surgeon is finished in the operating room, and has put his mind to the post-operative care, he turns the care over to the hospital and its staff."

(d) Of importance is Crawford J.'s acknowledgement at paragraph 8 that "...the issues have been in front of counsel for several years." In commenting

> upon the plaintiff's failure to tender the expert evidence of a duly qualified general surgeon, the Court stated at paragraphs 53 and 54:
>
> "In my view, there has been ample time for the plaintiff to develop his case, either with or without the protocols or other hospital orders being in effect.
>
> If they had been of consequence, I would have expected a report from a duly qualified general surgeon to have been put forward by the plaintiff as to the hospital relationship, of the mixture of drugs, and the standard of care, and the post-operative care provided by Dr. Houston. That has not been done in this case; and on balance, the defendants' [sic] application must succeed."

61 The plaintiff submitted that delay in document production, particularly production of Physician's Orders and related protocols, hindered his ability to fully assess the case against Dr. Houston. However, the Court's comments at paras. 53 and 54 address that issue; the medical evidence did not, at any time, suggest an issue of negligence by the physician.

62 Though the plaintiff asserts that he was unable to properly assess the case against Dr. Houston in the absence of the Physician's Orders and related protocols, and thus proceeded reasonably in maintaining the action against the doctor, it is important to note that the request for the Physician's Order came on July 20, 2001, on the examination for discovery of Nurse Martin. This request came over four years after the action was commenced.

63 In light of the plaintiff's failure to adduce expert evidence impugning the conduct of Dr. Houston, it is also important to note the evidence tendered by Dr. Dong and Dr. Gambling, on the issue of the Physician's Orders.

64 Dr. Dong's evidence was that the Physician's Orders in question are for the completion by the anaesthetist, and not the general surgeon. This was left to the anaesthetist's discretion in circumstances such as this, when spinal fentanyl was administered.

65 Similarly, it was Dr. Gambling's evidence that it was left to the anaesthetist's discretion as to whether or not the Physician's Orders form was to be completed when only spinal fentanyl was administered. In Dr. Gambling's opinion, the small dose of spinal fentanyl administered to Mr. Lee did not necessitate completion of the Physician's Orders form.

66 Both Dr. Dong and Dr. Gambling deposed that, due to the short-acting nature of the spinal fentanyl narcotic in question, there was no contra-indication to the administration of the drug as ordered by Dr. Houston.

67 After four years of litigation, the plaintiff failed to adduce any evidence of medical negligence on the part of Dr. Houston. Crawford J.'s recognition of this fact supports the proposition that there was never any evidence that would support a claim against the physician. In the circumstances, and in the absence of any evidence of negligence throughout the entire course of litigation, the continued joinder of Dr. Houston was simply not reasonable.

68 It was further submitted that an appropriate consideration for the Court where a Bullock or Sanderson order is sought is whether or not the unsuccessful defendant sought to shift blame to the

other defendant: Voest-Alpine Canada Corp. v. Pan Ocean Shipping Co., [1991] B.C.J. No. 2773 (B.C.S.C. at p. 5, upheld on appeal [1993] B.C.J. No. 1493 (B.C.C.A.).

69 In the case at bar, the Hospital did not seek to shift blame to Dr. Houston. It did not initiate a cross-claim or plead negligence against Dr. Houston, nor did it take any position on Dr. Houston's summary trial application.

70 Although orders under Rule 57(18) are not restricted to cases where the unsuccessful defendant has blamed the successful defendant, the Court of Appeal has recently held that such orders do require some act by the former to warrant his or her responsibility for the costs of the latter.

> There must be something which the unsuccessful defendant did, such as asserting the other defendant was the culprit in the case, to warrant his being made to reimburse the plaintiff for the successful defendant's costs. That was what happened in Bullock v. London General Omnibus Co., [1907] 1 K.B. 264. The omnibus company asserted the cart driver was the cause of the accident.
>
> But orders under Rule 57(18) are not restricted to cases where the unsuccessful defendant in the course of the litigation has blamed the successful defendant but may extend to acts of the unsuccessful defendant which caused the successful defendant to be brought into the litigation.
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> Grassi v. WIC Radio Ltd. (c.o.b. CKNW/98), [2001] B.C.J. No. 1073 (B.C.C.A.) at paras. 33-34.

71 In this case the Hospital did not take or fail to take any course of action which could reasonably have caused the plaintiff to maintain his case against Dr. Houston.

72 The plaintiff said the actions of the Hospital prevented him from fully investigating or assessing the claim against Dr. Houston. However, this argument must be considered in the context of the overall chronology of the litigation. The plaintiff did not examine a representative of the Hospital until June of 2001, when the issue of the Physician's Orders and protocols was raised. However, the litigation had been commenced four years previously, during which time it became clear that no sustainable claim against Dr. Houston was developed. It cannot be said that any delay was attributable only to the Hospital.

73 Given the positions held by the Hospital and the plaintiff with regard to the liability of Dr. Houston, it would not be a judicial exercise of the Court's discretion to hold the Hospital responsible for Dr. Houston's costs. The plaintiff proceeded and continued with his case against the physician despite the lack of any supporting evidence.

74 Accordingly, a Bullock or Sanderson order that the Hospital pay the costs of Dr. Houston is not appropriate.

2. The appropriate scale of costs

75 The Court's discretion to award increased costs is set out in Appendix B, section 7 of the Rules of Court:

> 7(1) Where the court determines that for any reason there would be an unjust result if costs were assessed under Scales 1 to 5, the court may, at any time before the assessment has been completed, order that costs be assessed as increased costs under subsection (2).
>
> (2) Where costs are ordered to be assessed as increased costs, the assessing officer shall fix the fees that would have been allowed if an order for special costs had been made under Rule 57(3), and shall then allow 1/2 of those fees, or a higher or lower proportion as the court may order, together with all proper expenses and disbursements.

76 An underlying objective of the tariff of costs is to achieve a 50% indemnity of a party's actual legal fees, or at least special costs which often represent 80-90% of the lawyer's bill: Rieta v. North American Air Travel Insurance Agents Ltd. (1998), 52 B.C.L.R (3d) 114; [1998] B.C.J. No. 640 (B.C.C.A.) at para. 35.

77 As is seen throughout the authorities, increased costs have been awarded to address injustice to a successful party where there is a significant discrepancy between taxable costs that would be recovered in the normal course and 50% of special costs. However, the Court must make considerations beyond the simple fact of a discrepancy:

> The law on costs has now evolved to the point where a discrepancy must be accompanied by some other reasons in order to justify an order of increased costs. My use of the phrase 'presumptive injustice' in referring to any discrepancy greater than 50% in Just v. British Columbia (1992), 9 C.P.C. (3d) 302 at 308, may not have been happily chosen. The better and current view is that a discrepancy is only a factor, and by itself not a decisive factor, in deciding a claim for increased costs. As has been observed in a number of the cases cited to us, a large disparity is often associated with some additional factor relating to the nature of the case or the conduct of the parties which usually provides an explanation for the disparity. The following statement by Madam Justice Rowles in Edgar v. Freedman, [1997] B.C.J. No. 1643 at para. 79 reflects the present state of the law:
>
> > My impression is that a quite significant disparity must be found to trigger an order for increased costs and even then, such an order is by no means likely to be made 'as of course' or automatically. Usually, there must be found special importance, difficulties or complication associated with the litigation or as seen in National Hockey League, [1995] B.C.J. No. 311, conduct of a litigant which the court finds deserving of a penalty in added costs.

Rieta, supra at para. 40

78 Though subject to some modification in recent years, the Court has generally adopted the following approach in exercising its discretion as to the appropriateness of an award for increased costs

> (a) approximate both the ordinary costs and the special costs; and
> (b) determine whether the discrepancy between them and other factors relating to the litigation would render unjust the awarding of ordinary costs.

Krangle (Guardian ad Litem) v. Brisco, [1998] B.C.J. No. 1954 (B.C.S.C.) at para. 16, reversed on other grounds (2000), 184 D.L.R. (4th) 251 (B.C.C.A.) which was reversed on appeal, [2002] S.C.J. No. 8.

79 Here, the plaintiff seeks an award of increased costs based on special costs as derived from actual fees paid under a contingency agreement. Though special costs will approximate 80%-90% of a party's actual legal fees in most cases, they ought to reflect an objective assessment of costs based on the "fees that a reasonable client would pay a reasonably competent lawyer for performing the work described in the bill": Bradshaw Construction Ltd. v. Bank of Nova Scotia (1991), 54 B.C.L.R. (2d) 309; [1991] B.C.J. No. 540 (B.C.S.C.) at p. 6, issue of costs affirmed on appeal (1992), 73 B.C.L.R. (2d) 212 at p. 233.

80 On this basis, it was submitted by the defendant that special costs ought not to be determined by simply examining the fees that a successful party is obligated to pay to their lawyer. Payment pursuant to a fee agreement does not reflect an objective measure of special costs sufficient to permit the Court to assess any discrepancy between ordinary costs and special costs. Similar circumstances were considered by this Court in the Krangle decision:

> In compliance with a contingency fee agreement the plaintiffs have paid their counsel $176,315.58 for fees, which is 35% of the amount recovered. The cases say that special costs under Rule 57(3) are intended to approximate 80% to 90% of the costs the successful litigant might pay to his own counsel. However, in my opinion, that cannot be determined by simply examining the fee agreement between the litigant and his counsel. Bouck J. touched on this in Bradshaw at p. 319 where he said:
>
> > ...special costs are the fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill. On the other hand, fees payable by the client to the solicitor pursuant to a bill taxed under the Legal Profession Act represent fees for work done by the solicitor for that client. In the usual course of events, a bill taxed as special costs will be less than a bill taxed under the Legal Profession Act. This is because special costs still fall under the category of party-and-party costs, whereas fees due under the Legal Profession Act are assessed in a similar way to the old method of solicitor-and-own client costs.
>
> The fees paid by the plaintiffs to their counsel represent only the work done for the plaintiffs by their counsel under contract. They do not amount to an objective measure of special costs to enable the court to determine, roughly at least, the extent of the gap between ordinary and special costs.

Krangle, supra at paras. 18-19:

81 This principle has been subsequently applied: See Freeman v. Simon Fraser University, [2001] B.C.J. No. 1166 (B.C.S.C.) at para. 31; Seaport Crown Fish Co. v. Vancouver Port Corp., [2000] B.C.J. No. 64 (B.C.S.C.) at para 24.

82 Plaintiff's counsel's fees currently stand at $1,735,150.15 including taxes. This was compared to their estimated bill of costs of $75,314.00 at Scale 5 of ordinary costs.

83 However, there is no evidence presently before the Court as to the work performed or time spent in preparation which would permit an objective assessment of special costs, pursuant to the principles enunciated in the recent authorities. Rather, the plaintiff seeks to have special costs determined as a function of the actual fees paid under a contingency agreement.

84 In addition to the threshold issue of discrepancy, the Court's exercise of discretion to award increased costs requires further considerations. Once that threshold test has been met, the Court ought to examine other factors relating to the nature of the case or the conduct of the parties which might provide an explanation for the disparity. Such factors may include the special importance, difficulties, or complications associated with the litigation, or conduct of a party which warrants an added penalty in costs: Rieta, supra, at para. 40.

85 While the law does now recognize that a significant discrepancy alone might stand as justification for an order for increased costs under particular circumstances, the Court, in exercising its discretion, must examine the discrepancy within the context of the particular case as a whole, and the facts which would make an award of ordinary costs unjust: Monenco Ltd. v. Commonwealth Insurance Co. (1999), 64 B.C.L.R. (3d) 307 (B.C.C.A.) at para. 11; Future Shop v. NW-Atlantic (BC) Broker (2002), 97 B.C.L.R. (3d) 87 (B.C.S.C.)at para. 28.

86 It has been held that in cases where there is an absence of other factors, a discrepancy between ordinary costs and 50% of special costs that is simply attributable to the allowance of the tariff is not an injustice on which an award of increased costs ought to be based:

> ... the objective of party and party costs is to indemnify a party for approximately 50% of special costs. If that indemnification falls short because of the nature of the action, or the conduct of a litigant, then increased costs should be awarded. However, if party and party costs fall short of being 50% of special costs for no reason other than that the tariff is inadequate, that situation calls for an amendment of the tariff rather than an award for increased costs. In other words, the law is that the inadequacy of the tariff does not constitute the type of injustice on which an award for increased costs can be granted.
>
> Chan v. Gastaldello, [1999] B.C.J. No. 692 (B.C.S.C.) at para. 34.

87 The plaintiff has submitted that the particular complexity of this case is a factor which militates in favour of an award for increased costs.

88 While it was conceded that there is obviously a degree of complexity involved in cases of this nature, it was also the Hospital's position that the degree of complexity in this case does not exceed that which would ordinarily be expected in a medical malpractice or personal injury case involving

significant injuries. Though it was agreed that there were and presently are numerous issues before the Court, those of causation and the various heads of damage considered are common aspects of litigation today.

89 Nor can it be said that the Hospital's conduct warrants an award of increased costs. Liability was admitted early in the trial, with the result that the remaining issues related solely to quantum of damages for the injuries sustained by the plaintiff. This significantly reduced the scope of matters to be dealt with at trial.

90 It is the Hospital's position that the substantial discrepancy between actual fees and taxable costs in this case is due to the plaintiff's contingency agreement with counsel, and not to circumstances of the case or the course of litigation.

91 In this regard, it was also submitted that the Court may recognize that the plaintiff, in entering into a contingency fee agreement, would have appreciated that the actual payment to his solicitors could potentially far exceed the costs he might recover. In this regard, there can be no injustice in granting the plaintiff ordinary taxable costs, given his choice to enter into a contingency agreement: Lucas v. Hardie, [1998] B.C.J. No. 1079 (B.C.S.C.) at para. 17.

92 This Court has also subsequently considered the decision in Lucas, supra, and held that the existence of a contingency agreement does not necessarily bar an award of increased costs: Reilly v. Lynn, [2001] B.C.J. No. 999 (B.C.S.C.) at para. 14.

93 In the absence of other factors warranting increased costs, it was submitted the plaintiff's choice to enter a contingency agreement with counsel that results in a substantial disparity between actual fees and recoverable costs ought not to be visited upon the defendant.

94 I agree that reported cases say that disparity alone is not enough to justify increased costs, but when put in context disparity is very often caused by other factors which make the disparity unjust - such as the amount involved (in this case approximately $4.6 million), the work required, the kind of arguments which had to be made etc. Each case must be viewed as a whole on its particular circumstances to decide whether an award of ordinary cost would be unjust.

95 In the particular circumstances of this case there will likely be a significant disparity between ordinary costs even at Scale 5 and special costs based on time spent. Twenty-two days was required at trial to litigate the facts in issue even though the defendant hospital admitted liability on the second day of trial. The damages in issue were reasonably complex due to the unusual nature of the plaintiff's injuries. Many witnesses were called and many issues were vigorously contested, including gross-up provisions. The plaintiff had at least two counsel present at all times, all of which was appropriate and no doubt contributed to the plaintiff's success in the quantum of awards made. There was thorough presentation during trial by all counsel.

96 For all these reasons, I exercise my discretion to award the plaintiff increased costs at 65 percent of special costs to be assessed by the registrar in the usual manner. However, if the parties can agree on the amount of special costs, there is no need to go to the registrar.

CONCLUSION

97 In summary:

1. Costs of future care is fixed at $2,345,350.00;

2. Tax gross-up on cost of future care is to be recalculated taking into account the factors discussed in my reasons at para. 28;
3. Management fees are fixed at $158,123.00;
4. Committee fees are a duplication and unnecessary in this case;
5. Plaintiff's claim for a legal cost gross-up on his future care award is denied;
6. Bullock or Sanderson orders in this case are inappropriate;
7. Plaintiff is entitled to increased costs at 65 percent of special costs, which will also include the three days of hearing in May before me.

WONG J.

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