Indexed as:

Dryden (Litigation guardian of) v. Campbell Estate

Between
Scott Douglas Dryden, by his Litigation guardian, Douglas Howard Dryden, Douglas Howard Dryden, Charlene Isabel Dryden, Leigh-Anne Dryden, Harold Dryden, Helen Parks, and Holly Elizabeth Dryden, by her Litigation guardian Douglas Howard Dryden, plaintiffs, and
Estate of David Campbell, deceased, James Campbell, Stars Inc., Bill Parchem, Carey Balzer, Royal Insurance Company of Canada and The Citadel Assurance Company of Canada, defendants

[**2001**] O.J. No. 4095

Court File No. C16365/96

Ontario Superior Court of Justice
Hamilton, Ontario

Cavarzan J.

Heard: June 4, **2001.**
Judgment: June 6, **2001.**

(12 paras.)

Practice — Costs — Party and party costs — Special orders — Offers to settle.

Ruling as to costs. The various plaintiffs had made a comprehensive offer to settle a companion action and the subrogated OHIP claim, and specified that the terms of the settlement were non-severable. The amount of the OHIP claim was settled early in the trial, such that participation of counsel for the Ministry of Health was minimal. The matter was described as one in which the plaintiffs lacked the resources to fund a lengthy and complex trial, but which ought to have proceeded in the interests of justice. It proceeded largely because the plaintiffs' counsel funded substantial interim expenses.

HELD: The plaintiffs were awarded party and party costs, plus a premium of $100,000 to reflect the measure of success achieved in the action and the risk incurred by the plaintiffs' solicitors. The form of the settlement offer did not warrant an award of solicitor and client costs. There was no award of costs in favour of OHIP. An administration fee was set at four per cent of the value of the funds administered.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, s. 131.

Insurance Act.

Ontario Rules of Civil Procedure, Rules 49.10(1), 49.11(a), 57.01(1), 57.01(3), 57.01(4).

[Quicklaw note: Original reasons for judgment were released February 28, **2001.** See [**2001**] O.J. No. 829.]

Counsel:

B. Hillyer, S. Abraham and D. Wands, for the plaintiffs.
H. Borlack and V. Burns, for the defendant, **Stars** Inc.
G. Swaye, S. Fay and A. Nurse, for the defendant, Bill Parchem.
D. Smith, for the Ministry of Health/O.H.I.P.

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1 **CAVARZAN J.**:— I heard submissions on costs in this matter on Monday, June 4, **2001.** A draft judgment and calculations based on the work of professors Welland and Pesando were filed. Counsel advised that rulings on four issues would facilitate further negotiations. It was agreed that this hearing on outstanding costs issues would continue on Friday, June 15, **2001** at 11:00 a.m.

2 The four issues referred to above are: the scale of costs to be awarded to the successful plaintiffs; whether or not a premium should be awarded; O.H.I.P.'s claim for an award of costs; and the amount of the management fee to be allowed.

3 In my view the plaintiffs are entitled to party and party costs of the action. The comprehensive offer to settle made by the plaintiffs on October 20, 2000, to the defendants Parchem and **Stars** Inc. included an offer to settle a companion action and O.H.I.P.'s subrogated claim, and specified that "the terms of this settlement are non-severable". As such, the offer was not one that was capable of acceptance by either defendant. It is not, therefore, an offer within the contemplation of either subrule 49.10(1) or subrule 49.11(a).

4 I do not see any reason why the Court should exercise its discretion, nevertheless, to award solicitor and client costs. In the absence of a proper offer to settle, it would take exceptional circumstances to prompt an award of solicitor and clients costs. This was an admittedly lengthy and hard-fought trial, but those are not factors which distinguish it from a host of similar trials. I disagree with the suggestion that new law was made. It was evident from the outset that what was at issue were allegations of negligent conduct. Triable issues were raised which the parties litigated vigorously, but fairly.

5 There is merit, however, in the suggestion that a premium should be awarded. The Ontario Court of Appeal in its 1994 decision in Desmoulin et. al. v. Blair et. al., 21 O.R. (3d) 217, was careful to distinguish between cases where the only issue is the quantum of recovery and cases in which there is a very real risk of an adverse finding on the issue of liability. The case at bar presents a curious hybrid in that with respect to non-pecuniary damages the only issue was the quantum of recovery, but with respect to pecuniary damages exigible against non-protected defendants only, there was a very real risk of an adverse finding on the issue of liability. Substantial energy and resources were devoted to making the case that there was liability on the part of the non-protected defendants. A very vigorous and determined defence was mounted by these defendants.

6 The categorization of defendants under the Bill 164 Insurance Act regime is elaborated in paragraphs 220 to 226 of my reasons for judgment released on February 28, **2001.**

7 In my view, the case at bar represents the class of case described in Desmoulin in which the plaintiffs lack the resources to fund a lengthy complex trial, but is a case which in the interest of justice ought to have proceeded. It proceeded largely because of the risk taken by plaintiffs' counsel in funding the substantial expenses in the interim.

8 In Durant v. Blandford, [2000] O.J. No. 378, Chadwick J. considered the following issue at

paragraph 17:

> In fixing the costs in this matter, the issue is whether I am entitled to provide a premium to the counsel for the plaintiff on the party-and-party costs or whether I am restricted to fixing the costs on the limited party-and-party scale.

After considering s. 131 of the Courts of Justice Act and the factors in rule 57.01(1) guiding the exercise of the Court's discretion, and the provisions of subrules 57.01(3) and (4) he reasoned as follows at paragraphs 20 to 24:

> 20. In fixing costs on a strict party-and-party basis the burden of paying the balance of the solicitor-client costs would rest upon the parents of Tim Durant who also have been saddled with the day-to-day responsibility of caring for their badly injured son. It is obvious from the way this matter proceeded the parents did not have the financial resources to even pay disbursements let alone a retainer during this lengthy litigation. In my view, a party-and-party scale of costs would not be appropriate under all of these circumstances.
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> 21. This is obviously not an appropriate case for the award of solicitor-client costs which award is usually restricted to cases where a party has misbehaved or conducted themselves in such a way the court punishes them by way of a full solicitor-client cost order.
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> 22. McLaughlin J. in Young v. Young, [1993] 4 S.C.R. 3 at p. 134 states:
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> > Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties.
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> 23. This leaves the final consideration to a party-and-party cost as between solicitor and client. It is noted that the costs sought by Mr. Cavanagh of $200,000 plus disbursements fall short of the proposed solicitor-client account of $250,000. Mr. Percival in his submissions on behalf of his insured client notes they are paying their policy limits and they should not be required to pay the costs incurred in numerous other issues that were not the responsibility of his client. Mr. Sigouin on behalf of the innkeeper also takes a similar position.
>
> 24. The fact of the matter is Tim Durant is the innocent plaintiff who is now and for the rest of his life has been rendered a mentally incompetent as a result of the combined conduct of the two defendants.

Chadwick J. allowed as a premium the difference between the $200,000 in costs sought by the plaintiffs' solicitor and the $50,000 to $60,000 which it was considered would be the assessed amount of party-and-party costs. The total settlement figure inclusive of costs was 2.3 million dollars in that case, of which 1.6 million had been structured.

9 The Durant case reflects the same concern expressed by Austin J.A. in Desmoulin about the ability of a client to pay the costs of litigation. There was ample evidence in the case at bar about the modest means and circumstances of the **Dryden** family.

10 Given the above-mentioned risk incurred by plaintiffs' solicitors and the measure of success achieved in the action it would be appropriate, in my view, to award to the plaintiffs the sum of $100,000 under this category.

11 O.H.I.P. was separately represented by counsel during most of the trial. The amount of O.H.I.P.'s subrogated claim was agreed upon early in the trial. Mr. Smith's participation in the trial proceedings was minimal. He led no evidence. He cross-examined some witnesses but only very briefly. His participation in the trial has been fairly described as that of maintaining a watching brief for his client. I agree with that characterization. In the circumstances, there ought to be no award of costs in favour of O.H.I.P.

12 On the issue of a management fee for management of the financial affairs of Scott **Dryden,** I agree with the compromise position suggested by Mr. Borlack. The affidavit of Roberto Bawrah, a financial planner with TD Canada Trust, suggests that a management fee of 1% of the value of the funds administered would be adequate compensation. There is a large gap then between 1% and the 6% or so claimed by the plaintiffs. The affidavit is not explicit, however, as to the types of services covered by the 1%. In my view, a substantial contingency factor should be built into this element of the award. I would set the administration fee at 4% of the value of the funds administered.

CAVARZAN J.

cp/s/qlhcc

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