

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *B.M. (Guardian ad litem of) v. R.M.*,  
2011 BCSC 64

Date: 20110121  
Docket: S045078  
Registry: Vancouver

Between:

**B.M., an infant, by his litigation guardian, O.P.**

Plaintiff

And

**R.M. and Her Majesty the Queen in Right  
of the Province of British Columbia**

Defendants

Before: The Honourable Madam Justice Dillon

## Reasons for Judgment

Counsel for the Plaintiff:

R.M. Gibbens, G. Mouzourakis,  
E. Good

Counsel for the Defendant, HMTQ:

A. Dalmyn and E. Ross

Counsel for the Public Guardian and  
Trustee:

W.P. Sokoloff

No appearance by the Defendant R.M.

Place and Date of Trial/Hearing:

Vancouver, B.C.  
January 7 and 11, 2011

Place and Date of Judgment:

Vancouver, B.C.  
January 21, 2011

[1] On January 11, 2011, this Court approved an infant settlement reached in this matter for approximately \$5.35 million. The matter of approval of proposed legal fees of \$1.7 million was left for further argument which was heard on January 11, 2011,

with judgment reserved to this date.

[2] The Public Guardian and Trustee believes that a generous and appropriate legal fee, having regard to all of the circumstances, is no greater than \$1.4 million. The plaintiff's counsel does not take much issue with this position but says that because this case went to the Court of Appeal, but is otherwise similar to the circumstances in ***Delaronde et al. v. HMTQ***, 2000 BCSC 1626 (***Delaronde***), the fees should be higher than \$1.4 million based on the present value of the fees awarded in ***Delaronde***.

[3] Following on 8-day trial, this Court found liability in favour of the infant plaintiff (2009 BCSC 214). An appeal was not successful (2009 BCCA 413). Continuation of the trial to determine damages was not necessary after a mediation resulted in the settlement as described. The Public Guardian and Trustee does not take issue that counsel's hours expended in this action are valued at \$607,320 and that counsel supported disbursements of \$129,564 to achieve success. There was a contingency agreement of 33 1/3% in place with a further 6% contingency fee for the appeal. There is no doubt that the plaintiff would not have otherwise been able to pursue this litigation.

[4] The issues raised in the case were complex as to liability and carried significant risk of no recovery. This risk was compounded with and only resolved by the appeal.

[5] While mediation resolved quantum of damages, this was not without complexity involving benefits receivable under the *Criminal Victims Assistance Act*, S.B.C. 2001, c. 38.

[6] The question is: what is the reasonable fee? (***Harrington v. Royal Inland Hospital*** (1995), 14 B.C.L.R. (3d) 201 (C.A.) (***Harrington***), as quoted in ***Adams v. Emmott***, 1997 CanLII 746 at para. 15 (B.C.S.C.) (***Adams***)). This must be answered, not as a percentage, but in dollars (***Richardson v. Low*** (1996), 23 B.C.L.R. (3d) 268 at para. 35 (S.C.)). Among the factors to consider, listed in ***Harrington*** at para. 210, is that:

A solicitor who undertakes the prosecution of a

difficult case, the prospects of which are uncertain due to various issues such as liability, causation or damages, is entitled to be well compensated in the event the case is brought to a successful conclusion. Such remuneration must be substantial, but not exorbitant, in order to make up for those cases taken by the solicitor on a contingency fee basis which do not result in success.

[7] As acknowledged by the Public Guardian and Trustee, this was a very risky case, especially as far as liability was concerned. Failure meant no recovery. It was not a foregone conclusion that the Court of Appeal would accept the finding of liability in this case. Once the Court of Appeal determined the matter, the risk was reduced but damages assessment was complicated.

[8] Because this case involves an infant who has been seriously handicapped for life, it cannot be forgotten that legal fees affect what is left to provide for the child's care (see **Adams** at paras. 23-50). There is the further reality here that the fees will attract a 12% HST tax. In this circumstance, care must be taken to strike a balance against the reduction in the amount available for future care of the infant because of legal fees, and the skill, expertise and effort expended by counsel in a situation where it is acknowledged by all that a premium is warranted.

[9] **Delaronde** was also a "shaken baby" case in which the Crown was found liable following a 23-day trial. While the trial was longer in that case, it settled without appeal. Legal fees of \$1,347,000 were approved by the Court in 2000, based upon an award estimated at \$5,448,000.

[10] A substantial but not exorbitant fee is warranted here, given the risks on liability and the result achieved for this impecunious family. A proper balance in consideration of the infant child's future care needs and the impact of HST must result in a reduction of the requested amount to a reasonable fee.

[11] Taking into account all of the circumstances, I conclude that a reasonable fee is \$1,475,000.

"Dillon J."

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The Honourable Madam Justice Dillon