

\$250,000 premium in contingency case

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In motions preceding an insurance company's appeal of a \$4-million, jury-trial loss, an Ontario Superior Court judge has granted costs on a substantial indemnity basis plus a \$250,000 premium to plaintiff's counsel, who spent a decade working on the case on a contingency basis.

Alfred Kwinter was sole counsel for three plaintiffs in a hotly contested action against Hamilton Township Farmers' Mutual Fire Insurance Company which ended a year ago with the jury awarding punitive damages totalling \$2.5 million as part of a total award of \$4 million. (See "Jury awards mushroom farmer, tenant \$4M damages," *The Lawyers Weekly*, July 25, 2003.)

Kwinter, a specialist in civil litigation who was called to the bar in 1972, claimed an hourly rate of \$450. He also billed his law clerk's time at \$125 per hour.

Justice Anne Tucker was told the firm of Singer, Kwinter carried the retainer and all costs of the proceeding for 10 years without any guarantee of payment.

The judge reviewed Kwinter's success in all aspects of the complicated, two-month jury trial and noted that plaintiffs had filed three offers to settle. She also held that the insurer had acted in bad faith. Accordingly, she awarded costs on a substantial indemnity basis.

Legal fees (including G.S.T.) claimed by plaintiffs were about \$416,100 and disbursements, \$220,200, for a total of \$636,300.

The defendants did not dispute Kwinter's hourly rate but contested many individual items. For example, the defence argued Kwinter should not be entitled to claim travel and hotel costs as a disbursement. Justice Tucker held that overhead "cannot include travel and hotels, as it is an unknown factor impossible to work into general overhead and dependent on the case, its location and duration."

The defence also contested Kwinter's request for a premium, arguing that one was already built into the contingency rate. Assuming a rate of 30 per cent of the \$4-million verdict, Kwinter would receive \$1.2 million out of the insurance company's payment. The defence submitted that to order payment of a premium would be to give Kwinter not only the benefit for the victory, but also a reimbursement for his risk.

Justice Tucker again sided with the plaintiffs, pointing out that the two personal plaintiffs were left without any home and business.

The jury heard that after a fire on August 13, 1993, destroyed the farm operation in Flamborough Township, north of Hamilton, the insurer rejected the claim, asserting that the fire had been deliberately set. The fire not only destroyed the business enterprise but left plaintiff Frank **Mazza**, his tenant and his family homeless.

Justice Tucker said the insurer gave the plaintiffs no support and immediately rejected their claim, "notwithstanding that no criminal charges were ever laid or any findings of arson ever made by any expert with the exception of one expert many years after the fire."

She said that to date, "Mr. **Mazza** does not have the financial resources to pay to provide for securing of the premises destroyed by fire almost 10 years ago and this by his testimony troubled him greatly."

Wilfred Menninga of Belleville's Templeman Menninga LLP acted for the insurer.

Reasons in **Mazza** v. Hamilton Township Farmers' Mutual Fire Insurance Company, [2004] O.J. No. 3335, are available from FULL TEXT, approx. 24 pp.