SUPREME COURT OF NOVA SCOTIA
Citation: ***Burke v. Snow***, 2019 NSSC 57

Date: 20190212
Docket: 473947
Registry: Sydney

Between:

Anthony Angione, Litigation Guardian of
Braydon Burke and Destiny Burke

Plaintiffs

v.

Austin Snow

Defendant

LIBRARY HEADING

Judge: The Honourable Justice Frank C. Edwards

Heard: January 21, 2019 in Sydney, Nova Scotia

Subject: **Motion for Approval of Infant Settlement**
Approval of Infant Settlements CPR 36.03(2)(b); 36.13
Contingency Fee Agreements CPR 77.14
Compensation for Counsel CPR 77.13

Facts: The child plaintiff, age 11, while inside a marked crosswalk, was struck by the Defendant's motor vehicle. She suffered fractures of both legs and abdominal trauma. Her brother, age 8, was also struck and suffered injuries. Both were airlifted to the IWK in Halifax. Both underwent surgery.

The children's father, a single parent on social assistance, signed an engagement letter/contingency fee agreement with lawyer Duncan MacEachern. The letter provided that Mr. MacEachern would get the greater of 35% of any award or his billed hours at $300.00 per hour. (which he later increased to $360.00 per hour). Payment was deferred until the conclusion of the case. The letter also provided that in the event the litigation was unsuccessful, the client would still be responsible to pay the lawyer for his billed hours.

Mr. MacEachern settled both claims with the Defendant's Insurer. He settled the younger child's claim in June, 2018, and the older child's claim in early September, 2018. In June, 2018, Mr. MacEachern brought a Motion For the Approval of the younger child's Settlement amount. That Motion was granted and Mr. MacEachern's requested compensation of 35% of the award was approved. The lawyer received $31,500.00 plus HST of $4725.00.

In January, 2019, Mr. MacEachern brought the present Motion For the Approval of the older child's (Destiny's) Settlement. The settlement figure for the older child was identical to that reached for the younger child: $70,000.00 in General Damages; $20,000.00 for Diminished Earning Capacity; and $5000.00 Costs for a total of $95,000.00. Mr. MacEachern again requested approval 35% fee or, alternatively, for his billed hours, $19,805.00. (The 35% is calculated on the settlement figure less costs; i.e. $90,000.00).

Issues: (1) Was the settlement in the best interests of the child?

(2) Was the lawyer's compensation claim fair and reasonable in the circumstances?

Result: 1. I adjourned decision on the adequacy of the settlement pending receipt of further medical information.

2. On a provisional basis, I assessed the lawyer's compensation claim to date pending receipt of further medical evidence. I found that the lawyer's claim for compensation was neither fair nor reasonable. Mr. MacEachern was not entitled to 35% of the second child's award. The fee agreement did not comply with the requirements of CPR 77.14. Even if it had, I would not have allowed the 35% flat fee:

> (i) this was a contingency agreement without an actual contingency. Win or lose the lawyer would still get paid. That is not the way it is supposed to be. The lawyer's premium is only justified when he shares the litigation risks with the client. No win = no fee is the standard.
>
> (ii) it did not account for the substantial duplication of effort

in pursuing the claims of the two children.

(iii) there should have been one Motion not two. The motion for each child cost approximately $7000.00 or $14,000.00 for both. A joint motion would have saved each child at least $2000.00 in fees.

(iv) despite the father's stated satisfaction with the agreement, I was not satisfied that Mr. MacEachern had treated him fairly.

I also reduced the claimed hourly compensation from $19,805.00 to $15,300.00. The billed hours actually totalled $15,300.00; $4556.50 had been paid in the June, 2018 motion; $2000.00 should have been saved with a joint motion. Further, because the overall account presented was so unreliable, I was not confident it accurately represented the actual hours spent on Destiny's claim. I resolved that uncertainty in Destiny's favor by further reducing the account balance to $5000.00.

The decision discusses the imbalance in the bargaining power between the typical inexperienced litigant and a knowledgeable, experienced lawyer. It also discusses the interplay between that imbalance and a lawyer's professional responsibility.

Cases Noticed:

Wood v Wood et al, 2013 PESC11

Wade (Litigation guardian of) v Burrell, [2011] N.S.J. No. 105

Lennox v Cantini Law Group, [2009] N.S.J. 156

Table of Contents

SUPREME COURT OF NOVA SCOTIA
Citation: ***Burke v. Snow***, 2019 NSSC 57

Date: 20190213
Docket: 473947
Registry: Sydney

Between:

Anthony Angione, Litigation Guardian of
Braydon Burke and Destiny Burke

Plaintiffs

v.

Austin Snow

Defendant

Judge: The Honourable Justice Frank C. Edwards

Heard: January 21, 2019, in Sydney, Nova Scotia

Counsel: Duncan H. MacEachern, for the Plaintiffs

By the Court:

[1] This is a Motion pursuant to CPR 36.03(2)(b) and CPR 36.13 for the Approval of a Settlement for an Infant Plaintiff. I heard the motion on January 21, 2019. At the conclusion of the hearing, Counsel agreed to provide further material (in particular, witness statements and police reports). He did so by letter dated January 21, 2019, received on January 23, 2019.

Background:

[2] At approximately 10:00 pm on July 4, 2014, the Plaintiff, Destiny Burke, age 11, ([Date of birth deleted]) and her brother Braydon, age 8, ([Date of birth deleted]) were struck by a vehicle driven by the Defendant. At the time of the collision both children were in a marked crosswalk. The collision occurred on a straight stretch of roadway in Glace Bay. There is no evidence regarding lighting in the intersection.

[3] Braydon was wearing dark clothing; Destiny was wearing light clothing. Braydon was riding his bike and Destiny was walking. One witness said the youths were crossing the street slowly and "the girl was within two feet of the boy who was riding his bike." The same witness (John McNeil) did not think the driver had been travelling at an "excessive speed." He says the driver "…started to brake after hitting them…"

[4] Another witness, Ashley Lloyd, felt that the vehicle was speeding; "…she determined the high speed by the sound of the vehicle impacting the children." Ms. Lloyd thinks the speed was over 60 (in a 50 km/hr zone). "The vehicle had travelled approximately a pole length before coming to a complete stop." Both Ms. Lloyd and Mr. McNeil placed the children inside the marked crosswalk.

[5] A third witness, Joseph Wilson, was travelling "approximately one pole length" behind the Defendant's vehicle. He says the Defendant's speed "…was definitely not excessive." Wilson did not see the children before impact.

[6] Unfortunately, it does not appear that police did measurements from the point of impact to where the Defendant's vehicle stopped. (I had asked Counsel to provide all the information he received from police). It is therefore not possible to get a professional opinion re speed short of hiring an accident reconstructionist to attend the scene with the witnesses. Apparently the police did not take a statement from the Defendant who is now deceased.

[7] As a result of the collision Destiny sustained personal injuries and was treated at the Cape Breton Regional Health Care Complex. Shortly after admission to the Regional facility both Destiny and Braydon were airlifted to the IWK in Halifax. At the IWK Destiny underwent surgical treatments, including a closed locked IM nail procedure of the right femur and a flexible nailing of her left tibia.

[8] Destiny was hospitalized for her injuries and eventually rehabilitated. She required the use of both a wheelchair and a walker to eventually gain mobility. Destiny sustained numerous injuries including abdominal trauma, displaced femoral fracture, and displaced shaft fracture of the tibia. She has undergone multiple surgeries and medical treatments which included surgical incisions on both of her legs.

[9] Subject to what I note later, Destiny exhibits no current physical restrictions. Dr. Collicutt, an orthopedic surgeon, recommends that Destiny not engage in a laboring occupation as a future course of occupation.

[10] Anthony Angione is the father of Destiny and Braydon. In his affidavit, Mr. Angione states that he is a single parent whose sole source of income is Community Services Benefits. He estimates his annual income at approximately $15,000.00 (I am unclear whether that figure is or is not in addition to his benefits). Mr. Angione met with lawyer Duncan MacEachern on April 24, 2015. Mr. Angione and the children met with Mr. MacEachern on June 1, 2015.

[11] On June 6, 2015, Mr. MacEachern provided Mr. Angione with what he references in his account as an “engagement letter” re both children. It reads:

Dear Mr. Angione:

RE: Pedestrian – Motor Vehicle Collision – July 27th, 2014 (sic July 4) – Litigation Guardian – Anthony Angione on behalf of Braydon Burke DOB: [deleted] and Destiny Burke DOB: [deleted]

Thank you for consulting the firm of Lorway MacEachern. Our primary objective will be to provide you with best possible legal services to deal with your matter.

In order for the firm to provide the level of service which you would deserve and expect for yourself it is essential that there be no misunderstanding regarding what your financial obligations will be to the firm. My current hourly rate for litigation matters is $300.00 per hour. Legal fees payable at the conclusion of litigation will be the greater of either thirty five percent (35%) of any award successfully negotiated, settled, or litigated on behalf of the client or the solicitor's hourly rate plus HST and disbursement costs. The client shall not be obligated to discharge any legal fees for services until such time as the matter has been concluded.

The client is aware in the event the solicitor unsuccessfully litigates the case the client shall in any event be responsible for the solicitor's hourly rate of compensation as provided herein. (**Bold in original**)

The client is aware any expenditures made by the solicitor shall become the client's responsibility and shall be discharged by the client within thirty (30) days of the settlement of the claim or conclusion of litigation, including the retention of experts, filing of court documentation, payment of discovery transcripts, etc. The service of paralegals are billed out at a rate of $60.00 per hour and associate legal counsel at a rate of $180.00 per hour.

Payment of legal services are (sic) required at the time of completion or settlement or litigation of your case or upon your decision to cease or not to peruse (sic) litigation whether or not damages are awarded to you.

You will be provided with invoices for all billings. **Although the time devoted to your matter is the primary basis for calculation of our fees, our account may be adjusted from a strict time calculation to a figure which provides reasonable compensation for the services performed.** Among the factors that we may consider in determining our fee are the nature, importance, and urgency of the matters involved; the skill, labour and responsibility involved; any contingencies involved; as well as the circumstances and interests of the person by whom the fees are payable. To a large extent, the costs of our representation depend on your instructions as to the conduct of the matter for which we have been retained. (**Emphasis added**)

> I attach with this correspondence a copy of our court's cost and fee schedule which reflects additional court costs which you may be compensated for if successful and for which you (sic) be responsible to the other party in the event is (sic) the case is lost.
>
> Please remember that we are here to assist you through your matter. I have provided you with two copies of this letter. Kindly sign one copy of the letter and return it to me.
>
> Yours respectfully,
> **LORWAY MACEACHERN**
>
> signed
> Duncan H. MacEachern
> DHME/amd
> Encl.
>
> I acknowledge receipt of this letter and I understand and approve the terms set out therein.
>
> signed
> Anthony Angione – Litigation Guardian
> Dated: August 18, 2015

[12] On August 18, 2015, Mr. Angione attended at Mr. MacEachern's office and signed his approval of the terms of the engagement letter.

[13] On June 23, 2017, Mr. MacEachern had Mr. Angione sign an "Amendment to Contingency Fee Agreement – Engagement Letter" wherein Mr. MacEachern increased his hourly rate to $360.00 per hour from $300.00 per hour. Whereas the June 6, 2015, letter applied to both children, this revision was on separate pages, one for Destiny and one for Braydon. Destiny's amendment (which is identical to Braydon's except for the child's name and gender changes) reads:

AMENDMENT TO CONTINGENCY FEE AGREEMENT – ENGAGEMENT LETTER

RE: DESTINY BURKE – MOTOR VEHICLE ACCIDENT – DOL: JULY 4, 2014

I, Anthony Angione, hereby acknowledge I have been informed by my solicitor in the event of settlement or conclusion of litigation of my daughter, Destiny Burke's case, it will be required my daughter's legal fees be approved by a court. As part of this process the court will look at the reasonableness of the legal fee compensation. In this respect I am aware my solicitor will charge the greater of either the contingency compensation or his hourly rate of $360.00 per hour plus paralegals at a rate of $60.00 per hour. I am aware the court will pay particular attention to the amount of time attributed to this matter. As such in the event time attributed exceeds the contingency compensation, my solicitor will be entitled to his hourly compensation and it is this amount that will be presented to the court for approval.

I hereby acknowledge I have agreed to amend the legal engagement of Lorway MacEachern based on this disclosure.

Dated at Sydney, Nova Scotia, this 23rd day of June, 2017.

_____Signed_____ ANTHONY ANGIONE

___Signed_____ WITNESS

[14] The amendment makes no mention of the payment in the event of an unsuccessful litigation clause as set out in the June 6, 2015 letter. Presumably, Mr. MacEachern considers that clause still in force. The amendment is "to" the engagement letter and not in substitution of the engagement letter.

Legal Proceedings Chronology:

[15] On March 5, 2018, this action was started on behalf of both children.

[16] On June 7, 2018, Mr. MacEachern filed a motion for Approval of an Infant Settlement for Braydon. By Order dated June 26, 2018, Justice Murray approved a $95,000.00 settlement of Braydon's claim. (General damages $70,000.00; diminished earning capacity $20,000.00; costs $5,000.00). Justice Murray also approved Mr. MacEachern's account with premium of $31,500.00 plus HST of $4725.00. Braydon's legal fees on a time basis amounted to approximately $20,000.00. As I will discuss later, that amount included time spent on Destiny's claim. In short, Mr. MacEachern requested and received the premium amount of 35% in lieu of his billed hours.

[17] Counsel advised that he believes settlement re Destiny was reached on or about September 4, 2018. He says he decided to await Destiny's sixteenth birthday (December [..], 2018) before making her Approval Motion in order to give her an opportunity to consent to the settlement. (CPR 36.13(4)(b) requires the consent of an infant 16 years of age and older). Counsel filed this Motion for Approval of Destiny's Settlement on January 9, 2019. It included Destiny's consent.

The January 21, 2019 hearing:

[18] Mr. MacEachern has taken some exception to my line of questioning (expressed in his January 21, 2019 letter). I will therefore outline the hearing itself.

[19] I asked for detail on what Counsel had done in order to enable me to make an assessment of fair and reasonable compensation. I asked that, in particular, Counsel focus on the settlement negotiations between himself and the Defendant's insurance adjuster. Counsel noted that he forwarded settlement offers to the adjuster regarding both children on March 3, 2018. The offer for Destiny was all inclusive $140,000.00. On April 6, 2018, Mr. MacEachern says the adjuster made a counter offer of $60,000.00.

[20] Some time prior to June 7, 2018, Counsel settled Braydon's claim. Between June 12, 2018, and September 4, 2018, Counsel continued working on Destiny's claim. His account shows entries on June 12, 2018 (reviewing medical chart), August 22, 2018 (meeting with clients) and August 23, 2018 (3 hrs 15 minutes reviewing 500 page hospital chart). Counsel says September 4, 2018, was the "most likely date" Destiny's claim settled.

[21] I queried Counsel on the reason why two separate motions were made rather than doing both children in a joint motion. Counsel acknowledged that there was no urgency to bring Braydon's motion; all of Braydon's award was going into a GIC until Braydon reached nineteen. The parent was not seeking to have any part of Braydon's award available for some immediate purpose.

[22] Counsel responded that he decided that it would be prudent to wait until Destiny turned 16 on December […], 2018. Counsel felt Destiny had the right to decide whether to consent to the settlement. I pointed out that that would only have meant about a six month delay in bringing Braydon's motion.

[23] Braydon's GIC at current rates would have earned a few hundred dollars between June, 2018 and December, 2018. If Braydon's Motion had been brought jointly with Destiny's, each child would have saved thousands of dollars (I calculate later). In the unlikely event that Destiny did not consent to the settlement, Braydon's Motion could then go forward. He would have lost 6-7 months interest on his GIC. In my view, waiting was well worth the minimal risk. (I calculate later that each Motion cost approximately $7000.00 or $14,000.00 for both)

[24] I noted that each individual motion was complex, expensive and duplicated each other to a significant degree, Counsel's response was that we need a more streamlined process. (Counsel seems to miss the point that he had the option to do substantial streamlining himself but chose not to do so.)

[25] I also tried to get some sense of Counsel's assessment of the risk of a finding of contributory negligence. In Mr. MacEachern's opinion affidavit, Counsel had stated:

> "It is envisioned some contributory negligence argument may be advanced, in view of Destiny being unattended by an adult."
>
> (My question was also inspired by paragraphs 12-16 of Mr. Angione's affidavit which clearly shows that the threat of a contributory negligence finding was key to his approval of the settlement.)

[26] Counsel stated that the only witnesses to the actual impact were Destiny and her brother. As noted, however, there were other witnesses present at the crucial time.

[27] Counsel then embarked upon the theme referenced in his Motion Brief about "lawyers sticking their necks out so the poor can have access to justice." He noted the costs risk to his clients who cannot afford to gamble as insurance companies can. The hearing then proceeded to its conclusion and the exchange to which Counsel appears to have taken exception. The transcription of the latter reads:

> **THE COURT:** Because, frankly, I'm a bit concerned by the level of compensation that you're seeking because there doesn't seem to have been any discount given by you for the fact that there were two individuals involved and I would say there was considerable overlap in the work that you had to do. You said before that they had two separate accounts, well I reviewed the account that you presented to Justice Murray in June and compared it to the one…and I think the first six pages are almost photocopies of one another. Now I could take you through it point by point because what I did, I put the account you gave to Justice Murray here, and mine here, and everywhere I saw a duplication I put a green mark on it and the first six pages as I recall, are pretty green.
>
> **MR. MACEACHERN:** There were separate researching of the medical charts, they were definitely separate.
>
> **THE COURT:** Separate are the medical of course. But the law, even the law in your briefs, I noticed the same different cases are cited for both.

MR. MACEACHERN: No, that's not fair. There are different cases in that brief, they're not all the same.

THE COURT: I don't want to be unfair.

MR. MACEACHERN: I can certainly, when I send my motor vehicle accident reports over that I have, I can certainly highlight the cases before you that Mr. Murray had, ah, Justice Murray.

THE COURT: Okay, wait now. I'm looking at the brief that you gave to me and in that brief you cited *Melanson & Robbins*…

MR. MACEACHERN: The Book of Authorities is what would have all of the cases, so in the Book of Authorities I believe there is the decision of *Wade v. Burrell*.

THE COURT: Yeah, that's in both. But fair enough, I'll have a look at the Book of Authorities, but I was looking at your briefs, the brief presented to Justice Murray, the brief presented to me, and you cited *Melanson & Robbins*, you cited *Leslie v. S & V Apartments*, you cited *Basque v. St. John City*…

MR. MACEACHERN: My Lord, I'll look at the Book of Authorities and hopefully…

THE COURT: You know, all those cases were cited in both so which reinforces the point I was making that to my mind, this case called for a discount but I don't see it, it's exactly the same pitch made by you in each of them. Anyway, Mr. MacMullin…

MR. MACEACHERN: So, My Lord, if I may, so just on this one, I'll get you the comparison in the Book of Authorities, any notations with regard to the cases distinguishing that there was additional case law reviewed and I'll get the motor vehicle accident reports. Those are the two documents, correct?

THE COURT: Thank you.

The January 21, 2019 Response Letter:

[28] As promised, Mr. MacEachern provided me with a letter and enclosures dated January 21, 2019. The letter is 3 ½ pages in length. The last page and a half reads:

In conclusion, it is hoped this honourable court will give due consideration that the function of contingency agreements is to provide an incentive for members of the private bar to undertake cases on behalf of those that cannot afford to litigate. When scrutinizing compensation based on a percentage the court must be cognizant that when members of the private bar are unsuccessful in their efforts they are left without any recourse to retrieve their fees. Thus, payment of a premium based on a contingency over and above hourly rate must be recognized by the judiciary as to provide compensation to offset losses, which are inherent in engaging in litigation.

Simply engaging in an arbitrary reduction of fees as a result of an overzealous application of the reduction of legal fees based on an analysis of the hourly rate may cosmetically look at first blush to be a proper intervention of the judiciary, when in reality it is a direct attack on legal fees for which allows the private bar to fund cases for which a successful outcome may not be achieved.

At the end of the day the compensation provided the greater of a flat fee of 35% of the award or the hourly rate. There is absolutely no suggestion that Mr. Angione was in any way forced to enter into this agreement on behalf of his daughter nor is there any indication to suggest the arrangement was unfair. To impute wrongdoing is grossly unfair. Compensation is sought upon the contracted amount of 35%.

In conclusion, to impute negative inferences upon the conduct of counsel, given the clear and unequivocal payment scheme it is submitted to be unwarranted, to the contractual relations for which counsel has arranged with his clients.

Having said this, it is recognized there are occasions where fees can be so excessive so as to warrant judicial intervention. It is submitted this is not one of those cases and clearly reflects the compensation which has been negotiated.

In this case the compensation was set at the greater of 35% or the hourly rate. To intervene with the contractual arrangement amounts to maintaining that contingency compensation structures are on the face inherently unfair to plaintiffs. Fairness also demands the risk associated with any litigation reflect a premium upon fees be available to the private bar to recognize the significant loss they may incur when litigation is not successfully concluded.

It is acknowledged the first six and a quarter pages of the billing attributed to Destiny Burke reflect an overlap of services rendered in regard to service on behalf of her brother, Braydon. By calculation $9,113.00 in respect to services rendered for both Braydon and Destiny would reflect an allotment of approximately $4,556.50 attributable to Braydon and $4,556.50 attributable to Destiny Burke. In all other respects the services performed after April 6, 2018 are unique to Destiny Burke only and do not constitute any billings or overlap in respect to Braydon.

It should be pointed out the total legal fees in respect to the account of Destiny Burke was $19,805.00 plus HST, materials, supplies, disbursements, whereas legal fees in respect to Braydon reflected $22,073.00. This difference in fees amounts to $2,268.00 which I submit reflects savings associated with utilizing information gathered for Braydon's case. Notwithstanding, should this honourable court

> entertain a reduction of $4,500.00 in respect to overlap for fees the account inclusive of disbursements would still approach slightly less than $20,000.00.
>
> It is submitted the case law in respect to analysis of contingency agreements reflects the judiciary have traditionally provided a premium be available over and above actual time on an hourly basis. It is submitted the contracted amount of 35% is reasonable and the premium over the hourly rate is not unreasonable and is consistent with case law in Nova Scotia.
>
> Lastly, some justices in Nova Scotia exhibit a proclivity for reducing legal fees when reviewing contingency compensation. Although I am a vocal advocate against such an approach, I believe a reduction of fees can be achieved without casting allegations of improper conduct towards counsel. The time attributed to this matter was significant. The utilizing of time billings is for the court to gage whether or not the court recognizes the percentage to be reasonable, if not, the court applies a premium over the hourly rate, for which is less than the percentage of compensation contracted but more than the services attributed to the file on an hourly basis.
>
> All of which is respectfully submitted.

[29] Later, I shall address some of the contents of the above letter.

I. Settlement Amount and Request for Further Medical Evidence

[30] I am satisfied that Counsel has considered the appropriate caselaw on general damages. Before I sign off on the $70,000.00 general damage award, however, I will require some additional medical information.

[31] In paragraph 4 of his Motion Brief, when listing Destiny's injuries, Counsel included "abdominal trauma" along with the leg fractures. On page 2 of his September 20, 2017 report, Dr. Collicutt notes that his review of the IWK chart revealed:

> "…There were concerns about abdominal trauma, but ultimately this was managed conservatively."

[32] In his statement of account, Mr. MacEachern notes a meeting on August 21, 2018 with Destiny and her father to discuss Destiny's medical condition. That entry reads in part:

> "…she is currently employed as a childcare worker looking after 4-5 year old; only takes advil; 1x per month for her pain in her belly if hurting or exerting."

[33] I have no medical evidence relating to Destiny's abdominal trauma. In view of the foregoing, I will require a report from Destiny's family physician regarding her abdominal trauma. Counsel's August 21, 2018 notation seems to imply that Destiny's "pain in the belly" is not an isolated incident. In the circumstances, I see no downside in having Destiny pay a visit to her family physician. Is there a possible causal link between the belly pain she reported on August 21, 2018 and the July 4 2014 collision? If there is any uncertainty on that question, the family physician may wish to refer Destiny to a specialist. In that case, I will require a report from the specialist.

[34] As well, I want Counsel to request Dr. Collicutt to provide, if he is able to do so, more detail about why he believes Destiny:

> "…should not embark on a laboring occupation in the future. Re: should remain in school and educate herself such that she has a good occupation that is not based on her physical skills. Truly she will have near normal functioning long-term that this might lead to some diminished physical capacity of a minor degree over time. For now, she has normal function as best as I can determine." (Dr. Collicutt's Sept 20, 2017 report pp. 3-4)

[35] The requested medical information may also have a bearing on the diminished earning capacity figure. I am therefore adjourning the matter pending receipt of the additional medical reports. Another Court appearance may not be necessary. Counsel should forward the new reports directly to me upon receipt. I will then provide direction.

II Counsel's Compensation:

[36] Despite the adjournment, I intend to make a provisional assessment of Counsel's requested compensation. Accordingly, I will determine what Counsel is owed on an hourly basis as of January 21, 2019.

(A) The Law and Applicable Civil Procedure Rules

[37] In ***Wood v Wood et al***, 2013 PESC11 at para 13, Justice Mitchell states:

> **13** What must be remembered about contingency fee arrangements is that the policy reason behind them is that they allow those of modest means to pursue legitimate litigation which they would be financially unable to do otherwise. The higher fees that the lawyer receives is justified by the fact that the lawyer shares in the risk of the litigation. A contingency fee arrangement should not be the automatic default fee arrangement. Clients must understand not only the nature of a contingency agreement but also the possible alternative options as it will sometimes be in the client's best interests to opt for a more traditional fee arrangement. In cases where the client, with knowledge, chooses a contingency fee agreement and the risk is low, the contingency percentage should reflect that fact. In this Province, what little guidance there is concerning contingency agreements is contained in Rules 57.08 to 57.12.

[38] Our rule governing contingency agreements is *Civil Procedure Rule* 77.14. It reads:

Counsel's fees and disbursements: contingency fee agreement

77.14 (1) A client may make an agreement with a lawyer under which payment for all or part of the lawyer's services or disbursements in a proceeding is conditional on success.

(2) A contingency fee agreement may provide for payment of a reasonable amount to compensate for services and the risk taken by the lawyer, and the amount may be based on a gross sum, a percentage of the amount recovered, or any other reasonable means of calculation.

(3) A litigation guardian, a guardian under the *Guardianship Act*, a statutory representative, the representative of an estate, or a power of attorney may enter into a contingency fee agreement on behalf of a represented party or estate and a payment due under the agreement may, with approval of a judge, be made out of proceeds of a claim advanced for the represented party or estate.

(4) A contingency fee agreement must be in writing, be dated and signed by each person who makes the agreement, and contain all of the following:

(a) the names and addresses of the lawyer and each client bound by the agreement;

(b) a concise description of the client's claim;

(c) a condition prescribing the contingency upon which services or disbursements are to be paid;

(d) a term providing for any part of the services or disbursements the client is required to pay regardless of the contingency, or providing that there are no such services or disbursements;

(e) a term providing the amount to be paid on the contingency expressed either as a gross sum or by a stated formula;

(f) the responsibilities of the parties if the solicitor and client relationship terminates before the claim is settled or determined;

(g) a statement that the client has the right to have the agreement and any payment due under it reviewed for the reasonableness and necessity of the charges by an adjudicator under the *Small Claims Court Act* or a judge.

(5) A lawyer must do all of the following after a contingency agreement is signed and dated by the parties:

(a) immediately deliver a copy to each client;

(b) place the original in a sealed envelope;

(c) after the envelope is sealed, keep it so that it can be produced on order of an adjudicator under the *Small Claims Court Act* or a judge.

> **(6)** A lawyer may seek payment under a contingency agreement only if the agreement conforms with Rule 77.14(4) and the lawyer complies with Rule 77.14(5).

[39] In ***Wood***, Justice Mitchell elaborated upon the reasons for the rule. At paragraph 15, he wrote:

> **15** A typical litigant knows nothing of the litigation process, does not know what constitutes a fair and reasonable fee, does not know what expenses to expect nor what sort of damage award he/she might reasonably expect. The lawyer, on the other hand, is the one with all the experience and knowledge. The onus, therefore, must always be on the lawyer to prove that the client understands and appreciates the nature of the contingency agreement and that, in the circumstances of the particular case, the contingency fee was fair and reasonable. Contingency agreements were not intended to put extra fees in lawyers' pockets for those cases where there is little or no risk.

[40] At paragraph 21, Justice Mitchell said this:

> **21** I have seen, and would not approve, contingency fee agreements where the client was to pay 20% of the settlement figure before discovery and 25-30% after discovery. Such an agreement, which allows for maximum percentage after discovery and nothing additional for trial, puts the potential for conflict between counsel and litigant at a dangerously high level. That is, there is zero incentive for counsel to go to trial as all counsel's money has been earned at the discovery stage. Discoveries are not trials. They are a necessary step before trial. Such an agreement may well see counsel encouraging the litigant to accept a settlement figure less than what would be reasonable because everything after discovery is all risk to the lawyer and no reward. In addition, when one takes the maximum percentage after discovery, one is doubtless paid more than the risk would merit. However, whatever amount agreed upon must fairly represent the risk and work of the lawyer and must be a decision made by a well-informed client.

[41] *Civil Procedure Rule* 77.13 provides guidance in the assessment of Counsel’s fees and disbursements generally.

Counsel's fees and disbursements: entitlement and assessment

77.13 (1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.

(2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:

(a) counsel's efforts to secure speed and avoid expense for the client;

(b) the nature, importance, and urgency of the case;

(c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;

(d) the general conduct and expense of the proceeding;

(e) the skill, labour, and responsibility involved;

(f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.

[42] In ***Wade (Litigation guardian of) v Burrell***, [2011] NSJ No. 105, Associate Chief Justice Smith states the following at paragraph 27:

[27] What then does the Court take into account when deciding whether the fee sought is fair and reasonable? In my view, there is no precise answer to this question. The matters that the Court will take into account when determining whether a fee is fair and reasonable may vary depending upon the circumstances of the case. In this case, the salient factors are:

(a) The time and effort required and spent;

(b) The complexity and importance of the matter;

(c) Whether special skill was required and provided;

(d) The results achieved;

(e) The terms of the Contingency Fee Agreement entered into in relation to this matter;

(f) The circumstances of the person who is to pay counsel or of the fund out of which counsel is to be paid;

(g) The amount of the settlement;

(h) Who is to receive any award of costs; and

(i) The risks involved in pursuing the matter.

(B) Analysis of Counsel's Contingency Compensation Claim:

[43] First, I want to make it clear that my decision is not a comment upon Justice Murray's disposition of the June, 2018 Motion regarding the first child. I reference the earlier Motion only to the extent that it is relevant to Counsel's conduct of Destiny's claim.

[44] What piqued my interest in this Motion was the realization that Counsel was back just months after the first Motion seeking the same premium fee for an identical monetary reward for the second child. In doing so, Counsel had not indicated any discount in his requested fee despite apparent duplication of effort with each child. Justice Murray had no such alert.

[45] Second, I have no problem with contingency fee agreements. I unreservedly endorse Justice Mitchell's comments with respect to them. I have heard infant settlement motions a few times a year for over twenty-six years. They have often involved contingency fee agreements. I do not recall ever having to disallow one. That says much about the high quality of the work it has been my privilege to assess.

[46] What caught my attention in this contingency agreement was the pay-if-you-lose clause. Counsel was going to get paid no matter what the outcome. As noted, the June 6, 2015 "engagement letter" contains the following sentence in bold:

> **"The client is aware in the event the solicitor unsuccessfully litigates the case the client shall in any event be responsible for the solicitor's hourly rate of compensation as provided herein."**

[47] I have not previously seen such a clause in a contingency agreement.

[48] *Civil Procedure Rule* 77.14(1) permits contingency fee agreements that are "…conditional on success." The lawyer and the client share the risk; no success=no fee. I am hopeful that the pay-in-any-event clause in this case in unique. This clause is contrary to both the spirit and the letter of CPR 77.14. The lawyer here may not get his 35% if the litigation fails but he will get his $360.00 an hour. The only one who takes all the risks is the client.

[49] To be fair, 77.14(4)(d) does permit a term providing for "any part" of the services the client would have to pay regardless of the contingency. That type of clause is appropriate for example, in a very complex case which was going to require hundreds of hours of a lawyer's time or in a case where the risk of an unsuccessful outcome is high. There may be other situations where a lawyer would justifiably seek to recover some of the cost of his or her time. I am satisfied that 77.14(4)(d) does not sanction Mr. MacEachern's stipulation for full payment in any event. It is not a term providing for "…any **part**…" of the lawyer's services. It is a term requiring payment in full.

[50] The situation here is about as low risk as a lawyer is going to see. Two children in a marked crosswalk struck by a driver who, if not speeding, was probably not exercising due care and attention. There is no evidence that the children darted unexpectedly into the path of the oncoming vehicle. In fact, two witnesses have the children inside the crosswalk. One of them says the children were moving slowly. It was 10:00 pm but the female child was brightly clothed. The collision occurred in a 50 km/hr zone on a straight stretch of roadway in Glace Bay.

[51] An "unsuccessful litigation" in this case would be a very low award for the children. Though anything is possible, it is difficult to envisage a situation where the children would do worse. In the unlikely event of a very low award, Counsel ensured that he was covered. He preserved his right to his hourly rate which conceivably could have seen most, if not all, of any low award go to him.

[52] The contingency fee agreement in this case does not comply with the requirements of CPR 77.14(4) or (5). In particular, the initial engagement letter makes no reference to Mr. Angione's right to have the agreement reviewed by a judge or an adjudicator of the Small Claims Court. [Required by 77.14(4)(g)]. It could be that Mr. MacEachern simply did not have the inevitable infant settlement in mind when he had Mr. Angione sign the letter in June of 2015. Whatever the

reason, this document alone was in effect for two years until it was amended (but not replaced) in June of 2017.

[53] By June of 2017 the eventual infant settlement review is clearly on Mr. MacEachern's radar. He is "aware that the court will pay particular attention to the amount of time attributed to this matter." (See Amendment para. 13 above). He appears to want to ensure that if the Court rejects the 35%, he will still get adequate compensation.

[54] The amendment alerts Mr. Angione to the upcoming court approval process. It also secures Mr. Angione's agreement to raising Mr. MacEachern's hourly rate to $360.00 per hour. And it secures Mr. Angione's commitment to approve the greater of the 35% and the hourly rate billing.

[55] The amendment does not bring the combined agreement into line with CPR 77.14(4)(g). The amendment does not put Mr. Angione on notice that he has the free-standing right to challenge the lawyer's requested fee. On the basis of the information available to him, Mr. Angione has little choice but to sign.

[56] The combined agreement also violates 77.17(4)(c) which provides that the agreement must contain

> "a condition prescribing the **contingency** upon which services or disbursements are to be paid." (Emphasis added)

[57] The 35% fee is contingent upon the successful negotiation or litigation of any award. That contingency is effectively negated by the pay-if-you-lose clause. For the lawyer there is little contingency remaining. That is especially so given the lawyer's right to take the greater of the 35% or the billed hours. Potentially, the billed hours (especially at $360.00 per hour) could have exceeded the 35%. The lawyer's risk of losing anything was slim. No matter what happened Mr. MacEachern ensured that he would be paid in full. There was therefore no contingency within the meaning of Rule 77.14(4)(c).

[58] As I have demonstrated, this contingency agreement does not conform with Rule 77.14(c) or (g). It is therefore caught by Rule 77.14(6) which reads in part:

> A lawyer may seek payment under a contingency agreement only if the agreement conforms with Rule 77.14(4)…

[59] Mr. Angione is a single parent on social assistance with a very low annual income. He obviously is concerned about the best interests of his children. I have no information about his level of education.

[60] Reading his affidavit, I am satisfied that Mr. Angione is the typical litigant whom Justice Mitchell spoke about in ***Wood***. Mr. Angione would know nothing of the litigation process, would not know what constitutes a fair and reasonable fee,

would not know what expenses to expect nor what sort of damage award he might expect for his children. I would add that it is clear that he implicitly trusts his lawyer and believes the lawyer has done the lawyer's best for him and his children.

[61] Again, as Justice Mitchell points out, the lawyer Mr. MacEachern is the one with all the experience and the knowledge. Mr. MacEachern says that he has been practicing for thirty years. The onus is on him "…to prove that the client understands and appreciates the nature of the contingency agreement and that, in the circumstances of the particular case, the contingency fee was fair and reasonable" (***Wood*** para 15). That onus would be impossible to discharge in this case. For the reasons already stated, and for those to which I will refer later, this agreement is neither fair nor reasonable.

[62] In his January 21, 2019 letter, Mr. MacEachern stated the following:

> …There is absolutely no suggestion that Mr. Angione was in any way forced to enter into this agreement on behalf of his daughter nor is there any indication to suggest the arrangement was unfair. To impute wrongdoing is grossly unfair. Compensation is sought upon the contracted amount of 35%
>
> In conclusion, to impute negative inferences upon the conduct of counsel, given the clear and unequivocal payment scheme it is submitted to be unwarranted, to the contractual relations for which counsel has arranged with his clients.
>
> …I have presented a claim for 35% contingency compensation, no more or less than what was contracted.

[63] These statements demonstrate that Mr. MacEachern does not recognize the huge imbalance in the bargaining power between himself and Mr. Angione. Mr.

MacEachern seems to be suggesting that his arrangement with Mr. Angione should be treated as if were a commercial service contract negotiated between two equals.

[64] This is not an unqualified commercial transaction where it may be fair game for one party to maximize his profit if he can get the other party to agree. This is an agreement between a professional and an inexperienced trusting individual. The professional has a professional obligation not to take advantage (or appear to take advantage) of the other party.

[65] Consider Mr. Angione's position. He does not have the financial ability to hire a lawyer. He has two seriously injured children for whom, as their parent, he wants justice. He hires Mr. MacEachern. For all Mr. Angione knows, the 35% may be as good a deal as he would get anywhere. What he does know is that now he has someone who will pursue his children's claims. Mr. Angione may harbour some unspoken reservation about the lawyer's fee, but he probably feels he has no choice. Mr. Angione is going to agree to whatever Mr. MacEachern puts in front of him. If there is any doubt about that, consider the June 23, 2017 amendment to the contingency fee agreement.

[66] At the time of the amendment (June 2017), this is the situation: In year 2 of a 4-5 year contract (being the usual anticipated minimum length of such proceedings) one party decides that he wants to change a fundamental term of the

contract, the hourly rate. There have been no unanticipated developments or complications in the case. In fact, the party wanting the change has only taken care of the necessary preliminaries. In two years he has worked less than 8 hours on the file. The bulk of his work is yet to be performed.

[67] If this were an ordinary commercial service contract the other party would, in no uncertain terms, tell the requesting party that the change was not on. But Mr. Angione was clearly in no position to do that. As far as Mr. Angione was concerned, Mr. MacEachern held the financial lifeline for Mr. Angione's children. Though he may have been taken aback by the amendment, Mr. Angione was in no position to challenge it. He would have known that, if he fired Mr. MacEachern, he would have to pay him for the work-to-date in addition to what he would have to pay a new lawyer (if he could find one to take the case). After two years he would have to start all over. And, undoubtedly, Mr. Angione probably still trusted that Mr. MacEachern would deliver. It is therefore not surprising that Mr. Angione signed his approval to the amendment. Mr. MacEachern had the upper hand and he used it.

[68] In his affidavit Mr. Angione does confirm that he is not opposed to an award of legal fees of 35%. He confirms that that is what he agreed to. At paragraphs 17 and 18, he states the following:

> 17. I have reviewed my solicitor's statement of account annexed hereto as Exhibit "4" by the commissioner swearing me to this my affidavit**. I have reviewed carefully the report and do not observe any discrepancies in respect to the allocation of time** and I verify the terms of my retainer with the law firm of Lorway MacEachern and payment in this case would be the greater of thirty five percent (35%) of damages awarded or legal services as expended on an hourly basis; (**Emphasis added**)
>
> 18. **I have reviewed the account of Duncan H. MacEachern which verifies his legal fees to date are currently approaching $20,000.00 on a time basis.** I am also aware compensation would, if approved by the court, be fixed at 35% of $90,000.00 which would be greater than the time amount provided. I understand the amount for legal fees shall be fixed by this honourable court and the account of my solicitor will be subject to approval of court order. **I am not opposed to an award of legal fees of thirty five percent (35%)** of Ninety Five Thousand ($95,000.00) as this reflects my initial agreement in respect to payment of legal fees; (**Emphasis added**)

[69] I question why Mr. Angione would think that a flat 35% fee was acceptable when the standard for settling a claim with an adjuster before discoveries would be more like 20%. (***Wood*** para 21). (See also ***Lennox v Cantini Law Group***, [2009] NSJ 156). Like most people, Mr. Angione would not know that.

[70] Also, with no disrespect to Mr. Angione, I question his ability to review and critically assess his lawyer's account. That account is ten pages long and would be a formidable slog for most reasonably intelligent but legally inexperienced clients. (Later, it will be evident that I found my review of the account to be daunting). Mr. Angione says that when he reviewed the account he did not observe any discrepancies in respect to the allocation of time. As I will point out, and as Mr. MacEachern has now acknowledged, there are significant discrepancies in the time allocations respecting each child.

[71] I want to emphasize that I am not finding fault with anything Mr. Angione did. Nor am I in any way questioning his intelligence. He did nothing wrong. He was acting at all times with the best interests of his children at heart. He had every right to believe he could completely rely on his lawyer. Any criticisms I make are directed solely at the lawyer.

[72] I refer to Justice Mitchell's observations in paragraph 21 of ***Wood*** where he speaks to the need for a graduated payment scale in a contingency agreement. (See also ***Lennox*** *supra*). There has to be some incentive for the lawyer to take the case to the next level, be that to discoveries or to trial. If the lawyer can get his 35% premium by settling with the adjuster, there is little incentive to take the case to discovery let alone to trial. As Justice Mitchell noted, an agreement like that could well see Counsel encouraging his client to settle earlier in the process than is in the client's best interests. I cannot say that that is what happened here. Barring any additional medical evidence, this settlement may be reasonable.

[73] There are no doubt times when a lawyer gets a good offer early on and, after assessing all the risks, quite appropriately advises his client to accept. The point is that the flat fee percentage premium sets up the risk (and the temptation) for the lawyer to settle too soon.

[74] The fact that the lawyer will still get his hourly rate if he continues with the case is not necessarily an incentive to continue. Getting an hourly rate is not a premium. Nor do I accept that the prospect of a percentage of a potentially larger settlement figure is sufficient incentive for the lawyer to proceed further. With a fixed percentage, the lawyer's cost/benefit analysis risks turning on what is the maximum return for the lawyer. The potential risk of a conflict between the interests of the client and those of counsel are too high.

(C) Fair and Reasonable Compensation:

I will now consider the factors other than the contingency fee agreement which can be weighed when assessing fair and reasonable compensation. (***Wade*** *supra* para. 27).

(a) Time and effort required and spent:

[75] Mr. MacEachern says that his fees re Destiny calculated on a time basis amount to $19,805.00. At the January 21, 2019 hearing he maintained that he kept separate accounts for Destiny and Braydon. When I questioned him on that, he acknowledged in his subsequent letter that there was an overlap of services to the tune of $9113.00. In his view, Destiny would therefore be entitled to a credit of $4556.50.

[76] It is not that simple. The entries totalling $9113.00 were included in the June 6, 2018 account Mr. MacEachern submitted to the Court at the motion hearing re Braydon. Mr. MacEachern used the June 6, 2018 account (including the $9113.00 amount) as leverage for the premium he sought (and received) in June, 2018. In paragraph 48 of his June 2018 Motion Brief he stated:

> "It is respectfully submitted although the legal fees in this case slightly exceed $20,000.00 on an hourly basis, the provision of a premium over this amount would not be unreasonable…"

[77] In the last paragraph of his January 21, 2019 letter he states:

> "The utilizing of time billings is for the Court to gage whether or not the Court recognizes the percentage to be reasonable…"

[78] The smaller the gap between the billed hours and the requested premium, the more reasonable the requested premium appears to be. In June, 2018 the duplicated billing to the tune of $9113.00 was used by Mr. MacEachern to shrink that gap, and thereby enhance his chance of getting the requested premium.

[79] Mr. MacEachern has therefore already been paid **in full** for the billings totalling $9113.00 even though he now admits that one half that figure applied to Destiny. By now giving Destiny credit for one half the $9113.00 figure, he is in effect asking me to allow him to be paid again for the other half. Clearly, he is not entitled to do that.

[80] A specific example may clarify the foregoing. In the June 6, 2018 account re Braydon's claim, and included in the $9113.00 figure, is an entry for March 3, 2018. It reads:

> To review case law re: to develop quantum claim for Braydon; to review case law and prepare book of authorities; to review cases; to prepare draft settlement proposal; 4 hrs 20 min …….$1560.00

[81] Keep in mind that that $1560.00 for 4 hours 20 minutes work performed on March 3, 2018 was part of the total account used to persuade the Court to grant the 35 per cent premium. Fast forward to the January 9, 2019 account re Destiny's claim. The entry for March 3, 2018 reads:

> To review case law re: to develop quantum claim**s** for **Destiny and** Braydon; to review case law and prepare book of authorities; to review cases; to prepare draft settlement proposal; 4 hrs 20 min ……$1560.00 (Emphasis added)

[82] Note that the only difference in the two entries is the pluralization of the word 'claim' and the insertion of Destiny's name and the word 'and'. Clearly, in his January 9, 2019 account, Mr. MacEachern is seeking payment for the same 4 hrs 20 minutes for which he was already paid in June, 2018. With his belated acknowledgement of the account duplication, Counsel is seeking to be paid again for half the same 4 hrs 20 minutes. He cannot do that.

[83] There are other anomalies in the accounts which are puzzling. I do not intend to review all of them. In both the June, 2018 and the January, 2019

accounts, there is an entry dated March 2, 2018 for identical work totalling 1 hour 20 minutes. In the June account re Braydon, that time is appropriately cut in half so that Braydon is charged $240.00 for 40 minutes. Inexplicably, Counsel charges Destiny $480.00 in the January, 2019 account for the same full 1 hr 20 minutes. Obviously, he has already been paid (as of June, 2018) for one half the $480.00 figure. He is not entitled to be paid again.

[84] Mr. MacEachern offered no reasonable explanation for making two motions rather than one. The account shows charges of just under $7000.00 related to Destiny's Approval Motion (See entries between October 19, 2018 and January 8, 2019). Presumably, Braydon's cost about the same. The cost of both applications was therefore approximately $14,000.00

[85] There is considerable overlap and duplication in much of the documentation pertaining to each Motion. For example, five of the eight cases cited in Destiny's Book of Authorities were also cited in Braydon's Book of Authorities. Those five cases are also quoted in each Motion Brief. The various affidavits and the briefs reveal substantial duplication.

[86] In June, 2018, I am satisfied that Mr. MacEachern knew that settlement of Destiny's claim was probably in sight. He was at least aware that the potential cost benefit for the children favored waiting a few more months before bringing

Braydon's Motion. I am satisfied that most lawyers in Mr. MacEachern's position would have delayed making Braydon's Motion.

[87] I am further satisfied that a joint motion for both children would have reduced the $14,000.00 figure to at least $10,000.00. Each child would therefore have saved at least $2000.00 in fees. [CPR 77.13(2)(a) enables me to consider Counsel's effort (or lack thereof) to avoid expense for the client.]

[88] Mr. MacEachern submitted that his premium was reasonable because he carried the case for almost four years. A review of his accounts shows that the total time charged for 2015, 2016, and 2017 is approximately 8 ½ hours (only ½ attributable to Destiny). There is nothing particularly unusual about that. In personal injury cases, it normally takes years to determine what the after-effects of the injuries may be. It is therefore prudent to put the legal proceedings on hold until the medical evidence gels. The point is that it was no excessive burden on Mr. MacEachern to have this file open for four years. His outlay for disbursements was negligible. The one major disbursement ($800.00 for Dr. Collicutt's report) was previously reimbursed by the insurer.

[89] The majority of Counsel's work was done in 2018. As noted, Braydon's claim was settled by June, 2018 and Destiny's by September, 2018. The account shows that Counsel billed 46 hours for Destiny in 2018. At $300.00 per hour (I

would not allow $360.00) that equals $13,800.00. If I add one half the 8 ½ hours work billed for both children between 2015-2017, the total hours billed in Destiny's account equal 51 for a monetary total of $15,300.00. He has already been paid $4556.50 for Destiny (the June 2018 Motion). Destiny's subtotal is therefore $10,743.50 ($15,300.00 - $4556.50). I would reduce the subtotal by a further $2000.00 being the minimum savings that could have been achieved with a joint motion. On an hourly basis, Mr. MacEachern would therefore be entitled to $8,743.50. However, considering the state of Mr. MacEachern's overall account, I am not confident that it accurately reflects the exact time spent on Destiny's claim. I am resolving that uncertainty in Destiny's favor. I therefore am reducing Mr. MacEachern's outstanding hourly entitlement to $5000.00

(b) The Complexity and Importance of the matter

[90] This was a fairly straightforward case in both terms of the liability and damage issues. Barring any new revelations in the requested additional medical reports, there was nothing complex.

[91] Obviously, the case is very important to Mr. Angione and his children.

(c) Whether special skill was required and provided

[92] No special skill was required beyond what one would expect from any reasonably competent personal injury lawyer.

(d) The results achieved

[93] Assuming for the moment that there will be no new medical evidence, the results achieved may prove to be reasonable in the circumstances. My feeling is that most lawyers would have pushed harder and not have settled so early. The first reported settlement discussions were in March, 2018 with Braydon's claim settled by June 2018 and Destiny's by September 2018.

(e) The fund out of which counsel is to be paid

[94] I am satisfied that the award will be sufficient to pay counsel appropriate compensation.

(f) The amount of the settlement

[95] Provisionally, and despite my reservations about Counsel's effort and negotiating strategy, the award may be fair and reasonable.

(g) Who is to receive any award of costs

[96] The client will receive the $5000.00 costs award.

(h) The risks involved in pursuing the matter

[97] As previously discussed, the risks involved in pursuing this matter were minimal.

(D) Summary and Conclusions

[98] After considering all the relevant factors, I have concluded that Mr. MacEachern's requested fee is not fair and reasonable compensation in the circumstances of this case.

[99] I am satisfied that his contingency fee of 35% is excessive and unfair. In any event, the contingency fee agreement does not comply with CPR 77.14 (4). Mr. MacEachern is not entitled to seek payment under it.

[100] I have also outlined why I believe Mr. MacEachern's submitted hourly account is not an accurate reflection of the actual work performed on Destiny's claim. Accordingly, as previously noted, I have provisionally assessed Mr. MacEachern's compensation balance to date on an hourly basis at $5000.00 plus HST of $750.00 and disbursements of $503.86.

[101] This case is disturbing on a number of levels. Mr. MacEachern demonstrates no contrition. In fact, he appears to be indignant about being questioned about his work and, in particular, about his account. He does not appear to recognize the Court's role in analyzing the evidence before it in order to ascertain what is in the best interests of the child. [Rule 36.13(6)]. He clings to his contractual right.

[102] Most disturbing, and perhaps of most far reaching consequence, is his attempt to veil his self-serving engagement letter as a noble attempt to give the poor access to justice. The public must understand that this is not a typical contingency fee agreement. This agreement would not be acceptable to the vast majority of practicing lawyers.

[103] Most contingency agreements commendably provide the financially disadvantaged with access to justice they could not otherwise afford. Most lawyers in this line of work accept the litigation risks along with their clients. Sometimes they win big and sometimes they take heavy losses. Regrettably, Mr. MacEachern's conduct of this case may reflect badly and unfairly upon others in the profession.

[104] I am concerned that the engagement letter in this case may represent business as usual for Mr. MacEachern. I doubt that this engagement letter was composed for this one case. It has the hallmarks of a form letter. Were this not an infant settlement situation requiring Court approval, the letter may never have come to light.

[105] The contingency fee agreement in this case is no more acceptable in a non-infant context. The *Civil Procedure Rules* mandate the required contents of all contingency fee agreements. Unfortunately, when the client is an adult, there is no

mechanism to reveal non-compliance with CPR 77.14. To illustrate, consider the hypothetical where it was Mr. Angione alone in the crosswalk that night. If he had subsequently signed Mr. MacEachern's engagement letter, Mr. MacEachern would have gotten his 35%, no questions asked. No one but Mr. Angione would ever have seen the letter. And Mr. Angione would have had no notice that he had the right to have Mr. MacEachern's fee reviewed. I am concerned about whether there are other Mr. Angione's in Mr. MacEachern's portfolio.

(E) Disposition of Proceeds

[106] In most cases, the Court will require the person receiving the funds on behalf of the child to provide security. This may be achieved by requiring the guardian to post a bond usually along with a surety. That method is only effective if the guardian has sufficient assets to make his bond meaningful. In this case the guardian does not have assets and does not know anyone willing to post a surety. The alternative is the purchase of a commercial bond which is quite expensive.

[107] CPR 36.14(5)(b) provides the Court with the discretion to waive a surety. That, together with removing the ability of the guardian to encroach upon the settlement proceeds, is a reasonable solution to the problem. Counsel has proposed establishing a trust with RBC whereby the only accessible amounts would be for emergency medical or education needs of the child. Any other encroachment

would require a further Court Order until Destiny reaches nineteen years of age. I am agreeable to incorporating such an arrangement in an Order of this Court.

[108] The matter is now adjourned pending receipt of the requested additional medical reports.

Edwards, J.