

COURT FILE NO.: 99-CV-181819CP
DATE: 20080115

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kathryn Anne Taylor v. The Attorney General of Canada
and University of Health Network (formerly, Toronto General Hospital) and Dr.
W. Dobrovolsky
BEFORE: Justice M. Cullity
COUNSEL: *Kirk Baert, Celeste Poltak, John Legge and Patrick Orr*, for the Plaintiff
*Paul Evraire, Q.C., James Soldatich, Sadian Campbell, Susan Keenan and
Adam Rambert*, for the Defendant
James Newland, for the Third Parties
DATE HEARD: July 23, 24 and 25, 2007

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT ON COSTS

[1] Written submissions on the costs of the certification motion have been received from the plaintiff, the defendant and counsel for OHIP. The plaintiff was successful on the motion and her entitlement to an award of costs - and that of OHIP - were not opposed by the Attorney General.

[2] The costs requested by the plaintiffs are \$239,070 for legal fees and \$26,498.38 for disbursements. GST is to be added to the fees. Counsel for OHIP requested costs of \$31,383.95 for fees, and disbursements of \$1,244.17. These amounts are inclusive of GST.

[3] Counsel for the Attorney General submitted that the amounts - totalling approximately \$315,000 when GST is added - are significantly in excess of what could be justified in an exercise of the court's discretion under section 131 of the *Courts of Justice Act* and Rule 57 of the Rules of Civil Procedure. I agree with this submission and, for the most part, the specific criticisms advanced by counsel.

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1. Substantial indemnity or partial indemnity

[4] The costs requested by plaintiff's counsel are on the basis of a substantial indemnity while OHIP seeks a partial indemnity. I agree with counsel for the Attorney General that there is nothing to justify a substantial indemnity in the circumstances of this case. There has been nothing in the conduct of the defendant that merits criticism and there are no other circumstances that could justify such an award. The plaintiff's reliance on section 31 of the CPA for this purpose will be considered below

2. Costs of case conferences

[5] At all times prior to the hearing of a certification motion, the statutory requirements for certification will necessarily be in the forefront of the attention of plaintiff's counsel. They may be influential not only in the decision to commence a proceeding under the CPA but, also, in framing the pleadings. Despite this, and although certification will be crucial to the success, or failure of the action, it does not follow that all of counsel's work prior to certification will sufficiently relate to the motion to be properly compensable in costs if certification is granted. From the outset, a distinction must be drawn between the costs of the action and those of the motion.

[6] Preparatory work on the merits of the plaintiff's case will fall within the first category. So, too - in most cases at least - will work done in preparing and drafting the statement of claim. Depending on the matters to be dealt with at case conferences, time spent on preparation for, and attendances at them, may, or may not be properly included when fixing the costs of a successful certification motion. If conferences are held because of difficulties in framing the pleading and the action, I believe the time should ordinarily be excluded. Whether or not all, or part, of such time would ultimately be recognized as costs of the cause, I do not see why it should be considered to relate to costs of a successful certification motion.

[7] Similarly, case conferences convened to deal with scheduling and timetables might, I believe, in many instances be disregarded for the purposes of fixing costs of the motion, as distinct from those of the action. Obviously, the line can be difficult to draw in the circumstances of any particular case. I am satisfied, however, that, when fixing costs of a successful certification motion - a process that differs from an assessment - the distinction can be a very relevant consideration.

[8] I am also satisfied that, to a very large extent, the significant amounts claimed by the plaintiffs in respect of the numerous case conferences attended by the parties before certification should be disregarded. On this question - as on others relating to the costs of the motion - I must rely on the material filed by the parties for the purpose. The proceeding was formerly managed by Winkler J. as the assigned motions judge. It was commenced in 1999 and the statement of claim has been amended, and proposed to be amended, on several occasions. As far as I am able to ascertain, the case conferences were, for the most part, concerned with these amendments and the attempts to decide upon the structure and scope of the plaintiff's case. The intended scope of the claims was not settled until June, 2006 after Winkler J. had directed that the action could not

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proceed unless and until the claims had been narrowed, and the pleading clarified. The proposed representative plaintiffs were changed on a number of occasions over the lengthy period and the original proceeding was ultimately bifurcated into a separate action by Kevan Drady – who at one stage was a co-plaintiff - and this action. I see no reason why, as a result of this particular motion, the defendant should be required to indemnify the plaintiff - partially let alone substantially - for the time spent while plaintiff's counsel were attempting to cast the action to their satisfaction, and in a form that, in the opinion of the court, could fairly be permitted to proceed.

[9] In consequence, I am satisfied that a decision fixing the costs should reflect a large reduction in the amount claimed for the work of plaintiff's counsel preparing for, and attending, case conferences.

3. Section 31 of the CPA

[10] Counsel for the plaintiff submitted - and defendant's counsel disputed - that, in the circumstances of this case, the court's discretion with respect to costs should be influenced by the provisions of section 31 of the CPA. The section authorises the court, in the exercise of its discretion, to consider whether the proceeding "was a test case, raised a novel point of law or involved a matter of public interest". In my judgment, none of these considerations is relevant in this case. Class actions with respect to medical implants have been relatively numerous in Canada. Some have involved specifically-identified TMJ implants for which substantially similar claims to those in this action have been made. The possibility that the ultimate decision in this case - like that in any class proceeding - may be influential in the final disposition, or a settlement, of the other cases is not, in my opinion, sufficient to make it a "test case". Although all the cases turn on their own facts, the points of law in the specific implant cases – as distinct from a case like *Drady v. The Attorney General of Canada*, [2007] O.J. No. 2812 in which generic industry-wide claims were made - are sufficiently similar to foreclose a finding of novelty for the purposes of section 31. Nor do I believe this case falls within the range of those that are to be considered to have public interest because they have "some specific special significance for, or interest to, the community at large beyond the members of the proposed class": *Pearson v. Inco Ltd.* (2006), 267 D.L.R. (4th) 111, at para 9.

4. Cross-examination of plaintiff's witness

[11] Counsel for the Crown cross-examined an affiant of the plaintiff in connection with the litigation plan filed in support of certification. They were entitled to do this but, as the plaintiff was successful in obtaining certification - and independently of rule 39.02 (4) - she is entitled to the costs of the cross-examination. In view of the deficiencies in the litigation plan, and the criticisms levelled by Winkler J. at a similar plan in *Attis*, the decision to cross-examine cannot, in my opinion, be considered to have been improper, vexatious or unnecessary in the sense referred to in rule 57.01 (1) (f) (i), or otherwise to justify anything but a partial indemnity for the costs that would normally follow from the plaintiff's success on the motion.

5. Fairness and reasonableness and the expectations of the parties

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[12] In *Pearson*, Rosenberg J.A. propounded a number of principles and factors that, in the absence of special circumstances, were described in *Attis v. Canada (Minister of Health)*, [2007] O.J. No. 2990 (S.C.J.), at para 6, as "a comprehensive set of guidelines to be utilized by courts in exercising their discretion in the fixing of costs on a certification motion". Included in these principles is a requirement that the costs must reflect what is fair and reasonable. In *Boucher v. Public Accountants Council* (2004), 71 O.R. (3d) 291 (C.A.), at para 37, this was described as "the overriding principle." For this purpose, the amount that an unsuccessful party could reasonably expect to pay was identified as a guide by Armstrong J.A., and subsequently described by Winkler J. in *Attis*, at para 8, as a crucial component in fixing costs.

6. Decision

[13] Judged by the above standards, the amount claimed on behalf of the plaintiff is seriously in excess of what might reasonably be awarded as the costs of the certification motion. This is not a case in which the defendant could reasonably expect to be ordered to pay a substantial indemnity, or to pay the plaintiff's costs of the somewhat chaotic attempts to settle the structure of the action, the choice of representative plaintiffs and the contents of the pleading. These factors alone require a substantial reduction in the costs claimed.

[14] Counsel fees of approximately \$49,000 are included in the amount of \$239,070 claimed in respect of the fees of plaintiff's counsel. This amount is, in my opinion, egregiously high, notwithstanding the presence of five counsel for the defendant. As a general rule, parties are entitled to decide how the presentation of their case is to be divided and allocated among their counsel. It does not follow that the considerations that motivate such decisions will necessarily justify an award of costs to a successful party for the attendance of multiple counsel throughout the hearing.

[15] The counsel fees requested on behalf of the plaintiff are based on time of 121.5 hours for four counsel. The fee sought for Mr Legge is calculated on 42 hours while Mr Orr's time is reported as 31.5 hours. The hourly rate applied for each is \$450 – significantly in excess of those that should properly be applied in using hourly rates to determine the amount of a partial indemnity.

[16] The greater part of the submissions for the plaintiff on the requirements of the CPA were made by Mr Baert who was retained for his special expertise and experience in class proceedings. Mr Orr was evidently retained on the basis of special knowledge and familiarity with the federal regulatory system and - although I do not question for a moment the value of his input in the preparation of the plaintiff's case - his submissions at the hearing could easily have been made by Mr Baert, or Mr Legge, and did not advance the case sufficiently to justify a claim for a counsel fee based on 31.5 hours. In my judgment, a combined counsel fee of \$25,000 for plaintiff's counsel would be at the very high end of an acceptable range in the circumstances of this case. This, I should add, is on the basis of an assumption – evidently shared by counsel - that the former distinction between fixing fees for work performed before, and during, a hearing has now been abandoned in the guidelines released by the Costs Subcommittee of the Rules Committee.

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[17] I recognize that, as Rosenberg J.A. noted in *Pearson*, the certification action is a vital step in any class proceeding. Parties, and their counsel, can be expected to do everything reasonably necessary to prepare and present their client's case in a competent, comprehensive and professional manner. Although they cannot be criticized if they over-prepare - or retain other counsel or consultants to assist them - it does not follow that the opposing party should be required to pay for an over-lavish expenditure of time and resources.


[18] In fixing the costs with the above factors in mind - as well as the experience of the lawyers involved and the degree of complexity of the proceeding - I consider \$75,000 to be reasonable in respect of the legal fees of the plaintiff's lawyers. This may be compared with the amount of \$115,680 that counsel reported as their substantial indemnity fees - including the counsel fees of \$49,000 - if no time was allowed in respect of the case conferences. I do not consider it to fall outside the range of costs awards made in broadly comparable cases of similar complexity.

[19] Disbursements of \$24,910.32 have been claimed. These include \$19,375 to Crawford Class Actions Services in connection with the preparation of the litigation plan. I am told that the firm has had extensive experience for this purpose but, in the light of my experience with other cases and the criticisms of the litigation plan that I accepted, the amount seems unreasonably high. In the absence of any breakdown of the time expended, or other supporting material, I will allow \$10,000 for this disbursement and \$15,535.32 for the plaintiff's disbursements in total.

[20] Costs of counsel for OHIP are fixed at \$26,007 for fees - reflecting a reduction in the amount claimed in respect of a student's time. No disbursement will be allowed as those claimed for internal printing of electronically-received documents should, in my opinion, be considered to represent an overhead expense.

[21] GST is to be added to the above amounts in respect of the fees of counsel for OHIP, as well as the fees and disbursements of plaintiff's counsel.

[22] The costs are to be paid within 30 days.


Cullity J.

Released: January 15, 2008