CITATION: Hemmings v Peng, 2023, ONSC 66
COURT FILE NO. CV-11-424715
DATE: 20230104

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
SOPHIA KENESHA HEMMINGS, by her Litigation Guardian, Rosalie Brown, ROSALIE BROWN personally, SAMANTHA CAMILE GAYLE and MOSES HEMMINGS, minor by their Litigation Guardian, Rosalie Brown, and SAMANTHA HEMMINGS Plaintiffs	*Amani Oakley and Neil W. Oakley, Duncan Embury, Daniela Pacheco and Samer Mishriki,* lawyers for the Plaintiffs
– and –	
CAROL YUEN-MAN PENG, SHARON ROSE O'BRIEN, NINA ELIZABETH NALINI VENKATARANGAM, RITIKA GOEL, NEIL THOMAS JAMENSKY, ANDRES BARTOLOME UMOQUIT, JENNIFER LAI-YEE TSANG, LLOYD GREGORY PADMORE, STEPHANIE SLADDEN, NORA DJIZMEDJIAN, YOUYI JIAN and THE SCARBOROUGH HOSPITAL Defendants	*Darryl Cruz, Dorothy Charach and Madison Howell,* lawyers for the Defendants, Carol Yuen-Man Peng, Sharon O'Brien, Neil Thomas Jamensky and Lloyd Gregory Padmore *Daniel Girlando, Mary Lynn Gleason and Tamaro Boro*, lawyers for The Scarborough Hospital
	HEARD: OCTOBER 31, 2022

REASONS FOR DECISION ON COSTS

G. DOW, J.

[1] Further to my Reasons released May 3, 2022, following the trial of this matter (which proceeded between September 21 and December 22, 2021), the parties were unable to agree

on costs. After submitting materials, oral submissions narrowed the dispute as described below.

[2] The plaintiff seeks payment of $3,928,496.00 in fees plus HST ($510,704.48). They also seek payment of their disbursements of $602,052.00 (which was not disputed). The plaintiffs request a Sanderson Order with regard to any costs awarded in favour of the not at fault physicians against whom they proceeded to trial, being Dr. Pang and Dr. O'Brien.

[3] The defendant physicians acknowledged their exposure to a portion of the plaintiffs' costs which they submit should only be $2.6 million plus the plaintiffs' disbursements. The defendant physicians accepted they should be responsible for two-thirds of the plaintiffs' costs. The not at fault physicians sought recovery of one-quarter of the defendant physicians total claimed partial indemnity costs of $1,362,482.40 and their disbursements of $425,021.60 plus applicable HST for a total of $1,976,122.22, one-quarter of which is $494,030.55. The not at fault defendant physicians opposed the Sanderson Order whereby their costs would be payable by the at fault defendants.

[4] The defendant hospital acknowledged their exposure to the plaintiffs' costs which they submitted should not exceed $2,050,000.00 for fees plus HST ($266,500.00) and disbursements of $602,052.00. They did not dispute their responsibility for the remaining one-third of the plaintiffs' costs. They also opposed any Sanderson Order with regard to the successful defendant physicians.

[5] The plaintiffs relied on a variety of factors in support of their position. The first factor was the actual time spent in what they described as a decade long, hard fought, complex medical negligence case requiring 42 days of trial. Quantum was agreed at the outset of trial and approved by Justice D. Wilson at $12 million. The quantum was not disclosed to me until these submissions. Voluminous time dockets were produced totaling $6,547,499.20 of "billed" time. Counsel for the plaintiffs acknowledged the arrangement between themselves and the plaintiffs involved a Contingency Fee Retainer Agreement which was not produced.

[6] This raised whether the hourly rates used of between $500.00 to $1,000.00 per hour for senior counsel between 2013 and 2021 were reliable. I find those rates to be at the top end of rates charged in complex matters by senior counsel in the Superior Court of Justice.

[7] It should be noted no Rule 49 compliant Offers to Settle were served although the plaintiffs did put forward a September 9, 2021 Offer to Settle for $12.5 million with its costs, disbursements and taxes to be agreed on or assessed. Further, they relied on an October 1, 2021 email of a willingness to accept $15 million, all inclusive, that is an attribution towards costs, including fees, HST and disbursements of $3 million. This is in the face of the defendants only proposed settlement being a dismissal without costs.

[8] In response to the defendant's submissions of an inordinate amount of time being expended and excessive rates being utilized, counsel for the plaintiffs relied on the need for thorough research and preparation which was required in the face of the lack of any concessions from the defendants or narrowing of the trial issues. In the latter stages of litigation, being mediation, pre-trial and trial time, plaintiffs' counsel relied on their recorded time being similar to that expended by the counsel for the defendants to support the veracity of their expended time.

[9] Counsel for the plaintiffs also submitted caution should be exercised in comparing hourly rates between the parties in this matter on the basis the defendants were involved institutional clients or *quasi*-insurers with the ability to depress the actual rates charged to them by their counsel in exchange for the volume of work provided.

[10] Regarding the position taken by the defendant physicians, the primary submission was the plaintiffs were using "a flawed starting point". This was explained by submissions that much of the research and non-court room work docketed was from senior counsel as opposed to the appropriate person or the lowest hourly rated person competent to perform the task. The defendant physicians acknowledged that it raised some issues such as Amniotic Fluid Embolism to which the plaintiffs were required to respond and that this was a complicated case.

[11] The defendant physicians agreed with the proposition that the onus and burden was on the plaintiffs to prove their case and, as a result, greater time and expense would be required in defending the matter. However, the docketed time or starting point included portions of time that related to other defendants whom were released before trial on a "without costs" basis.

[12] The defendant physicians also relied on other medical negligence cases for the length of trial, the amount of damages and the costs awarded as part of determining a proper award. In this regard, it should be noted none of those other matters sought as much in costs on a proportionate basis, for a trial of similar length. However, this would ignore the trial was considerably shortened by the agreement on quantum which was not made until the outset of the trial.

[13] Regarding the position taken by the defendant hospital, it submitted the amount sought by the plaintiffs was greater than that which should be awarded. It relied on excessive hourly rates, the inclusion of items for which compensation ought not to be given and case law that considered the long ago discarded Costs Grid on an inflation adjusted basis. The claim of excessive hourly rates was based on apparently different hourly rates used by the same counsel in another medical negligence matter with overlapping periods of time. This was explained by counsel for the plaintiffs in submissions and undermined.

[14] Counsel for the defendant hospital referred to amounts of time that included work on motions which did not proceed and the large quantum sought for medical research. In this

regard, plaintiffs' counsel noted and I accept the parties embarked on this litigation with very disparate starting points. The inability of the injured plaintiff to communicate, let alone have some idea of what went wrong, required research. This was unlike the defendants that had medically trained, experienced clients who could review the records kept and apply their expertise in discussing what occurred.

Analysis

[15] In addition to the oral submissions made which assisted in narrowing the dispute between the parties, I reviewed the written submissions submitted in advance. The key elements would appear to be consideration of the factors identified in Rule 57.01. This action through to trial raised many of the identified factors at the highest level. Briefly, regarding:

a) the importance of the issues raised were paramount for both the sides. For the plaintiffs, the severity of the injuries resulted in the need for 24 hour per day care and for the defendants against whom serious allegations of professional negligence were made;

b) the complexity of the proceedings involved a multitude of medical issues including the standard of care for obstetricians of patients seeking birth control, proper maternal-fetal care, particularly of a patient with a variety of health conditions which placed the patient at high risk for complications, proper anesthetic procedures and the possibility of Amniotic Fluid Embolism;

c) the experience of counsel and rates being charged at the highest level of those sought in the Superior Court of Justice;

d) the amount being claimed which the parties agreed on at the outset of the trial to be $12 million and which was court approved;

e) the settlement offers, which were non-Rule 49 compliant by the plaintiffs and reflected the defendants' firm denial of any liability (in the face of concerning discovery and documentary evidence to the contrary);

f) the apportionment of liability where I found two of the four physicians which proceeded to trial at fault as well as the defendant hospital;

g) the conduct that tended to shorten or lengthen the trial unnecessarily, there was little to none of the former and ample examples of the latter, no doubt fueled by the serious difference in the position of the parties and the quantum at stake; and

h) the amount the unsuccessful party could reasonably expect to pay as directed by the Court of Appeal in *Boucher v Public Accountants, Council for the Province of Ontario*, [2004] O.J. No. 2634 (at paragraph 26).

[16] I accept the nature of the claim and specifically the wide and numerous areas of possible issues and conduct by various medical professionals in the nine months leading to the events of April 20, 2009 and months thereafter put this matter at the highest end for comparison with other awards of costs in medical negligence matters. I find the defendants were well aware of this highest level of complexity given their own hard fought multiple experts responses to the claims advanced.

[17] I note the plaintiffs have substantially discounted the amount they originally sought. This, to some extent, recognized factors identified by the defendants as having merit.

[18] However, there is merit to the submissions that Dr. Padmore was exposed to a finding of liability from his examination for discovery in 2014 given the evidence he tendered and on which I relied in reaching my decision. Similarly, the glaring failure by nurse San Juan to complete the Nursing Telephone Advice form was known early on and amplified by her lack of any independent recollection years later but in advance of trial.

[19] Without repeating verbatim the statements made by other judges in their decisions on costs, it is noteworthy and should be acknowledged:

a) the medical negligence plaintiffs' bar is well aware that the defendant physicians and hospitals are well prepared and well financed to maintain a stout denial of liability and willingness to proceed to trial which often needs to be matched;

b) a litigant's right to proceed to trial comes the exposure to the costs incurred by employing that litigation strategy;

c) the agreement by the parties that the costs incurred by the plaintiffs generally in mounting a successful medical negligence claim can be expected to exceed that of the defendants and even be twice as high (*Cheesman v. Credit Valley Hospital*, 2020 ONSC 1729 (at paragraph 89); and

d) the need to balance access to justice in medical negligence matters with the principle of what a non-successful party can reasonably expect to pay.

[20] As a result, following consideration of the submissions made, the authorities relied on, the important factors to consider as described above (particularly the multitude of issues raised in the care of Sophia Hemmings between August 1, 2008 and April 20, 2009), I award the plaintiffs partial indemnity fees of $3.2 million plus HST of $416,000.00 and the disbursements not disputed of $602,052.00 for a total $4,218,052.00.

Sanderson Order

[21] As indicated, the defendant physicians, Dr. Peng and Dr. O'Brien sought their costs as successful defendants. They were represented by the same counsel that represented the at fault physicians, Dr. Padmore and Dr. Jamensky. The amount sought as two of eight physicians against whom the action was commenced was one quarter of the defendant physicians claim for costs, if successful, being $494,030.55.

[22] The plaintiffs relied on its efforts to remove these physicians from litigation on terms that would not impede or hinder their ongoing claims against Dr. Padmore and Dr. Jamensky. This was resisted. The defendant physicians relied on the absence of any claim or issue between themselves.

[23] The defendant hospital relied on it being a step removed this aspect of litigation.

[24] The parties referred to the decision of *Moore v. Wienecke*, 2008 ONCA 161 (at paragraph 41) which requires a two-step analysis. The first question to address is whether it was reasonable to join the successful defendants. I would answer that question in the affirmative given the care of Sophia Hemmings was subject to scrutiny from her August 1, 2008 attendance at the Woburn Clinic looking for birth control assistance until the catastrophic events of April 20, 2009.

[25] Dr. Peng and Dr. O'Brien were responsible for Sophia Hemmings' care in the hospital immediately before and at the time of her cardiac arrest. I found Dr. O'Brien's actions fell below the standard of care with regard to obtaining or noting Sophia Hemmings multiple risk factors and knowing where to look for additional information available to her.

[26] The second step is to address whether it would be just and fair to add these defendants claims for costs to that payable by the unsuccessful defendants. The factors to consider include whether the unsuccessful defendants caused these successful defendants to be added. That did not occur here. Further, where there were causes of actions independent of each other, I would answer that question in the affirmative given the focus of the plaintiffs' case was that Sophia Hemmings had multiple high risk factors during her pregnancy which required specialized care.

[27] The third factor is the ability to pay. That is not an issue in this matter because the amount sought, if granted, can be deducted from the award of costs made in favour of the plaintiffs, let alone the quantum of damages agreed upon.

[28] The fourth factor to be reviewed as noted in *Moore v. Wienecke, supra* (at paragraph 46) and "foremost consideration" is whether the defendants at the trial attempted to "shift responsibility onto each other". This did not occur.

[29] As a result, I am not prepared to make the Sanderson Order requested. However, I have difficulty with the quantum sought and the basis for same.

[30] The approach of seeking one quarter based on their being eight physicians named as defendants is overly simplistic. As noted in the defendant physicians' written submissions, the plaintiffs "adduced very little expert evidence against Drs. Peng and O'Brien (at page 8). In fact, a review of the defendant physicians' disbursements of $425,021.60 indicates experts that dealt with the actions of Dr. Padmore and Dr. Jamensky (being Dr. Schmidt and Dr. Westcott) totalled $160,935.20. Further, the expert reports not tendered at trial (thus likely related to damages) are an additional $73,128.86.

[31] The defendant physicians made no effort to separate their docketed time between the physicians. Further, I note the trial time for Dr. Peng and Dr. O'Brien was less than four of the 42 days. Much time would have been expended addressing the quantum of damages which was required regardless of the number of physicians against whom the action was litigated. I find that the evidence of Dr. O'Brien, as the obstetrician in the operating room at the time of the cardiac arrest, was very likely required in any event.

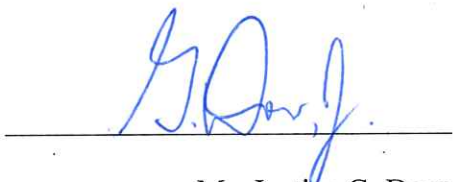
[32] Overall, my conclusion is the appropriate time and expense to be attributed to Dr. Peng and Dr. O'Brien is considerably less than the amount sought.

[33] I have concluded the appropriate amount to award and I assess the partial indemnity costs of Dr. Peng and Dr. O'Brien to be $250,000.00 inclusive of fees, HST and disbursements.

Conclusion

[34] The plaintiffs shall recover their costs fixed in the amount of **$4,218,052.00** inclusive of fees, HST and disbursements.

[35] This amount is to be payable two-thirds by the unsuccessful defendant physicians, Dr. Padmore and Dr. Jamensky and one-third by the unsuccessful defendant hospital (that is $2,812,034.67 and $1,406,601.33 respectively). The successful defendants, Dr. Peng and Dr. O'Brien are entitled to recover from the plaintiffs the sum of **$250,000.00** inclusive of fees, HST and disbursements.



Mr. Justice G. Dow

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Plaintiffs

– and –

CAROL YUEN-MAN PENG, SHARON ROSE O'BRIEN, NINA ELIZABETH NALINI VENKATARANGAM, RITIKA GOEL, NEIL THOMAS JAMENSKY, ANDRES BARTOLOME UMOQUIT, JENNIFER LAI-YEE TSANG, LLOYD GREGORY PADMORE, STEPHANIE SLADDEN, NORA DJIZMEDJIAN, YOUYI JIAN and THE SCARBOROUGH HOSPITAL

Defendants

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