CITATION: Levac v. James, 2021 ONSC 7917
COURT FILE NO.: CV-14-511333-00CP
DATE: 20211202

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Anne Levac, Plaintiff

– AND –

Stephen Rose James, Sue-Ellen Solger, Izabella Gerbec, Erin Kostuch, Anita Takyi-Prah, Joana Nunes, Elizabeth Hicken, Marissa Allin, Rachel Schrijver, Annie Michaud, Anna Nudel, Elena Polyakova, Raymund Tanalgo, Jefferd Felix, Jason Foster, Paolo Galvez, Glenn Francesco, Peter Rothbart and Rothbart Centre For Pain Care Ltd., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Paul Harte and Maria Damiano*, for the Plaintiff

Darryl Cruz, Erica Baron, Jacob Klugsberg, and Eric Pelligrino, for the Defendant, Stephen Rose James

P. Voula Kotoulas, for the Defendants, Sue-Ellen Solger, Izabella Gerbec, Erin Kostuch, Anita Takyi-Prah, Joana Nunes, Elizabeth Hicken, Rachel Schrijver, Annie Michaud, Anna Nudel, Elena Polyakova, Raymund Tanalgo, Jefferd Felix, Jason Foster, Paolo Galvez, Glenn Francesco

Ron Bohm, for the Defendant, Marissa Allin

HEARD: Costs submissions in writing

AMENDED COSTS OF COMMON ISSUES TRIAL

[1] This endorsement addresses the costs of a 5-week common issues trial. The class were patients of the Defendant, Stephen Rose James, who suffered infections after being treated by him. The other Defendants were Nurses who worked at the relevant time in the clinic that also employed Dr. James (the "Nurse Defendants").

[2] The findings and answers to the 12 common issues questions were entirely in the Plaintiff's favour as against Dr. James, who was the main Defendant in the case. The Nurse Defendants were brought into the case by way of Third Party Claim by Dr. James, who then converted his claim to a Crossclaim against all of them when the Plaintiff amended her pleading to include the nurses as

Defendants. The findings and answers to the common issue questions were entirely in the Nurse Defendants' favour in terms of the allegations made and evidence lead against them by Dr. James. The findings and answers were also in the Nurse Defendants' favour in terms of the allegations made and evidence lead against them by the Plaintiff, although this was a small to negligible portion of the evidence and allegations in the trial.

[3] The majority of the 5-week trial entailed evidence relating to the claim by the Plaintiff against Dr. James and Dr. James' defense of that claim. Another portion of the trial time was devoted to Dr. James' Crossclaim against the Nurse Defendants and their defense of that claim. The Plaintiff presented a very small amount of evidence in her claim against the Nurse Defendants, and relatively little trial time was taken up by that evidence and the Nurse Defendants' defense of that claim.

[4] The Plaintiff deserves her costs as against Dr. James. Class counsel advise that the *quantu*m of costs owed by Dr. James to the Plaintiff has been agreed upon between them. They have not advised me of the *quantum*, but have made submissions on the timing of the costs payment. It is the Plaintiff's view that costs are payable upon being ordered by me. It is Dr. James' position that the payment of costs should be deferred until after the individual trials are completed. The answers to the common issues questions are such as to necessitate follow-up individual trials to determine the specific liability of Dr. James to each class member.

[5] Counsel for Dr. James submit that the unique features of this case call for a flexible and specially-tailored costs arrangement. In support, they point to the discretionary nature of costs generally under section 131 of the *Courts of Justice Act* as well as the guidance provided by section 31(1) of the *Class Proceedings Act* which authorizes the court in exercising this discretion to "consider whether the proceeding was a test case, raised a novel point of law or involved a matter of public interest."

[6] Dr. James' counsel also make reference to *TD Bank v. Lloyds,* 2016 CanLII 103497, at paras 22-25 (SCJ), where the court determined that when a case raises exceptional circumstances a pragmatic approach to costs should be adopted. It is Dr. James' position that this trial represents a first medical malpractice common issues trial where the elements of liability to the class members will not be determined until the individual trials to follow. Counsel for Dr. James argue that this unique feature of the case prompts a need for a uniquely deferred costs award to the Plaintiff.

[7] While I agree that a medical malpractice class action and common issues trial is a rarity, it is not rare in class actions practice to have individual mini-trials follow on the findings of a common issues trial. Indeed, it is probably more common than not; a trial of common issues is meant to shorten the determination of liability, but not to replace the means of doing that. As the Supreme Court of Canada said in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at para 39, "Nor is it necessary that…the resolution of the common issues would be determinative of each class member's claim, however, the class members' claims must share a substantial common ingredient to justify a class action."

[8] The present case is unique in terms of its subject matter but it is not unique in terms of its process or any features that would go to the payment of costs. The fact that the specific liability of

Dr. James to any given class member is not fully determined at a common issues trial is the norm, not an exception to the norm. The *quantum* of costs agreed upon by the Plaintiff and Dr. James is payable within 30 days of the issuance of this endorsement.

[9] Turning to the costs claimed by the Nurse Defendants, it is Dr. James' position that those costs be paid by the Plaintiff. The Plaintiff, as indicated, was unsuccessful in establishing findings or answers to the common issues questions which impugned the Nurse Defendants' conduct toward the class members or which could form the basis of any liability by the Nurse Defendants. At the same time, Dr. James was unsuccessful in establishing any findings or answers to common issues questions which could form the basis of any liability or shared liability by the Nurse Defendants under the Crossclaim.

[10] In *Moore v Weinecke*, 2008 ONCA 162, at para 37, the Court of Appeal indicated that, "In a multiple-defendant case in which the plaintiff succeeds against some defendants but not against others, the 'normal course' is for the unsuccessful defendant to pay the plaintiff's costs and the plaintiff to pay the successful defendant's costs." The Court has established a test for deviating from this normal course in the form of so-called *Sanderson* and *Bullock* orders.

[11] In the first place, the Court considers whether it was reasonable for the Plaintiff to sue multiple defendants in the same action. Secondly, if the answer is affirmative, the Court considers whether it would be fair to shift costs from the plaintiff to the unsuccessful defendant: *Greenough v. Maple Ridge Media Inc* at para 58; *Dynamic Medical Concepts Inc. v DiBenedetto,* 2008 CanLII 16076 at para 81, rev'd on other grounds 2009 ONCA 662.

[12] I can say without hesitation that it was reasonable for the Plaintiff to amend her pleading to name the Nurses Defendants once Dr. James had brought them into the action by way of Third Party Claim. It was Dr. James' position that the nurses working at the clinic, and not himself as the responsible doctor, who had caused some or all of the injuries suffered by class members.

[13] The Plaintiffs and class members are the patients of the clinic. They cannot be expected to know more than their doctor about the division of responsibility between physicians and nurses at the clinic. Moreover, it is common ground among all parties that the medical procedures in issue in this case – epidural spinal injections – take place literally behind the patient's back. No class member is in a position to determine what the doctors and nurses already know – which of them was responsible for doing what during the injection procedure.

[14] In my view, it is fair to shift to Dr. James any costs owed by the Plaintiff to the Nurse Defendants. It was evident to me early in the trial that the physician is responsible for the treatment and preparatory procedures performed by the nurses under his supervision and authority. He conceded as much himself in his testimony. For Dr. James to have sued the nurses in the first place instead of simply summonsing them as witnesses is perplexing to me. The responsible physician was not going to enjoy any positive findings or helpful answers to the common issues questions by trying to pin some of his responsibility on the nurses who assisted him.

[15] As counsel for the Nurse Defendants (other than the Defendant Marissa Allin, who is separately represented) submits, the common issues trial determined that there was no sustainable

legal claim against any of the nurses. In fact, I found the entire body of evidence against the nurses to be "remarkably thin", amounting to "next to nothing". As indicated above, Dr. James ought to have been aware of this all along; in fact, in his testimony he said in a very straightforward way that throughout the class period he never had any concerns or criticisms of any of the Nurse Defendants.

[16] The same thing goes for the Defendant Marissa Allin, who is the one uninsured Nurse Defendant. I found that there was "not a shred of evidence" against Ms. Allin. There was no evidence that Ms. Allin was even involved in the care of any class member. All of this was or ought to have been known by Dr. James, who initially brought Ms. Allin into this class action by means of a Third Party Claim. In fact, Dr. James testified at trial that Ms. Allin "always met her professional obligations and standards."

[17] On November 30, 2018, two of the Nurse Defendants delivered to Dr. James an offer to settle all claims against them by having the Third Party Claim/Crossclaim dismissed without costs. The remaining Nurse Defendants (except for Ms. Allin, who had already delivered an offer to settle) delivered offers to settle on the same terms on December 3, 2018. These offers were not accepted.

[18] Counsel for Ms. Allin advises that his client delivered an offer to settle all claims against her on a without costs basis at the same time that she served her Statement of Defence. That offer was accepted by the Plaintiff, but not by Dr. James. Ms. Allin's counsel therefore submits that the sole responsibility for the legal expense of Ms. Allin's involvement in this complex and lengthy class proceeding lies with Dr. James.

[19] The Nurse Defendants all submit that they should be awarded costs on a partial indemnity scale up until the date of their offers to settle and on a substantial indemnity scale thereafter. Counsel for Dr. James submits that there are no grounds for a substantial indemnity scale in the wake of a common issues trial, as the findings and answers to the common issues questions were not determinative of the outcome of the case.

[20] In my view, the Nurse Defendants deserve to be awarded costs on the scales that they propose. Even if Rule 49 of the *Rules of Civil Procedure* does not apply to this type of proceeding, I am prepared to exercise my discretion to mirror the result of Rule 49. The same policy of encouraging reasonable and cost efficient settlements that underlies that Rule underlies my approach here. Dr. James put all of the Nurse Defendants through a costly ordeal when he would have been better off letting then out of the action at an early stage and calling them selectively as witnesses if he and his counsel determined they were needed.

[21] In any case, regardless of the scale of costs being applied, the Nurse Defendants seek a relatively modest amount. Ms. Allin seeks a total of $487,513.00, inclusive of disbursements and tax, for her entire defense of this action since its inception. The other Nurse Defendants collectively seek a total of $348,067.58, inclusive of disbursements and tax. For an action culminating in a 5-week trial, those amounts are extremely reasonable. I am not inclined to look behind them at the

hourly content. Both counsel for the Nurse Defendants did an excellent job and added greatly to the trial, even though none of their clients should have been there in the first place.

[22] Dr. James shall pay costs to the Plaintiff in the amount agreed upon between them.

[23] Dr. James shall pay costs to the Nurse Defendants, with the exception of the Defendant Marissa Allin, in the all-inclusive amount of $348,067.58. Dr. James shall also pay costs to the Defendant Marissa Allin in the all-inclusive amount of $487,513.00.

[24] All of the above amounts are payable within 30 days of the date hereof.

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December 2, 2021 Morgan J.