

COURT FILE NO.: 03-CV-259655CP

DATE: August 25, 2009

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

GEORGE FARKAS

Plaintiff

- and -

SUNNYBROOK & WOMEN'S COLLEGE HEALTH SCIENCES CENTRE

Defendant

Proceeding under the *Class Proceedings Act, 1992*.

COUNSEL:

R. Douglas Elliott and Alexandra Carr for the Plaintiff
Barry Glaspell and Tanya Goldberg for the Defendant
James H. Turner, self-represented

HEARING DATE: August 24, 2009

REASONS FOR DECISION

PERELL, J.

Introduction

[1] In this action, which has been certified as a class action, the Representative Plaintiff, George Farkas, makes a motion under s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 for an order approving the settlement of the class action. He also moves for an order approving Class Counsels' fee agreement.

[2] The motion for approval of the settlement is supported by the Defendant Sunnybrook & Women's College Health Sciences Centre ("Sunnybrook").

[3] Mr. James H. Turner, one of the class members, appeared in person at the approval hearing, and he objected to the settlement in so far as it affected him and any others similarly situated.

[4] For the reasons that follow, I approve the settlement and Class Counsel's fee.

[5] As I will explain, in all the circumstances the settlement is fair, reasonable, and in the best interests of the class. While I have sympathy and respect for Mr. Turner, his objection involves a personal matter outside of the class action or it raises a question of whether the time for him to opt out of the class action might be extended. In any event, his objection does not provide a reason for not approving the settlement for the class.

Factual Background

[6] I shall describe the general factual background, and then I shall describe the factual circumstances of Mr. Turner's objection.

[7] In 2003, as a result of an internal audit of its infection control practices, the defendant Sunnybrook & Women's College Health Sciences Centre ("Sunnybrook") discovered that between December 3, 1999 and August 5, 2003, equipment used in its Urology Clinic to perform Trans Rectal Ultra Sound biopsies of the prostate had not been disinfected to the degree required by Health Canada and the manufacturer's guidelines.

[8] The biopsy procedure administered at the Urology Clinic is a diagnostic technique to detect prostate cancer, and the procedure involves the insertion of an ultrasound wand and needle through the rectum. After each procedure, the needle is discarded, but the ultrasound wand is reused, and it must be disinfected to prevent any transmission of diseases, including HIV, Hepatitis B, and Hepatitis C.

[9] Having determined that better disinfection techniques had not been used, Sunnybrook decided to change its practices for future patients and to give notice to past patients. By letter dated November 17, 2003, Sunnybrook advised approximately 861 patients that the method used to clean the biopsy equipment might have been inadequate to eliminate the transmission of viruses such as Hepatitis B and C and HIV. Patients were told that the risk of hepatitis was less than 1 in 100,000 and the risk of HIV was virtually zero. The patients were also advised that no cases of infection from transmission had been reported and they were being notified out of an abundance of caution. The patients were offered expedited and prompt blood testing.

[10] A further 48 patients were later identified and given notice, bringing the total notified to 913 patients.

[11] One of the patients notified was Mr. Farkas. He is now a 77-year old retired engineer who is married with an adult child. Most class members are elderly gentleman.

[12] On November 28, 2003, an anonymous representative plaintiff, Dr. Doe, who was later replaced by Mr. Farkas, had issued a statement of claim in a proposed class action against Sunnybrook.

[13] The action proceeded toward certification, but Sunnybrook sought leave to bring a motion to challenge Mr. Farkas' cause of action as not being reasonable. Justice Cullity directed that this issue would be dealt with as part of the certification motion.

[14] The action continued to move toward a certification hearing, but by letter dated November 26, 2004, Sunnybrook informed Mr. Farkas that it no longer intended to proceed with a Rule 21 motion to challenge the cause of action and instead would consent to certification.

[15] Sunnybrook's consent to certification, however, was not a consent for settlement purposes. Rather, Sunnybrook proposed to defend the class action vigorously. It was its position that Mr. Farkas had not suffered a compensable loss. It was Sunnybrook's position that in the absence of a diagnosed psychiatric injury, anxiety, stress, and worry are not compensable injuries under tort law. Further, Sunnybrook submitted that in the absence of a physical injury, a diagnosed psychiatric injury is reasonably foreseeable only if persons of reasonable robustness and fortitude would be likely to suffer the disorder. Sunnybrook denied that its notification program caused any reasonably foreseeable psychiatric injury. And, it advanced a policy argument against liability arguing that it would be contrary to public policy and would significantly increase the cost of public health to taxpayers if liability was imposed for distress caused by its notification program.

[16] On February 4, 2005, Justice Cullity certified the action as a class proceeding.

[17] Class Counsel is comprised of the law firms of Koskie Minsky LLP and Roy Elliott O'Connor LLP ("REO").

[18] As a result of some patients exercising their right to opt-out, the class consists of 749 patients, as well as, their spouses who advance *Family Law Act* claims. Of the 165 patients who opted out, none commenced an action against Sunnybrook.

[19] Fortunately, with the possible exception of Mr. Turner, none of the class members were infected as a consequence of the prostate biopsy, and class member claims are based on the psychological distress associated with receiving the news that they might have been infected with a lethal virus and that they might have passed that virus on to their wives or partners.

[20] In November 2006, the parties attended a mediation session before the Honourable George W. Adams, Q.C., which was unsuccessful.

[21] In late May and early June of 2007, the parties exchanged affidavits of documents and examinations for discovery were scheduled but later postponed.

[22] In or around the summer of 2008, after Sunnybrook advised that it intended to bring a motion for summary judgment, Justice Cullity directed that both the summary judgment motion and the examinations for discovery proceed on parallel tracks, and I was appointed to hear the summary judgment motion.

[23] At a case conference on February 12, 2009, I scheduled the hearing of the summary judgment motion for January 2010.

[24] A few months later, Sunnybrook made an offer for settlement in the all-inclusive amount of \$1.2 million. Counter-offers and negotiations followed, and the parties eventually signed a settlement agreement.

[25] The structure of the proposed settlement is as follows:

- Sunnybrook creates a fund of \$1.2 million.
- \$739,000 is allocated for patient class members and spousal class members. Each patient class member will receive at least \$943.85, depending on how many make claims. Each spousal class member will receive approximately \$100.
- Patient and spousal class members may donate all or 50% of their compensation to either: (1) The University of Toronto Centre for Patient Safety; or (2) to the support of prostate cancer patient care and research funded by the Sunnybrook Health Sciences Centre Foundation. If they do so, they will receive a tax receipt in the amount of the donation. (The University of Toronto Centre for Patient Safety fosters novel research and education projects aimed at improving patient safety both locally and internationally.)
- If 70% or more of the 748 patient class members submit claims on the Settlement Fund, whether to take money or to donate, the residue will be split 50:50 as between the patient and *FLA* Class Members and the University of Toronto Patient Safety Centre. If fewer than 70% of the 748 patient Class Members submit claims on the Settlement Fund, then the entire residue shall go to the University of Toronto Patient Safety Centre.
- \$360,000 is allocated for counsel fees, which includes a \$5,000 honourarium for Mr. Farkas. (Settlement approval, however, is not contingent on approval of the counsel fee.)
- \$42,000 of the fund is payable to the Ontario Ministry of Health and Long-term Care ("OHIP") in exchange for a release of its claim for expenses to provide health services
- \$30,000 of the fund is allocated for loss of income claims for class members that can prove to an arbitrator that they suffered a loss of income. If the amount of income loss claims exceed \$30,000, the compensation will be paid proportionally.
- \$30,000 of the fund is allocated for the costs of administration of the settlement, which sum is payable to REO LLP, a member firm of Class Counsel
- Sunnybrook will provide a single education session involving an infectious diseases expert, to class members and their spouses/partners.
- Sunnybrook will receive a release of "subject claims" in favour of Sunnybrook Hospital, and its affiliates, subsidiaries and related bodies corporate, and past,

present and future officers, directors, employees, staff physicians, agents, insurers, predecessors, successors and assigns.

- "Subject Claims" means all claims or other proceedings at law, in equity or under a statute including declaratory or subrogated claims, all causes of action for damages (actual, compensatory, punitive, exemplary, or treble), losses, injuries, contribution, indemnity and other relief over, and all claims for interest, costs, disbursements, expenses, taxes including GST, penalties and lawyers' fees, known or unknown, that a Settling Person ever had, now has, or hereafter can, shall or may have to the date hereof and into the future which arise specifically from the facts pleaded in the Actions, and without limiting the generality of the foregoing, Subject Claims includes all claims made arising from the pleaded facts, or which could have been made, in the Actions.

[26] Sunnybrook supports the settlement. It indicated that if the settlement is not approved that it will vigorously defend the action in light of the significant duty of care, foreseeability, causation, and remoteness issues. It views the settlement as being in the overall public interest and for charitable purposes.

[27] Mr. Farkas supports the settlement. Although a compromise, he finds it to be a creative resolution to the litigation because the settlement allows class members to make donations to health care charities involved in prostate cancer and other health issues.

[28] Class Counsel are experienced class action and personal injury litigators. Class Counsel have acted in various class proceedings for both plaintiffs and defendants. Douglas Elliott, in particular, has unique experience and expertise in litigation relating to HIV, Hepatitis C and other blood borne illnesses. Class Counsel recommended the settlement as being reasonable, fair, and in the best interests of the class. In assessing the reasonableness of the settlement, it was Class Counsels' opinion:

- that although a strong case could be made that Sunnybrook was negligent and breached its fiduciary duties to the class, the delay and expense associated with the continued litigation including the pending summary judgment motion, any appeals, and the trial of the common issues and any appeals presented significant risks if the action proceeded
- that the primary risk was liability because Sunnybrook continues to dispute that the class suffered any compensable loss
- given that absence of authorities, that there was a risk that the range of compensation might be between \$100 and \$3,500 for each class member
- that the settlement had the benefits of: (a) certain recovery; (b) timely recovery; (c) the option of donating to charity; (d) the class member education session; and (e) behaviour modification to similar future defendants.

[29] If the settlement is not approved and the action continues, the legal costs will be substantial. Since certification, Koskie Minsky and REO (and its predecessors) have fees

of \$722,942.30. It would take considerable additional time to prepare for and carry forward examinations for discovery, pre-trial motions, as well as to respond to Sunnybrook's summary judgment motion and prepare for trial, depending on the outcome of the summary judgment motion.

[30] The class was notified of the proposed settlement via direct mail, e-mail, and by Class Counsel posting the court-approved notice on its website.

[31] In response to the notification of the settlement approval hearing, Class Counsel received five responses from class members. Three of the responses favoured the settlement. One response is from Mr. Turner, which I will discuss below, and one response opposed Sunnybrook having to pay anything. That response stated:

I feel that this class action suit is totally unnecessary due to the result of NO infections. The fact that the hospital made a huge mistake as is reason for future concern, the fact is our health care system and hospitals can ill afford these lawsuits. However, in the event that this action is approved, I'll opt for the tax receipt, so the money can be put back into the system for badly needed research and development. I was given first class care during my procedure, and believe that the hospital has learned from this mistake

[32] As part of the notice, class members were provided with the option of completing a claim form to indicate their intention as to whether they would accept the payment of cash compensation or donate some or all of their compensation to charity.

[33] Class Counsel received 383 claim forms from the patient class indicating that 297 would accept compensation in cash, 44 would donate their compensation to charity and 36 would accept part of their compensation in cash and donate part to charity.

[34] Class Counsel received 289 spousal claims indicating that 222 would accept compensation in cash, 50 would donate their compensation to charity and 7 did not indicate a preference.

[35] Six class members indicated that they would make loss of income claims in the amounts of \$55,200, \$30,000, \$18,000; \$800, \$250, and unspecified.

Mr. Turner's Objection

[36] Mr. Turner attended at the settlement approval hearing. He was self-represented and he made oral submissions. He was not sworn, and for present purposes I will simply assume the truth of what he said without making any findings of fact.

[37] To put Mr. Turner's submissions in context, it is necessary to recall that the class action concerns biopsies performed at Sunnybrook's Urology Clinic between December 3, 1999 and August 5, 2003. During this period, Mr. Turner had two biopsies, which were followed by successful treatment to cure prostate cancer. It is also necessary to recall that the action was certified as a class action in February 2005 and Mr. Turner had an opportunity to opt-out, which he did not exercise.

[38] In 2004, he attended the Cancer Ward, and was diagnosed as suffering from an unidentified virus in the prostate.

[39] The unidentified virus was not Hepatitis or HIV. However, it has persisted from 2004 until this day and, unfortunately, so far, the virus has proven to be incurable. Mr. Taylor has only been able to work part time and not at all for the last year due to pain and associated conditions.

[40] The original source of the unidentified virus is presently unknown and whether it is related to Mr. Taylor's treatment at Sunnybrook is unknown.

[41] During his oral submissions, Mr. Taylor said that he had no objection to the settlement as it applied to other class members but he objected to the settlement on the basis that his case and any similar cases should be dealt with differently in some unspecified way.

Settlement Approval

[42] I turn now to the matter of the settlement approval.

[43] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[44] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[45] When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expenses and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arm's length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[46] Under s. 29 (2) of the *Class Proceedings Act, 1992*, it is the court's responsibility to approve or disapprove a settlement, and given that each case is different, this is a more or less difficult responsibility depending on the circumstances of the particular case. The settlements easiest to approve are perhaps those where the court can conclude that the class's recovery from the settlement approaches the optimum recovery after a trial. The settlements easiest to disapprove are those where there is the suspicion that class counsel or the Representative Plaintiff were incompetent or were acting for their own interests and not in the best interests of the class.

[47] In the case at bar, there is no evidence and no reason to suspect that in recommending the settlement, Mr. Farkas and Class Counsel were incompetent or were not acting in the best interests of the class, so this is not an easy case to reject the settlement, but given the uncertainty in the law about compensation for psychological harm, the case at bar is also not one where it is easy to approve the settlement and it is necessary to consider the various factors defined by the case law on settlement approvals.

[48] The affidavit material filed on the motion for settlement canvassed most of the factors that the court must consider in determining whether to approve or disapprove a settlement, and while I have considered all this material, to my mind among the more important factors are that the settlement agreement was reached by experienced counsel after vigorously contested proceedings in which both sides confronted reasonably strong cases and a difficult legal question about the scope of recovery for psychological harm from nervous shock and about the quantum of compensable damages, if any.

[49] A motion for approval of a settlement is not the place to interpret or apply the law about the recovery for psychological harm and all that can or perhaps need be said is that the Supreme Court of Canada's decision in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 is grounds for debate about the law on compensation for psychological harm. This decision, which was released some years after the action was commenced, perhaps, presents more problems for the success of the class members' case but both sides were confident in their cases and they have now reached a settlement without conceding the merits of their opponent's position.

[50] Another important factor is that with the exception of Mr. Turner, no objections were made to the settlement. Three objectors favoured the settlement and the last objector's comments do not speak to the merits of the settlement but rather to whether a class proceeding against Sunnybrook was appropriate at all.

[51] I also regard as important factors that the settlement appears to satisfy the policy imperatives of the *Class Proceedings Act, 1992* of access to justice, judicial economy, and behaviour modification, of which only the last matter requires some comment.

[52] The policy of behaviour modification imparts that there is an element of social engineering in class proceedings with the exposure to liability encouraging proper conduct and discouraging misbehaviour. In my opinion, it is, however, not necessary or appropriate in the context of a settlement approval to achieve this social engineering by assuming that the defendant is liable or by making a villain of the defendant to be

condemned or punished. To do so is to discourage settlements because it compels the defendant to refuse to settle in order to vindicate its reputation.

[53] Therefore, I simply say that in my opinion, as a matter of behaviour modification, the payment of \$1.2 million and the design of the settlement in the case at bar is a creative and socially responsible act by Sunnybrook without any admission of liability.

[54] Putting aside for the moment, Mr. Turner's objection, in my opinion, the settlement is fair, reasonable, and in the best interests of the class.

Mr. Turner's Objection

[55] At the time when Mr. Turner had an opportunity to opt-out of the class action, he was not suffering from Hepatitis or from HIV, but he had been diagnosed as suffering from a viral infection of the prostate. He did not know and it remains unknown whether this infection was caused by the biopsies performed at Sunnybrook. With this state of knowledge, Mr. Turner decided not to opt out, and thus he placed his claim for compensation in with the claims of other class members who did not opt out.

[56] As a class member, it would be quite proper for Mr. Turner to object that the settlement is unfair, unreasonable, or not in the best interests of the class but Mr. Turner does not do that. Rather, he objects to the settlement being applicable to his particular case and any similar cases (of which there does not appear to be any).

[57] In my opinion, Mr. Turner's objection should be rejected as a reason to refuse to approve the settlement for three reasons;

- First, if Mr. Turner did not wish to be bound by the class action because his circumstances were different from class members, he ought to have opted-out. At this juncture, his recourse is not to object to the settlement but to seek an extension of time for opting-out, which may or may not be granted.
- Second, given that it is possible that the biopsies were not the cause of Mr. Turner's current infection, his claim, if any, may be outside the "subject claims" that are being settled and thus the settlement does not affect his claim.
- Third, and this is the most important reason, if it assumed that the biopsies were the cause of his infection, then the compensation he will receive under the settlement including a possible loss income claim remains fair, reasonable and in the best interests of the class of which he is a member. A settlement does not have to be perfect, and in determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[58] I, therefore, conclude that Mr. Turner's objection does not provide a reason to refuse to approve the settlement and therefore I approve the settlement pursuant to the *Class Proceedings Act, 1992*.

Fee Approval

[59] I turn to the matter of the approval of Class Counsel's fee.

[60] Factors relevant in assessing the reasonableness of the fees of any class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at para. 67; *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Mura v. Archer Daniels Midland Co.*, [2003] B.C.J. No. 1751 (S.C.); *Lam v. Ajinomoto U.S.A., Inc.*, [2004] B.C.J. No. 985 (S.C.); *Ritchie-Smith Feed, Inc. v. Rhône-Poulenc Canada Inc.*, [2005] B.C.J. No. 857 (S.C.).

[61] Mr. Farkas signed a contingency fee retainer agreement. He approves the fee for Class Counsel. He believes that the fee is reasonable in the circumstances and suitable compensation for the efforts of Class Counsel.

[62] The original retainer agreement provided that legal fees should only be paid in the event of a successful judgment or a successful settlement, calculated in one of two ways: (1) compute a base fee, using the usual hourly rate of legal professionals working on a file, and then apply a "multiplier"; or (2) 25% of class recovery after certification plus the fee portion of any party and party costs

[63] A new retainer agreement was executed by REO and Mr. Farkas on March 6, 2009 to modify the agreement to reflect section 28.1(8) of the *Solicitors Act*, R.S.O. 1990, C. S.15, which requires that court approval is required if a contingency fee agreement provides that lawyers receive part of a costs award. The new current agreement does not provide for a "multiplier" approach and provides for a contingency fee of 30% of class recovery after certification but before a trial of the action.

[64] Under the terms of REO's agreement with OHIP, Class Counsel is to receive 25% of OHIP's recovery.

[65] The legal work performed by class counsel has been necessary, and it has been performed competently and professionally.

[66] The fee of \$360,000 is substantially below the amount of hours of work that Class Counsel have expended for this class proceeding.

[67] Given the uncertainty of the law and the tenacity of Sunnybrook's defence, Class Counsel's exposure to the risk of no recovery under the contingency fee agreement was substantial.

[68] Put simply, in my opinion, the Counsel Fee in the case at bar was earned. I conclude that the fee should be approved.

[69] Finally it is proposed that Mr. Farkas receive an honourarium to be deducted from the Counsel Fee. In his affidavit for the settlement approval hearing, he stated:

I understand that class counsel has proposed a modest honourarium for me of \$5,000. I was pleasantly surprised when I learned of this and would be grateful if the court approved it. It would recognize the amount of time I have devoted to this action, especially in travelling downtown on several occasions to meet with class counsel and for the time spent in the mediation. While I was happy to be involved in this case, it did cause a certain amount of stress in my life. It would be nice to use the sum to take a small vacation with my wife, to celebrate the action coming to a conclusion.

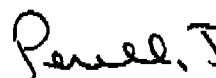
[70] Mr. Farkas has carried out his responsibilities as Representative Plaintiff in a diligent and responsible way and it is appropriate that he receive the suggested honourarium.

Conclusion

[71] For the above reasons, I approve the settlement and the Class Counsel fee.

[72] I have signed the order approving the counsel fee.

[73] If necessary, the parties should schedule a case conference to settle the terms of the formal court order approving the settlement.



Perell, J.

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Plaintiff

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**SUNNYBROOK & WOMEN'S
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Defendant

REASONS FOR DECISION

Perell, J.

Released: August 25, 2009