CITATION: Denman v. Radovanovic, 2023 ONSC 3621
COURT FILE NO.: CV-17-574151
DATE: 20230615

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL DENMAN, ANDREA DENMAN, OLIVIA DENMAN and ISABEL DENMAN Plaintiffs	)	*Sloan H. Mandel, Aleks Mladenovic and Deanna Gilbert,* for the Plaintiffs
IVAN RADOVANOVIC, VITOR MENDES PEREIRA, LEE-ANN SLATER, RONIT AGID, KAREL TER BRUGGE, JOHNNY HO YIN WONG, JOHN DOE #1, JOHN DOE #2, and JOHN DOE #3 Defendants	)	*Darryl A. Cruz, Adam Goldenberg and William Rooney,* for the Defendants *(Sarit E. Batner and Lauren Weaver, on Costs)*
	)	**HEARD: March 16-18; 21-25; and March 28 to 31; April 1, 4, 5, 7, 8; and June 10 and 13 to June 22, 2022**

ENDORSEMENT

J.E. FERGUSON J.

[1] Further to my Reasons for Decision dated February 16, 2023, following the trial of this matter (which proceeded for 25 days between March 16 and June 22, 2022), the parties were unable to agree on costs. Written submissions on costs were received and oral submissions were heard on May 25, 2023.

[2] The plaintiffs submit two scenarios. The first is partial indemnity costs to the date of the offer and substantial indemnity costs thereafter. The amount sought is $2,487,555.77 plus HST of $323,382.25 and disbursements of $256,882.25 totaling 3,067,820.27.

[3] The second scenario is partial indemnity costs to the date of the offer and something between substantial and full indemnity thereafter. The amount sought is $2,889,581.50 plus HST of $375,645.60 and disbursements of $256,882.25 totaling $3,522,109.35.

[4] The defendant doctors submit that the appropriate costs should be $1,554,175.28 inclusive of fees, disbursements and taxes.

[5] I am awarding the plaintiff's $3 million for costs for the following reasons.

[6] The costs requested by the plaintiffs are consistent with costs awarded in other lengthy medical malpractice cases. In *Hemmings v. Payne,* 2023 ONSC 66 the plaintiff was awarded costs of $4,218,052 inclusive of fees HST and disbursements. Although that case was longer than this case, the plaintiff did not serve or "beat" a Rule 49 offer. In this case, the plaintiff served a Rule 49 offer which they "beat" by more than $2 million.

[7] In *Hemmings*, time dockets totaling $6,547,499.20 were produced by plaintiff's counsel. In this case, time dockets total $2,996,804.74. I find that there is no merit to the suggestion that plaintiff's counsel was inefficient with their time. I also agree that defence counsel ought to have anticipated the magnitude of costs being sought since Mr. Cruz was also lead counsel in *Hemmings*. The cost implications of losing a complex medical malpractice trial such as this are known. I put no weight on the submission that the plaintiffs over relied on a top-heavy team of senior counsel. The team is comprised of Mr. Mandel, Mr. Mladenovic and Ms. Gilbert. In *Hemmings* the plaintiff's trial team consisted of five lawyers from two separate firms.

[8] I also put no weight on the defence submission that the task of preparing written submissions should have been assigned to a junior lawyer. This was a complex case and I greatly appreciated the comprehensive written submissions received from both sides. This was a task for senior medical malpractice lawyers and not junior lawyers.

[9] In this case, only the three defendant physicians proceeded to trial and the case was successful against all of them.

[10] The plaintiffs submit that costs on an enhanced scale are appropriate. They cite Rule 57.01(8) which expressly gives the court discretion to make a costs award that takes into account "conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding".

[11] I do not accept that an enhanced cost award would penalize the defendants for defending the action. In this case, the plaintiffs seek enhanced costs for the defendants' conduct that resulted in the need for more legal work. They cite that this included leading evidence contrary to pleadings and discovery evidence, conduct that this very same trial counsel used in *Hemmings.*

[12] Dr. Pereira gave new evidence at trial about his alleged involvement in Mr. Denman's care on August 5, 2014 (evidence that was contradicted by his sworn discovery evidence and his own

amended statement of defence). I agree that this required extensive cross-examination and repeated impeachment of all defence witnesses (including their expert on a matter that should have been acknowledged by the defence).

[13] The defendants submits that they have already suffered the consequences because of their failed attempt to call their expert, Dr. Redekop who, on the basis of bias was excluded from testifying at trial. I agree that additional costs were caused to the plaintiff by involving Dr. Redekop throughout years of litigation, including the delivery of his multiple reports that had to be critiqued and responded to.

[14] The trial of this matter was originally expected to be for 13 days. This time was provided prior to the late defence production of relevant documentation, (CVs; journal publications; and presentations authored by Dr. Redekop and not previously disclosed; a consent to broadcast form, a historical website produced by the defence in the middle of trial after they had previously advised the plaintiff that it could not be recovered; the need for the last minute further discovery of Dr. Pereira given his late production; the refusal to take affirmative steps to obtain a recording of the live broadcast and the need to address evidence that directly contradicted admissions and pleadings and readings from sworn examination for discovery transcript.) I agree that all of the foregoing drove up the plaintiffs costs by requiring their counsel to likely scramble in the days and weeks before and during the trial to review and respond to the defendants new material and evidence. Significant time was required reviewing late and mid-trial defence productions, carefully analysing the defendants' late produced medical literature. I also agree that detailed and accurate written submissions and reply submissions were required that incorporated the new evidence the defendants had introduced for the first time at the trial or just before.

The Rule 57.01 Cost Factors

[15] (i) This case required experienced lawyers. All three plaintiff lawyers are certified specialists in civil litigation;

(ii) A sophisticated litigant like the CMPA is aware that litigation is expensive and trials more so;

(iii) The parties agreed to damages of $8.5 million. The costs sought are either 29 or 32% of that amount;

(iv) The plaintiffs were entirely successful against the defendants;

(v) This was a very complicated case;

(vi) The case was important to the Denman family;

(vii) Mrs. Denman was a very credible witness. The defendants were not found to be credible nor reliable;

(viii) The defendants made last minute disclosure and production;

(ix) The defendants attempted to lead evidence contrary to the amended statement of defence;

(x) Dr. Pereira did not correct his discovery evidence;

(xi) Dr. Redekop was found to be biased and was not entitled to testify;

(xii) Dr. Roy failed to provide an updated report despite having volumes of additional documentation;

(xiii) The defendants failed to admit things that should have been admitted.

[16] The plaintiffs are awarded $3 million in costs payable forthwith.

J.E. Ferguson J.

Released: June 15, 2023