

CITATION: Kellesis v. Paramed, 2023 ONSC 5702
COURT FILE NO.: CV-18-1862-CP
DATE: 2023/10/11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sara Kellesis, Plaintiff/Moving Party

AND:

Paramed Inc., Defendant/Responding Party

BEFORE: Tranquilli J.

COUNSEL: Chelsea Smith, Emily Assini, for the Plaintiff

Doug Wallace, Kristin King, for the Defendant

HEARD: September 29, 2023

ENDORSEMENT

[1] On September 29, 2023, I heard, and for oral reasons given, granted the plaintiff's unopposed motions for approval of a negotiated settlement of this class proceeding and approval of class counsel's fees. I also signed the orders in that regard. These written reasons supplement the record.

Background

[2] This class action arises from the defendant's 10-year failure to follow public health standards in the sterilization of medical instruments at its wound care clinics in London, Ontario. The lapse in infection prevention and control throughout this time may have exposed its clients to the risk of serious communicable disease such as hepatitis B, hepatitis C and HIV. The defendant was required to notify its patients of the situation and to recommend they get tested.

[3] The action was issued September 14, 2018. I was assigned to the proceeding as case management judge. In September 2020, the Class was divided into two subclasses on consent of the parties: the "Infected Persons Class" and the "Uninfected Persons Class" (collectively the "Class Members").

[4] The court also certified the following common issues:

- a. did Paramed owe the Class Members a duty of care with respect to the sterilization of medical devices used in wound care services;
- b. if so, what was the applicable standard of care;

- c. did Paramed breach the standard of care;
- d. if those foregoing common issues were answered in the affirmative, are the Class Members each entitled to damages;
- e. can the damages of the Class Members be determined on an aggregate basis and if so, in what amount; and
- f. are the Class Members entitled to punitive damages and if so, in what amount?

[5] The parties each brought summary judgment motions.

[6] The plaintiff sought summary judgment findings on the duty of care and the manner of the breach of the standard of care. That motion was resolved on consent in favour of the Class Members.

[7] In turn, the defendant sought partial summary judgment dismissing the claims of the Uninfected Persons Class. For reasons released October 3, 2022, I granted the defendant's motion for partial summary judgment and dismissed the claims of the Uninfected Persons Class. In brief, I found the record did not establish that those subclass members sustained a serious and prolonged mental injury as a result of learning of the risk of exposure to serious infection.

These Motions

[8] The court is advised that following this partial summary judgment decision dismissing one of the two subclasses, the parties entered arm's-length negotiations to resolve the claims in the remainder of this proceeding, being those members of the Infected Persons Class.

[9] Four weeks later, the parties reached a settlement agreement in principle on October 31, 2022, which then required further negotiation as to terms and drafting of the agreement over the next five months. They finalized a "Settlement Agreement and Compensation Plan" on March 20, 2023, subject to the court's approval and which was before the court on this record.

The Proposed Settlement & Class Counsel Fees

[10] The key terms of the proposed settlement would establish a settlement fund of \$195,000.00 inclusive of payment of approved claims, administration costs, notice plan costs, a representative plaintiff honorarium of \$1,500.00 and Class Counsel fees of \$112,078.93 (inclusive of fees, disbursements and HST).

[11] The Compensation Plan provides for individual compensation ranging from \$10,000 to \$25,000 per successful claimant from the Infected Persons Class (hereinafter "Settlement Class Member") as follows:

- a. HIV claims - \$25,000;

- b. Hepatitis B Claims - \$15,000; and
- c. Hepatitis C Claims - \$10,000.

- [12] A prospective Settlement Class Member need only complete and submit a claim form with the supporting documentation, within three months of court approval. If they have contracted more than one of these diseases, they are entitled to multiple or aggregate compensation as per the three classes of compensation. It is a paper-based determination, requiring only documentation from a qualified medical professional that the claimant or their estate contracted one of these illnesses and that the diagnosis arose after the Settlement Class Member received wound care at one of the Defendant clinics. They would not be required to testify or otherwise prove that the wound care was the cause of their compensable diagnosis.
- [13] Notice of this settlement approval hearing was distributed as approved by the court, with an objection deadline of September 5, 2023. No objections were received before this deadline and no objectors appeared at the hearing.
- [14] The representative plaintiff supports the proposed settlement, even though the partial summary judgment disposition dismissed her claims as a member of the Uninfected Persons class.
- [15] The proposed Class Counsel fee of \$112,078.93 is comprised of \$58,000 in fees (based upon 30% of the settlement fund, \$7,605.000 HST and disbursements of \$45,973.93.
- [16] On inquiry, Class Counsel advised the outstanding administration costs approximate a range of \$16,000. They confirmed that the net result for compensation would leave a modest fund for claimants, estimated to be approximately \$65,000. However, they have satisfied me that the number of Settlement Class Members is extremely small. Approximately 1853 clinic patients were formally notified following certification. Only three potential Settlement Class Members have contacted Class Counsel since the inception of the claim. Moreover, if they are appointed as the Class Administrator, Class Counsel proposes that they will absorb that time and expense at no additional cost.

Analysis

- [17] I am satisfied that in all the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole. I am persuaded that the compensation is commensurate with similar class resolutions and that Class Counsel has done their due diligence in satisfying themselves that the net amount remaining in the settlement fund will likely satisfy the claims of the Settlement Class. The proposed settlement is the result of arm's-length negotiations by experienced counsel following critical steps in the litigation by way of the summary judgment motions.
- [18] The non-monetary value of this compensation plan cannot be overstated. Concerns about the possibility of inadequate compensation for individual class members must be measured against the delay and uncertainty they would face in carrying on the litigation, where causation would be an exceedingly complex and expensive evidentiary exercise and

adversarial common issues and/or individual trials many years into the future. The Settlement Class would otherwise face the risk of no recovery. I accept the likelihood that many members of the Settlement Class are socioeconomically disadvantaged, marginalized and/or suffering from HIV, hepatitis B and/or hepatitis C. The compensation process is straightforward, confidential, timely, and non-adversarial, where causation does not have to be established. To that end, the compromise is in their best interests. The court is satisfied the proposed settlement falls within the zone of reasonableness.

- [19] The proposed Class Counsel fees are also fair and reasonable in all the circumstances. The fees of \$58,500.00 represents a 30% contingency fee as contemplated in the retainer agreement. The retainer agreement satisfies the requirements of s. 32 of the *Class Proceedings Act, 1992*. The representative plaintiff's affidavit confirms her understanding and acceptance of the retainer agreement. The retainer agreement is accordingly presumptively valid and enforceable. In fact, the proposed fees represent less than 13% of the value of the time Class Counsel has invested in this proceeding. Given the modest recovery, they propose to perform and assume all further costs in the administration of the proposed settlement.
- [20] Class Counsel invested efforts in an initially contested certification and then summary judgment motions. I accept that Class Counsel assumed some risk with this retainer, particularly with respect to the complexities of establishing causation and with the narrowing of the class size to only the Infected Persons Class. In this context, they have achieved a successful result for the Settlement Class members for a meritorious claim that might not have otherwise been pursued.
- [21] The Counsel Fees proposal also incorporate a representative plaintiff honorarium of \$1,500 for her notable involvement in this proceeding through multiple affidavits and a cross-examination in respect of the summary judgment motion. She continued as representative plaintiff with full support notwithstanding my partial summary judgment decision which the Uninfected Class, of which she was a member. This is modest and reasonable considering her active contributions to the proceeding. She was more than a nominal plaintiff.
- [22] For these reasons and oral reasons delivered at the hearing, the settlement and class counsel fees are approved on the terms as proposed. I thank both Class and defence counsel for their professionalism and assistance throughout this proceeding.



Justice K. Tranquilli

Date: October 11, 2023