COURT FILE NO.: 04-CV-281230 CP
DATE: 20071207

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

AUDRA JEANETTE BELLAIRE, CATHERINE MARIE FRAUENLOB, SANDRA LaROCCA, CLAUDIA PAYNE, YVONNE THOMSON, STEVEN CHARLES BELLAIRE and ANDREW FRAUENLOB

Plaintiffs

- and -

SALIM DAYA and HAMILTON HEALTH SCIENCES CORPORATION

Defendants

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

TABLE OF CONTENTS

COURT FILE NO.: 04-CV-281230 CP
DATE: 20071207

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
AUDRA JEANETTE BELLAIRE, CATHERINE MARIE FRAUENLOB, SANDRA LaROCCA, CLAUDIA PAYNE, YVONNE THOMSON, STEVEN CHARLES BELLAIRE and ANDREW FRAUENLOB Plaintiffs	**Harvey T. Strosberg, Q.C., Stanley M. Tick, Q.C., Pheroze J.K. Jeejeebhoy and David Thompson,** for the Plaintiffs
- and -	
SALIM DAYA and HAMILTON HEALTH SCIENCES CORPORATION Defendants	**Mary M. Thomson**, for the Defendant Salim Daya **Tanya M. Goldberg**, for the Defendant Hamilton Health Sciences Corporation
	Laurie S. Redden, for the Office of the Public Guardian & Trustee
	Linda Waxman, for the Office of the Children's Lawyer
Proceeding under the *Class Proceedings Act, 1992*	**HEARD:** November 27, 2007 Further written submissions by letters dated November 30, 2007 and December 5, 2007

Hoy J.

REASONS FOR DECISION

INTRODUCTION

[1] The plaintiffs bring this motion for an order, among other things, certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "CPA"), and approving the terms of a settlement of this action signed as of September 20, 2007, including the provision for the payment of compensation to them. They also seek approval of the claims forms developed by Class counsel.

[2] Class counsel seek an order approving their fees and disbursements.

[3] The five female plaintiffs were patients of the defendant Dr. Salim Daya, an obstetrician/gynaecologist with a specialty in fertility and recurrent pregnancy loss. Counsel for the plaintiffs and the defendants describe Dr. Daya as the "physician of last resort" for women with certain kinds of fertility problems. Each of the five female plaintiffs underwent a surgery, called a Tompkins metroplasty, designed to correct an abnormality in the internal shape of the uterus in order to decrease the risk of pregnancy loss. The surgery was conducted by Dr. Daya at the defendant Hamilton Health Science Corporation's hospital (the "Hospital"). The male plaintiffs are the spouses of two of the female plaintiffs.

[4] In June of 2003, the Hospital directed Dr. Daya to stop performing metroplasties. In early March, 2004, the Hospital issued a press release announcing that it had conducted a review of Dr. Daya's practice and concluded that as many as 93 patients had undergone an unnecessary or inappropriate metroplasty. The release went on to indicate that, during the 1990s, the Tompkins metroplasty had been replaced by a less invasive approach, and that such approach represented the standard of care. The Hospital attempted to contact all affected patients. Dr. Daya resigned from the Hospital.

[5] The press release explained that, in addition to the risks associated with the surgical procedure, there were other implications: "A possible increased risk of uterine infection, or scarring of the uterus, may also cause infertility problems. Most importantly, because of the metroplasty incision at the top of the uterus, the patient must give birth by caesarean section during any subsequent pregnancy."

[6] Shortly after the March press release, the plaintiffs launched actions against Dr. Daya and the Hospital, alleging negligence and breach of contract. The male plaintiffs advanced claims under the *Family Law Act,* R.S.O. 1990, c. F.3, as amended.

[7] The female plaintiffs seek to represent the following Class:

[8] "Those women who underwent a Tompkins metroplasty performed by Dr. Daya at the Hospital during the period January 1, 1990 to March 31, 2004, inclusive."

[9] The spouses seek to represent the following Family Class:

[10] "The spouse, child, grandchild, parent , grandparent or sibling (as defined in s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.4) of each Class Member alive on the date the Class Member first underwent a Tompkins metroplasty performed by Dr. Daya at the Hospital in the period January 1, 1990 to March 31, 2004, inclusive."

CONCLUSION

[11] For the reasons that follow, an order shall issue certifying the action, and approving the settlement, conditional upon:

(1) the notice provisions in the judgment forming part of the settlement being revised as provided in paras. 64-67 below in my consideration of the settlement agreement;

(2) the Distribution Plan being revised to provide for awards to persons under the age of 18 years to be paid into court and any award payable to a mentally incompetent person to be paid to his/her qualified representative;

(3) the provision of the settlement providing for the payment of compensation to the representative plaintiffs being deleted;

(4) the "Claims Bar Date" and "Deadline for Opting out of the Action" definitions set out in the judgment forming part of the settlement being amended as provided in paras. 66-67 below;

(5) the date by which notice of the judgment is to be given being extended, as contemplated by para. 67 below; and

(6) the amendment of Revised Appendix "A" to the Distribution Plan to increase the "cap" on additional compensation from $10,000 to $20,000.

[12] The foregoing does not modify the settlement presented to me. It indicates my areas of concern, and affords the parties an opportunity to address them, in order to obtain the approvals sought.

[13] The claims forms developed by Class counsel are also approved, subject to certification and approval of the settlement agreement, and modifications required to reflect the foregoing conditions.

[14] An order shall also issue, subject to certification and approval of the settlement, fixing Class counsel's fees, inclusive of disbursements and GST, at $2,000,000.

DOES THE ACTION MEET THE TEST FOR CERTIFICATION?

[15] An action must be certified if it meets the requirements of section 5(1) of the CPA:

> 5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the Class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,

> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying Class members of the proceeding; and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other Class members.

[16] While the requirements for certification are the same in a settlement context as in a litigation context, it is generally accepted that they need not be as rigorously applied in a settlement context.

[17] The statement of claim discloses causes of action in negligence and breach of contract; the requirement of section 5(1) (a) is met.

[18] The proposed classes are set out above. I am satisfied that they have properly defined by referenced to objective criteria and that there is a rational relationship between the class and the proposed common issues.

[19] The plaintiffs propose the two following common issues:

(1) Was Dr. Daya negligent in performing the Tompkins metroplasty on each Class Member?

(2) Was the Hospital negligent in relation to Dr. Daya's performing the Tompkins metroplasty on each member?

[20] In the portion of their factum addressing the preferable procedure requirement, plaintiffs' counsel refers to what the standard of care was, and whether there was a breach of the standard, as the common issues. I have taken that the reference to negligence in common issues proposed by the plaintiffs is intended to cover those elements, and not the element of loss. I am satisfied, in this settlement context, that the above constitute common issues.

[21] I am also satisfied that a class proceeding is the preferable procedure. While this matter is not proceeding to trial, had it, the standard of care and whether there was a breach of the standard would have been determined only once, resulting in judicial efficiency. Given the sensitive nature of the medical issues involved, many Class members might have been hesitant to participate in a trial in open court. Also, the cost of expert evidence can be spread across the Class and legal services were available to all Class members on a contingency basis. Thus, access to justice is promoted.

[22] To date, the proposed representative plaintiffs have capably represented the class. They have retained experienced counsel. They have attended mediation sessions.

[23] Class counsel tender the Distribution Plan, which forms part of the settlement agreement of which approval is sought, as satisfying the requirement of section 5(1)(e) that the representative plaintiffs have produced, "a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the Class and of notifying Class members of the proceeding". I conclude below in my consideration of the settlement agreement, that the notice provisions in Distribution Plan are not workable. I also indicate the basis on which I would be prepared to approve the notice provisions.

[24] The proposed representative plaintiffs do not have, on the common issues for the Class, an interest in conflict with the interests of the other Class members.

[25] I am satisfied that, in this settlement context, all of the requirements for certification are met, except the requirement of section 5(1)(e)(ii). If the notice provisions of the Distribution Plan which form part of the settlement agreement are modified, as discussed in my consideration of the settlement agreement, the requirement of 5(1)(e)(ii) will be met.

SHOULD THE SETTLEMENT BE APPROVED?

The Applicable Law relating to the Approval of a Settlement

[26] A settlement of a class proceeding is not binding unless approved by the court. In order to approve the settlement, the court must find that it is fair, reasonable, and in the best interests of the class as a whole. The test is not whether it meets the demands of a particular Class member.

[27] There is a strong initial presumption of fairness when the proposed class settlement is negotiated at arm's length. To reject the terms of the settlement, the judge must conclude that the settlement does not fall within the range of reasonable outcomes.

[28] Some of the criteria account court may take into account determining whether to approve the settlement include:

- the likelihood of recovery or likelihood of success;
- the amount and nature of discovery, evidence or investigation;
- the proposed settlement terms and conditions;
- the recommendation and experience of counsel;
- the future expense and likely duration of litigation;
- the recommendation of neutral parties, if any;
- the number of objectors and nature of objections;
- the presence of arm's length bargaining and the absence of collusion:

- the information regarding the dynamics of, and the positions taken by, the parties during negotiations; and

- the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation.

The court's power to approve or reject a settlement does not permit it to modify the terms of a negotiated settlement. It can, however, indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. (*Ford v. F. Hoffmann-La Roche Ltd.*, (2005), 74 O.R. (3d) 758 (S.C.J.) paras. 110-154; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.).)

The Terms of the Settlement

[29] The settlement is in the form of a two page settlement agreement signed as of September 20, 2007, agreeing to a settlement in the form of a draft judgment and a Distribution Plan attached to it.

[30] The proposed settlement contemplates the following:

- The defendants will pay $9,900,000 in full and final settlement of all claims asserted in this action by the Class members and their Family Class members and $575,000 in full and final settlement of all subrogated claims asserted in this action in respect of provincial health-care services.

- Notice of the settlement shall be given on or before December 31, 2007 to the Class and Family Class through a direct mailing by registered mail, a newspaper publication, through posting on the Internet and through class counsel providing the notice to any person who requests it.

- Any person who wants to opt -out or exclude herself from the settlement may send written notice of her intention to do so by February 29, 2008

- Class members who wish to participate in the distribution of settlement funds must submit a claim form by April 30, 2008.

- Class members who do not opt-out and who do not submit a claim form are not entitled to receive monies from the settlement fund.

- The settlement will be distributed to Class and Family Class members in accordance with the Distribution Plan, which forms part of the settlement agreement. An Arbitrator will be appointed by the Court to decide amounts to be distributed to Class members under the Distribution Plan.

- The settlement fund of $9,900,000 will be notionally divided into four funds: the Base Fund ($6,845,000), the Additional Compensation Fund (which.

subject to "top up", is $880,000), the Administrative Costs Fund ($175,000) and the Class Counsel Fund ($2,000,000).

- Each Class member who submits a valid, proper claim by the required date will be paid $35,000 for her and $2000 for her Family Class members, from the Base Fund. If the take-up rate is (as expected) less than 100%, the surplus in the Base Fund will "top up" the Additional Compensation Fund.
- Each Class member who experienced one or more of the additional complications/interventions specifically identified in the Revised Appendix "A" to the Distribution Plan, in the time frame indicated, which were caused by the Tompkins metroplasty, shall be entitled to additional compensation to a maximum of $10,000.

- To support a claim for additional compensation, the Class member must provide the opinion of a medical expert, in the form provided with the Claim Form approved by the Court, copies of only those portions of her medical records which indicate the relevant complications/interventions and when they occurred, or such other medical record or report as is acceptable to counsel for the settlement fund.

- Court-appointed counsel for the settlement fund is to review the claims, and determine if the complications/interventions were caused or contributed to by the Tompkins metroplasty. If unsatisfied with the settlement fund's counsel's decision, a Class member claiming additional compensation can require the matter to be determined by the Court-appointed Arbitrator.

- The maximum amount that any class member may be paid out of the Additional Compensation Fund is $10,000 regardless of the type and number of additional medical complications/interventions claimed.

- If there is an insufficient amount in the Additional Compensation Fund to pay the aggregate of all additional compensation awarded to Class members who establish entitlement, the payment to each Class member entitled to additional compensation will be reduced *pro rata*.

- If there is any notional surplus in the Additional Compensation Fund or any other fund after payment of all approved awards and expenses, the balance shall be divided on a per capita basis among all of the Class members admitted to participate in the Distribution Plan.

Is the Settlement fair, reasonable and in the best interests of the Class as a whole?

[31] Plaintiffs' counsel estimated the risk of establishing Dr. Daya's negligence for the class period at 35%, and the risk the action would not be certified at 25%.

[32] While the settlement occurred prior to discovery, the plaintiffs had prepared a questionnaire, "surveyed" the some 75 members of the Class who retained them, obtained

their medical records, and retained experts, including Dr. Tyson. I am satisfied that Class counsel had sufficient information to negotiate a fair overall financial settlement, and that they have put sufficient information before the court for me to assess the settlement.

[33] The settlement is recommended by very experienced Class counsel. It resulted, in part, from two mediations conducted by an independent and highly regarded mediator, who recommended the overall financial amount of the settlement to Class counsel. The settlement of the overall financial amount of the settlement was negotiated at arm's length.

[34] Class counsel estimate that, if not settled, it would take at least two more years to reach trial and exhaust all appeals. Moreover, Class members have individual, complicated medical histories; the settlement ensures the privacy of their medical histories and brings an end to litigation that, for many, may have intensified the emotional devastation of infertility.

[35] The gross amount of the settlement (excluding amounts payable in respect of the subrogated claims of the provincial health-care providers) was based on a payment of $35,000 per Class member, assuming a specified Class size and a certain take-up rate. The evidence is that $35,000 is within the range Class counsel sought to recover. Class counsel submits that this payment is the equivalent of a $50,000 award in an individual malpractice claim, because, they say, in such a case the plaintiff would pay legal fees of at least 30%.

[36] I am satisfied that the overall financial amount of the settlement is fair and reasonable.

[37] How the settlement is proposed to be allocated among, and distributed to, Class and Family Class members was not negotiated with the defendants. Nor was the mediator involved in determining how the settlement funds should be distributed among the Class members. The list of complications proposed to entitle Class members to additional compensation was determined by Class counsel, with input from Dr. Tyson and the representative plaintiffs. The $10,000 cap for additional compensation was set by Class counsel. They describe it as a "judgment call", based in part on prior experience with grid-type damages calculations. Neither the defendants nor Dr. Tyson were involved in this determination. Accordingly, how the settlement is proposed to be allocated among, and distributed to, Class and Family Class members may be entitled to less deference than the terms of the settlement negotiated at arm's length.

[38] The $35,000 payment to be made to all Class members from the Base Fund - the "Base Payment" - was designed by Class counsel to compensate for the damages commonly experienced on a class-wide basis. As indicated above, the evidence is that the $35,000 base payment provided for in the settlement is within the range Class counsel sought to recover. The Base Payment amount does not distinguish between Class members who had abnormally shaped uteruses before surgery, and for whom the surgery was inappropriate, and Class members who did not have abnormally shaped uteruses, and for whom the surgery was unnecessary. Nor does it distinguish among Class members based on the date on which the Tompkins metroplasty was performed on them, although it is acknowledged that Class members who underwent the procedure prior to the mid 1990s faced a greater litigation risk on the issue of standard of care.

[39] Notice of the settlement hearing was sent by the Hospital to the 189 identified members of the Class by registered mail, to their last known addresses, as provided by OHIP, whose records were thought to be more up to date than those of the Hospital. Counsel for the Hospital advised that as at November 26, 2007, receipt of 167 of the notices was signed for. Twenty-two of the notices were returned. Notice was also published in the Globe and Mail and the Hamilton Spectator.

[40] A total of four objections were received. One was subsequently withdrawn. One was from a lawyer on behalf of a woman who will opt- out. The other two objections related to entitlement to additional compensation, and are discussed below. I do not refer to the objectors by name in these reasons in order not to unnecessarily invade their privacy.

[41] The list of medical sequelae entitling Class members to additional compensation were developed by Class counsel with the aid of Dr. Tyson. The identified components are what were considered to be the complications and interventions that commonly manifest themselves among patients who have had a Tompkins metroplasty. Input from class members was considered in formulating the list of compensable sequelae.

[42] Class counsel has developed a distribution process and claim forms that are "user friendly" and cost efficient. They were designed to minimize both the stress to Class members associated with the claims process and administration costs.

[43] To apply for additional compensation, the Class member must have a two-page Physician's Form completed by a doctor, indicating (in a "check the box" format) which complications were experienced by the Class member, whether the Tompkins metroplasty " materially contributed" to the Class member experiencing the complication within the stipulated time period, and why the physician is of this view. Relevant portions of the patient's medical records are to be filed with the Claim Form. From the terms of settlement, and Class counsel's submissions, it appears that doctors' forms will generally be taken at face value. Class members and their physicians need not subject themselves to cross-examination.

[44] Administration costs, including administration per se, the arbitrator and the independent court-appointed counsel to the settlement fund, are capped at $150,000- roughly 1.5% of the amount of the settlement. Counsel advises that administration costs typically total 4 to 10%.

[45] As indicated above, counsel for the defendants did not participate in the drafting of the list of compensable sequelae. They advise that, given the compromised gynecological history of all of the Class members, they would have produced a shorter list of sequelae causally related to the Tompkins metroplasty.

[46] One of the objections was from a woman who delivered a baby at 26 weeks gestation who subsequently died. She objected that, under the grid, she would not be entitled to additional compensation. On the advice of Dr. Tyson, Class counsel did not revise the Distribution Plan to include this as a compensable complication. Dr. Tyson's advice was that to do so would establish a lower threshold of causality than currently represented in the grid in the distribution plan. If done on the basis that excessive scar tissue from the Tompkins

metroplasty contributed to the event, then, Dr.Tyson advised, the plan should also compensate Class members for failure to conceive, miscarriage and still birth, all of which can be caused by excessive scar tissue. This, based on their medical records, would result in the majority of Class members receiving additional compensation as the majority have failed to conceive, miscarried or endured premature labour.

[47] Given the compromised gynecological histories of the Class members, the complex individual issues of causation, and the summary, user- friendly, claims procedure the Distribution Plan provides for, I am satisfied that the list of compensable sequelae and the amounts associated with them are fair.

[48] This leaves the second of the two objectors. She filed articulate written submissions and made moving oral submissions at the settlement hearing. Since the Tompkins metroplasty was performed on her in 2002, she has undergone three surgical procedures necessitated, based on what she has been told by a doctor, by the Tompkins metroplasty. As a result, she has no hope of bearing children.

[49] Class counsel confirmed that each of the three surgeries undergone is on the list of compensable complications.

[50] The settlement is unfair, she argues, because it caps the additional compensation payable to claimants at $10,000, regardless of the number of additional complications/interventions claimed. If there was no cap, she, for example, would be entitled to $30,000 under the grid, having regard to number and nature of the complications/interventions she suffered. She seeks acknowledgment - in some form - of the trauma, physical and emotional, that she suffered and continues to suffer.

[51] She writes," Opting out may not be financially feasible for some of us; it may not benefit us psychologically to seek another two years of litigation."

[52] She specifically does not object to the base compensation payable to all Class members. That amount, as noted above, is the same regardless of whether the surgery was necessary or not, and regardless of the date of the procedure.

[53] As indicated above, the $10,000 cap for additional compensation was set by Class counsel. In determining what the cap should be, Class counsel communicated with many Class members to determine by way of sample how many women suffered one or more of the additional complications/interventions within the specified time periods. Their survey indicated that the number of women who did was very low. While that is the case, Class counsel advised by way of supplemental written submissions, after reviewing the medical records in their possession, that three of the five female plaintiffs suffered complications or interventions. One will be entitled to claim $3,500 in additional compensation under the grid; one underwent a surgical procedure outside of the time period established under the grid and will therefore not be entitled to the $3,500 of additional compensation available for persons who underwent such a procedure within the stipulated time period; and the third underwent a salpingectomy, a procedure which entitles claimants to $10,000 of additional compensation under the grid, and experienced a wound infection. A wound infection only entitles a claimant to additional compensation under the grid if it caused a wound dehiscence or

required surgical repair. It is at this stage not claimed that the wound infection experienced did either. Therefore, based on the record and the additional written submissions provided. it appears that none of the five female plaintiffs will have claims for additional compensation which will exceed the $10,000 cap under the grid.

[54] Class counsel's expectation is that much of the Additional Compensation Fund will be un-tapped, resulting in a per capita distribution among all Class members of the un-utilized balance.

[55] Counsel for the defendants advised that 9 individual lawsuits have been commenced by Class members, and Class counsel indicates that some have done so because they suffered multiple complications. Lawyers representing these parties could, they argue, represent this second objector, and economies of scale, and thereby access to justice, could be achieved.

[56] Based on submissions by Class counsel in relation to the fees they seek to have approved , it appears that the cost of pursuing a claim on an individual contingency fee basis would be more than the fees that counsel seek in this action. Moreover, this response does not address the psychological advantages of this settlement, which both counsel and this second objector have referred to. The second objector does not wish to proceed to trial.

[57] Given the expected surplus, and all of the foregoing, is a cap of $10,000 for claims for additional complications fair and reasonable to the class members as a whole? Or, as Winkler J. (as he then was) phrased the question at para. 80 of *Parsons v. Canadian Red Cross*, does the settlement provide a reasonable alternative for those class members who do not wish to proceed to trial?

[58] Class counsel submits that the answer is "yes".

[59] After careful consideration, and in the absence of evidence that a $10,000 cap on additional compensation was a factor in estimating the take-up rate on the settlement, and therefore the amount of the overall settlement, I have concluded that a settlement on this basis should not be approved.

[60] I fully appreciate that a simplified claims procedure was designed specifically to make the process accessible and minimize the emotional distress to Class members, as well as to be cost efficient. Moreover, a cap is understandable when viewed in the context of the simplified procedure for claiming additional compensation. If there was no cap on the amounts that could be distributed to Class members for additional complications, then, to be fair to Class members who did not suffer additional complications, a more rigorous approach to proof of causation would be appropriate. And were that done, a more complex approach to entitlement to base compensation. reflecting the different degrees of litigation risk that various Class members were subject to, would also be appropriate. Causation may be more complex where a Class member has undergone multiple surgeries.

[61] The difficulty I have had is that none of the representative plaintiffs appear to be affected by the cap, and the representative plaintiffs will benefit financially by a smaller pay-out from the Additional Compensation Fund. Nor is the second objection addressed by

medical evidence, as in the case of the first objection. This is not a term negotiated by a defendant. There can be seen to be an appearance of conflict.

[62] I would be prepared to approve a settlement with a $20,000 cap on the amount that a Class member can be paid out of the Additional Compensation Fund as a reasonable compromise. Given the expected surplus, this should not require other changes to the Distribution Plan. It is not material to the defendants.

[63] The primary form of notice of the settlement is direct mail, by registered mail. As noted above, 22 of the 189 notices of the settlement approval hearing sent by registered mail were not signed for. Having regard to this, the significant amounts at stake and the comprehensive releases provided pursuant to the judgment by all Class members and Family Class members, whether or not they received notice, I am not prepared to approve the settlement (or conclude that the requirements of section 5(1)(e) of the CPA have been met) with the existing form of notice provision.

[64] Class counsel proposes that additional steps could be taken to locate these 22 members before the opt-out date: the notices could be sent by ordinary mail, as well as by registered mail; the notices could be addressed to both the Hospital's last known address for the Class member, and OHIP's, if they are different; and, if provided with these individual's names by the Hospital, what counsel describe as "411" and "skip-tracing" searches could be undertaken, as soon as possible, at Class counsel's expense, to locate these 22 identified Class members, presumably with follow up to obtain acknowledgment of receipt of notice. The Hospital does not oppose disclosing the 22 names to Class counsel for this purpose.

[65] The settlement agreement provides for the Hospital to report to the Court on or before March 21, 2008, on a confidential basis, as to the names of the persons who opted-out of the action. Class counsel suggests that they could, at the time that the Hospital reports on the opt-outs, provide an update to the court as to how many of the 22 identified Class members they succeeded in notifying, and when. Class counsel points out that, if appropriate, the opt-out date could be extended in respect of affected Class members.

[66] I would be prepared to approve a notice provision that incorporated, as requirements, all of Class counsel's proposed additional steps to locate Class members, and to authorize the provision of the 22 names to Class counsel for the limited purpose described above, provided that the definitions of the "Claims Bar Date" and "Deadline for Opting Out of the Action" set out in the judgment are modified to mean, "April 30, 2008, or such later date as fixed by the Court" and " February 29 2008, or such later date as fixed by the Court ", respectively, and that the judgment is revised to require a report, at the time that the Hospital reports on the number of opt-outs, as to the number of Class members who acknowledged receipt of the judgment. In this manner, the Court, should it consider advisable, could ensure that further steps were taken to locate Class members before closing the opt-out period. The provision requiring newspaper advertisements (8(b) in the draft judgment) should also be revised to require the notice to be published on a date selected to assure maximum readership.

[67] It may be that, as a result of changes that I require as a condition of certifying the action and approving the settlement, it will be difficult to give notice effectively before the December 31, 2007 date contemplated by the settlement agreement. Only one newspaper

notice is contemplated; it should not be given in the height of the upcoming holiday season. In that event, the December 31 date should be extended by a month, and the Claims Bar Date and the Deadline for Opting Out of the Action similarly extended by 30 days.

[68] The Class is not restricted to the 189 women whom the Hospital's comprehensive record's search identified as having undergone a Tompkins metroplasty. I raised at the settlement hearing whether, given the substantial amounts at issue, it is fair and reasonable for unidentified Class members who will not receive direct notice of the action to provide releases in favour of the defendants. The press releases issued by the Hospital in 2004 and the newspaper notices of the settlement hearing have not turned up any additional members and the Hospital is confident that there are no other Class members. Indeed, it has agreed as part of the settlement to fund claims by any Class members not identified in its records. The flip side, counsel assert, is that the defendants are fairly entitled to releases. Moreover, Mr. Strosberg assures me, but for the tolling of the limitation period as a result of this action having been commenced, class members would not be in a position to advance individual claims. I am satisfied that the releases provided for are fair and reasonable.

[69] Paragraph 27 of the form of judgment that forms part of the settlement agreement provides for each of the five female representative plaintiffs to be paid $5,000, "in full payment for their assistance, time, travel and outstanding expenses for acting as representatives to the Class and that these payments be notionally allocated as having been made from the Administrative Costs Fund."

[70] An award of compensation to representative plaintiffs should not be seen as routine: *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen.Div.). Compensation for representative plaintiffs must be awarded sparingly: *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.). In *Garland v. Enbridge Gas Distribution Inc.* [2006] O.J. No. 4907 (S.C.J.), a case that Class counsel referred me to in which compensation to representative plaintiffs was awarded, compensation was paid out of approved class counsel's fees. It did not, as it would here, reduce amounts payable to other Class members.

[71] Here, and without in any way diminishing their efforts, or the emotional aspects of this case, the representative plaintiffs did what is expected of representative plaintiffs. This is not a case, such as *Garland*, where the representative plaintiff's contribution exceeded significantly what might properly have been expected of a representative plaintiff. The $25,000 that I am not approving payment of to the representative plaintiffs will be available to fund any additional administrative costs arising out of the increase to the cap.

[72] The final issue under the settlement agreement is the manner in which payments are to be made to persons under a disability. Rule 7.09(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that any money payable to a person under disability shall be paid into court unless a judge orders otherwise. The Distribution Plan contemplates the Court ordering "otherwise". Class counsel provided drafts of the settlement agreement and the proposed claims forms to the Office of the Public Guardian & Trustee (the "OPGT") and to the Children's Lawyer. In response to their comments, Class counsel revised the proposed claims forms provided to me for approval, providing for awards to persons under the age of 18 to be paid into court and any award payable to a mentally incapable person to be paid to her/his qualified representative. The Distribution Plan itself has not yet been revised to

respond to their comments. The use of claims forms substantially in the form of the revised forms prepared by Class counsel is approved. In order for the settlement agreement to be approved, the Distribution Plan must be revised accordingly.

[73] Counsel for the OPGT has requested that she be provided with a list of the identified Class members so that the OPGT can cross-check it against its register of guardians for mentally incompetent persons. The Hospital does not oppose, provided that the list is provided in a manner that is minimally invasive of Class member's privacy interests. To that end, the Hospital shall, as soon as reasonably possible, prepare and provide to Ms. Redden, counsel for the OPGT , a list setting out the names, dates of birth and last known addresses of the Class members. The list shall not include any medical information and shall not be titled in a manner that links the list to this action or to any doctor or medical condition. It shall be delivered on a password protected CD or "memory stick". It shall not be "saved" and no copies, electronic or otherwise, shall otherwise be made of the document. Ms. Redden shall designate a single individual to undertake the data base search under her supervision. The CD or "memory stick" shall be returned to the Hospital within 10 days. The Hospital shall coordinate with Ms. Redden the date on which the list is to be provided. The OPGT shall promptly provide Class counsel with the outcome of its search.

COUNSEL FEES

[74] The settlement provides for an amount, not exceeding $2,000,000, to be paid to Class counsel for fees, disbursements and GST. Class counsel seek a lump sum award of $1,798,000 in fees plus disbursements of approximately $94,000 plus GST of $108,000, for a total of $2,000,000.

[75] Counsel's aggregate fee, calculated by multiplying the docketed hours by the applicable hourly rates, is $1,025,000. Assuming the reasonableness of the base fee, if $1,798,000 is awarded, this extrapolates to a multiplier of 1.75. Given that three separate firms were involved - an alliance cobbled together to avoid a carriage dispute - one can safely assume, that, despite counsels' best efforts, there were some inefficiencies and unnecessary duplication. Four senior counsel, with hourly rates ranging from $500 an hour to $810 an hour, as well as junior counsel, attended the settlement approval hearing. From the material filed, I could not assess the extent of the duplication and the reasonableness of the base fee. The "real" multiplier is likely somewhat higher than 1.75.

[76] In this case, a fee calculated on a percentage basis is a more meaningful way of assessing counsels' request. A lump sum of $1,798,000 for legal fees is 18% of the recovery of $9,900,000.

[77] Ms. La Rocca signed a contingency fee agreement in March of 2004 providing for a fee equal to 25% of all monies available to the Class by way of settlement or judgment, and the representative plaintiffs all approve of the $2,000,000 amount sought by counsel.

[78] Counsel also argue that the usual fees in a medical malpractice or personal injury action invariably exceed 20% and usually are in the range of 30%, and that an 18% fee is therefore more than reasonable in a class action context. They note that the Court of Appeal, in *Raphael Partners v. Lam*, [2002] O.J. No. 3605, approved a fee of 18.5% of a $2.5 million

settlement in a catastrophic personal injury case, and commented that fees as high as 31% have been approved. The comparisons to contingency fees in individual actions, particularly that awarded in *Raphael Partners v. Lam*, are not completely compelling; Counsel argue that class actions are the preferable procedure because they are a *less* costly way for plaintiffs to pursue their claims. Given that the amounts of the settlements are typically greater in class proceedings than in individual actions, the percentage contingency fee should generally be smaller in a class proceeding.

[79] Nonetheless, in this case I am satisfied that in this case a fee equal to 18% of recovery is fair and reasonable and should be approved.

[80] Class counsel took responsibility for rejecting a $2,000,000 initial offer and other offers during the course of mediation. They obtained a settlement within the range that they had contemplated.

[81] Significantly, they agreed to indemnify the representative plaintiffs against any adverse costs award, thereby saving the Class $990,000 which otherwise would have been payable to the Class Proceedings Fund. To my knowledge, indemnification against adverse costs awards is not typically provided by counsel retained on a contingency basis in respect of individual action. The action has taken three years to resolve. Class counsel funded the disbursements and inventoried their time. The Distribution Plan crafted reflects counsel's very considerable experience and provides a cost-efficient manner of distributing proceed of settlement to Class members.

[82] The fee sought is accordingly approved, subject to satisfaction of the various conditions to certification and approval of the settlement agreement that I have identified in these reasons.

Alexanch ne J.
Hoy J.

Released: December 7, 2007

COURT FILE NO.: 04-CV-281230 CP
DATE: 20071207

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

AUDRA JEANETTE BELLAIRE, CATHERINE MARIE FRAUENLOB, SANDRA LaROCCA, CLAUDIA PAYNE, YVONNE THOMSON, STEVEN CHARLES BELLAIRE and ANDREW FRAUENLOB

- and -

SALIM DAYA and HAMILTON HEALTH SCIENCES CORPORATION

REASONS FOR DECISION

Hoy J.

Released: December 7, 2007