

CITATION: Head v. 859530 Ontario Inc., 2025 ONSC 6642
COURT FILE NO.: CV-21-00000142-00CP
DATE: 20251127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GEORGE HEAD by his Litigation
Guardian MARCELLA LAMBIE,
MARCELLA LAMBIE, the Estate of
JANET MARTIN, deceased, by her Estate
Representative SCOTT MARTIN, and
SCOTT MARTIN

Plaintiffs

– and –

859530 ONTARIO INC., BARRIE LONG
TERM CARE CENTRE INC., JARLETTE
HOLDINGS INC., JARLETTE LTD., and
ROBERTA PLACE RETIREMENT
LODGE INC.

Defendants

Gayle Brock, Nicholas Fleming, Robert
Durante, Ben Irantalab, for the Plaintiffs

Deborah Berlach, Gaetana Campisi, Thomas
Russell, for the Defendants

HEARD: By written submissions

DECISION ON COSTS

HEALEY J.

Overview

- [1] This costs decision follows a successful motion for certification of a class action, heard on May 12, 2025 (*Head v. 859530 Ontario Inc.*, 2025 ONSC 4817). In the action, the plaintiffs seek \$25,000,000 in damages for gross negligence, \$25,000,000 for punitive and aggravated damages, and *Family Law Act* damages in the amount of \$100,000 for each member of the family class.
- [2] Due to agreements reached between counsel five days before to the hearing, this court had to determine four primary issues:

1. If the action was certified as a class proceeding, whether it should only be certified in respect of all of the five named defendants;
 2. Whether the amount of damages, or some portion thereof, could be determined on an aggregate basis;
 3. Whether punitive, exemplary or aggravated damages should be certified; and
 4. Whether a class action was the preferable procedure.
- [3] The plaintiffs were successful on three out of four of the disputed issues. The determination of damages on an aggregate basis was not certified as a common issue.

Position of the Parties

- [4] The parties have made their costs submissions in writing. The plaintiffs seek fees, inclusive of HST, in the amount of \$421,376.99, and disbursements totalling \$102,588.53, for a total of \$523,965.52.
- [5] The plaintiffs made three offers for consent certification. The second offer, dated February 7, 2025, offered to release some defendants from the action, alter the class definition, and exclude the common issues related to causation and damages. The last offer, made on April 28, 2025, is identical to the outcome of the motion decision. For that reason, the plaintiffs seek costs on a partial indemnity scale before the date of the offer and substantial indemnity thereafter.
- [6] The defendants' submission is that the costs sought by the plaintiffs are not fair, reasonable or proportionate, and that no costs should be ordered for the certification motion. Their main points are that success was divided due to non-certification of aggregate damages, the plaintiff incurred unnecessary costs, the defendants ultimately did not oppose multiple issues, which was confirmed in their offer delivered on February 7, 2025, and the quantum of costs is well beyond the defendants' reasonable expectations and not supported by case precedent.
- [7] If this court decides to award any costs, the defendants submit that a reasonable amount is in the range of \$60,906.

The Law

- [8] Section 31(1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the "CPA"), permits the court to consider, in exercising its discretion to award costs, whether the proceeding was a test case, raised a novel point of law or involved a matter of public interest.
- [9] Aside from that provision, class proceedings are subject to the same principles and law that govern costs in any other civil proceeding. On a certification motion, the general rule remains that costs on a partial indemnity scale follow the event: *Davidson v. T.E.S. Contract Services Inc.*, 2024 ONSC 4362, at para. 12. In accordance with r. 57.03(1), the

typical result is to fix the costs of a contested motion and order them to be paid within 30 days, unless the court is satisfied that a different order would be more just.

- [10] The court has broad discretion in deciding whether to award costs, to whom, and in what amount: s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. However, that discretion is to be exercised in accordance with the provisions of an act or the *Rules of Civil Procedure*, O. Reg. 194: *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, [2006] O.J. No. 4248 (Ont. C.A.), at para. 25; *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 508 (Div. Ct.), at para. 20; leave to appeal refused, 2006 CarswellOnt 7749 (Ont. C.A.).
- [11] Rule 57.01 sets out the factors a court may consider when deciding costs, and the court must adhere to the principle of proportionality set out in r. 1.04(1.1). Despite those factors, the court's authority under r. 57.01(1) remains discretionary: *Ontario v. Rothmans Inc.*, 2013 ONCA 353, [2013] O.J. No. 2367, at para. 134.
- [12] The overarching principle when fixing costs is that the amount of costs awarded be reasonable in the circumstances: *Davies v. Clarington (Municipality)*, 2009 ONCA 722, [2009] O.J. No. 4236, at para. 52.
- [13] Within the class proceedings context, these principles were all reviewed in *Pearson v. Inco Ltd.*, 2006 CarswellOnt 1527. Additionally, at para. 13, the court in *Pearson* noted that the following factors are important to determining costs of a certification motion: 1) a motion for certification is a vital step in the proceeding and the parties expect to devote substantial resources to prosecuting and defending the motion; and 2) a fundamental object of the CPA is to provide enhanced access to justice: See also *Brown v. Canada (Attorney General)*, 2013 ONCA 18, at para. 58 and *Good v. Toronto Police Services Board*, 2016 ONCA 250, at para. 109.
- [14] In determining the appropriate amount of costs to which the defendant may be entitled pursuant to r. 57.01(1), the principles that guide my decision are those articulated in *Pearson*, as well as *Andersen*, at para. 22:
- (1) The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in Rule 57.01(1): [*Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (Ont. C.A.); *Moon v. Sher*, [2004] O.J. No. 4651 (Ont. C.A.); and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC*, [2005] O.J. No. 160 (Ont. C.A.)].
 - (2) A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure

of the actual costs to the successful litigant: [*Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495 (Ont. C.A.), at para. 4].

- (3) The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: Rule 57.01(1)(0.b).
- (4) The court should seek to avoid inconsistency with comparable awards in other cases. “Like cases, [if they can be found], should conclude with like substantive results”: [*Murano v. Bank of Montreal*, [1998] O.J. No. 2897 (Ont. C.A.)] at p. 249.
- (5) The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

[15] In arriving at this decision on costs, I have fully considered the r. 57.01(1) factors and the preceding principles.

Analysis

- [16] There was not divided success on the motion. Argument was required on four issues, as set out above, with only one being decided in the defendants’ favour. Accordingly, this case is distinguishable from *Robertson v. Ontario*, 2022 ONSC 5127 and *Pugliese v. Chartwell* 2024 ONSC 1135, where no costs were ordered.
- [17] The hourly rates being charged by plaintiffs’ counsel, including for law clerks and for a student-at-law, do not exceed the maximum partial indemnity and substantial indemnity rates outlined in O. Reg.284/01, adjusted for inflation.
- [18] The defendants have made submissions regarding the costs associated with various steps in the proceeding, which have merit and should result in a reduction of the costs awarded. The reduction should reflect not only the fees incurred by the plaintiffs, but those that were wasted by the defendants in their counsels’ own work on these issues.
- [19] First, they submit that the plaintiffs devoted unnecessary time and costs in their factum to two causes of action - breach of fiduciary duty and breach of contract - despite the guidance in the caselaw. Due to s. 2(1) of *Supporting Ontario’s Recovery Act, 2020*, S.O. 2020, c. 26, Sched. 1, courts had already determined that no COVID-related lawsuits could proceed against a defendant unless there are allegations of bad faith or gross negligence: *Robertson*, at para. 10, cited with approval in *Pugliese*, at para. 29. The plaintiffs continued to push to have breach of fiduciary duty and breach of contract certified up until five days before the hearing. The \$36,401.25 attributed to preparation of the plaintiffs’ factum requires adjustment.
- [20] Second, costs were incurred in relation to one of the plaintiffs’ experts, Gary Principe, whose report purported to prescribe a methodology for an aggregate damages assessment.

He had been cross-examined by the defendants. However, the plaintiffs decided not to rely on his report or evidence at the hearing, without telling the defendants in advance. I note that his expert report is not included in the taxable disbursements claimed by the plaintiffs but given that his evidence was included in the factum, I infer that some of fees associated with this expert remain included in the costs outline, but there are no detailed dockets to work from.

[21] Last, the defendants point out the amount of fees incurred for the preparation of the plaintiffs' motion record, amended motion record and reply record (almost \$200,000 on a partial indemnity rate), in comparison to their own of approximately \$32,000 for their responding record. One of the affidavits in the plaintiff's record is that of Gary Principe, but it is a four-paragraph affidavit attaching his curriculum vitae, report and form 53.

[22] The plaintiffs provide compelling reasons for why so much work had to be invested in their motion records. They submit:

...The facts of what happened at Roberta Place were opaque and a significant investment of time was required to meet the Plaintiffs' evidentiary burden. The investigation involved extensive online research, over 100 interviews with putative class members, corresponding with and collecting documents from hundreds of putative class members, submitting ten Freedom of Information (FOI) requests, and obtaining two reports from an infectious disease expert. The information received needed to be reviewed and distilled so that only relevant information was included in the Plaintiffs' motion records.

[23] I accept this submission. The uncontrolled outbreak of COVID-19 at Roberta Place in Barrie made for distressing news headlines in 2021. A total of 73 residents died, 71 of whom tested positive for COVID-19 prior to their passing. The 73 residents represented 57% of the resident population at the time. It was common ground on the motion that all residents of Roberta Place were vulnerable by reason of age or infirmity and reliant on their caregivers for protection from the pandemic. Evidence gathering from the residents who survived, or from the family members of those who did not, would be understandably difficult given the patient cohort and the exclusion of family members from the building for much of the critical time. The evidence that the plaintiffs' counsel needed to amass to be successful on a certification motion would in large part have to come from the defendants. Given the number of deaths and the notoriety of this case within Simcoe County and surrounding regions, the defendants were not particularly forthcoming. They attempted to prevent access to information made through the FOI requests. As noted by plaintiffs' counsel, the responding record consisted largely of documents that the plaintiffs had not previously seen, which triggered a lengthy review by plaintiffs' counsel.

[24] This is a claim for millions of dollars, understandably rigorously prosecuted and defended. It is no surprise that the costs award will be substantial.

- [25] Additionally, the defendants argue that they should not be charged for the costs that the plaintiffs incurred for submitting the ten Freedom of Information (“FOI”) requests. Again, the plaintiffs’ submissions detail some of the work that was required to obtain the collection of evidence for the certification motion, the accuracy of which is not disputed. The defendants were consulted on seven of the ten FOI requests and appealed the release of the documents to the Information and Privacy Commissioner of Ontario on six of the seven requests. Each of the appeals was mediated and four proceeded to adjudication. The defendants’ objections were found to be without merit.
- [26] Regardless of whether the defendants’ lawyers were involved in those FOI requests, the extra work and costs were necessitated by the position taken by the defendants, were incurred for the purpose of the certification, and are therefore recoverable.
- [27] Another of the defendants’ submissions regarding excess is related to the amount spent on the reports of the plaintiffs’ infectious disease expert, Dr. Sharkawy. The disbursement incurred by the plaintiff for his reports is \$83,850. They contrast this with the \$14,375.75 spent on the responding report of their own expert, Dr. Loeb. Further, the defendants make the point that much of his reports were recycled from other COVID-19 class actions in which he offered expert evidence, in which their counsel was likewise involved.
- [28] These physicians are both experts in the field. Both offered competing opinions in *Pugliese*.
- [29] The plaintiffs’ counsel understandably went with a leader in the field, given the importance of the expert evidence. Counsel have little to no control over the fees charged by an expert. The court would never penalize a party for not “shopping around” for a cheaper alternative. Furthermore, having been previously acquainted with the cost of Dr. Sharkawy’s reports from *Pugliese*, the defendants likely knew the cost that they were facing when considering their positions on this motion.
- [30] Accordingly, other than as indicated above, I accept the plaintiffs’ costs outline is an accurate reflection of the fees and disbursements that were incurred for this certification motion.
- [31] For the two issues that were discussed, being the two abandoned causes of action and the evidence of Mr. Principe, there must be an arbitrariness given the information available to me. I reduce the partial indemnity fees up to the date of the argument of the certification motion for motion records, cross-examinations and factums, which currently totals 275,866.24, by 10% to take into account wasted costs on both sides. This reduces the fees for those steps to \$248,279.62. I have not applied this reduction to the FOI requests or the case conferences, the latter of which dealt with procedural matters only. As for the certification motion itself, there will have been some preparation costs incurred by the defendants to deal with the entirety of the Mr. Principe’s evidence, but days before the hearing everyone was aware that the claims for breach of contract and breach of fiduciary duty were not proceeding.

- [32] The plaintiffs achieved a result equal to their offer of April 28, 2025, and therefore are entitled to substantial indemnity costs for the hearing of the motion. This is the only step in the proceeding for which they claim substantial indemnity costs.
- [33] The plaintiffs claim \$61,368.75 on a substantial indemnity basis in their costs outline for “certification motion”. It is not clear to me that this includes anything other than preparation for, and attendance at the motion. All other work appears to be captured in other categories. It appears excessive to have this step require 80 hours of Mr. Durante’s time, and an additional 55.3 hours of a junior associate, Mr. Fleming. By comparison, 52 hours were docketed by the defendants’ counsel for the certification motion. I accept that the plaintiff had more responsibility and that their counsels’ time likely included the offer to settle and communication with the representative plaintiffs regarding final positions taken, but the time still seems excessive. Accordingly, I reduce related fees by 30% from \$61,368.75 to \$42,958.12.
- [34] The defendants prepared to respond to Mr. Principe’s evidence, which was unnecessary. I reduce the fees associated with the motion hearing itself by a further 2.5% as a result, decreasing those costs to \$41,884.17. Further, the disbursements incurred by the defendants for Mr. Principe’s cross-examination, which I estimate at \$315 for the attendance and \$1,000 for the transcript, will also be taken into account.
- [35] Then I will take into account that the plaintiffs did not achieve total success, as the issue of aggregate damages was not certified. There should not be much reduction related to this, however, as it was not a complex issue, there was no evidence to substantiate it, and the issue did not consume a significant portion of the time or submissions.
- [36] The “credits” to the defendants have so far reduced the fees to \$325,828.79. The defendants’ success on that one issue merits a further proportionate reduction. It would be artificial to extend this across all work needed for the motion, as it will have mostly impacted the cross-examinations, the defendants’ factum and argument of the motion. Taking into account all of these factors, I reduce the fees by a further \$20,000, to \$303,779.15
- [37] This brings the potential costs award to \$345,586.53 inclusive of HST, plus disbursements reduced by the \$1,315 credit to the defendants. Additionally, there are several miscellaneous disbursements claimed by the plaintiffs that are overhead expenses and not allowable disbursements under Part II of Tariff A. These are, specifically, fax transmission, mileage, postage, telephone charges, class action website, Tracument mail expenses and research, totalling \$1,728.93. I reduce the disbursements of the plaintiffs, including the \$1,315 credit to the defendants, to \$87,442.38 plus HST for a total of \$98,809.89.
- [38] The next question is whether such an award is in line with other costs awards. The plaintiff has provided a chart of cost awards made in class proceedings in the last five years. The plaintiffs acknowledge that the costs sought are at the higher end of recent cost awards. They remain so even with the adjustments made by this court.

- [39] One of the cases in which an even greater amount of fees was awarded is *Kibalian v Allergan PLC*, 2023 ONSC 1185, a decision of Morgan J. He awarded partial indemnity costs of \$496,000 to the successful plaintiff following a three-day certification motion. The amount of disbursements was not specified. The defendants distinguish this case on the basis of the length of the hearing, as well as the fact that the defendants in *Kibalian*, unlike here, did not raise any arguments of excessive billing by the plaintiff: at paras. 7-9.
- [40] The length that it takes to argue a certification motion is not necessarily a reliable indicator of its complexity. Many things can affect that, including preparation of counsel and how prepared the judge is in advance. In *Kibalian*, Morgan J. generally had high praise for counsels' presentation of the motion, as I would in this case. But presentation time is not determinative. There were multiple pre-motion conferences, which helped to streamline the hearing. There were many other complexities, as already reviewed, that drove up costs. The plaintiffs had to establish some basis in fact for their gross negligence claim, involving breaches of the standard of care related to pandemic planning and infection prevention and control. Establishing some basis in fact for causation was a complex matter.
- [41] Overall, I do not find that the plaintiffs' fees and disbursement, as altered by the court, are disproportionate to the complexity of the proceeding, the amount claimed, or the results achieved.
- [42] But I must also consider the awards in other cases, which informs the defendants' reasonable expectations and what is fair and reasonable for this court to award. In *Curtis v. Medcan Health Management Inc.*, 2023 ONSC 552, following a one-day certification motion the plaintiffs were awarded partial indemnity costs of \$140,000 (disbursements were not specified). In *Wilson v. Ontario*, 2025 ONSC 2831, also involving a one-day hearing, the class action was not certified and the defendants were awarded \$60,000 in costs and disbursements. At the other end of the scale, in *Peters v. SNC-Lavalin Group Inc.*, 2021 ONSC 6161, the defendants were awarded \$285,000, which included disbursements of \$2,804, after a two day hearing. And at the extreme, in *Markowich v. Lundin Mining Corporation*, 2022 ONSC 1233, also involving a two-day hearing, the defendant was awarded partial indemnity costs in the amount of \$693,805.39. As the defendants' counsel points out, the plaintiffs did not file its own costs outline in *Markowich*, which could have assisted the court in gauging their reasonable expectations.
- [43] The defendants have produced their own costs outline in support of their submission that the plaintiffs' costs are excessive and unreasonable. On a partial indemnity basis, their fees are \$98,661.54 and disbursements are \$25,918.49, both inclusive of HST.
- [44] Along with the substantial indemnity costs from the date of the plaintiffs' offer, another factor that explains the gap between the plaintiffs' and defendants' costs is the hourly rate of counsel. The two lead lawyers for the plaintiffs charge at an hourly rate of \$850, while the lead and primary associate for the defendants charge at hourly rates of \$515 and \$305, respectively. Over the number of hours that had to be invested by plaintiffs' counsel, this difference becomes significant. Add to this the onus on the plaintiffs and it is no surprise that the cost outlines do not align.

- [45] As is often the case, the amount of costs that the unsuccessful party could be expected to pay clashes with the requirement that this court also consider the principle of indemnity for the successful party. Considering the resources that have been required by the plaintiffs, I am satisfied that there has not been over-lawyering or padding of their accounts other than, in the absence of an explanation, in relation to the time directly attributable to the argument of the motion.
- [46] There is also the public interest factor. I disagree with the submissions of the defendants that this action is of limited interest to anyone beyond those involved in Roberta Place. The way pandemics were handled within long-term care homes remains a topic with future widespread policy and public health implications.
- [47] In the final analysis, I am to “step back” to consider the appropriateness of the costs order overall. The total before HST is \$391,221.53. It remains very high compared to some of the other awards in the last five years.
- [48] After contemplating all of this, I find it fair and reasonable to fix the costs and disbursements at \$300,00 plus HST, or \$339,000 all inclusive.
- [49] This court orders that the defendants shall pay costs to the plaintiffs fixed in the amount of \$339,000 all inclusive and payable in 30 days.

HEALEY J.

Released: November 27, 2025