CITATION: *Papineau v. Romero-Sierra and Brisebois*, 2025 ONSC 194
COURT FILE NO.: CV-13-58490
DATE: 2025/01/09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Frank Papineau, Plaintiff

-and-

Dr. Pablo Romero-Sierra and Dr. Jonny Brisebois, Defendants

COUNSEL: Self-Represented Plaintiff

Corey Williard and François Guay-Racine for the Defendants

HEARD: In writing

COSTS ENDORSEMENT

WILLIAMS J.

Overview

[1] The defendants Dr. Pablo Romero-Sierra and Dr. Johnny Brisebois seek substantial indemnity costs of $957,893, following a trial that lasted almost seven weeks.

[2] The plaintiff had sued the defendants for medical malpractice, alleging that they negligently failed to diagnose him with Lyme disease and provide him with appropriate treatment.

[3] I dismissed the plaintiff's action. I found much of the plaintiff's oral testimony to be unreliable and some of it to be incredible. Lyme disease is caused by bacteria carried by ticks. Although the plaintiff insisted at trial that he had been bitten by a tick, I was not persuaded that this was true. It was plain from the emergency department records at the Kemptville District Hospital that, a few days after he was bitten, the plaintiff believed he had been bitten by an insect and not a tick. The plaintiff had a rash at the time, but Dr. Brisebois concluded that it was cellulitis and not the distinctive *erythema migrans* rash peculiar to Lyme disease.

[4] Although the plaintiff's action was for failure to diagnose and treat Lyme disease, the plaintiff did not persuade me that he had Lyme disease. I found that the plaintiff was never been diagnosed with Lyme disease by a physician who had all relevant information and no misinformation. Following his Lyme disease diagnosis by an American doctor, the plaintiff was offered referrals to Canadian infectious disease specialists who could have confirmed or ruled out Lyme disease. The plaintiff refused all offers of a referral; he said there was no point because he already knew he had Lyme disease.

[5] At trial, the plaintiff waged an aggressive assault on the defendant Dr. Romero-Sierra's integrity and reputation. While I found there were several contradictions in Dr. Romero-Sierra's testimony and he admitted that his chart was less than perfect, the attacks against Dr. Romero-Sierra were unfounded, unfair and particularly audacious in the context of a case in which I found the plaintiff's foundational evidence to be unbelievable.

[6] At trial, Mr. Papineau described how Lyme disease had forced him to restrict his recreational, social and sports activities. On cross-examination, Mr. Papineau agreed that he had failed to mention a post-diagnosis 7,000 km trip by motorcycle from Ottawa to Tuktoyaktuk he embarked upon in August 2019 and had enthusiastically documented on Facebook.

The plaintiff's position

[7] Although the plaintiff was represented by counsel throughout the 10-year history of the litigation, he served a notice of intention to act in person with his written costs submissions.

[8] I have read and carefully considered the plaintiff's costs submissions. The defendants' claim for close to $1,000,000 in costs is significant. The plaintiff already owes the defendants $100,000 in costs thrown away ordered by Beaudoin J. in July 2019, when the trial of this action was adjourned.

[9] The plaintiff argues that his action was a public interest case that should not be subject to a costs award. The plaintiff argues the action was not about money; he says he was seeking justice and recognition that he had been wronged. The plaintiff says his action "was to be a voice for the Lyme suffers (sic) across Canada because until recently chronic Lyme had no standing."

[10] The plaintiff argues that if the costs sought by the defendants are awarded against him, the order would have a detrimental impact on access to justice by making individuals reluctant to pursue civil cases in the future.

[11] The plaintiff submits that he is 61 years old and that in the last several years, he has earned between $30,000 and $35,000 per year. He says he has no assets to offer the defendants. The plaintiff argues that a costs award would increase his suffering, while an award of no costs would have no effect on the defendants.

[12] The plaintiff argues that his strategy to discredit Dr. Romero-Sierra was appropriate and driven both by statements Dr. Romero-Sierra made at his examination for discovery and by gaps and discrepancies in Dr. Romero-Sierra's chart.

[13] The plaintiff argues that it was Dr. Romero-Sierra's failure to identify in his notes the Ottawa Hospital infectious disease specialists he consulted about the plaintiff's case that forced the plaintiff to call six infectious diseases specialists as witnesses. The plaintiff also argues that he was required to call three of Dr. Romero-Sierra's physician colleagues as witnesses, because Dr. Romero-Sierra had said at his examination for discovery that he had consulted them about the plaintiff's case.

[14] The plaintiff argues that I should consider the critical comments I made about Dr. Romero-Sierra in my decision when I make my costs award.

[15] The plaintiff argues that seven weeks is not unusually long for a medical malpractice trial. He submits that his counsel worked cooperatively with the defendants' counsel to ensure that the trial proceeded as efficiently as possible.

[16] The plaintiff argues that he made an offer to settle the case in September 2021 for $78,000 plus costs and disbursements. He argues that, had he succeeded on liability, he would have beaten his offer, because I had assessed his general damages at $100,000.

[17] The plaintiff argues the defendants should have recognized that there was a risk they would lose the case by making an offer to settle that included monetary compensation for the plaintiff, but that the defendants failed to do so.

[18] The plaintiff acknowledges that he should not have started the action but blames the defendants' notes. The plaintiff argues, "[h]ad the involved physicians kept proper clinical notes and records that were clear and unambiguous, then it would have been evident before the action commenced that it was unwarranted. By not keeping property (sic) clinical notes and records, this created the appearance of negligence which led to the action."

Costs: Some legal principles

[19] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, provides that the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court.

[20] Although discretionary, a court must fix costs on a principled basis. (*Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722, at para. 40.)

[21] Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, sets out the factors the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing, in exercising its discretion under section 131 of the *Courts of Justice Act* to award costs. These factors include the principle of indemnity, including the experience of the lawyer involved, the hourly rate and the hours spent. They include the complexity of the proceeding and the importance of the issues. They also include certain conduct of the parties, including conduct that may have shortened or lengthened the duration of the proceeding or that was improper, vexatious or unnecessary.

[22] The Court of Appeal has made it clear that the fixing of costs does not begin and end with a calculation of hours times rates. It says the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay rather than an amount fixed by the actual costs incurred by the successful litigant. (*Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.), at para. 26.)

[23] In *Davies*, the Court of Appeal noted that it had repeatedly said that elevated (that is to say, full or substantial indemnity as opposed to partial indemnity) costs are warranted in only two circumstances: (1) where specifically authorized through the operation of an offer to settle under Rule 49.10 of the *Rules*; or (2) where the losing party has engaged in behaviour worthy of sanction. Substantial indemnity costs are only awarded in rare and exceptional cases. (*St. Elizabeth Home Society v. Hamilton (City*), 2010 ONCA 280, at para. 92.)

Analysis

The defendants are entitled to costs

[24] I am satisfied the defendants, as the successful parties, are entitled to costs of the action.

[25] I do not accept the plaintiff's argument that his action was public interest litigation that should not attract a costs order. Although there is controversy surrounding the diagnosis of Lyme disease and the existence of chronic Lyme disease, and although the case attracted media attention and multiple on-line observers, the plaintiff sued the defendants for monetary compensation, a purely private interest. As I noted in my decision, the case did not require me to enter the fray in respect of the controversy over Lyme disease diagnosis and treatment in any significant respect. The evidence at trial did not satisfy me that the plaintiff had ever been diagnosed with Lyme disease by a physician who had all of the relevant information and no misinformation, regardless of the diagnostic criteria that were applied.

[26] I do not accept the plaintiff's argument that a significant costs award should not be made against him because it would limit access to justice by discouraging litigants from pursuing civil cases. One of the goals of a system which awards costs against unsuccessful litigants is to encourage litigants to consider carefully whether their action or defence has merit. If a significant costs award against this plaintiff makes another plaintiff with an equally unmeritorious case think twice about using valuable court time, the system is working.

[27] The plaintiff argues that he does not have the means to pay a costs award. The plaintiff was represented by counsel throughout. He was ordered to pay $100,000 in costs by Beaudoin J. in July 2019 when the trial was adjourned. I am satisfied that he was aware of the risk of a further

significant costs award if he proceeded to trial and the trial did not go his way. The plaintiff added to the length of the trial by calling multiple witnesses in an unsuccessful attempt to establish that Dr. Romero-Sierra had lied about consulting colleagues and the Ottawa Hospital's infectious disease specialists about the plaintiff's case. The plaintiff now argues that if the defendants' records had been better, he would have known that his action was unwarranted. The plaintiff had ample opportunity to figure out, before the trial began, whether his action was warranted. The defendants offered to permit the plaintiff to dismiss his action without costs and kept the offer open for acceptance until the trial began. The plaintiff could have accepted the defendants' offer but instead decided to forge ahead. "Parties cannot expect to be immune from an order of costs based on their limited financial resources. If this were the case, parties would be free to conduct litigation as they wished without fear of reprisal in the form of adverse costs orders and this would be contrary to the philosophy of the *Rules* as well as to their requirements." (*Mark v. Bhangari*, 2010 ONSC 4638.)

[28] I do not accept that the defendants were under any obligation to make a monetary offer to settle the case. Their position was that the plaintiff never had Lyme disease. The plaintiff failed to prove that he had Lyme disease.

The defendants are entitled to costs on a substantial indemnity scale

[29] This is one of the rare cases in which substantial indemnity costs are warranted: The plaintiff's conduct is worthy of sanction for two reasons.

<u>The plaintiff's claim was without foundation and the plaintiff knew it</u>

[30] In his action, the plaintiff claimed that he had been bitten by a tick and that the defendants were negligent because they failed to diagnose and treat Lyme disease. However, it was clear from the records of the Kemptville District Hospital that when the plaintiff visited the hospital's emergency department in April 2010, concerned about a bite and a rash, the plaintiff did not believe he had been bitten by a tick. At the time, the plaintiff believed he had been bitten by a "bug" and that he thought it "was an insect and not a tick." Although there was no evidence that any new information emerged about what had bitten the plaintiff, in September 2012, the plaintiff told the American doctor who diagnosed him with Lyme disease that he had been bitten by a "black leg

nymph tick". The plaintiff also told the American doctor that he had had the telltale rash associated with Lyme disease, even though he had never been diagnosed with this rash—Dr. Brisebois had seen and felt the rash and had concluded that the plaintiff had cellulitis. The plaintiff had photographs of his rash but did not give them to the American doctor.

[31] Although the plaintiff alleged the defendants were negligent because they failed to diagnose him with Lyme disease, the plaintiff did not believe he had been bitten by a tick and had given the one doctor who diagnosed him with Lyme disease (a) information he did not know to be true (that he was bitten by a "black leg nymph tick") and (b) information he knew was false (that he had had the *erythema migrans* rash peculiar to Lyme disease). It is not surprising that the plaintiff failed to show the American doctor the photographs of his rash; she might have questioned whether it was an *erythema migrans* rash. It is also not surprising that the plaintiff, who frequently consulted his family physicians, regularly attended at hospital emergency departments and routinely accepted referrals to specialists, steadfastly refused offers of referrals to Canadian infectious diseases specialists who they might have questioned his diagnosis. What is surprising is that, knowing the facts, the plaintiff not only started an action against the defendants but allowed it to proceed to the end of a seven-week trial.

<u>The plaintiff made unsubstantiated allegations of dishonesty against Dr. Romero-Sierra</u>

[32] The plaintiff attacked Dr. Romero-Sierra's integrity and reputation in a manner I considered to be unfair. The plaintiff alleged that Dr. Romero-Sierra had lied about several matters, including whether he had contacted an infectious disease specialist at the Ottawa Hospital to discuss the plaintiff's case. The evidence at trial, which included telephone records, proved that Dr. Romero-Sierra had in fact contacted the hospital's infectious disease department several times during the period that Dr. Romero-Sierra and the plaintiff were discussing Lyme disease. Despite this, in his written closing submissions, the plaintiff maintained that Dr. Romero-Sierra "never called infectious disease." The plaintiff also accused Dr. Romero-Sierra of destroying a hospital record, so that he could say that he did not know about the plaintiff's concerns about Lyme disease. I found this accusation to be "outrageous" and also to make no sense.

[33] The plaintiff's attacks against Dr. Romero-Sierra are summarized in paras. 345 to 353 of my reasons for decision.

[34] Litigants who make unsubstantiated allegations of misconduct or dishonesty can expect to pay enhanced costs. (*Shannon v. Hrabovsky*, 2024 ONCA 188, at para. 4, citing *Unisys Canada Inc. v. York Three Associates Inc.* (2001), 2001 CanLII 7276 (ON CA) and *Davies v. Clarington (Municipality) et al*., 2009 ONCA 722, at para. 47.)

Quantum

[35] The defendants are requesting $957,893 in substantial indemnity costs, inclusive of disbursements and HST. This amount includes substantial indemnity fees of $863,528.61, inclusive of HST.

[36] Turning now to some of the factors under Rule 57.01 of the *Rules*, I consider the issues in this case, standard of care and causation in a medical context, to have been important. The proceeding was complex: The witnesses included experts on standard of care and causation relating to each of the defendants and three experts on damages.

[37] The defendants filed a detailed bill of costs.

[38] The defendants argue that work was consistently delegated to junior lawyers. They argue that much work was assigned to articling students and law clerks and that none of this time was included in the bill of costs. The defendants acknowledge that while only two lawyers represented the plaintiff at trial, the defendants had three lawyers in attendance. The defendants say, however, that the hourly rates of these lawyers were discounted to compensate for the attendance of the additional lawyer. They also say the time of other lawyers who assisted with and advised about the trial was not included in the bill of costs. Other than the discounted hourly rates, which were not apparent from the bill of costs, the defendants' submissions were supported by their bill of costs.

[39] The hourly rates charged by the defendants' legal professionals appear to be consistent with the rates charged by Ottawa-based legal professionals with similar years of experience.

[40] The plaintiff sought $350,000 in general damages and $1,000,000 in special damages. The plaintiff offered to settle the action for $78,000 plus costs, On two occasions, the defendants offered to permit the plaintiff to dismiss his action without costs, an opportunity that remained available to the plaintiff until the commencement of the trial.

[41] The disbursements claimed by the defendants appear to be standard and reasonable. In reference to footnote 15 of the defendants' costs submissions, I am satisfied that none of the disbursements which appeared in the defendants' post-trial bill of costs were included in Beaudoin J.'s July 23, 2019 order for $100,000 in costs thrown away. In his reasons, Beaudoin J. said he was ordering the plaintiff to pay costs thrown away on a partial indemnity basis and that he was discounting the amount requested by the defendants by 40 percent. The amount requested by the defendants was $166,520.58. The $100,000 ordered by Beaudoin J. was $166,520.58 less 40 percent. The $100,000 did not, therefore, include any amount for disbursements.

[42] I must fix costs in an amount that would be fair and reasonable for the plaintiff to pay.

[43] The defendants rely on several costs decisions of this court in support of their position that the costs they are seeking are reasonable: *Denman v. Radovanovic,* 2023 ONSC 3621, aff'd 2024 ONCA 276, in which the successful plaintiffs were awarded $3,000,000 in costs following a 25-day medical negligence trial; *Hemmings v. Peng*, 2022 ONSC 6482, in which the successful plaintiffs were awarded more than $4,000,000 million in costs following a 42-day medical negligence trial; and *Sean Omar Henry v. Dr. Marshall Zaitlen*, 2022 ONSC 3050, in which the successful plaintiffs were awarded $800,000 in costs following a 25-day medical negligence trial.

[44] Unfortunately, the plaintiff did not file a bill of costs, so I am not able to compare the hours worked by the opposing parties' legal professionals.

[45] In all of the circumstances of this case, I consider the amount requested by the defendants to be fair and reasonable.

Disposition

[46] The plaintiff shall pay the defendants substantial indemnity costs in the amount of $957,893, inclusive of fees, disbursements and HST.

[47] The order for costs of $957,893 is in addition to the $100,000 ordered by Beaudoin J. on July 23, 2019, an order which remains outstanding.

Justice H. Williams

Date: January 9, 2025

CITATION: *Papineau v. Romero-Sierra and Brisebois*, 2025 ONSC 194
COURT FILE NO.: CV-13-58490
DATE: 2025/01/09

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Frank Papineau, Plaintiff

-and-

Dr. Pablo Romero-Sierra and Dr. Jonny Brisebois, Defendants

COUNSEL: Self-Represented Plaintiff

Corey Williard and François Guay-Racine for the Defendants

COSTS ENDORSEMENT

Williams J.

Released: January 9, 2025