

**CITATION:** Rizzi v. Handa, 2020 ONSC 1004

**COURT FILE NO.:** CV-20-00638438-0000

**DATE:** 20210210

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Lina Rizzi, Plaintiff

– **AND** –

Dr. Vivek (Vick) Handa, Upper Middle Dental and Vick Handa Dentistry Professional Corporation, Defendants

– **AND** –

Fadwa Balestra, Judy Bondi, Sara Bouchard, Diana Campbell, Tiffany Campbell, Crystal Caverley, Brooke Comrie, Andrea Dyack, Mariam Shahbana Farooq, Amanda Fuller, Nicole Elizabeth Garside, Viktoriya Gonchar, Karima Heidary, Kelli-Lee Anne Howie, Manpreet Jodha, Kim Jones, Anita Lynsdale, Lori McDonald, Stacey Linda Parker, Vihangi Patel, Tamsan Puley, Pam Sandhu, Tina Singh, Helen Thuy-Duong Vu, and Jane Doe, Third Parties

**BEFORE:** E.M. Morgan J.

**COUNSEL:** *Sean Brown, Candace Mak, and Christopher Lupis*, for the Plaintiff

*Andrew Lundy and Eric Baum*, for the Defendants

*Jason Mangano*, for Third Parties Fadwa Balestra, Judy Bondi, Crystal Caverley, Amanda Fuller, Viktoriya Gonchar, Karima Heidary, Manpreet Jodha, Pam Sandhu, Tina Singh

*Avi Sharabi*, for Third Parties Diana Campbell, Brooke Comrie, Andrea Dyack, Nicole Elizabeth Garside, Kelli-Lee Howie, Anita Lynsdale, Vihangi Patel, Helen Thuy-Duong Vu, Kim Jones

**HEARD:** February 5, 2021

**SETTLEMENT AND CLASS COUNSEL FEE APPROVAL**

[1] This class action against a dentist relates to the discovery in 2017 by the Halton Public Health Department of a health hazard related to the failure to reprocess dental equipment and

devices used in patient care services. Class counsel seek approval of a proposed settlement and of its fees pursuant to section 27.1 (1) of the *Class Proceedings Act, 1992*, SO 1992, c. 6 (“CPA”).

## **I. Settlement approval**

[2] The Regional Municipality of Halton sent letters to approximately 9,000 current and former patients of the Defendants, advising them to see their family doctor to discuss testing for Hepatitis B, Hepatitis C and HIV. The letter is addressed to “Dear Client of Upper Middle Dental”. The letter is dated June 19, 2017 and states:

An investigation by the Halton Region Health Department has identified that clients who have received dental services at Upper Middle Dental operated by Dr. Vick Handa, located at 1900 Walkers Line in Burlington, Unit 4 may have been exposed to improperly cleaned instruments used for procedures.

You have been identified as a client of this dental office and may have been exposed to unclean equipment. Improperly cleaned dental instruments carry a low risk of transmitting infectious diseases, such as hepatitis B, hepatitis C and human immunodeficiency virus (HIV) to clients.

As a precaution, the Halton Region Health Department recommends that you contact your physician or go to a walk-in clinic if you do not have a physician to discuss testing for hepatitis B, hepatitis C, and human immunodeficiency virus (HIV).

[3] The letter enclosed a direction to physicians recommending that any patient of the Defendants to undergo the following tests:

Hepatitis B surface antigen (HbsAg)  
 Hepatitis B core total antibody (HbcAb Total (IgG + Igm))  
 Hepatitis C screen  
 HIV screen

[4] A proposed class action by patients of the Defendants was commenced on June 28, 2017. The parties entered into negotiations, which eventually included the Third Parties who are dental hygienists employed by the Defendants over the course of the relevant years. On March 20, 2019, I certified this action under the CPA for the purposes of settlement: *Rizzi v. Handa*, 2020 ONSC 6584. The cause of action as certified is negligence, and the common issues are as follows:

- (1) Did the Defendants owe a duty of care to the Class Members?
- (2) If the answer to Question 1 is YES, what is the standard of care (or standards of care at all material times) prior to June 9, 2017?
- (3) Did the Defendants breach the duty of care owed to the Class Members?

- (4) If the answer to Question 3 is YES, was it reasonably foreseeable to the Defendants that harm to some or all of the Class Members would result from that breach of duty of care?
- (5) If there has been a breach of the duty of care, and if the Class Members sustained harm as a result of the breach of duty of care, are the Class Members entitled to general damages and/or special damages?
- (6) If there has been a breach of the duty of care, and if the Class Members sustained harm as a result of the breach of duty of care, can damages be determined for the Class Members on an aggregate basis? If so, what is the quantum of those damages? How will any award of damages be distributed among Class Members?
- (7) If there has been a breach of the Defendants' duty of care, is the Ministry of Health entitled to recover the amount paid by it, and in favour of the Class Members, for insured services necessarily arising from the Defendants' breach of a duty of care owed to the Class Members? If so, what is the quantum of this recovery?
- (8) Should the Defendants pay the cost of administering and distributing any recovery, including the cost of giving notice of judgment? If so, in what amount?

[5] RicePoint Administration Inc. ("RicePoint") was appointed to act as the Notice Administrator for the Notice of Certification for this class action. It also handled the Notice of Settlement Approval Hearing, disseminating both notices by direct mail to all known patients of the Defendants. Class counsel also published the certification Order and Long Form Notice on its informational website for class members.

[6] The Settlement Agreement defines the Class or Class Members as:

- (a) a) Patients of Upper Middle Dental who received dental services prior to June 9, 2017, and had a positive laboratory test for Hepatitis B, Hepatitis C and/or HIV after receiving said services, and contracted Hepatitis B, Hepatitis C and/or HIV (the "Infected Class");
- (b) All persons who had a positive laboratory test for Hepatitis B, Hepatitis C and/or HIV, and contracted Hepatitis B, Hepatitis C and/or HIV, after an Infected Class Member received dental services from Upper Middle Dental prior to June 9, 2017 (the "Cross-Infected Class");
- (c) Patients of Upper Middle Dental who received dental services prior to June 9, 2017, and who were notified by a health authority, or were otherwise advised by a health authority that they were put at risk of contracting Hepatitis B, Hepatitis C and/or HIV, after receiving said services (the "Exposed Class");

- (d) All living parents, grandparents, children, siblings and spouses within the meaning of section 61 of the Family Law Act, RSO 1990, c F-3, as amended, of the persons described in paragraphs (a) and (b) above (the “FLA Class”).

[7] RicePoint has advised that 225 people have validly opted out of the class proceeding during the opt-out period.

[8] The monetary terms of the proposed settlement are as follows:

Defendant pays damages	\$1,550,000
Defendant pays costs with HST	56,500
Defendant pays disbursements with HST	5,000
Gross Settlement Funds	\$1,611,500
LESS Class Counsel (Contingency) Fees	465,000
LESS HST	60,450
LESS disbursements	<u>27,550</u>
Net Settlement Amount	\$1,058,550

[9] The Settlement Agreement proposes the following breakdown of the Net Settlement Amount for compensation purposes:

- (a) The Infected Claims Fund will receive 70% of the Net Settlement Amount to satisfy valid claims made prior to the Claims Deadline; and
- (b) The Exposed (“Uninfected”) Claims Fund will receive 30% of the Net Settlement Amount to satisfy valid claims made prior to the Claims Deadline, which will be then reduced by \$20,000 payable to the Ontario Ministry of Health as recovery of its subrogated claim related to Class Members who were only exposed to Hepatitis B, Hepatitis C and HIV, but did not contract a disease.

[10] After notice of the settlement and fee approval is given to class members in accordance with the Notice Plan, the parties propose that the Claims Bar Deadline shall be ninety days after the date on which Notice is first published.

[11] The Settlement Agreement identifies two classes of participants: infected and uninfected class members.

[12] The Uninfected Claims Fund is defined in the Settlement Agreement as a fund to compensate claims by Uninfected Class Members, as well as claims by the Ontario Ministry of Health (fixed at \$20,000). This fund is 30% of \$1,058,500, or approximately \$317,550. It will be further reduced by \$20,000 to compensate the Ontario Ministry of Health for its subrogated claim.

Class counsel is currently engaged in negotiating a resolution with the Ontario Ministry of Health of its subrogated interest related to doctor visits and blood testing incurred as a consequence of class members who were advised of their exposure to Hepatitis B, Hepatitis C and HIV. Once the Ministry indicates its agreement, the Net Settlement Amount of the Uninfected Claims Fund will likely be \$297,550.

[13] The claims process will be administered by RicePoint, and the Settlement Agreement sets out the mechanics of how an Uninfected Class Member will make a claim. RicePoint will determine which claims are eligible on the basis of the documentation submitted in accordance with that process. Claimants will be advised of the decision within thirty days of its submission.

[14] The Settlement Agreement provides that each Authorized Claimant who makes a proper claim prior to the Claim Deadline shall be paid a *pro rata* share of the Uninfected Claims Fund, to a maximum of \$500.00 payable to each authorized claimant. RicePoint is not to assess entitlement to compensation for all authorized claimants and the Ontario Ministry of Health in an aggregate or total amount that exceeds the total of the Uninfected Claims Fund.

[15] The Infected Claims Fund is defined in the Settlement Agreement as a fund to compensate claims by the Infected Class, the Cross-Infected Class and FLA Class, as well as claims by the Ontario Ministry of Health related to authorized claimants among those classes. The Infected Claims Fund is 70% of \$1,058,500, or approximately \$740,950. There is a \$100,000 upper limit placed on compensable general damages for any one claimant. There is no upper limit placed on compensable special damages claims.

[16] Again, the claims process will be administered by RicePoint. It has prepared a proposal for administration of the process, including claims made by mail and online, and the design and operation of a website for the administration of claims. RicePoint will communicate directly with each claimant who submits a claim in order to assist the claimant in obtaining the requisite documentation to allow the Claim to be subjected to Claims Adjudication. The claims adjudicator will be John Burns, a senior member of the bar. The claim submission process and adjudication procedures are set out in detail in the Settlement Agreement. The Settlement Agreement also provides that the decision of the Claims Adjudicator is a final and binding decision, and there is no right of appeal.

[17] A court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it if the settlement is to be approved: *Lavier v MyTravel Canada Holidays Inc.*, 2011 ONSC 3149, at para 19. In making this assessment, I am to consider a number of factors, including: a) the likelihood of recovery or success; b) the amount and nature of discovery, evidence or investigation; c) the settlement terms; d) the recommendation and experience of counsel; e) the future expenses and likely litigation risk; f) the recommendation of neutral parties, g) the number of objectors and the nature of the objections; h) whether there was arms-length bargaining; i) the involvement of the representative plaintiff; and j) the positions taken by the parties during the negotiation: *Lavier*, at para 19; and *Maggisano v Skyservice Airlines Inc.*, 2010 ONSC 7169, at para 17.

[18] A settlement does not have to be perfect, nor is it necessary for it to treat everybody equally as long as it is fair and reasonable: *Goyal v Niagara College of Applied Arts and Technology*, 2020 ONSC 739, at para 34. It is class counsel's view that while the settlement terms are not perfect, they compare favorably with what might have been expected to result from a trial. In the first place, it alleviates members of the Uninfected Class members from the difficult task of proving that the stress and anxiety to which they were put in being notified of the potential for infection was extraordinary. For the Infected Class members, there is a streamlined claims and adjudicative process that will expedite their recovery and will do so on a cost-free basis.

[19] Class counsel state that the following factors relating to the litigation of this claim were taken into account by it in evaluating the merits of the settlement:

- (a) While there was evidence of various Public Health violations at the Defendants' dental practice in June 2017, these were arguably only applicable to June 2017 and could not necessarily be relied upon to support a negligence claim on behalf of all Class Members;
- (b) While there was evidence of various Public Health violations at the Defendant's dental practice in June 2017, there is no obvious or persuasive evidence that this necessarily caused any Hepatitis B, Hepatitis C or HIV infection among dental patients;
- (c) Proving causation for any Hepatitis B, Hepatitis C or HIV infection is always difficult;
- (d) For those Class Members who were only exposed to a Hepatitis B, Hepatitis C or HIV infection, the law has traditionally not supported class-wide damages, absent evidence of individual mental distress. While aggregate damages could be assessed, any mental or emotional distress experienced by Class Members would have been an individual issue and would have to await a successful common issues trial before being adjudicated separately. A case-by-case damages assessment could result in some Class Members receiving compensation while others do not. Additionally, some Class Members may have difficulty proving their quantum of damages because the events that gave rise to this action occurred about 10 years ago;
- (e) In this regard, common issues could have been overwhelmed by individual assessments of each Class Member regarding their level of mental distress upon being advised that they had been exposed to a Hepatitis B, Hepatitis C or HIV infection;
- (f) Despite the possibility of success at trial, Class Counsel anticipates that further litigation could result in uncertainty and difficulty in recovering damages for each Class Member; and

- (g) Inordinate delay will likely arise from ongoing litigation. A failed settlement means a lengthy discovery process followed by a common Issues trial, likely then followed by individual issues trials or appeals. Ongoing litigation in this context will inevitably mean a much longer resolution process if a resolution is reached at all.

[20] Class counsel proposes that the Short Form Notice will be published in a number of local newspapers. They proposed that the Long Form Notice will be sent by RicePoint by regular mail to each class member at their address as indicated in the Defendants' records.

[21] Based on the risks associated with ongoing litigation, class counsel has recommended the proposed settlement to all class members. They have reviewed the matter with the representative Plaintiff, and she, too, is in agreement that it is in line with the best interests of the class.

[22] In my view, the settlement is a fair and reasonable one, and reflects a successful result that achieves compensation for the class members.

## **II. Class counsel fee approval**

[23] In addition, class counsel seeks to have its Retainer Agreement be approved along with its legal fees in the amount of \$553,000. This amount is comprised of \$465,000 for legal fees, \$60,450 for HST applicable to legal fees and \$27,550 for disbursements inclusive of HST. This is based on a contingency fee of 30% of the damages portion of the settlement funds.

[24] The fairness and reasonableness of the legal fees are to be determined in light of the risk undertaken by the lawyers conducting the litigation and the degree of success achieved: *Lavier, supra*, at para 31. A contingency fee of 33.33% of the recovery has been held to be presumptively valid: *Emond v. Google LLC*, 2021 ONSC, at para 41. A fair and reasonable contingency fee provides access to justice for class members, and at the same time provides an economic incentive to lawyers to take on a class action and to strive for a successful result for the class: *Lavier*, at para 31.

[25] In all, class counsel seek an Order that their fees and disbursements be fixed at \$553,000, being \$465,000 for fees, \$60,450 for HST and \$27,550 for disbursements inclusive of taxes.

[26] In my view, the amount sought for class Counsels' fees and disbursements is reasonable. It reflects the value of the indemnification for costs provided by class counsel to the representative Plaintiff in the Retainer Agreement and reasonable compensation for counsel, who invested considerable time and effort into the litigation and who assumed all of the risk of the inherently uncertain litigation process.

## **III. Disposition**

[27] The settlement and class counsel fees are approved as proposed.

[28] There will be an Order as attached at tab 6 of the Plaintiff's motion record.

A handwritten signature in blue ink, appearing to read "Morgan J.", is centered on a light blue rectangular background.

**Date:** February 10, 2021

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Morgan J.