

CITATION: Lowe v. Dr. Meikle Professional Corporation, 2021 ONSC 7450
COURT FILE NO.: CV-17-579325
DATE: 20211110

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
KATELYN LOWE and MEGAN LOWE,)
by their litigation guardian,) *Gordon Marsden* for the Plaintiffs
KIMBERLEY LOWE, and)
KIMBERLEY LOWE)
Plaintiffs)
- and -)
)
DR. MEIKLE DENISTRY)
PROFESSIONAL CORPORATION) *Larissa Vermeersch* for the Defendant Dr.
c.o.b. **GUELPH DENTAL**) Meikle Dentistry Professional Corp.
ASSOCIATES, DR. KATHERINE) *Eric Baum* for the Defendants Dr. Katherine
ZETTLE, DR. KANISHA CAMPBELL,) Zettle, Dr. Kanisha Campbell, Dr. Ladan
DR. LADAN MANSOURI and DR.) Mansouri and Dr. Andrew Meikle
ANDREW MEIKLE)
Defendants)
Proceeding under the *Class Proceedings*) **HEARD:** October 12, 2021
Act, 1992)

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In this class action under the *Class Proceedings Act, 1992*,¹ the Plaintiffs Katelyn Lowe and Megan Lowe by their litigation guardian Kimberley Lowe and Kimberley Lowe sue the Defendants Dr. Meikle Dentistry Professional Corporation, Dr. Katherine Zettle, Dr. Kanisha Campbell, Dr. Ladan Mansouri and Dr. Andrew Meikle.

¹ S.O. 1992, c. 6.

[2] The action was certified for settlement purposes.² The Plaintiffs now move for: (a) approval of the settlement; and (b) related relief, including the form and content of the settlement notice, and approval of the distribution plan.

[3] Class Counsel move for approval of their initial counsel fee of \$250,000.

[4] For the reasons that follow, the relief requested is granted.

B. Facts

[5] Guelph Dental Associates is a dental practice owned and operated by the defendants through Dr. Meikle Dentistry Professional Corporation and Dental Corporation of Canada Inc.

[6] On June 20, 2017, after a child had contracted a bacterial infection after being treated by a dental hygienist at Guelph Dental Associates, Guelph Public Health conducted an inspection of the Defendants' dental clinic and found numerous significant concerns about IPAC (Infection Prevention and Control) practices. Pursuant to s. 13 of the *Health Protection and Promotion Act*,³ the Public Health officials ordered that patient care services immediately cease because Guelph Dental constituted a health hazard.

[7] When adequate remedial measures were not taken by the clinic's staff, the Medical Officer of Health requested Public Health Ontario to perform a risk assessment of Guelph Dental. Public Health Ontario advised that the patients of Guelph Dental were at risk of Hepatitis B and C, HIV and bacterial infections because of the noncompliance with IPAC practices. Public Health Ontario recommended the closure of the dental clinic until the equipment was reprocessed and the staff received training.

[8] Public Health contacted all the patients who had a dental procedure at the Defendants' clinic from January 21, 2015 to June 21, 2017. The patients were advised about the infection control complaint and about Public Health's determination that the sterilization of dental instruments had not been done properly. The notice recommended testing for Hepatitis B and C, HIV, and for bacterial infections.

[9] Katelyn Lowe and Megan Lowe, who were patients of the dental practice, and their litigation guardian, their mother Kimberley Lowe retained Will Davidson LLP to commence a class action. The retainer agreement contemplated a 33.33% contingency fee.

[10] The action was commenced on July 20, 2017, and the Plaintiffs alleged that the Defendants were negligent in providing dental service at the dental clinic known as "Guelph Dental Associates" and exposed their patients to communicable diseases.

[11] Will Davidson LLP were subsequently contacted by 268 individuals who were patients or who were the parents of patients of the clinic. Many of the patients were children including special needs children suffering from anxiety disorders, autism, and cerebral palsy.

All persons, or their estates, who received dental care and services at the dental clinic formerly located at 380 Eramosa Road in Guelph, Ontario and known as "Guelph Dental Associates" between January 21, 2015 and June 21, 2017.

² *Lowe v. Dr. Meikle Professional Corporation*. 2021 ONSC 5050

³ R.S.O. 1990, c. H.7.

[12] After extensive arm's-length negotiations, the parties have reached a settlement subject to court approval. The major terms of the settlement are as follows:

- An "Eligible Non-Infected Class Member", which is defined as a Class Member who tested negatively for Hepatitis B, C or HIV in the period from June 30, 2017 to June 30, 2018 is eligible to receive compensation.
- An Eligible Non-Infected Class Member must submit proof to the Claims Administrator in the form of a doctor's note or supporting laboratory confirmation that actual testing was obtained for Hepatitis B, C, or HIV in the period from June 30, 2017 to June 30, 2018.
- The claims deadline for an Eligible Non-Infected Class Member is 120 days from the publication/dissemination of the Settlement Claim Notice.
- Each Eligible Non-Infected Class Member who submits the required proof will receive \$500.
- An "Eligible Infected Class Member," which is defined as a Class Member who tested positively for Hepatitis B, C, and/or HIV in the period from June 30, 2017 to June 30, 2018 will receive compensation.
- An Eligible Infected Class Member must submit proof in the form of a doctor's note or supporting laboratory confirmation to that establish that he or she tested positive for Hepatitis B, C, and/or HIV.
- The claims deadline for an Infected Class Member is 120 days from the publication/dissemination of the Settlement Claim Notice.
- If the Class Member's initial test was positive for Hepatitis C, he or she must also furnish additional evidence that he or she tested positive on a PCR test no later than the date that the Class Member filed the claim form.
- If the Class Member contracted Hepatitis B, C, or HIV, he or she must provide evidence satisfactory to the Claims Administrator that the Class Member contracted Hepatitis B, C, or HIV at Guelph Dental. In making this determination, the Claims Administrator must consider the factors set out in s. 3.2 of the Settlement Agreement.
- Each Eligible Infected Class Member, who submits the required proof will receive \$75,000.
- Under the Settlement Agreement, OHIP will receive payment equal to 10% of the total payments to all Eligible Non-Infected Class Members and Eligible Infected Class Members.
- Additionally, the Defendants agree to pay costs to Class Counsel in the amount of \$250,000 or whatever lesser amount as may be approved by the court.
- After the distribution of the settlement funds, Class Counsel may apply for an additional counsel fee up to \$185,000.

[13] The Representative Plaintiff approves the proposed settlement and OHIP has agreed to it.

[14] Will Davidson LLP has been engaged on this action for over four years. Its billable hours total 840.4 hours with an entered value of \$339,515 before HST. Disbursements total \$2,200.44. It will have more to do in implementing the distribution plan and administering the settlement for

Class Members.

[15] As noted above, the action was certified for settlement purposes. Epiq Class Action Services Canada Inc. was appointed Claims Administrator.

[16] Epiq disseminated the Notice of Certification and of the Settlement Approval Hearing to 3,661 Class Members. There were timely 34 opt-outs, 9 late opt-out requests, and 15 incomplete opt-out requests. There were no objections to the proposed settlement.

[17] There is no evidence of any Class Member contracting an infection of Hepatitis B, Hepatitis C or HIV at Guelph Dental.

C. Settlement Approval

[18] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.⁴

[19] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.⁵

[20] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.⁶ An objective and rational assessment of the pros and cons of the settlement is required.⁷

[21] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.⁸ A settlement does not have to be perfect, nor is

⁴ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

⁵ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).

⁶ *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

⁷ *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

⁸ *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

it necessary for a settlement to treat everybody equally.⁹

[22] Having read the motion materials and considered Class Counsel's factum, I am satisfied that the settlements in the immediate case should be approved along with the ancillary relief.

D. Fee Approval

[23] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.¹⁰ Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.¹¹

[24] These risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding.¹²

[25] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well.¹³

[26] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved.¹⁴ Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee.¹⁵ The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.¹⁶

[27] In the immediate case, in my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request should be approved. Class Counsel earned their fee, and the fee should be and is approved.

⁹ *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.).

¹⁰ *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).

¹¹ *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

¹² *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35; *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 t para. 17 (C.A.).

¹³ *Sayers v. Shaw Cable Systems Ltd.*, 2011 ONSC 962 at para. 37; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61 (S.C.J.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.).

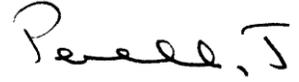
¹⁴ *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.

¹⁵ *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 at para. 92.

¹⁶ *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (C.A.).

E. Conclusion

[28] For the above reasons, the requested relief is granted. Order to go as requested.

A handwritten signature in black ink, appearing to read "Perell, J.", with a stylized flourish at the end.

Perell, J.

Released: November 10, 2021

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Plaintiffs

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**DR. MEIKLE DENISTRY PROFESSIONAL
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Defendants

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