

ONTARIO

SUPERIOR COURT OF JUSTICE

**Parties:** Godknows Itamunoala and Genevive Itamunoala and Tonye Itamunoala,  
Fraser Itamunoala and Denma Itamunoala, Minors, by their Litigation  
Guardian Godknows Itamunoala

**Before:** Jennings J.

**Counsel:** Sloan Mandel, Solicitor for the Plaintiffs  
Maureen B. Currie, Solicitor for the Defendants, Karen L. Peirce, Gurpal  
Mand, David S. Swartz and Marril Smullen

ENDORSEMENT ON COSTS

[1] I have had the advantage of extensive submissions as to costs: those of the plaintiffs dated December 21, 2004 and of the defendants dated February 7, 2005.

[2] The trial took place before me over two weeks and one day in December 2004. The plaintiffs succeeded in establishing negligence against the individual defendants. They obtained a judgment for approximately \$179,000. The action against the defendant hospital was dismissed without costs at the opening of trial.

[3] On July 29, 2004 the plaintiffs served a Rule 49 offer to settle all claims, which was still outstanding when the trial began. The offer was for less than the sum awarded.

[4] The defendants chose to proceed to trial without submitting any offer under Rule 49.

[5] Clearly the plaintiffs are entitled to costs up to the date of the offer on a partial indemnity basis, and on a substantial indemnity basis thereafter. Equally clearly, the defendants are not to bear an additional penalty for exercising their right to a vigorous defence. The plaintiffs' allegations concerning the traditional "hard-nosed" approach to admissions of liability exhibited by that body, which represents the medical profession in this country cannot support a claim for substantial indemnity costs throughout as the plaintiffs seek in their submissions (See, *Lurtz v. Duchesne*, Ontario Court of Appeal decision released February 4, 2005). No other exceptional circumstances exists which would call for an award other than partial indemnity costs, pre-offer.

[6] In fixing the plaintiffs' costs I have been guided by the general principle that I must assess an amount that is fair and reasonable for the defendants to pay, rather than an amount representing the plaintiff's actual costs. In arriving at that amount the

expectation of the parties as to quantum is a relevant factor. (See, *Boucher v. Public Accountants Council* (2004), 71 O.R. 3D 291 (C. of A.))

[7] The plaintiff's case was commendably prepared and expeditiously and competently presented. That said the case was no more complex and difficult than is the usual case of medical malpractice and indeed, perhaps it was less complex than many. It was largely fact-driven. The quantum of damages for the cost of medical treatment received in the United States, which comprises the largest part of the sum awarded, was not seriously challenged.

#### **Fees to July 29, 2004 – Partial Indemnity**

[8] Solicitors' fees of \$27,762.50 are claimed. Senior counsel submits his hourly rate at the grid maximum. In my opinion the maximum should be reserved for cases of the highest complexity, requiring the most experienced counsel. I would allow senior counsel's fees at \$200 per hour and fees for junior counsel, at \$140 per hour.

[9] Some of the time charged, relates to the claim against the hospital, which was abandoned at trial. Other charges relate to a motion to add a party, for which costs have already been awarded. Rates for law clerks and students are charged at the maximum level. Given my earlier comments regarding the maximum levels I would not allow maximum rates for students and law clerks.

[10] Considering all of the foregoing I would fix fees under this heading at \$22,000.

#### **Fees July 30, 2004 to December 21, 2004 – Substantial Indemnity**

[11] Senior counsel's fees are charged at \$300 an hour, again the highest grid level. Junior counsel's fees are charged at \$225 an hour. Clerks and students fees are charged at the highest level. Having regard to my remarks about grid levels I would reduce the fees charged of \$50,838.50 to \$44,000.00.

#### **Counsel Fee at Trial – Substantial Indemnity**

[12] I reject the submission from the defence that junior counsel was not required at trial.

[13] Senior counsel's fees are submitted at \$17,500 per week and \$4,000 per day, in each case the maximum grid amount. It is to be observed that there is no differential in the grid for counsel fee at trial for the number of years of experience of counsel, as there is for fees other than counsel fee. As I have said plaintiff's counsel was competent and efficient in putting in his case. Again referring back to my comments about what attracts the upper limit I believe a weekly fee of \$15,000 and a daily fee of \$3,500 to be reasonable. I award a fee to junior counsel of fifty percent of the amounts awarded to senior counsel. Counsel fees will therefore be reduced to \$33,500 in total for senior counsel and \$16,750 for junior counsel for a total of \$50,250.

**Premium**

[14] Counsel requests a premium to be paid by the defendants of \$25,000.

[15] I am not aware of any arrangement between counsel and his clients for dealing with the premium. The evidence before me was that the male plaintiff is the owner of a successful public company and whatever may have been the arrangement between counsel and client there would not appear to me to have been any necessity for counsel to fund the entire cost of this action pending trial.

[16] Medical malpractice cases are inherently complex and risky. They require a level of experience and skill, which counsel clearly met in this case. That said this was not an exceptional medical malpractice case. To award a premium here would be to indicate that a premium must follow in most successful malpractice cases. I do not believe that to be the law.

**Disbursements**

[17] I allow the disbursements as submitted.

[18] If counsel have any difficulty in calculating the costs that I have fixed in these reasons, I may be spoken to.

[19] I am grateful to both counsel for their assistance.

Released: February 14, 2005

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Jennings J.