

CITATION: Gill v. Maciver, 2022 ONSC 6169
COURT FILE NO.: CV-20-652918-0000
DATE: 20221031

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Dr. Kulvinder Kaur Gill and Dr. Ashvinder Kaur Lamba, Plaintiffs

AND:

Dr. Angus Maciver, Dr. Nadia Alam, André Picard, Dr. Michelle Cohen, Dr. Alex Nataros, Dr. Ilan Schwartz, Dr. Andrew Fraser, Dr. Marco Prado, Timothy Caulfield, Dr. Sajjad Fazel, Alheli Picazo, Bruce Arthur, Dr. Terry Polevoy, Dr. John Van Aerde, Dr. Andrew Boozary, Dr. Abdu Sharkawy, Dr. David Jacobs, Tristan Bronca, Carly Weeks, The Pointer, The Hamilton Spectator, Société-Radio Canada, the Medical Post, Defendants

BEFORE: Stewart J.

COUNSEL: *Jeff G. Saikaley*, for the Plaintiff Dr. Kulvinder Kaur Gill

Asher Honickman, for the Plaintiff Dr. Ashvinder Kaur Lamba

Howard Winkler and Eryn Pond, for the Defendant Dr. Angus Maciver

Julian Porter, for the Defendant Nadia Alam

Jaan Lilles and Katie Glowach, for the Defendants Dr. David Jacobs, Dr. Alex Nataros, Dr. Abdu Sharkawy, Dr. Nadia Alam and Dr. Michelle Cohen

Susan Toth, for the Defendant Dr. John Van Aerde

Andrea Gonsalves and Caitlin Milne, for the Defendant Dr. Andrew Fraser

Alex Pettingill, for the Defendants Dr. Ilan Schwartz, Dr. Marco Prado, Timothy Caulfield and Dr. Sajjad Fazel

Timothy Flannery, for the Defendant Dr. Terry Polevoy

Daniel Iny and Melanie Anderson, for the Defendant Dr. Andrew Boozary

Meredith Hayward and Michael Binetti, for the Defendants Tristan Bronca and The Medical Post

Brian Radnoff and David Seifer, for the Defendant The Pointer Group Incorporated

Andrew MacDonald, Carlos Martins and Emma Romano, for the Defendants André Picard and Carly Weeks

George Pakozdi, for the Defendant Alheli Picazo

Emma Carver, for the Defendant Bruce Arthur

HEARD: In Writing

ENDORSEMENT ON COSTS

Preliminary Background

[1] In my decision of February 24, 2022 I invited counsel for the parties to provide submissions as to costs if that subject could not be agreed upon.

[2] Unfortunately, none of the parties have been able to arrive at any resolution on costs. Accordingly, I received submissions from the several moving parties/defendants on these motions who were successful in obtaining the dismissals of the actions brought against them pursuant to 137.1 of the *Courts of Justice Act* (“CJA”).

[3] In response I received very brief submissions from then counsel for the responding parties/plaintiffs. Given the nature and brevity of those submissions I gave counsel for the moving parties/defendants some additional time to determine their intentions in the expectation that they might wish to provide reply submissions.

[4] Following this inquiry as to the intentions of the moving parties/defendants, I received requests from new counsel for both responding parties/plaintiffs to provide supplementary submissions on costs. I granted that request.

[5] I now have received and reviewed those submissions as well as reply submissions from counsel for some of the moving parties/defendants.

Section 137.1 (7) of the Courts of Justice Act (“CJA”)

[6] It is evident from my decision that the moving parties/defendants were entirely successful in obtaining complete dismissals of the proceedings brought against them. The approach to be taken regarding any costs to be awarded to successful moving parties/defendants on such motions is set out in s. 137.1 (7) of the *CJA*, as follows:

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

[7] The costs provision that applies to this determination therefore requires that successful moving parties on motions of this nature are entitled to full indemnification of their costs unless such costs are not appropriate in the circumstances. As I interpret the provision, its purpose is to provide for full indemnification of the costs of successful moving parties, but not designed as punishment of the unsuccessful responding parties.

[8] The preservation of a discretion by the motions judge to fix costs is apparent in the language employed in the applicable provision. Even when costs on a full indemnity scale are sought, available and otherwise justifiable such costs may be determined not to be appropriate and disallowed as a result.

Issues

[9] Costs, inclusive of disbursements and applicable taxes, are sought by the moving parties/defendants as set out in their Joint Costs Submissions, as follows:

- (a) Dr. Angus MacIver seeks costs of \$98,530.24;
- (b) Dr. Nadia Alam seeks costs in connection with the OMA dispute of \$73,176.71;
- (c) Dr. David Jacobs, Dr. Alex Nataros, Dr. Abdu Sharkawy, Dr. Nadia Alam and Dr. Michelle Cohen seek costs in connection with the Covid-19 dispute of \$254,057.35;
- (d) Dr. John Van Aerde seeks costs of \$63,386.08;
- (e) Dr. Andrew Fraser seeks costs of \$100,211.82;
- (f) Dr. Ilan Schwartz, Dr. Marco Prado, Timothy Caulfield and Dr. Sajjad Fazel seek costs of \$138,464.37;
- (g) Dr. Terry Polevoy seeks costs of \$51,058.69;
- (h) Dr. Andrew Boozary seeks costs of \$59,015.25;
- (i) Tristan Bronca and The Medical Post seek costs of \$129,337.77;
- (j) The Pointer Group Incorporated seeks costs of \$64,170.15;
- (k) Andre Picard and Carly Weeks seek costs of \$90,562.89;
- (l) Alheli Picazo seeks costs of \$33,281.26;
- (m) Bruce Arthur seeks costs of \$33,281.26.

[10] All amounts for costs and disbursements as set out above reflect claims for recovery of costs on a full indemnity basis.

[11] The total amount sought in costs by the moving parties/defendants therefore is \$1,115,357.13.

[12] Two main issues have been advanced on behalf of the plaintiffs/responding parties in their costs submissions:

- (a) Are the amounts sought by any or all of the moving parties/defendants for costs not appropriate in the circumstances?

- (b) Should the costs of all of the moving parties/defendants be made payable by both plaintiffs/responding parties on a joint and several basis as has been requested?

Appropriateness of Amounts of Costs Sought

[13] It is submitted on behalf of both responding parties/plaintiffs that full indemnity costs are not appropriate, and that a significant reduction of the amounts claimed is particularly warranted as a result of the duplication of efforts of all counsel for the moving parties/defendants.

[14] Although a more cost-effective way of addressing the issues on the motion might have been employed, such as the bringing of one or more test motions on behalf of a small number of representative moving parties/defendants, all motions apparently were brought and heard together on agreement of the parties. Each had slightly different factual underpinnings which made separate arguments and considerations necessary.

[15] Where appears to have been possible, the moving parties/defendants dealing with the various claims who shared a similar factual foundation were represented by the same counsel. The fact that so many moving parties/defendants brought individual motions was inevitably the product of having been claimed against by the responding parties/plaintiffs in the same action but with respect to different statements and/or conduct.

[16] Although it must be observed that there was some degree of repetition and duplication of the legal principles that apply and of the public policy considerations in the various facta prepared and submitted by the moving parties/defendants, the issues were nevertheless of great importance to each of the parties and submissions were required to be tailored to the specific fact situations bearing on the many and various claims against them.

[17] As has been set out in the Joint Costs Submissions, in order for the moving parties/defendants to pursue these motions it was necessary for extensive affidavit material to be filed and for cross-examinations to be conducted. Facta were prepared and submitted to address the legal authorities bearing upon the outcome of the motions as well as the fairly extensive factual background giving rise to the various claims. Presence of counsel was required for the cross-examinations conducted and for all other necessary steps leading up to the motions, as well as for the hearing of the motions themselves.

[18] The motions were heard fairly efficiently over three days from September 27-29, 2021.

[19] Counsel for Dr. Jacobs et al. submitted a request for costs in an amount substantially higher than those submitted on behalf of most of the other moving parties/defendants. However, this is a product of having represented several of the moving parties/defendants, and the assumption of a leading role in the preparation of materials and presentation of submissions to the court throughout the process generally.

[20] It must also be noted that the responding parties/plaintiffs claimed damages of \$2,000,000.00, a considerable sum by any calculation and of understandably great concern to the moving parties/defendants. Further, the costs now claimed are costs of the entire actions, all of which were dismissed in their entirety on these motions.

[21] Although counsel for the moving parties/defendants maintain the belief that third party funding was involved in maintaining the claims against their clients, this is strenuously denied by the responding parties/defendants and their former counsel. There is no evidence before that amounts to proof to the contrary, and I do not view this assertion as having any bearing on the subject of costs.

[22] I also have no reason to conclude that the fees and disbursements claimed by experienced counsel for the moving parties/defendants were not actually incurred.

[23] Although the individual responding parties/plaintiffs are not substantial corporations or institutions, they are educated persons who were represented by counsel throughout. I agree that no real access to justice argument serves to soften the costs consequences of their failure to withstand the motions brought. The purpose of the anti-SLAPP provisions, including the costs provisions, in the *CJA* is to discourage those who would seek to use the legal process improperly to shut down debate on matters of public interest (see: *Levant v. De Melle*, 2022 ONCA 79; *Niagara Peninsula Conservation Authority v. Smith*, 2018 ONSC 127; *Air Georgian Ltd. v. Eugeni*, ONSC 9 September 2019).

[24] Having said that, I am of the view that the responding parties/plaintiffs should not be expected to incur exposure to the costs for additional legal counsel, clerks or students who may have been present at any of the proceedings but did not take an active role. I consider the inclusion of such costs claimed against the responding parties/plaintiffs in these circumstances to be not appropriate. Accordingly, any costs of attendance in court or related proceedings claimed with respect to persons falling under that description are to be removed and the resulting amounts recalculated.

[25] Accordingly, the full indemnity costs in the amounts requested by counsel for the moving parties/defendants with the noted reductions are to be recoverable as claimed. If there is any issue or argument with respect to the amounts that result following such adjustments, I may be spoken to.

Joint and Several Liability for Costs

[26] Dr. Lamba submits that the OMA issue was not a SLAPP suit, and that costs on a partial indemnity scale are therefore appropriate.

[27] Having already determined that the claims arising out of the OMA issue comprise a SLAPP suit, I consider that the costs provisions of s. 137.1 (7) therefore apply for which the responding parties/plaintiffs are responsible to pay.

[28] It is further submitted on behalf of Dr. Lamba that she should not bear costs in connection with the Covid-19 issue on a joint and several liability basis with Dr. Gill.

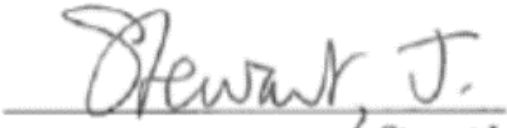
[29] A reading of the Statement of Claim and an assessment of the issues advanced on the motions make it clear that Dr. Lamba made allegations against Dr. MacIver and Dr. Alam, and only with respect to the OMA issue. This comprised a comparatively small portion of the motions proceedings and the subject matter responded to and argued on behalf of the moving parties/defendants. Further, she did not file any affidavit and therefore was not cross-examined.

[30] In my view, the only costs which Dr. Lamba ought to be required to pay are those of Dr. MacIver and Dr. Alam on the OMA issue. As the claims in this regard are also advanced on behalf of Dr. Gill, both Responding Parties/Plaintiffs are to be jointly and severally liable for payment of those costs as determined herein.

[31] With respect to the costs awarded to the Moving Parties/Defendants in connection with their successful motions arising out of the Covid-19 issue, such costs are to be payable by Dr. Gill only.

Conclusion

[32] An order shall issue in accordance with these reasons.


Stewart J.

Date: October 31, 2022