

**CITATION:** Davidson v. Solomon (Estate), 2020 ONSC 2898  
**COURT FILE NO.:** CV-17-0343-00CP  
**DATE:** 20200508

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

SARAH DAVIDSON

Plaintiff

– and –

THE ESTATE OF ANTHONY GARRY  
SOLOMON, DECEASED

Defendant

)  
)  
)  
) *Lucy G. Jackson, Kristian Bonn and Darcy  
R. Merkur, for the Plaintiff*

)  
)  
) *Richard Macklin and Daniel McConville, for  
the Defendant*

)  
)  
) **HEARD at Belleville:** 8 May 2020 (by  
video conference)

**REASONS FOR DECISION**

(Motion for certification and settlement approval pursuant to the *Class Proceedings Act, 1992*)

**MEW J.**

[1] Sarah Davidson moves to certify this action as a class proceeding against the estate of the late Dr. Anthony Garry Solomon. She also requests the court's approval of a settlement including the fees and disbursements to be paid to the lawyers acting for the class represented by the plaintiff.

[2] Because of the ongoing suspension of regular court operations due to the public health emergency resulting from COVID 19, the motion was heard by video conference.

[3] For the reasons that follow, I grant the relief requested.

**Factual Background**

[4] Dr. Anthony Garry Solomon (who I will refer to as the defendant) ran an orthodontist clinic in Belleville, Ontario. In 2015, the defendant retired from his practice. It is alleged that throughout the many years that he practised as an orthodontist in Belleville, the defendant would surreptitiously video record his patients while providing them with orthodontic treatment.

[5] On 18 July 2017, the Belleville Police Service published a news release stating that in early February of 2017, the Belleville Police Criminal Investigations Branch began an investigation after it was reported that the defendant was inappropriately video recording clients without their consent or knowledge. The news release further confirmed that on 12 July 2017, a search warrant was executed at a residential address in Toronto, following which the defendant was arrested and charged with the following offences:

- (a) Voyeurism - surreptitiously recording images of a person over the age of 18 years contrary to Section 162 (1) of the *Criminal Code*;
- (b) Voyeurism - surreptitiously recording images of a person under the age of 18 years contrary to Section 162 (1) of the *Criminal Code*;
- (c) Possession of child pornography contrary to Section 163.1 (4) of the *Criminal Code*; and,
- (d) Making child pornography contrary to Section 163.1 (2) of the *Criminal Code*.

[6] The Belleville Police Service confirmed that the investigation was on-going and that victims identified in the video recordings were being notified by police.

[7] This proposed class proceeding was commenced by a "Jane Doe" plaintiff on 29 September 2017 on behalf of a class of persons defined as "all persons who were notified by the police that they had been surreptitiously video recorded by the defendant" (who I will refer to as the "Class" or "Class Members").

[8] The Jane Doe plaintiff was subsequently replaced by the current proposed representative plaintiff, Sarah Davidson. In July 2017, Ms. Davidson was informed by the Belleville police that she was one of the victims identified in the video footage seized from Dr. Solomon's property. She was told that the video recording displayed her when she was 15 years old and that the camera panned down on her lower back and focused on her exposed underwear.

[9] The claim alleges that by surreptitiously video recording his patients, including the proposed representative plaintiff and the proposed Class, the defendant breached the duty of care and the fiduciary duty owed by him to the Class, thereby causing personal and psychological injury.

[10] It is alleged that the defendant never disclosed to any of his patients, including the proposed representative plaintiff and Class Members, that he had video recorded them. He never sought and never obtained consent or permission from any of his patients to record them during treatment or at any time.

[11] It is further alleged that as a result of being surreptitiously video recorded by the defendant, the proposed representative plaintiff and the Class Members suffered damages, including but not limited to anxiety, depression, worry and distrust of healthcare professionals, as well as invasion of privacy and intrusion of Class Members' physical and bodily integrity.

[12] There is an identifiable class of 295 individuals who were notified by the police that they had been surreptitiously video recorded by defendant.

[13] The defendant died from natural causes on 5 October 2017. Following his death, the criminal charges against Dr. Solomon were withdrawn by the Crown on 25 October 2017.

[14] The news media, specifically *The Belleville Intelligencer*, reported on the Crown Attorney's submissions to the court. The court was informed that 71 tapes had been seized and that the Crown had "little doubt that [Dr. Solomon] was the individual who created the videos".

[15] The recordings are said to have shown the defendant's female patients' chests and crotch areas, including down the patients' shirts and pants revealing images of their breasts, pubic hair and buttocks. According to the article, over 250 of the video recordings were of patients who were under the age of eighteen years at the time of filming.

[16] The statement of claim was amended on 19 December 2017 to continue the action against Dr. Solomon's estate.

[17] The proposed common issues are:

- a. whether Dr. Anthony Garry Solomon breached a duty of care or fiduciary duty owed to Class Members by allegedly surreptitiously video recording Class Members; and,
- b. if Dr. Anthony Garry Solomon breached a duty of care or fiduciary duty owed to the Class Members, did the Class Members suffer damages as a result of the breaches?

[18] The lawyers representing the plaintiff are Bonn Law Office and Thomson Rogers. Both firms, and, in particular, the lead counsel, Kristian Bonn and Darcy Merkur, have extensive class action litigation experience.

[19] In addition to investigating the issues of liability and damages and identification of Class Members, the plaintiff's lawyers investigated the availability of insurance which might respond to the claims of the Class members. Having ascertained that the defendant's professional liability insurance policy would not respond, given the criminal nature of the allegations, the plaintiff's lawyers engaged the assistance of a private investigator to investigate the estate's assets.

[20] After extensive investigation, including dialogue with the defendant's lawyers, the plaintiff's lawyers concluded that any judgment for damages obtained in the class proceeding would be limited to the value of the estate's assets, believed to be limited to approximately \$500,000.

[21] The defendant has denied the allegations made against Dr. Solomon.

[22] The parties began informal settlement discussions in or around June of 2018 after the lawyers for the defendant completed their investigation into the defendant's assets.

[23] The defendant's lawyers required evidence of what was contained on the video recordings in order to properly assess both liability and damages before being in a position to engage in meaningful settlement discussions. Efforts to obtain the video recordings from the Crown Attorney's Office were directed to the Crown Law Office – Civil. Several case conferences with the court ensued which ultimately led to an order being made by me on 26 July 2019 requiring production of a chart, prepared by the Officer in Charge of the criminal proceedings, summarising the content of each video recording. Although the identities of the victims were redacted, the chart contained enough information to identify which individuals were minors at the time of the video recording and what the videos depicted.

[24] It is important to note that the allegations concerning the contents of the video recordings have not been proved in court. Nor do those recordings form part of the evidentiary record in this action. Indeed, the video tapes themselves have not been produced by the Crown to, or viewed by, the lawyers for the parties.

[25] Following receipt of the redacted chart on 2 October 2019, the parties engaged in extensive negotiations, eventually coming to a tentative settlement agreement on 9 December 2019.

[26] On 18 February 2020, I made an order, on consent of the parties and the Crown Law Office – Civil, for production of the names and last known contact information of all Class Members, as well as allowing the plaintiff's lawyers to send those individuals a "Notice of Certification and Settlement Approval Motion".

[27] The Settlement Agreement was signed on 3 March 2020 and 17 March 2020 by the defendant and the representative plaintiff respectively.

[28] The parties agreed to certify the Class Proceeding on consent. A Certification and Settlement Approval Motion was scheduled to proceed on 20 April 2020. However, due to the COVID-19 pandemic and the subsequent cancellation of in-person hearings at the Superior Court of Justice, the parties and the court agreed to an adjournment of the Certification and Settlement Approval Motion to proceed on 8 May 2020 by way of video conference.

#### The Settlement

[29] The defendant will pay to the credit of the Class \$425,000, to be deployed as follows:

- a. Payment of \$350,000 to Class Members for total damages;
- b. Payment of up to \$20,000 towards the administration fund; and
- c. Payment of \$55,000 for partial indemnity costs (inclusive of HST and disbursements).

[30] The Settlement Agreement provides a breakdown of the compensation available to Class Members. It also specifies that the plaintiff's lawyers will evaluate all claims and will notify Class Members of their anticipated estimated recovery.

[31] Claims by Class Members will be assessed at a fixed amount, distributed on a *pro rata* basis. Class Members are anticipated to receive approximately \$1,000 per claimant (after the deduction of any court approved legal fees) in recognition of all potential damage claims.

[32] The Settlement Agreement also sets out the requirements for claimants to successfully apply for compensation under the Settlement Agreement.

[33] In accordance with the Settlement Agreement, the Class was defined to only include those individuals who were notified by the police that they had been surreptitiously video recorded by the defendant.

[34] The police only notified those individuals that they were able to identify in the video recordings. Therefore, there is no evidence to support that other patients of Dr. Solomon who were not notified by police of the surreptitious video recording were, in fact, video recorded.

[35] The Settlement Agreement defines "Uncompensated Patients" as "all patients of the Defendant other than those that fall within the Class". Uncompensated Patients are therefore those individuals who were not notified by the police of the defendant's surreptitious video recording and therefore do not have any evidence that the defendant breached his duty of care or fiduciary duty owed to Uncompensated Patients by surreptitiously video recording them.

[36] According to the Settlement Agreement, Uncompensated Patients are not entitled to any compensation under the Settlement Agreement. The plaintiff submits that it is unlikely that Uncompensated Patients would have a compensable claim under this class proceeding, as there is no evidence that the defendant breached a duty of care or fiduciary duty owed to by him to Uncompensated Patients by surreptitiously video recording them.

[37] The Settlement Agreement sets out that if any Uncompensated Patient intends to issue a proceeding in relation to alleged surreptitious video recording by the defendant, then they must provide written notice to the lawyers for the defendant by no later than 1 July 2020 (the "Notice Deadline") and issue a claim in the Ontario Superior Court of Justice and served on the lawyers for the defendant by no later than 31 August 2020, failing which they will be barred from bringing such a proceeding.

[38] If four or more Class Members opt out and/or Uncompensated Patients deliver the required written notice to the defendant's lawyers, then the defendant has the right to terminate the Settlement Agreement.

[39] Following approval of the Settlement Agreement by the court, a Notice of Settlement will be sent to all Class Members. It will describe the process for Class Members to submit a claim to the lawyers for the Class. The Notice of Settlement will also contain a link to a Settlement Administration Guideline document ("Guideline"), which further details the process for the submission and evaluation of claims and appeals.

[40] The Notice of Settlement and Guideline will advise Class Members that they must complete a "Compensation Request Form" and submit it to the lawyers for the Class in order to be considered for compensation under the Settlement Agreement. The Notice explains that the

Compensation Request Form must be submitted by 1 July 2020 and that failure to do so by that date will result in permanent forfeiture of the ability to recover compensation from the defendant.

[41] Compensation Request Forms that have been completed and submitted will be reviewed by the Class lawyers who will evaluate whether compensation will be payable in accordance with the guideline. Class members will be required to confirm that they have been negatively impacted as a result of being notified by the police that they had been surreptitiously recorded by Dr. Solomon.

[42] After the 1 July 2020 deadline, assuming the Settlement Agreement is not terminated by the defendant due to opt outs and/or notices, the Class lawyers will send each Class Member who submitted a claim a "Claimant Explanation Letter" by no later than 23 July 2020. The Claimant Explanation Letter will advise the Class Member of the Class lawyers' evaluation of their entitlement, along with a conservative estimate of their expected compensation under the settlement, which estimate will be subject to the outcome of an appeals process, if engaged.

[43] The proposed Settlement Agreement includes an Administrative Fund of \$20,000 to cover the cost of the Administrator's Fees and disbursements. Any surplus in this fund will be distributed to the Class Members on a *pro rata* basis.

[44] The parties have selected Epiq Class Action Services Canada Inc. as the Administrator under the Settlement Agreement, subject to approval by the court.

[45] Any person who submits a claim will have the right to appeal the decision of the Class lawyers regarding their entitlement, if any, to compensation. Epiq will review any appeals that are submitted and any documents that the Class Member provides along with it. Epiq will also give the Class Member the opportunity to participate in a telephone call regarding the basis of the appeal or to make further submissions in writing. Epiq will then make a final binding determination with respect to the appeal and will report back to the Class Member regarding the outcome.

[46] Following the resolution of any appeals, settlement funds will be distributed to Class Members.

[47] The Class lawyers recommend the proposed settlement to the court for the following reasons:

- a. Class Members' individual claims are subject to consistent analysis and treatment under the Settlement Agreement and Guideline;
- b. the claims process under the Settlement Agreement and the Guideline is efficient and Class Members are not required to provide supporting documentation to quantify their individual losses;
- c. after extensive investigation, it is unlikely the defendant would have significant assets to respond to a judgment in this class proceeding, thereby limiting the amount of damages available to the Class;

- d. it was not certain the Class Proceeding would be certified given the individualised nature of the damages sustained by each Class Member;
- e. proving damages would need to be done individually and would require complex individual hearings following a common issues trial;
- f. it was uncertain if many of the Class Members would be able to substantiate any psychological injury or impairment resulting from the defendant's alleged wrongdoing;
- g. it could take many years to resolve the class proceeding and individual actions that would be required, together with the length of time for expected appeals, on the many contentious issues;
- h. the cost of litigating the claims would become increasingly disproportionately high relative to the ultimate recovery that could be expected.

[48] Ms. Davidson has accepted counsel's recommendation to seek approval of the settlement.

#### Notice of the Proposed Settlement

[49] A Notice of Certification and Settlement Approval Motion was sent to all but eleven of the 295 putative Class Members identified from the list produced by the Crown. While the addresses of the remaining eleven putative Class Members could not be obtained, attempts were made to contact nine of them by telephone and multiple messages were left. The Notice was also posted on Thomson Rogers' website under the heading "Class Action Against Dr. Garry Solomon".

[50] Along with the Notice, all known Class Members were sent a letter, summarising the information contained in the Notice, including the right to object to the settlement.

[51] The Notice and the letter sent to Class Members also specified that Class Members did not need to take any further steps at that time, but that a further "Notice of Settlement" would be sent to Class Members if the settlement was approved and thereafter, Class Members would be required to apply for compensation within a deadline set by the court.

#### Objectors

[52] A letter was received from an individual who explained that she was a former patient of Dr. Solomon's, but that she had not been notified by the police that she had been surreptitiously video recorded by him. She said that she would like to appeal the decision that she would be classified as an "Uncompensated Patient" and thus not eligible for compensation under the proposed settlement agreement.

[53] After further communication with that individual, she confirmed that she did not wish to object to the proposed settlement agreement.

[54] No other potential objections were received by the lawyers for the parties prior to the motion being heard on 8 May 2020.

### Opt Outs

[55] The proposed Notice of Settlement specifies that Class Members who wish to opt out of the Class Proceeding must do so on or before 1 July 2020 by sending a signed "Opt Out Form" to the Class lawyers and that no Class Member will be permitted to opt out of the Class proceeding after that date.

### Certification

[56] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[57] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, as held by Perell J. in *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 24, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements.

[58] I am satisfied that for settlement purposes, the criteria for certification have been met. Furthermore, I agree with the plaintiff's submission that certifying this class proceeding will promote access to justice for all Class Members. Sharing the cost of this litigation will promote access to justice, making the litigation affordable. It also helps to preserve recoveries for Class Members, leaving a greater proportion of a damage award available for compensation, as opposed to legal fees and disbursements. This is particularly so having regard to the limited resources available to satisfy any judgment against Dr. Solomon's estate.

### Settlement Approval

[59] The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement. The test is not whether the settlement meets the demands of a particular class member. A settlement need not be perfect. It need only fall "within a zone or range of reasonableness". That some class members are disappointed or unsatisfied will not disqualify a settlement because the measure of a reasonable settlement is not unanimity or perfection: *Baxter*, at para. 10; *Dabbs v. Sun Life Assurance* (1998), 40 O.R. (3d) 429, 5 C.C.L.I. (3d) 18 (Gen. Div.) at para. 9, *aff'd* (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372; *Parsons v. Canadian Red Cross Society* (1999), 103 O.T.C. 161, 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paras. 68-73; *Smith v. National Money Mart*, 2010 ONSC 1334 (rev'd. in part on other grounds, 2011 ONCA 233), at paras 17-21.

[60] When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and

experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs*, at 440-41 (O.R.); *Parsons* at paras. 71-72; *Smith*, at para. 19.

[61] These factors are guidelines rather than rigid criteria. In any given case, some criteria may be given more or less weight than others: *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62, at para. 8.

[62] Where parties are represented by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement: *Wein v Rogers Cable Communications Inc.*, 2011 ONSC 7290 at para 20.

[63] In my opinion the settlement is fair, reasonable and in the best interests of the Class Members. It would have been challenging for some, if not many, of the Class Members to individually substantiate having suffered psychological injury or pecuniary loss as a result of being surreptitiously recorded by Dr. Solomon. Furthermore, there is a significant risk that but for this settlement, the Class Members would recover nothing, given the limited assets available to satisfy any judgment.

[64] I am reinforced in my conclusion by a comparable resolution in *Hunt v Mezentco Solutions Inc.*, 2017 ONSC 2140, where a class of 1,200 alleged psychological injury after they were underdosed with a chemotherapy drug. It was alleged that members of the class had suffered anxiety caused by having undergone potentially ineffective cancer treatment. The court approved a settlement that provided \$1,500 to each class member.

#### Fee Approval

[65] The plaintiff's lawyers move for approval of their retainer agreement with the representative plaintiff and of legal fees in the amount of \$122,100, HST in the amount of \$15,873 and disbursements in the amount of \$5,000, for a total of \$142,973. The fees sought represent a contingency fee of 33% on the damages amount (inclusive of the Administration Fund), namely \$370,000.

[66] The retainer agreement sets out that the Class lawyers would be paid fees and disbursements based on success in the action. The Retainer Agreement is not a contingency fee retainer agreement. The legal fee would be based on the total number of hours worked on the class action without any multiplier when the total recovery from the defendant is less than \$500,000. As of 17 April 2020, the plaintiff's lawyers had expended docketed time of approximately \$150,000 and incurred disbursements of approximately \$3,000 in pursuing this claim.

[67] It was expected that approximately \$20,000 in further time would be expended by the plaintiff's lawyers up to, including, and after this certification and settlement approval motion, as

well as during the administration period. It is also expected that further disbursements will be incurred, bringing the total disbursements to an estimated \$5,000.

[68] The Settlement Agreement includes an additional payment of \$55,000 by the defendant for partial indemnity costs and disbursements of the proceeding. The costs which belong to the Class and will thus be properly applied to reduce the total amount of the legal fees payable by the Class.

[69] 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: *Serwaczek v. Medical Engineering Corp.*, (1996), 3 C.P.C. (4th) 386 (Ont. Ct. Gen. Div.) at para. 16; *Parsons*, at para. 19; *Smith*, at paras. 19-20.

[70] Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee which may include a premium for the risk undertaken and the result achieved, but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the Class Members as a whole: *Smith*, at para. 22.

[71] Furthermore, 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: *Smith*, at para. 23.

[72] Factors relevant in assessing the reasonableness of the fees of class action lawyers 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 the lawyers; (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 the lawyers; (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; (j) the opportunity cost to the class action lawyers in the expenditure of time in pursuit of the litigation and settlement: *Smith*, at paras. 19-20.

[73] In my opinion, the plaintiff's lawyers' fees should be approved. The lawyers were entitled to a legal fee based on the total number of hours worked on the class action without any multiplier where, as turned out to be the case, the total recovery from the defendant was less than \$500,000, plus HST and disbursements. The Retainer Agreement was fully understood and accepted by the representative plaintiff. The fee sought is, in fact, equal to 33% of the damage amount and administration fund, but it is an amount somewhat less than the plaintiff's lawyers' docketed time.

[74] Ultimately, despite the limited resources available to fund a settlement, the plaintiff's lawyers successfully negotiated as favourable an outcome as seems possible for them to have done under the circumstances. The litigation would not have had to continue for much longer for the remaining available assets of Dr. Solomon's estate to have been dissipated. It is to both their credit and to the credit of the defendant's lawyers that a settlement was achieved and that the Class Members will receive some compensation. It could easily have been otherwise.

### Conclusion and Disposition

[75] An order shall go in the form consented to by counsel and now approved by this court.

[76] I am grateful to counsel for their assistance throughout this proceeding. The court remains available to assist the parties with any issues that arise in relation to the implementation, administration and enforcement of the order that has been made.

*Gemma Maw J.*

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Mew J.

**Released:** 8 May 2020

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**REASONS FOR JUDGMENT**

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**Released:** 8 May 2020