AHERNE et al. v CHANG et al.
CITATION: 2012 ONSC2689
COURT FILE NO.: CV-08-358325
DATE: 2012/05/02

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **AHERNE et al. v CHANG et al.**

BEFORE: **MASTER RONNA M. BROTT**

COUNSEL: **K. C. Tranquilli, for the Defendants P. Chang and S. Power/Moving Parties**
D. Gilbert, for the Plaintiffs/Responding Parties

E N D O R S E M E N T

[1] The defendants Dr. Paul Chang and Dr. Stephen Power ("the moving parties") seek to transfer this action and a companion action from Toronto to either London, Hamilton or Milton.

[2] The principal plaintiff Julie Aherne ("Ms. Aherne") commenced two actions in Toronto claiming damages for psychological and physical injuries allegedly arising from latex exposures which occurred in 2006 ("the 2006 action") and in 2008 ("the 2008 action"). The parties have consented to have the two actions tried at the same time or one immediately following the other, in the discretion of the trial judge. Both actions have been set down for trial in Toronto.

[3] This action arises from alleged latex exposure which took place at London Health Sciences Centre while Ms. Aherne was undergoing a course of in vitro fertilization. The 2008 action arises from allegations that Ms. Aherne suffered an adverse reaction following an exposure to latex at the defendant LifeLabs Medical Laboratory Services ("LifeLabs") clinic in Ancaster (Hamilton), Ontario while she was having a blood test.

[4] The moving parties are moving pursuant to rule 13.1.02(2) to transfer the action to another county. Subparagraph (b) sets out a series of factors which must be considered by the court when determining whether a transfer is "desirable in the interest of justice". These factors include:

(i) Where a substantial part of the events or omissions that gave rise to the claim occurred,

(ii) Where a substantial part of the damages were sustained,

(iii) Where the subject matter of the proceeding is or was located,

(iv) Any local community's interest in the subject matter of the proceeding,

(v) The convenience of the parties, the witnesses and the court,

(vi) Whether there are counterclaims, crossclaims or third or subsequent party claims,

(vii) Any advantages or disadvantages of a particular place with respect to securing the just, most expeditious and least expensive determination of the proceeding on its merits,

(viii) Whether judges and court facilities are available at the other county, and

(ix) Any other relevant matter.

[5] The rule was enacted in 2004 and the two leading decisions are *Eveready Industrial Services Corp. v Jacques Daoust Coatings Management Inc.* [2005] O.J. No. 2285 (Sup. Ct.) ("*Eveready*") and *Siemens Canada Ltd. v Ottawa (City),* (2008) 93 O.R. (3d) 220 (Sup. Ct.) ("*Siemens*").

[6] In allowing the appeal of the Master's Order in *Eveready*, Stinson, J. imported the former common law principle that there ought to be a 'rational connection' to the venue for trial. At paragraph 14 he stated:

> Based on common sense, and apart from authorities, it seems logical that a case should be heard at a place where the cause of action arose or where all or at least some of the parties are located.

[7] In *Siemens,* decided three years later, Corbett, J. espoused a two-part test as follows: (paras. 24 – 25)

> In the first instance, the court must be satisfied that the place of trial selected by the plaintiff is a reasonable place for trial. If it is not, then a change is in order, to the place suggested by the defendant, or to some other place if the defendant's suggestion is not a reasonable place for the trial. If the plaintiff's choice is reasonable, then some element of comparison is required to assess the relative merits of the place suggested by the plaintiff and the place suggested by the defendant.

[8] Brown, J. considered both *Eveready* and *Siemens* in 2009 in *Hallman Estate v Cameron* ("*Hallman*") [2009] O.J. No 4001 (Sup. Ct.). At para 28 he stated:

> While I do not quarrel with the second part of the approach in *Siemens* dealing with the balancing of the various factors enumerated in rule

> 13.1.02(2), I have difficulty with the suggestion that before weighing the factors a court should first examine whether the place selected by the plaintiff is a reasonable one. To impose such a "threshold" condition in my view places a gloss on rule 13.1.01(2) that does not find support in the language of the rule which permits a party to commence a proceeding in any court office in any county so long as a statute or rule does not specify a place of commencement. The rule does not state that the initiating party must justify the choice as a reasonable one. If one of the parties opposite thinks the choice an unreasonable one for whatever reason, it may bring a motion to change the venue. On that motion the court should engage in the "holistic" exercise described in *Eveready* of considering the enumerated factors, including "any other relevant matter", in order to determine whether the moving party has demonstrated that "a transfer is desirable in the interest of justice."

[9] In the cases which have been decided since these three decisions, the majority of the courts (all lower courts) seem to have adopted the *Hallman* approach which, in my view, notes the purpose given to the rule amendment which found that there is no pre-condition that the place of trial must have a rational or reasonable connection to the cause of action. The more recent decisions appear to support a plaintiff's ability to commence his or her actions in the county of his or her own choosing. To impose the rational connection test actually requires a court to give more weight to some of the factors enumerated in rule 13.1.02(2) and *Patry v Sudbury Regional Hospital* [2009] O.J. No. 1060 (S.C.J.) clearly states that the "current rule makes it clear that none of the enumerated factors are more important than the other …"

[10] Because I prefer the *Hallman* analysis where there is no pre-condition that the place of trial must have a rational or reasonable connection to the cause of action I must determine if a transfer is desirable in the interest of justice and in doing so must analyze the enumerated factors in rule 13.1.02(2) with specific reference to the facts of this action and the related action.

(i) Where a substantial portion of the events that give rise to the claim occurred

[11] The parties are in agreement that the events occurred in London and Ancaster (Hamilton).

(ii) Where were a substantial part of the damages were sustained

[12] From 2006 to present Ms. Aherne has resided in London, Woodstock, Ancaster (Hamilton) and Burlington. She has not yet returned to work. Her damages are ongoing. She has accordingly allegedly suffered damages in many counties and potentially in other counties where she may move between now and trial.

(iii) Where the subject matter of the proceeding is or was located.

[13] The alleged latex exposures occurred in London and/or Ancaster (Hamilton).

(iv) Local Community Interest

[14] The moving parties submit, relying on the *Eveready* rational connection test that there must be a rational connection between the proper venue for a proceeding and the principle that our judicial system should be open to public observation. It is their assertion that the affected communities are London and Ancaster (Hamilton). Jury notices have been filed in both actions.

[15] In my view the public access aspect referred to in *Siemens* must be weighed with due consideration to 'access to justice' also referred to in *Siemens.* These actions are relatively private matters relating to this particular plaintiff's allergy to latex. Personal exposure to latex is not an issue of local or public interest. This factor plays no role in these disputes.

(v) The convenience of the parties, the witnesses and the Court

THE PARTIES

[16] The four plaintiffs reside in Burlington. Based on their evidence, they all prefer the actions to be tried in Toronto. They do not consider Toronto to be an inconvenience. LifeLabs has its head office in Toronto but the clinic where Ms. Aherne attended was located in Ancaster (Hamilton). The defendant Mignardi, who was examined for discovery on behalf of LifeLabs, works, resides and was examined for discovery in Hamilton. The LifeLabs defendants' evidence is that they prefer the actions be tried in Toronto. Presumably then, Toronto is not an inconvenience to the LifeLabs defendants.

[17] The moving defendant Dr. Chang now resides and works in Toronto. Dr. Power and the Hospital's representative presumably reside in London. There is no evidence from them that they would be inconvenienced if the trial was to proceed in Toronto as opposed to London (or Hamilton or Milton).

THE WITNESSES

[18] In their factum the moving parties estimate that "at least 12 lay/medical witnesses employed or holding privileges at the Hospital" will be required to testify as to their observations and involvement in the material events of the first action. It is the defendants' evidence that "a majority of the lay witnesses reside or work in London, Hamilton or Burlington" but no particulars have been given.

[19] The moving parties also anticipate that evidence will be required from eight physicians or other health care providers in Ms. Aherne's treatment. All but two of them practice in Hamilton. Of the two, one of them is in Toronto and the other is in Burlington (Milton).

[20] There is no evidence about the expected length of time that each of these anticipated witnesses will be on the witness stand. There is also no evidence that any of the defendants' witnesses will be inconvenienced if the trials remain in Toronto.

[21] There is evidence that the plaintiffs intend to call seven expert witnesses who practice in Toronto, and two from the Burlington (Milton) area. The defendants have, to date, retained only one expert and he practices in Toronto. It is convention in medical malpractice matters that the

plaintiffs remain at the trial for its entire duration while the defendants and all of the witnesses attend on an as-needed basis, usually for not much longer than one day – other than the named physicians – one of whom in this action, resides and works in Toronto.

THE COURT

[22] Both of the actions will be tried by a jury and the length of the trial is estimated at 27 days. There is no evidence that leaving the actions in Toronto or transferring them to London, Hamilton or Milton will cause an inordinate delay. The evidence is that the trials could take place as quickly as November 2012 in Burlington (Milton) but all parties are agreed that they would not be ready by then. The next long trial list in Hamilton commences in October 2012 but it is unknown when these actions could be tried there. There is little difference between the courts' availability in Toronto and London and these actions are in fact already on the trial list in Toronto.

(vi) Crossclaims, Counterclaims, Third Party Claims, Subsequent Claims

[23] The moving parties and the hospital have cross-claimed against one another in this Toronto action.

(vii) Any advantage or disadvantage of a particular place with respect to securing the just, most expeditious and least expensive determination of the proceeding on its merits

[24] Three of the four counsel practice in Toronto. Counsel for the moving parties practices in London but also has an office in Toronto. The cost of the litigation would increase if the three counsel and potentially nine experts were forced to travel outside of Toronto for this long trial.

(viii) Whether court facilities are available

[25] The parties agree that Judges and facilities are available in all of Toronto, London, Hamilton and Milton.

(ix) Other relevant matters.

[25] The moving parties have not made submissions on any additional relevant matters but in my view it is significant that the moving parties have waited over three years since the commencement of these actions, and until both actions have been set down for trial in Toronto, before bringing this motion. Despite pleading the issue of the venue in their Statement of Defence, the moving parties have not provided any explanation for their late request.

[26] It is relevant that the co-defendant in the 2006 action, the London Health Sciences Centre, supports the moving parties in seeking the transfer these actions to one of London, Hamilton or Milton. It is also relevant that the LifeLabs defendants are supporting the plaintiffs

on this motion. The effect of the moving parties' request would be to force parties in a separate action to transfer out of Toronto when they're opposed to doing so.

[27] It is relevant that the moving parties have not adduced evidence to demonstrate why one particular venue is significantly better but rather they have provided three alternatives, namely London, Hamilton and/or Milton.

[28] It is also relevant that Dr. Chang admitted on his examination for discovery that he was aware of Ms. Aherne's allergy to latex when he inserted a latex-covered probe into her vagina without her consent. Issues of the events that transpired thereafter are in dispute. He has not admitted liability in the within proceeding but yet he is willing to put Ms. Aherne, who has yet to return to work, to increased cost and inconvenience after she selected Toronto as the preferred venue for trial, after her matters were set down for trial in Toronto and at this very late date in the proceedings.

CONCLUSION

[28] Having considered the evidence and having weighed the factors enumerated in rule 13.1.02(2)(b) I am not satisfied that a transfer of these actions from Toronto to one of London, Hamilton or Milton is desirable in the interest of justice. In reaching this conclusion I keep in mind Justice Corbett's (*Siemens*) words:

> 'this comparison should not be a minute assessment designed to determine which is the "better" or the "best" choice. If there is something to be said for both of the suggestions, then the plaintiff's suggestion should prevail. However, if the defendant's suggestion is significantly better than the plaintiff's, then the change should be made."

[29] I find the plaintiff's chosen venue should prevail as I am not satisfied that the moving parties, who have the onus of proving that the transfer is desirable in the interest of justice have demonstrated that their venue(s) are significantly better. The moving defendants' motion is therefore dismissed.

[30] In the event that the parties cannot agree on the issue of costs they shall, within 30 days, exchange brief (maximum 1 – 2 pages) written submissions for my review.

MASTER RONNA M. BROTT