

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Bailey v. Young*, 2022 NSSC 43

**Date:** 20220110

**Docket:** Ken.No. 470770

**Registry:** Kentville

**Between:**

Jayden Bailey, by his litigation guardian Jessica Bailey, and Jessica Bailey

*Plaintiffs*

v.

David Young, Christopher Nash, Alicia Williams, Heather Scott, Elinor Lu-Olaco  
and the Izaak Walton Killam Heath Centre, a body corporate

*Defendants*

**Judge:** The Honourable Chief Justice Deborah K. Smith

**Heard:** December 13<sup>th</sup>, 2021, January 6<sup>th</sup> & 10<sup>th</sup>, 2022

**Oral Decision:** January 10<sup>th</sup>, 2022

**Counsel:** Raymond F. Wagner, Q.C., for the Plaintiffs  
Colin J. Clarke, Q.C. for the Defendants, David Young,  
Christopher Nash, Alicia Williams, Heather Scott, Elinor Lu-  
Olaco  
Karen N. Bennett-Clayton for the Defendant IWK

**By the Court:**

[1] Eight-year-old Jayden Bailey was born at the Izaak Walton Killam Health Centre on January 29<sup>th</sup>, 2013. Unfortunately, Jayden suffered a brain injury at or around the time of his birth. This brain injury resulted in cerebral palsy, motor dysfunction and intellectual disability. Jayden's mother, Jessica, was less than 31 weeks pregnant when Jayden was born.

[2] In November, 2017, Jayden (via his litigation guardian) and his mother, Jessica, brought an action in the Supreme Court of Nova Scotia against doctors David Young, Christopher Nash, Alicia Williams, Heather Scott, Elinor Lu-Olaco as well as the Izaak Walton Killam Health Centre (the IWK). The complete allegations against the Defendants are set out in the Plaintiffs' Statement of Claim. In essence, the Plaintiffs allege that the Defendants were negligent in their treatment during Jayden's birth which led to birth asphyxia, intraventricular hemorrhage and cerebral palsy. In particular, the Plaintiffs allege that the Defendants made critical mistakes by choosing not to intervene in the face of signs of placental abruption and fetal distress.

[3] Defences were filed by all Defendants. The issues of liability (including causation) and damages were strongly contested.

[4] The matter was scheduled for a 23-day trial commencing August 30<sup>th</sup>, 2021. On July 26<sup>th</sup> and 27<sup>th</sup>, 2021 all parties appeared before me for a two-day settlement conference. The materials filed in relation to the settlement conference were voluminous. As a result, I have a thorough understanding of the facts and issues arising out of Jayden's birth.

[5] At the time of the settlement conference an agreement was reached, subject to the approval of the court, whereby the Defendants, Dr. David Young and Dr. Heather Scott, agreed to pay to the Plaintiffs the sum of \$4,600,000.00 (four million six hundred thousand dollars) in full and final settlement of this action. Eighty-five thousand dollars (\$85,000.00) of that amount was attributed to Jayden's mother, Jessica. The remainder was for the benefit of Jayden. Further, it was agreed that the action against Dr. Williams, Dr. Nash and Dr. Lu-Olaco, as well as the IWK, would be dismissed without costs to any party.

[6] Medical malpractice litigation is fraught with risk. Expert opinion evidence can be garnered in support of a party's action, but that evidence is only as good as

the author's ability to hold up under cross-examination. Many plaintiffs have gone into a medical malpractice trial with strong experts' reports in support of their case, only to have the action dismissed at the conclusion of the matter.

[7] In this action, Jayden's solicitors had strong expert opinion evidence in support of their position on the issue of a breach of the duty of care. Some of the hospital's experts supported the Plaintiffs' position on this issue. The Defendants, however, had expert opinion evidence that warned of the dire consequences associated with delivering Jayden at less than 31 weeks gestation and, therefore, the appropriateness of "expectant management".

[8] There was similar divergence of opinion on the issues of causation and damages. In relation to damages, it was my view that the Plaintiffs had a number of weaknesses in their experts' opinions. From my perspective, causation and damages were the two areas where the Plaintiffs were most vulnerable.

[9] I thoroughly reviewed the various experts' reports in preparation for the two-day settlement conference that was held before me. I am very familiar with the facts of this case. Taking into account the experts' opinions and the risks of litigation, I am satisfied that the proposed settlement is in Jayden's best interest.

[10] That takes me to the approval of counsel's accounts. Civil Procedure Rule 77.13 deals with counsel's entitlement to reasonable compensation for services rendered. It provides:

**Counsel's fees and disbursements: entitlement and assessment**

**77.13** (1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.

(2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:

- (a) counsel's efforts to secure speed and avoid expense for the client;
- (b) the nature, importance, and urgency of the case;
- (c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;
- (d) the general conduct and expense of the proceeding;
- (e) the skill, labour, and responsibility involved;

(f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.

[11] Civil Procedure Rule 36.15 deals with the approval of counsel's accounts when counsel is to be paid by a represented party. It provides:

**Approval of counsel's accounts**

**36.15** (1) Counsel who is to be paid by a represented party from a fund owned directly or beneficially by a represented party, or from funds of an estate, must make a motion for a judge to allow counsel's account, unless the instrument or other authority under which the representative was appointed provides otherwise.

(2) The motion must be supported by an affidavit providing evidence of all of the following:

(a) the terms of retention and, if the terms included payment on a contingency, a copy of the contingency agreement;

(b) a description of the services rendered by counsel, including, unless a judge permits a summary, the date, amount of time, and description of each service;

(c) details of the disbursements;

(d) counsel's usual hourly rate, if counsel has established an hourly rate;

(e) the hourly rate charged on the account, if counsel charges the representative party by the hour;

(f) an explanation of the risks undertaken by counsel, if the retention was on a contingency;

(g) a copy of the account, which may include an amount required to conclude counsel's work.

(3) The affidavit may provide other relevant information, such as information for evaluating counsel's charges based on results achieved, skill, experience, and timeliness.

(4) A representative may make a motion for directions about an account submitted by counsel.

[12] Mr. Wagner has provided the court with the information required by Civil Procedure Rule 36.15.

[13] In this case, Jayden's mother entered into a Contingency Fee Agreement for services rendered in relation to this action. The Contingency Fee Agreement in question is not dated as required by Civil Procedure Rule 77.14(4). However, in Ms. Bailey's affidavit, sworn on December 8<sup>th</sup>, 2021, she confirms that she entered into

this Contingency Fee Agreement on December 20<sup>th</sup>, 2017. In the circumstances, I am satisfied that this is a valid Contingency Fee Agreement, even though it is not dated as required by the Rules.

[14] Contingency Fee Agreements are dealt with by Civil Procedure Rule 77.14. The court is not bound by the terms of a Contingency Fee Agreement. Rather, it considers whether the fee sought by counsel is fair and reasonable in the circumstances.

[15] The Contingency Fee Agreement in question provides that reasonable contingent compensation is to be paid for services rendered by the solicitor. The Agreement then indicates that if collected compensation exceeds one million dollars the client shall pay 30% on the first million dollars collected and 25% on the amount that exceeds one million dollars, after all reasonable and proper disbursements and expenses have been deducted.

[16] As indicated previously, the action settled for the all-inclusive sum of four million six hundred thousand dollars (\$4,600,000.00). The Plaintiffs incurred disbursements in the amount of \$327,334.44 in order to pursue this matter. I am satisfied that these disbursements were reasonably and properly incurred. Twelve thousand two hundred and seventy-eight dollars and 51 cents (\$12,278.51) of the settlement amount related to a Nova Scotia Department of Health subrogation claim. This figure has been deducted from the settlement amount. Fees under the Contingency Fee Agreement would equal three hundred thousand dollars (\$300,000.00) on the first one million dollars (\$1,000,000.00) collected (based on 30%) and \$815,096.76 on the next \$3,260,387.05 (based on 25%). The Plaintiffs' solicitors have asked the court to approve a fee in the amount of \$1,282,361.28 inclusive of HST.

[17] The question I must ask is what is fair and reasonable compensation in the circumstances of this case?

[18] According to the affidavit evidence provided to the court, counsel and staff at Wagners spent at least 1,397.8 hours working on this file over the last seven plus years. I use the term "at least", as Mr. Hooper has filed affidavit evidence indicating that he believes that a reasonably significant volume of work may not have been recorded on the file – so that the actual number of hours spent working on this case may actually be greater. In addition, Wagners hired outside counsel, Richard Halpern, to assist with this action. Mr. Halpern is said to have spent 296.4 hours on

this file. Staff from his office appear to have put in a small amount of additional time.

[19] Mr. Wagner has suggested to the court that on an hourly rate basis the fees of his firm and Mr. Halpern would total one million forty-eight thousand six hundred and sixty-two dollars and one cent (\$1,048,662.01) including HST. The hourly rates provided to the court to calculate this figure ranged from one hundred dollars (\$100.00) per hour for a summer student to one thousand one hundred dollars (\$1,100.00) per hour for Mr. Wagner.

[20] In my view, in the circumstances of this case, it is the number of hours that have been expended on the file that is most relevant to this portion of my analysis – not the hourly rates that counsel have suggested to the court. The reality is that Mr. Wagner and his firm, as well as Mr. Halpern, have spent significant hours bringing this action to what I view as a successful conclusion.

[21] Regardless of whatever hourly rate one ascribes to the hours spent on this file, the fee proposed by Plaintiffs' counsel is greater than that that would be owing on a hourly rate basis. Can this proposed fee of \$1,282,361.28 be said to be fair and reasonable in the circumstances of this case? In my view, it can. My reasons include the following:

- As indicated previously, medical malpractice actions are risky. For many Plaintiffs, and for Jayden and his mother in particular, a Contingency Fee Agreement is likely the only way that an action could have been commenced in relation to the alleged medical malpractice. Counsel who practice in this area recognize the risks that are being taken. While they may receive more than a reasonable hourly rate on some files, there are likely many others where they will lose money. Allowing lawyers to recover a reasonable contingency fee, even if it exceeds that which would be reasonable on an hourly rate basis, encourages access to justice for children such as Jayden and for his mother.
- There is no question in my mind that this case was complex and required a great deal of effort and specialized knowledge and experience by the Plaintiffs' solicitors.
- This case was extremely important to both Jayden and his mother. Without this litigation, Jayden would have had a very different life than what he is now going to be able to enjoy. Providing this child and his mother with

funds to assist with and respond to his special needs was of great significance.

While the settlement agreed to may not cover all of Jayden's needs throughout his life, it will go a long way to improving his situation and providing him with the extra care that he requires as a result of his brain injury.

- Mr. Wagner's firm funded and carried hundreds of thousands of dollars in disbursements related to this action for a number of years with no interest being charged to Jayden or his mother. This enhanced access to justice for both Plaintiffs. If this case had been unsuccessful, it is highly unlikely that Mr. Wagner's firm would have been able to recover these disbursements.
- Finally, I take note of the fact that Mr. Wagner has indicated to the court and confirmed today, that it is his practice to continue to work for Plaintiffs such as Jayden on a *pro bono* basis after the case is resolved. I think that is a proper matter to take into account when I am analyzing Mr. Wagner's proposed fee to determine whether it is fair and reasonable in the circumstances.

[22] The Plaintiffs' disbursements in the amount of \$327,334.44 and counsel's fee of \$1,282,361.28 are hereby approved.

Deborah K. Smith  
Chief Justice