

Case Name:

Treyes v. Ontario Lottery and Gaming Corp.

Between
Joseph Treyes, Plaintiff, and
Ontario Lottery and Gaming Corporation and John Doe,
Defendants

[2007] O.J. No. 2772
Court File No. 05-CV-290238PD1

Ontario Superior Court of Justice
E.M. Macdonald J.

Heard: June 15, 2007.
Judgment: July 11, 2007.
(16 paras.)

Counsel:

H. Fancy and M. Chakravarti, for the Plaintiff.

James Doris, for the Defendant, Ontario Lottery and Gaming Corporation.

REASONS FOR DECISION

¶ 1 **E.M. MACDONALD J.**— The issue on this motion is the entitlement of the Plaintiff's solicitors to a premium for their professional services in this action. The premium sought is 14.5% of Mr. Treyes' damages. The court is asked to award a costs premium as a part of the contingency fee agreement, on consent of the Plaintiff, pursuant to s. 28.1(8) of the *Solicitors Act*, R.S.O. 1990, c. S.15. Section 28.1(8) reads as follows:

- (8) A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless;
- (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
- (b) the judge is satisfied that exceptional circumstances apply and

approves the inclusion of the costs or a proportion of them [emphasis added].

¶ 2 The action was an unprecedented claim by the Plaintiff, Mr. Treyes, for recovery of his gambling losses, over the course of several years. These losses largely occurred at the Defendant's gaming facilities located at Woodbine Racetrack and Mohawk Raceway. There was and is no case law that directly supported the action brought by Mr. Treyes.

¶ 3 Mr. Treyes was diagnosed with Parkinson's disease in 1992. As a result of the medications prescribed to treat the symptoms of Parkinson's disease, Mr. Treyes became a pathological gambler and was diagnosed as a pathological gambler in 1999. Pathological gambling is heavily laden with stereotypes, the most notorious of which is the notion that a gambler is the author of his or her misfortune and displays a lack of willpower.

¶ 4 Mr. Treyes' losses were all in cash. The result was that there was a lack of records supporting his losses at any of OLGC's facilities. Mr. Treyes played slot machines. Mr. Treyes became impecunious and had no ability to fund this litigation. Indeed, Fancy Barristers felt morally compelled to lend Mr. Treyes money to pay his rent during the course of the litigation. He underwent two bankruptcies and was living "hand to mouth". He was living on a small disability pension and CPP. His pension from his former employer will not be available to him until he is 65. He is now 61.

¶ 5 Prior to retaining Fancy Barristers, one lawyer who attempted to represent Mr. Treyes was faced, in response to a demand letter for \$100,000.00 in losses, with the Self Exclusion Agreement signed by Mr. Treyes in favour of OLGC. [See Note 1 below] OLGC took the position that Mr. Treyes' claim was totally lacking in merit. It maintained that there was no precedent for a court imposing a duty of care on a gaming venue to find and exclude individuals who identify themselves as problem gamblers.

Note 1: Mr. Treyes signed a Self Exclusion agreement with the OLGC on September 2, 2000. In this agreement OLGC contracted to use its best efforts to deny Mr. Treyes entry to all of OLGC's gaming venues in the province of Ontario. Contrary to the agreement Mr. Treyes was permitted access to Woodbine and Mohawk where he sustained the losses claimed in the Statement of Claim dated May 26, 2005.

¶ 6 Fancy Barristers had a program to take on one or two apparently impossible cases each year to aid the disadvantaged and impecunious litigant who would otherwise have no access to justice. After several months of research at their firm's expense, Fancy Barristers agreed to represent Mr. Treyes and entered into a Contingency Fee Retainer Agreement ("CFA") with him. The CFA is dated January 17, 2005. Aside from the serious evidentiary and proof hurdles, there were 13 critical issues

in this novel action as set out at pages 3 and 4 of the affidavit of Monica Chakravarti dated June 10, 2007:

i. **Pathological Gambling: OLGC's Knowledge of Illness and Policy**

- a. Whether Joe was a pathological gambler ("PG")?
- b. Whether PG was an illness such that fault did not lie with Joe, regardless of the stereotypes associated with PG or problem gamblers?
- c. Whether Parkinson's disease played a role in Joe's PG?
- d. Whether the OLGC was knowledgeable about the consequences of PG and the financial, psychological, marital, and sometimes suicidal consequences thereof?
- e. Whether slot machines at the OLGC facilities contained addictive features?
- f. Whether the OLGC created a policy to combat PG?

ii. **Proximity: Relationship Between OLGC and Joe**

- g. Whether there was a special relationship between the OLGC and Joe to create the foundation for a duty of care?
- h. What was the nature of the duty?

iii. **Implementation of Policy**

- i. If there was a policy to combat PG, and there was a proximate relationship between the OLGC and Joe, whether the OLGC took "operational" steps to implement the policy?
- j. Whether the implementation, if any, of the OLGC's policy was reasonable in the circumstances?

iv. **Joe's Economic Loss, Causation and Release**

- k. Whether Joe attended the OLGC's facilities after proximity arose, gambled, lost, and the quantum of all his **cash losses** [*sic*]?
- l. Whether Joe's depression, after diagnosis of PG, was due to Parkinson's disease or PG?
- m. Whether Joe was contributorily negligent in connection with the gambling losses?
- n. Whether Joe had released the OLGC from all claims and losses by signing a form drafted by the OLGC years before the within action?

¶ 7 Mr. Treyes' attracted the attention of the CBC and the National Post both of whom reported on the details of Mr. Treyes' claim. On one occasion, Mr. Treyes asked a National Post reporter for a \$5.00 loan so that he get home from Woodbine.

¶ 8 Between January 17, 2005 to June 2007, Mr. Fancy, a Director of the Ontario Trial Lawyers Association with 15 years post-call experience, Ms. Chakravarti with 5 years post-call experience, and Mr. S. Hahzad Siddiqui with 2 years post-call experience, spent well in excess of 500 hours preparing for, researching, conducting investigations, examining, and litigating this action. They spent \$30,000 in disbursements. There were some weeks where all three lawyers plus law clerks worked exclusively on Mr. Treyes' case to the prejudice of the balance of their firm's practice. Mr. Treyes consents to and joins his legal team in support of the order sought in this motion.

¶ 9 Prior to the bringing of this motion and following a one-day mediation, paid for by OLGC, a settlement was reached. The settlement is confidential. I am aware of the contents of the settlement agreement.

¶ 10 Mr. Fancy and his colleagues used a new advocacy model called Demonstrative Advocacy (D.A. Model) to prove Mr. Treyes' claim. I agree with the point made by Ms. Chakravarti that the D.A. Model goes a long way in constraining subjective interpretations, reducing acrimony and expediting settlement. The utilization of the D.A. Model demonstrated the state of Mr. Treyes' life before his addiction and diagnosis with Parkinson's disease. He was an electrical engineer and worked at Delphax Systems for over a decade. He was married and had one daughter. When the diagnosis of Parkinson's was initially made, his family was very supportive but matters became more difficult when he was forced to go on long-term disability and was withdrawn from his workplace due to the severity of the disease.

¶ 11 Mr. Fancy and his colleagues extensively researched Mr. Treyes' pre-pathological gambling life. Lay and expert Witnesses were identified. In 1999, he was diagnosed with pathological gambling. His treating neurologist, Dr. Guttman, whose report is contained in the record, confirmed this diagnosis. The firm also retained Dr. Williams of the Albert Gaming Research Institute at the University of Lethbridge. He correlated pathological gambling and Parkinson's disease in his report dated April 18, 2007. He opined that the diseases are almost the mirror image of each other. I will mention one other expert, Mr. Sol Boxenbaum, a well-respected, independent anti-gambling consumer advocate. He is an expert on the issue of the OLGC's self-exclusion program. His report is dated June 10, 2007 and is contained in the record. He became familiar with the D.A. Model from reading the affidavits filed on behalf of Mr. Treyes in support of this motion. He stated that in all of his years as a consumer advocate in the gambling industry, he had never come across such an innovative methodology.

¶ 12 Before I deal with the legal questions posed in this case, I comment on a recent and comprehensive article that the Plaintiffs included as an exhibit on this motion: William V. Sasso and Jasmina Kolajdzic, "Do Ontario and Its Gaming Venues Owe a

Duty of Care to Problem Gamblers?" (2006) 10 Gaming L. Rev. at 552. The article addresses many, if not all, of the issues that arise in cases such as this one including the Voluntary Self Exclusion Program undertaken by the OLG, and the duty of care of gaming venues. The authors conclude at page 570:

The ramifications of [*Edmonds v. Laplante* (15 March 2005), Toronto 02/CV226280 (Ont. S.C.J.)] remain to be seen. Will other courts, including appellate courts, follow *Edmonds*? What steps could the OLG take to meet its duty of care? For the time being, at least one question has probably been answered by *Edmonds*: Do Ontario and its gaming venues owe a duty of care to problem gamblers? Under the current state of the law, the answer would appear to be "yes".

¶ 13 The content and conclusions of this article are likely to have influenced the confidential settlement of this action.

Disposition

¶ 14 The legal considerations in this case are similar to those dealt with in *Christian Brothers of Ireland in Canada (Re.)* (2003), 68 O.R. (3d) 1 (C.A.). In his judgment, Laskin J.A. observed that the financial risk assumed by Weir Foulds alone supported a premium. Awarding a reasonable premium to a law firm that assumes a large risk gives lawyers an economic incentive to take on the litigation and "to do it well": *Christian Brothers, supra* at para. 21. Equally as important is the fact that awarding a premium enhances access to justice and promotes access to justice in future cases.

¶ 15 I allow the 14.5% premium. Mr. Fancy and his colleagues did exemplary work at enormous risk to their firm as detailed above. This was a novel action. For it to succeed, as it did, it required great temerity and commitment to a difficult case by Fancy Barristers.

¶ 16 This is a case of exceptional circumstances for all of the reasons set out above. The Plaintiff consented to the premium as part of the contingency fee arrangement. By correspondence dated June 22, 2007, Mr. Fancy, with the consent of Mr. Doris brought to my attention the recent decision of the Ontario Court of Appeal in *Kramer Henderson (Re)* 84 O.R. (3d) 241. I agree that *Kramer* is factually opposite to case asserted by Mr. Treyes in this motion. I have endorsed the motion record accordingly.

E.M. MACDONALD J.