*Lapierre Estate* v. *Fort Simpson Hospital, et al*, 2004 NWTSC 7

Date: 2004 02 25
Docket: CV 07854

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ANN LAPIERRE, Administrator of the Estate of Marc-Andre Lapierre, Deceased, DANIEL LAPIERRE and ANN LAPIERRE

Plaintiffs

- and -

FORT SIMPSON HOSPITAL, FORT SIMPSON HOSPITAL, operating under the name and style of FORT SIMPSON HEALTH CENTRE, FORT SIMPSON HEALTH CENTRE, MACKENZIE REGIONAL HEALTH SERVICE, MACKENZIE REGIONAL HEALTH SERVICE, operating under the name and style of DEH CHO HEALTH & SOCIAL SERVICES, DEH CHO HEALTH & SOCIAL SERVICES, DEH CHO HEALTH & SOCIAL SERVICES, operating under the name and style of FORT SIMPSON HEALTH CENTRE, MACKENZIE REGIONAL HEALTH SERVICE, operating under the name and style of FORT SIMPSON HEALTH CENTRE, DEH CHO HEALTH & SOCIAL SERVICES, operating under the name and style of FORT SIMPSON HOSPITAL, MACKENZIE REGIONAL HEALTH SERVICE, operating under the name and style of FORT SIMPSON HOSPITAL, STANTON REGIONAL HOSPITAL, YELLOWKNIFE HEALTH AND SOCIAL SERVICES, YELLOWKNIFE HEALTH AND SOCIAL SERVICES, operating under the name and style of STANTON REGIONAL HOSPITAL, DR. DAVID WONG, DR. MATTHEWS, DR. MATTHEWS PROFESSIONAL CORPORATION, DR. MATTHEWS PROFESSIONAL CORPORATION practising medicine under the name of DR. MATTHEWS, DR. SYLVAIN CHOUINARD, DR. NICOLE CHATEL, DR. JOHN DOE A, DR. JOHN DOE A PROFESSIONAL CORPORATION, DR. JOHN DOE A PROFESSIONAL CORPORATION, practising medicine under the name of DR. JOHN DOE A, DR. JOHN DOE B, DR. JOHN DOE B PROFESSIONAL CORPORATION, DR. JOHN DOE B PROFESSIONAL CORPORATION, practising medicine under the name of DR. JOHN DOE B., DR. JOHN DOE C, DR. JOHN DOE C, DR. JOHN DOE C PROFESSIONAL CORPORATION, DR. JOHN DOE C PROFESSIONAL CORPORATION, practising medicine under the name of DR. JOHN DOE C, ROSE LANG, D. CRANCH, NURSES A, B, AND C, LABORATORY TECHNICIANS A, B, C, and D, MEDFLIGHT LTD., MEDFLIGHT LTD. ATTENDANTS A, B, C, D, AND E.

Defendants

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Applications for a) determination of proper conduct money, and b) case management.
Heard at Yellowknife, NT, February 13, 2004
Reasons filed: February 25, 2004

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel: E.A. Olszewski for Plaintiffs
J.P. Rossall for Defendant Physicians
G. Malakoe for Stanton Regional Hospital Defendants,
and as agent for counsel for Fort Simpson Hospital Defendants

CV 07854

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Defendants

## REASONS FOR JUDGMENT

[1] The within proceeding commenced by the plaintiffs in 1998 includes allegations of negligence against certain medical practitioners (the defendant physicians). The litigation has not progressed much beyond the exchange of pleadings. The present stumbling block which hinders the advancement of the litigation is a disagreement regarding what constitutes proper conduct money for the plaintiff Ann Lapierre to present herself for cross-examination on an affidavit by counsel for the defendant physicians.

[2] At the time the cause of action arose and at the time she commenced the within lawsuit, the plaintiff resided in Fort Simpson, N.W.T. At the present time she is temporarily resident in Trinity, Newfoundland, having travelled there in 2002 to attend to her ailing mother.

[3] As stated, the plaintiff's statement of claim was filed in August 1998. Four statements of defence have been filed. A statement of defence on behalf of the defendant physicians (the defendants Wong, Chouinard and Chatel) was filed in September 1999. A statement of defence on behalf of the Stanton Regional Hospital defendants was filed in December 2000. A statement of defence on behalf of the Fort Simpson Hospital defendants was filed in January 2001. A statement of defence on behalf of the defendant Rose Lang was also filed in January 2001. In each of the three last-mentioned statements of defence, the respective defendants pleaded, *inter alia*, a limitation defence, i.e., that the within proceedings were not commenced within the time period prescribed by law. The statement of defence filed on behalf of the defendant physicians in September 1999 does not plead a limitation defence.

[4] In September 2002 the defendant physicians filed an interlocutory application for an order allowing them to amend their statement of defence by adding a paragraph to plead a limitation defence. In response and in opposition to this application, the plaintiff filed a detailed affidavit sworn November 15, 2002. In the affidavit, to which are appended numerous documentary exhibits, the plaintiff sets forth the circumstances which, she says, led to the "discoverability" of the cause of action. The affidavit was sworn by her in Newfoundland where she is temporarily resident.

[5] Counsel for the defendant physicians wishes to cross-examine the plaintiff on her affidavit.

[6] The *Rules of Court* provide that a party who has sworn and filed an affidavit may be cross-examined on the affidavit by an adverse party. The rules that apply to an examination for discovery apply to such a cross-examination (Rule 381). Those rules (Rule 248) indicate that "conduct money" is to be provided to the person to be examined.

[7] Conduct money is defined in Rule 1:

> "Conduct money" means, subject to rule 652, the actual costs of attendance for the person to be examined, including transportation and accommodation costs, but not including a fee.

[8] Rule 652 provides a mechanism whereby a taxing officer can set the amount of the conduct money either before or after the examination.

> 652(1) Where a person is provided with conduct money before attendance at an examination, the person is entitled to receive as costs such additional sum as may be determined to be payable on the completion of his or her attendance.
>
> (2) The taxing officer, on an application made *ex parte* by a party who is permitted or compelled to pay or tender conduct money, may fix the amount of the conduct money before attendance at an examination and, on the actual attendance of the person to whom the conduct money is payable, the taxing officer may adjust the amount.

[9] Neither counsel made submissions with respect to the applicability of Rule 652(2) and presumably no application has been made to the taxing officer.

[10] The wording of the pertinent Rules was slightly changed in the 1996 revision of the Rules. For example, in Rule 211 of the 1979 Rules the examining party was required to tender "proper conduct money" to the person to be examined, whereas the present Rule 248 does not use the adjective "proper". Also, the 1979 Rules did not contain a definition of "conduct money", as today.

[11] However, counsel agree that a wide discretion remains with the Court on the determination of conduct money, as stated in case authority decided under the previous Rule or the Alberta Rule or an equivalent Rule.

[12] Counsel indeed are in agreement that the Court has a broad discretion on the issue and must consider the relevant facts and circumstances of the individual case. The Court is to determine what is fair and convenient, not just for one party but for both parties. There is no definitive rule — what is fair in one case may not be fair in another. See *Pacific Engineering Ltd.* v. *Pine Point Investments Ltd.*,1968 Carswell N.W.T. 4 (N.W.T.T.C.); *Canada* v. *Sandford*, [1995] A.J. No. 847 (Alta.Q.B.); *Sweeny* v. *Manufacturers Holding Corp.*, [1924] 2 D.L.R. 296 (Ont.C.A.); *Peckford Consulting Ltd.* v. *Akademia Enterprises Inc.*, [1997] A.J. No.734 (Alta.Q.B.); *375069 Alberta Ltd.* v. *Parwinn Developments Ltd.*, 1998 ABCA. 388.

[13] Counsel for the defendant physicians submits that he should only be required to provide to the plaintiff conduct money for travel expenses from the plaintiff's ordinary place of residence (Fort Simpson) to the place of examination (be it Yellowknife or Edmonton). Plaintiff's counsel submits that conduct money should be tendered for travel expenses from Newfoundland to the place of examination.

[14] Among the relevant circumstances is that the plaintiff is an ordinary resident of this jurisdiction, and left the jurisdiction, temporarily, after commencing these proceedings. In the context of this application and the continuing litigation, in my view it is not unfair for her to be responsible for the financial consequences of her indefinite absence from the jurisdiction. Conversely, it would be unfair to visit the financial consequences of the plaintiff's decision upon the defendants.

[15] There is an interlocutory application before the Court (by the defendant physicians to add a limitation defence) which could be determinative of these proceedings as against the defendant physicians. On that application the plaintiff has put forward an affidavit sworn outside the jurisdiction. In my view a party who does so ought to be prepared to present the affiant for cross-examination within the jurisdiction. The opposing party ought not to have the expense of bringing the affiant to the jurisdiction, or, in this case, back to the jurisdiction.

[16] For these reasons, I find that it is fair and convenient that the plaintiff present herself for cross-examination at the request of counsel for the defendant physicians, and upon being provided conduct money equivalent to transportation and accommodation costs from Fort Simpson to the place of examination.

[17] An order will issue accordingly. The application of the defendant physicians in paragraph 2 of their Notice of Motion filed December 11, 2003 is granted; the application of the plaintiff in paragraph 1 of her Notice of Motion filed September 29, 2003 is dismissed. The defendant physicians will be entitled to one set of costs in any event of the cause.

Application for Case Management:

[18] Plaintiff's counsel seeks the appointment of a case management judge. Counsel for the defendant physicians and counsel for the Stanton Regional Hospital defendants do not see a need for case management at this stage.

[19] One of the main reasons cited by plaintiff's counsel in support of the request for case management is the impasse regarding conduct money. This is now resolved.

[20] In support of this application plaintiff's counsel does not offer evidence to the effect that the plaintiff has been diligent in proceeding with the litigation but has been hampered by the lack of diligence or the intransigence of the opposing parties. There is no evidence that the applicant plaintiff has attempted to take the next step in the

proceedings but has been prevented from doing so. There is no evidence of the reasons why the plaintiff has not advanced her lawsuit (other than the impasse which has now been resolved).

[21] Once the interlocutory motion pending before the Court (application to amend pleading to add limitation defence) is resolved, surely responsible counsel can move the matter along to the discovery process, seeking rulings as necessary under the comprehensive provisions of the *Rules of Court* without the assistance of a case management judge or, at a minimum, counsel should make an effort to do so.

[22] The application for case management is denied. Costs of this application will be costs in the cause.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT,
this 25th day of February 2004

Counsel: E.A. Olszewski for Plaintiffs
J.P. Rossall for Defendant Physicians
G. Malakoe for Stanton Regional Hospital Defendants,
and as agent for counsel for Fort Simpson Hospital Defendants

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Defendants

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# REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

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