Mangelana v. *McFadzen, et al,* 2005 NWTSC 54

Date: 2005 06 10
Docket: CV 05291

I N THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SPENCER MANGELANA

Plaintiff

- and -

J. M^{c}FADZEN, HELENE BELANGER, LORRIE MEISSNER, INUVIK REGIONAL HEALTH AND SOCIAL SERVICES AUTHORITY, operating facilities known as TUKTOYAKTUK HEALTH CENTRE and INUVIK REGIONAL HOSPITAL, DR. BOTHA

Defendants

MEMORANDUM OF JUDGMENT

[1] The plaintiff's claim against the defendants, alleging medical malpractice, was dismissed following trial. I have now received and considered the parties' submissions with respect to costs.

[2] The Court has an inherent discretion with respect to the awarding of costs. This discretion is to be exercised judicially in the circumstances of the particular case. See Rule 643 and also *Inkit Ltd.* v. *Polar Parkas Ltd.* , [1995] N.W.T.J. No. 73; *G.D.* v. *G.M.*, [1999] N.W.T.J. No. 140; and *M^{ac}Neil* v. *M^{c}Leod-Norris,* 2005 NWTSC 17. The expectation is that a successful litigant will be awarded costs in the absence of special circumstances.

[3] Here, the defendants were successful, in the sense that the plaintiff's action was dismissed. Yet, it is argued on behalf of the plaintiff that the circumstances are such that each party should bear its own costs.

[4] In the within negligence action, the plaintiff, to be successful, was required to prove, *inter alia*, that the defendants breached the professional standard of care owed to the plaintiff and also that the defendants' conduct was the cause of the plaintiff's injury. The plaintiff alleged many breaches of the standard of care by the defendants. As stated in my Reasons for Judgment, I found only three specific instances where the plaintiff had established on a balance of probabilities that the defendants failed to meet the expected level of care. However, most importantly, I found that the plaintiff did not establish a casual link between the defendants' acts of negligence and the plaintiff's injury. Thus the action failed.

[5] In these circumstances the plaintiff submits that there has been "divided success". I respectfully disagree with such a characterization. The plaintiff in the lawsuit alleged the commission of the tort of negligence but failed to prove, on a balance of probabilities, one of the essential elements of negligence, i.e., causation.

[6] The plaintiff cites a number of reported decisions wherein a successful defendant was denied costs; however, with respect, those decisions are quite fact-specific. Upon consideration, I cannot find special circumstances in the present case which would allow me to exercise discretion in this plaintiff's favour in a similar fashion.

[7] Accordingly, I see no reason to depart from the norm, i.e., to award the successful defendants their respective costs.

[8] There are two other matters which have been raised by the defendants on the matter of costs.

[9] Firstly, the Hospital defendants seek enhanced costs on account of an offer to settle made by those defendants just prior to trial. Secondly, the defendants submit that costs should be awarded jointly and severally against the plaintiff and a non-party, the Government of the Northwest Territories (GNWT), on account of the government's subrogated claim for hospital and medical expenses which was included in the plaintiff's damages claim.

[10] In the request for an enhanced costs award, the Hospital defendants rely on a written Offer to Settle served on the plaintiff's counsel (and counsel for GNWT) on Saturday, October 23, 2004. The trial commenced on Monday, October 25, 2004. The offer was not accepted by the plaintiff. In the offer the Hospital defendants offered to pay $60,000.00 to the plaintiff in settlement of the lawsuit as against the Hospital defendants.

[11] The Hospital defendants seek an enhanced costs award on account of the Offer to Settle which was not accepted, i.e., they seek party and party costs on Column 6 up to the date of the Offer to Settle and solicitor and client costs or party and party costs on a multiple of Column 6 subsequent to the date of the Offer to Settle.

[12] Part 13 of the *Rules of Court* deal with formal offers to settle, acceptances, and also with costs consequences of certain offers to settle that are not accepted. For purposes here, I refer only to Rule 193, 194, 195, 201, 203 and 206:

> 193. A party to an action or a proceeding may serve on any other party an offer to settle any one or more of the claims between them in the action or proceeding.
>
> 194(1) An offer to settle may be made at any time before the commencement of the trial or hearing.
>
> (2) An offer to settle shall be in writing.
>
> 195. Where an offer to settle is made less than 10 days before the day on which the trial or hearing is commenced, the costs consequences set out in rule 201 do not apply unless the offer to settle is accepted before the commencement of the trial or hearing.
>
> . . .
>
> 201(1) A plaintiff who makes an offer to settle at least 10 days before the commencement of the hearing is entitled to party and party costs to the day on which the offer to settle was served and solicitor and client costs from that day where
>
> (a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the defendant; and

(b) the plaintiff obtains a judgment on terms as favourable as or more favourable than the offer to settle.

(2) Where a defendant makes an offer to settle at least 10 days before the commencement of the hearing, the plaintiff is entitled to party and party costs to the day on which the offer was served and the defendant is entitled to solicitor and client costs from that day if

(a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the plaintiff; and

(b) the plaintiff obtains a judgment on terms as favourable as or less favourable than the terms of the offer to settle.

. . .

203. Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, the costs consequences set out in rule 201 do not apply to the offer to settle unless,

(a) in the case of an offer made by the plaintiff, the offer to settle is made to all the defendants and is an offer to settle the claim against all the defendants; or

(b) in the case of an offer made to the plaintiff,

(i) the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer, or

(ii) the offer is made by all the defendants and is an offer to settle the plaintiff's claim against all the defendants and, by the terms of the offer, the defendants are made jointly and severally liable to the plaintiff for the whole amount of the offer.

. . .

> 206(1) Notwithstanding the costs consequences set out in rules 192 and 201, the Court may make any order or disposition with respect to costs that it determines to be in the interests of justice in the circumstances of the case.
>
> (2) Nothing in this Part prevents the Court from fixing the amount of any costs.

[13] The Offer to Settle of the Hospital defendants is by its wording stated to be made pursuant to Rule 193.

[14] However, the costs consequences set out in Rule 201 are not available to these defendants because they did not comply with the 10-day requirement nor was the offer made on behalf of all defendants as required by Rule 203.

[15] The Hospital defendants seem to acknowledge that their offer does not come within the four corners of Rule 201. Yet they submit the Court still has a discretion to award enhanced costs on account of the Offer to Settle by virtue of Rule 206 (reproduced above). With respect, I disagree with this interpretation of Rule 206. In my view that Rule permits the Court in an appropriate case to disallow the enhanced costs under Rule 201 in a case where the Offer to Settle otherwise comes within Rule 201. Rule 206 is not applicable in the instant case.

[16] I do agree, however, that the Court does have an inherent discretion (see Rule 643) to award enhanced costs consequential on a litigant's refusal to accept a reasonable offer prior to trial. Such an offer, though, ought to be made in a time frame which will allow the opposite party a reasonable time to reflect upon and make a decision on the offer. A reasonable time was not afforded in this case, in the circumstances. These circumstances are not dissimilar to those in *Anderson* v. *Buffalo Airways Ltd.*, 2001 NWTSC 57 where a request for enhanced costs was denied.

[17] Quite apart from the lack of timeliness of the Hospital defendants' offer, I am unable to determine its reasonableness in any event, for the reason that it is unclear what portion, if any, of the proffered $60,000.00 the plaintiff himself would have received, given that $150,000.00 of the damages he was seeking was the subrogated claim of the GNWT. And, it seems, even if the offer had been accepted, the trial would have continued against the other defendant Dr. Botha, with the attendant expense to the plaintiff.

[18] In all of the circumstances, I deny the Hospital defendants' request for an enhanced costs award.

[19] I turn now to the defendants' submission that the Government of the Northwest Territories ought to be jointly and severally liable, with the plaintiff, for any costs award.

[20] In his Statement of Claim commencing this lawsuit, the plaintiff included a claim for the cost of "insured services" he received from hospital authorities and medical practitioners in connection with his injuries. This he was required to do by virtue of subsection 20(2) of the *Hospital Insurance and Health and Social Services Administration Act* (HIHSSA Act) and the equivalent provision in the *Medical Care Act*. Sections 19-23 of the HIHSSA Act read as follows:

> 19(1) Where insured services have been provided to an insured person in respect of an injury resulting from a wrongful act or omission of another, the Minister is subrogated to the rights of the insured person against any other person for the recovery of the full amount of the cost of providing the insured services.
>
> (2) The Minister may enforce the rights subrogated under subsection (1) by
>
> (a) bringing an action in the name of the Minister or in the name of the insured person; and
>
> (b) effecting a settlement at such time and for such amount as the Minister considers appropriate.
>
> 20(1) Notwithstanding section 19, an insured person who, as a result of a wrongful act or omission of another person, suffers an injury for which the insured person has received insured services may recover the full amount of the cost of providing those services to the insured person from the person guilty of the wrongful act or omission in the same manner as though the insured person had been required to pay for those services.
>
> (2) An insured person described in subsection(1) who commences an action for the recovery of damages for personal injuries shall include a claim on behalf of the Minister for the full amount of the cost of providing any insured services to the insured person, unless the Minister, in writing, waives this requirement.

(3) An insured person who recovers an amount in respect of the cost of the provision of insured services to the insured person in a settlement relating to personal injuries or in an action to recover damages for personal injuries shall, without delay, pay the amount recovered to the Minister.

21. Where the Minister has commenced an action in the name of an insured person for the recovery of the amount of the cost of providing insured services to the insured person, the insured person may

(a) at any time before the trial of the action, and

(b) on conditions as to costs or otherwise that to the court seem just,

join in that action any other claims that the insured may have arising out of the same occurrence.

22(1) It is not a defence to an action brought by the Minister that the claim has been adjudicated unless the claim subrogated included a claim for the full amount of the cost of providing the insured services.

(2) It is not a defence to an action to recover damages for personal injuries brought by a person who has received insured services that an action taken by the Minister for the recovery of the cost of those services has been adjudicated.

23. No release or settlement of a claim or judgment based on an action to recover damages for personal injuries where the injured person has received insured services is binding on the Minister unless the Minister or a person designated by the Minister has approved the release or settlement in writing.

[21] There are similar provisions in the *Medical Care Act*.

[22] As stated in my Reasons for Judgment at paragraph 128, the parties at trial agreed that the cost of these insured services provided to the plaintiff was $150,000.00.

[23] The Minister did not commence the within lawsuit pursuant to s.19 of the Act, either in the name of the Minister or in the name of the plaintiff. The lawsuit was commenced by the plaintiff on his own initiative for the recovery of damages for personal injuries, and the Minister's subrogated claim was included as required by the two statutes.

[24] There is no evidence that the Minister or his department, the Department of Health and Social Services, played any role in this litigation, beyond providing to the plaintiff the details of the cost of the insured services in question.

[25] There is evidence that it is the policy of the department to grant a 10%–15% collection fee to a plaintiff's counsel upon successful recovery of the costs of insured services.

[26] There is also evidence that in the present case the GNWT became aware, just days before the trial, that the defendants, if successful at trial, would look to the GNWT for costs of the litigation.

[27] In my view these facts and circumstances are insufficient to justify making the Minister or the GNWT liable for the defendants' costs in successfully defending the lawsuit.

[28] (Although the defendants in their written submissions assert this claim for costs against the GNWT, I assume they mean the Minister as that is the entity referenced in the subject legislation).

[29] I acknowledge and reiterate that the awarding of costs is in the discretion of the Court:

> Rule 643(1) Notwithstanding anything else in this Part, the Court has discretion as to awarding of the costs of the parties, including third parties, to an action or a proceeding, the amount of costs and the party by whom or the fund or estate out of which the costs are to be paid, and the Court may
>
> (a) award a gross sum in lieu of, or in addition to, any taxed costs;
>
> (b) allow costs to be taxed to one or more parties on one scale and to another or other parties on the same or another scale; or
>
> (c) direct whether or not any costs are to be set off.
>
> (2) Where no order of costs is made in an action or proceeding the costs follow the event.

> (3) Costs may be dealt with at any stage of an action or a proceeding before the entry of judgment.

[30] I am not convinced that the phrase "the party by whom" in Rule 643(1) includes a non-party to the litigation such as the Minister.

[31] Yet there is case authority for the proposition that the Court's discretion on the matter of costs includes an inherent jurisdiction to award costs against a non-party in a situation where the "real litigant" is hiding behind the named plaintiff.

[32] In particular, the defendants cite the following cases in support of their costs claim against the GNWT: *Kowalchuk* v. *Adduri*, 2000 MBQB 9 and 2001 MBCA 7; *Re Sturmer and Town of Beaverton* (1912), 2 D.L.R. 501; *269335 Alberta Ltd.* v. *Starlite Investments Ltd.*, [1987] A.J. NO. 434; *Ted Power Realty Inc.* v. *Danray Alberta Ltd.*, [2000] A.J. NO. 779; and *D.N.* v. *S.C.*, [2004] O.J. NO. 2068.

[33] With respect, these cases do not assist the defendants' submission.

[34] In *Kowalchuk*, the action was vested in the non-party (Workers' Compensation Board) and not in the named plaintiff. That case is accordingly unlike the present case.

[35] In *Sturmer*, there was a finding that the non-party instigated the proceedings in the name of another in order to escape liability for costs.

[36] In *Starlite*, there was a finding that the non-party initiated and conducted the entire course of litigation.

[37] In *Ted Power*, there was a finding that the non-party was the "real instigator" of the litigation.

[38] In *D.N.* v. *D.C.*, there was a finding that the non-party "instigated and controlled the conduct of the proceedings" and was "the directing mind of the litigation".

[39] These cases are distinguishable on their facts. In the present case, the defendants' submission that the GNWT had a significant role in this litigation is not founded in the evidence before me.

[40] The circumstances of the within proceedings are such that it cannot be said there exists any injustice to the defendants merely because the subrogated claim of a non-party (the Minister) was included within the plaintiff's unsuccessful lawsuit.

[41] Even if I had found evidence that the GNWT had played a significant role in this litigation, I would nonetheless have had a remaining concern about the lack of timely notice to the GNWT that the defendants would be seeking costs against the GNWT as a non-party.

[42] For these reasons, I deny the defendants' request that the GNWT be held jointly and severally liable, with the plaintiff, for the defendants' costs.

[43] In the result I order that the plaintiff shall pay the party and party costs of the Hospital defendants and of the defendant Botha, to be taxed in Column 6.

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

Dated at Yellowknife, NT,
this 10th day of June 2005

Counsel for the Plaintiff: Sheila Torrance and Joe Miller

Counsel for the Defendants J. McFadzen,
Helen Belanger, Lorrie Meissner, and
Inuvik Regional Health and
Social Services: Garth Malakoe and Terry Nguyen

Counsel for the Defendant Dr. Botha: Jonathan P. Rossall and Alexis Moulton

CV 05291

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

BETWEEN:

SPENCER MANGELANA

Plaintiff

- and -

J. M^{c}FADZEN, HELENE BELANGER, LORRIE MEISSNER, INUVIK REGIONAL HEALTH AND SOCIAL SERVICES AUTHORITY, operating facilities known as TUKTOYAKTUK HEALTH CENTRE and INUVIK REGIONAL HOSPITAL, DR. BOTHA

Defendants

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE J.E. RICHARD