

CANADA / JUDGMENT

Bystedt v. Hay

2007 BCSC 27

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 27 Bystedt v. Hay IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bystedt v. Hay, 2007 BCSC 27 Date: 20070108 Docket: S050592 Registry: New Westminster Between: Morgan Beverly Bystedt, by her guardian ad litem Wylie Melissa Bystedt Plaintiff And Richard Creighton Hay Defendant Before: The Honourable Madam Justice D. Smith Ruling on Defendant's application for Standing at Hearing on Plaintiff's Fee Approval Counsel for the plaintiff T.P. Harding Counsel for the defendant: C.E. Hinkson, Q.C. J.K. Gibson Written Submissions: Defendant's Submissions: Plaintiff's Submissions: Defendant's Reply: Plaintiff's Rebuttal: December 13, 2006 December 21, 2006 December 28, 2006 January 2, 2007 Nature of Application

- [1] Counsel for the defendant applies for leave to re-open both evidence and argument on the court's assessment and approval of plaintiff counsel's legal fees in regard to a medical malpractice action in which the infant plaintiff was awarded substantial damages following an 18-day trial: Bystedt v. Hay, 2001 BCSC 1735, aff'd at 2004 BCCA 124, 24 B.C.L.R.(4th) 205.
- [2] The court further awarded the infant plaintiff increased costs at 50% of special costs. This award was made before its assessment of plaintiff counsel's legal fees for the action. In that regard, the court concluded that an assessment of plaintiff counsel's actual legal fees was not essential to deciding the plaintiff's application for increased costs: Bystedt v. Hay, 2002 BCSC 1400 at ¶16 and 35. In the reasons for judgment on the costs award, the court prefaced its ruling on an assumption of at least a 25% contingency fee agreement with the infant plaintiff in determining if a significant disparity existed between ordinary and special costs.
- [3] An appeal of the increased costs award is scheduled to be heard January 11-12, 2007. It is anticipated that one of the issues on appeal will be whether the court should have assessed the plaintiff's actual legal fees before it determined the plaintiff's application for increased costs. The argument advanced is that the extent of any disparity between ordinary and special costs could not properly be determined without first assessing the amount of plaintiff counsel's actual legal fees.
- [4] After making the award for increased costs on January 28, 2005, the court approved plaintiff counsel's reasonable fees at 100% of actual fees. Plaintiff's counsel did not give notice of the application to defendant's counsel, although the latter had requested it. Plaintiff counsel's position is that such notice was not required pursuant to the relevant statutory provisions

governing the application. Defendant counsel's position is that he should have been given standing to make submissions on plaintiff counsel's fee assessment given the defendant's liability for 50% of special costs.

- [5] Authority for approving an infant plaintiff's legal fees is found in the statutory provisions of the Infants Act, R.S.B.C. 1996, c. 223, the Legal Professions Act, S.B.C. 1998, c. 9, and the Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383. The statutory provisions require that notice of such application be given to the Public Trustee. In this case, that notice was provided. The Public Trustee took no position on the application and did not attend the hearing. The statutory provisions do not require that a defendant be notified of the application.
- [6] An assessment of increased costs is governed by the Rules of Court and is generally conducted before the Registrar. Rule 57(29)(c)(iii) requires that an appointment to review a bill of costs and any affidavit in support must be served on the party against whom the costs are to be assessed.
- [7] The central issue in this application is whether counsel for the defendant should have received notice of and granted standing to challenge plaintiff counsel's fee approval application in light of this court's award on costs.
- [8] There is no reported authority that specifically addresses this issue. The legislative provisions
- [9] Section 40(1)(b) & (3) of the Infants Act provides: 40(1) A guardian may make a binding agreement for an infant,
 - (b) with the approval of the court by order made on the petition of a party to the agreement. ...
 - (3) An agreement to indemnify a person as a result of the person making an agreement with another person for an infant is void unless consented to or approved under subsection (1).
- [10] Section 70 of the Legal Professions Act sets out the procedure for reviewing or taxing a lawyer's bill. Section 71(4) lists the factors to be considered on such a review:
 - 1. the complexity, difficulty or novelty of the issues involved;
 - 2. the skill, specialized knowledge and responsibility required of the lawyer;
 - 3. the lawyer's character and standing in the profession;
 - 4. the amount involved;
 - 5. the time reasonably spent;
 - 6. if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable;
 - 7. the importance of the matter to the client whose bill is being reviewed; and,

8. the result obtained.
- [11] Many of these factors were derived from *MacLeod v. Harrington (Public Trustee of)* (1995), 14 B.C.L.R. (3d) 201 (C.A.). The court listed the following factors to consider in determining reasonable legal fees (the "Harrington" factors) at ¶268-69:
1. Whether the litigant has sufficient financial resources to fund the litigation or must be funded by the lawyer;
 2. Whether the lawyer was called upon to carry the disbursements called for to properly conduct the litigation;
 3. Whether the case involved complex issues of liability and damages;
 4. The amount of risk undertaken by counsel;
 5. The seniority of counsel;
 6. The amount of time reasonably spent by counsel on the file;
 7. The importance of the litigation to the client; and,
 8. The result.
- [12] Thus, an assessment of the legal fees for an infant plaintiff generally includes a consideration of s. 71(4) of the Legal Professions Act and the Harrington factors.
- [13] The Public Guardian and Trustee Act sets out the powers of the Public Trustee when appointed as guardian of the estate of a minor person and the parameters within which it must manage that estate.
- [14] The factors to be considered in an assessment of special costs are set out in Rule 57(3). They are a codification, in part, of the factors originally identified in *Yule v. Saskatoon (City)* (1955), 1 D.L.R. (2d) 540 (Sask. C. A.), and are listed as follows: 57(3) Where the court orders that costs be assessed as special costs, the registrar shall allow those fees that the registrar considers were proper or reasonably necessary to conduct the proceeding to which the fees relate, and, in exercising that discretion, the registrar shall consider all of the circumstances, including
- (a) the complexity of the proceeding and the difficulty or the novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the solicitor;
 - (c) the amount involved in the proceeding;
 - (d) the time reasonably expended in conducting the proceeding,
 - (e) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;

- (f) the importance of the proceeding to the party whose bill is being assessed, and the result obtained, and
 - (g) the benefit to the party whose bill is being assessed of the services rendered by the solicitor.
- [15] At ¶27 of Yule, the court summarized the factors to consider in objectively determining special costs as follows: In fixing the remuneration of the plaintiff in this case all factors essential to justice and fair play must be taken into account: *R. Solicitor* (1920), 47 O.L.R. 522, affirmed [(1920),] 48 O.L.R. 363 (C.A.). The circumstances to be considered in arriving at the proper amount are the extent and character of the services rendered; the labour, time and trouble involved; the character and importance of the litigation in which the services were rendered; the amount of money or the value of the property to be affected; the professional skill and experience called for; the character and standing in his profession of the counsel; the results secured, and to some extent at least the ability of the client to pay: *Murphy v. Corry*, (1906), 7 O.W.R. 363 [(Master)].
- [16] These comments were adopted by the Court of Appeal in *Diligenti v. McAlpine* (1978), 9 B.C.L.R. 153 (C.A.). The plaintiff's submissions
- [17] Counsel for the plaintiff submits there is no statutory provision or common law authority that requires the defendant to be given notice of or standing on an application for approval of plaintiff counsel's legal fees for an infant plaintiff. The Infants Act requires that notice be given to the Public Trustee who has standing to make submissions as to the appropriate fee charged. The Legal Professions Act gives authority to "the person charged or a person who has agreed to indemnify that person" to secure an appointment to have a legal bill reviewed. He submits that neither of these legislative provisions requires that notice be given to a party in the action. The defendant's submissions
- [18] Counsel for the defendant submits it is a proper participant, and has standing, in a fee assessment where there is an award of increased costs or special costs. He states that the amount to be paid by the defendant is directly linked to the plaintiff counsel's fee assessment because the costs to be paid are based on a percentage of the fee itself, as well as the plaintiff's obligation to pay that fee. He submits the authorities clearly give a party against whom an award of increased or special costs has been made standing to challenge an assessment of increased costs, which are based on a percentage of special costs: *Denovan v. Lee* (1991), 62 B.C.L.R. (2d) 213 (S.C.), and; *Canadian National Railway Co. v. A.B.C. Recycling Ltd.*, 2005 BCSC 1559, 47 B.C.L.R. (4th) 185. These decisions permit the party against whom an award of increased or special costs has been made to obtain disclosure of otherwise privileged information from plaintiff counsel's file in advance of such an assessment in order to make submissions on the reasonableness of the proposed fee.

- [19] Counsel for the defendant also refers to *Clark v. Nash*, [1990] B.C.J. No. 727 (C.A.), where the court held that entitlement to costs depended on there being an obligation by the client to pay the solicitor and that costs could not exceed the amount of that obligation. That obligation can only be determined upon an examination of the evidence in support of the fee approval application.
- [20] Counsel for the defendant further relies on *Jack v. Martin*, 2001 BCSC 1857, and *Strachan (Guardian ad litem of) v. Winder*, 2005 BCSC 59, as authority for granting a defendant standing on an application for approval of legal fees on an infant settlement. He states in these cases, which involved infant settlements, a defendant was permitted to make submissions on plaintiff counsel's fee approval application even in the absence of an order for special or increased costs. Discussion
- [21] It is clear from the above legislative and common law authorities that an application to approve legal fees for an infant plaintiff is a distinct process from an assessment of a Bill of Costs under the Rules of Court, albeit many of the same factors are to be considered in the determination of reasonable legal fees.
- [22] An application for approval of legal fees is governed by the above-noted legislative provisions. The issues engaged by the application are outside those of the main action. The application requires court approval because it proposes a disposition, in part, of the infant plaintiff's property. The only required notice of the application is to the Public Trustee, who is mandated with the task of ensuring the infant plaintiff's best interests are properly considered. The defendant is not charged with paying plaintiff counsel's legal fees and therefore has no interest in the application.
- [23] In comparison, an application for an assessment of costs, special or otherwise, is a process governed by the Rules of Court. Rule 57(29) requires that notice of the assessment must be given to any party against whom an award of costs has been made. The reason for such notice is that an assessment of costs requires the unsuccessful party to an action to pay the successful party a sum of money as calculated by the taxing officer in accordance with the Rules of Court. That party is charged with payment of the assessed bill of costs and therefore must be given notice of the application before the Registrar.
- [24] In the case of an award of special or increased costs, the party against whom an award has been made is entitled, upon request, to disclosure of documents from the successful party's solicitor file, including "work product", before the assessment in order to make submissions on what might be a reasonable fee in the circumstances: *Denovan v. Lee*, and; *Canadian National Railway Co. v. A.B.C. Recycling*.
- [25] The submission advanced by the defendant that the legal fees sought must be payable by the plaintiff in order for the plaintiff to obtain an award of costs was expressly overruled by a panel of five in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.). It is also clear from the authorities (see *Fullerton v. Matsqui* (District), [1992] B.C.J. 2980 (C.A.); *Howelling Nurseries Ltd. v. Fisons Western Corp.*, [1986] B.C.J. No. 1110 (S.C.); *Gibbs v. Jalbert*, [1995]

B.C.J. No. 612 (S.C.); Krangle (Guardian ad litem of) v. Brisco, [1998] B.C.J. No. 1954 (S.C.), rev'd in part on different issue 2000 BCCA 147, aff'd [2002] 1 S.C.R. 205) that an award of costs is not intended to solely indemnify the successful party for its legal costs.

- [26] Moreover, the examples provided by counsel for the defendant, of cases involving infant settlements where a defendant was permitted to make submissions on plaintiff counsel's legal fee even in the absence of an order for special or increased costs, also bear closer scrutiny. Both *Jack v. Martin* and *Strachan v. Winder* were cases involving joint applications for approval of an infant settlement and legal fees at the same hearing. In *Jack*, the Public Trustee opposed the proposed infant settlement. Submissions from counsel for the defendant appear to have been limited to the offer of settlement. The reasons for judgment only refer to submissions from the Public Trustee on the proposed legal account, which were tied to its position regarding the inadequacy of the proposed settlement. Similarly in *Strachan*, it would appear that submissions were received from counsel for the defendant on the issue of the settlement only, and from the plaintiff's counsel and Public Trustee on the application for approval of plaintiff counsel's legal fees.
- [27] In a subsequent case, *Makowsky v. Jaron*, 2004 BCSC 419, the infant settlement was approved by Melnick J. while the fee approval application, in the absence of counsel for the defendant, was approved by Groberman J. That procedure would appear to confirm that the two applications involve distinct and different processes.
- [28] In this case, the statutory requirements for approving plaintiff counsel's legal fees for his infant client were complied with. The Public Trustee who is tasked with the duty to oversee the infant plaintiff's best interests did not object to the proposed legal fees. The plaintiff's litigation guardian, her mother, was present in court and consented to plaintiff counsel's fees. The court upon reviewing the material in support of the application was satisfied that the proposed legal fees and disbursements were reasonable in the circumstances of this case. In the result, the court set special costs at 100% of actual fees.
- [29] However, the court made no ruling that the fees it approved as between plaintiff's counsel and his client were equal to special costs for the purpose of calculating the award of 50% of increased costs. As stated, the two processes are distinct from one another and while many of the same factors govern their determination, the context in which the applications are advanced and the parties affected by their determination are different.
- [30] In this case, plaintiff counsel's application for approval of his legal fees was based on an agreement between himself and the infant plaintiff's guardian ad litem. That individual was present in court when the application was made and consented to the application. The infant plaintiff's interests were reviewed by the Public Trustee who did not oppose the application. In these circumstances, the issue to be addressed did not engage any defendant's interests and therefore notice to the defendant of the application was not required.

- [31] On the other hand, an assessment of special costs in order to calculate 50% of increased costs does engage the defendant's interests as the defendant is charged with having to pay 50% of those special costs. The process for an assessment of costs before the Registrar requires the defendant to receive notice of the appointment and any affidavits in support of the claim. The authorities also permit the defendant access to those parts of plaintiff counsel's solicitor file that may be relevant to submissions on the reasonableness of his legal fees.
- [32] The context in which each of these two applications was made was different. Accordingly, in the absence of any agreement between the parties, I am unable to see how these two distinct processes could be expedited by a single hearing before the trial judge.
- [33] In the result, the defendant's application is dismissed. However, the plaintiff's assessment of the award of increased costs at 50% of special costs remains outstanding, subject to the decision on appeal. If upheld, that assessment must be conducted in accordance with the Rules of Court, which will involve a hearing before the Registrar with the appropriate notice and disclosure to be given to the defendant's counsel, upon request. "D. Smith, J." The Honourable Madam Justice D. Smith

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