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Saleh v Nebel, 2015 ONSC 3680 (CanLII)

by Taus Shah

Like snowflakes, no two lawyers are alike. Differences of opinion between lawyers over the law and procedure are a daily occurrence in the world of civil litigation. However, the *Rules of Civil Procedure* and the *Rules of Professional Conduct* exist to ensure that lawyers meet the basic standards of ethics and professionalism when dealing with one another during litigation. Sometimes lawyers fail to do even that.

In the case of *Saleh v. Nebel*, the conduct of the defence counsel reads like a train wreck: you just can't turn away from this disaster. At every step, Justice Myers outlines the complete disregard shown by the defence counsel not only for opposing counsel, but also the court and its orders. In this case, the defence lawyers conducted themselves so poorly and with such gall that the judge felt it was reasonable to deprive them of a significant costs award despite succeeding at trial.

FACTS

This case involved a straightforward personal injury claim arising from a motor vehicle accident. The plaintiff was injured in an accident caused by the defendant. The defendant admitted liability and so the only issues left to litigate were causation and quantum of damages. Instead of being professional and expeditious, the insurance company's lawyers refused to cooperate with the plaintiff's lawyer on matters as simple as scheduling and photocopying fees. At one point, defence counsel also failed to provide its expert witness reports in a timely manner, which almost resulted in a mistrial.

Miraculously, the trial concluded and the jury was given instructions regarding damages. While the jury deliberated, defence counsel brought a motion regarding the *Insurance Act* threshold – also known as a 'threshold motion'. Such a motion requires the court to determine whether the plaintiff's injuries are serious and permanent enough to entitle them to non-pecuniary damages. On that question, Justice Myers held that the plaintiff had failed to prove that his injuries were serious and permanent. At the same time, the jury gave its verdict and awarded the plaintiff $30,000 in non-pecuniary damages. No awards were given for past or future income loss.

Since the plaintiff's case did not meet the statutory threshold and no pecuniary damages were awarded, Justice Myers dismissed the plaintiff's action. Upon conclusion of trial, each party sought its costs.

DECISION

Justice Myer begins his decision by outlining the relevant factors that are to be considered when awarding costs. The court notes that the winner of an action does not have a *right* to costs, but instead costs are completely within the discretion of the court (*Lakew v. Munro*, 2014 ONSC 7316). The general rules regarding costs are as follow (as outlined in *DUCA Financial Services Credit Union Ltd v. Bozzo*, 2010 ONSC 4601):

1. "Costs follow the event" meaning that the costs are awarded based on the outcome of trial, i.e., loser pays;
2. Costs are awarded on partial indemnity basis; and
3. Costs are payable immediately, i.e., usually within 30 days.

The court also outlines several principles that are to be considered when awarding costs (as per *Andersen v. St. Jude Medical Inc.*, 2006 2264 DLR (4th) 557), such as:

1. Discretion must be exercised in accordance with specific facts and circumstances of the case, in relation to factors in Rule 57.01(1);
2. It is appropriate to consider experience, rates charged and hours spent, but reasonableness is the overriding principle;
3. Another factor to consider is the unsuccessful party's reasonable expectation of the costs, which are to be fair and reasonable;
4. Courts should try to be consistent in awarding comparable awards;
5. Courts should balance the principle of indemnity with the fundamental objective of access to justice.

Using this framework, the court looks towards the outcome of trial and the failure of counsels to comply with the Pre-trial Case Management order, in order to determine the costs award.

(i) Outcome of trial

The outcome of trial was somewhat peculiar as the plaintiff lost the threshold motion but won a jury award of $30,000, which is nil after applying the statutory deductible. The peculiarity lies in the fact that a plaintiff's failure to meet the *Insurance Act* threshold precludes them from receiving any non-pecuniary damages. However, the jury award indicates that the jury believed the plaintiff did deserve *some* non-pecuniary damages for his injuries.

As an interesting aside, the court goes on to say that although the plaintiff's failure to meet the statutory threshold is a factor when determining costs, the application of the deductible is not. This means that costs are not to be awarded based on whether or not the deductible applies to the plaintiff's damage award. This makes sense because an award for non-pecuniary damages, even if below the deductible (currently at $30,000), implies that the plaintiff met the threshold and therefore, the injuries sustained were indeed serious and permanent enough to commence an action.

Nevertheless, since Justice Myers determined that the plaintiff failed to meet the threshold, he was inclined to find that the costs ought to favour the defendant, who did *technically* succeed at trial. Using the factors described above, Justice Myers found the defendant's reasonable costs to value approximately $100,000.

(ii) Failure to comply with pre-trial order

The court eventually turns its attention to the order of the Pre-trial Case Management judge. The pre-trial order had outlined the steps required of counsel in order to ensure that the action was prepared to go to trial in the most clear and organized manner. This point is especially stressed by Justice Myers in light of the Supreme Court of Canada's call for reform in today's litigation (*Hryniak v. Mauldin*, 2014 SCC 7). That call for reform put an emphasis on Pre-trial Case Management, allowing parties to distill the issues so that the action is tried expeditiously.

The Pre-trial judge ordered that the parties exchange their evidence in a timely manner, provide jury questions at the start of trial, provide a joint document brief and produce will-say statements from potential witnesses. Almost all of these orders were ignored by defence counsel. Almost all of these could have been easily accomplished by simply cooperating and openly communicating with opposing counsel.

The Court summarizes the conduct of defence counsel in a devestating rebuke (at paragraph 106):

"Playing uncivil, tactical, inappropriate, old-school, trial by ambush games like: threatening to require proof of obviously valid records, holding back important documents until the last second, failing to fulfil undertakings until the eve of trial, saying untrue things to counsel opposite (whether knowingly or not), failing to to prepare examinations in advance to "wing it" at trial, refusing to agree to the admissibility of relevant documents while requiring changes to be made to irrelevant ones, refusing to share costs of joint expenses, refusing to cooperate on court ordered process matters, are all wrongful. Most of these things have been considered unprofessional sharp practice and inappropriate for decades."

In the end, Justice Myers felt justified in depriving the defence of their $100,000 in costs, which they would have probably won had the defence conducted itself professionally and ethically. In trying to play hardball, the defence counsel dropped the ball entirely.

COMMENT

After reading this case, it is no surprise that law schools across the country are shifting their focus towards legal ethics and professionalism. It benefits no one when lawyers conduct themselves in a manner that not only shows disdain for other lawyers, but also the Court, its orders and its time. Not only did the defence's conduct in this case make it more difficult for the plaintiff's counsel, but as Justice Myers notes it inflated the legal fees that their client ultimately paid.

As our litigation system is already suffering from rising costs, increasing caseloads, crumbling infrastructure and tighter budgets, litigators ought to be more aware of the strains imposed by their conduct. The more professionally and ethically lawyers behave, the better it is in the end for our civil justice system as a whole.