Case Name:
D.N. v. S.C.

Between
D.N., applicant, and
S.C., respondent

[2004] O.J. No. 2068

2004 ONCJ 46

Toronto Registry No. D10214/03

70 O.R. (3d) 658

Ontario Court of Justice

M. Cohen J.

May 11, 2004.

(30 paras.)

Civil Procedure -- Costs -- Liability of non-party -- Municipal welfare agency that encourages and assists recipient to apply for support order -- Instead of launching claim in its own name for child support where case for respondent's paternity was very weak, welfare agency forced 17-year-old mother to launch claim -- Respondent always denied paternity and city must have expected need for blood tests to establish case against him -- Respondent with low income agreed to testing and to bear cost of tests only after city welfare worker negotiated consent order between mother and respondent that, if test results excluded him as father, court could reapportion cost of tests -- Thus, city had to be aware of high risk that re-apportionment could shift burden of costs from very poor respondent onto very poor mother -- In fact, test results cleared respondent of paternity -- City was never party to this case but facts showed that its shadowy hand pulled all strings in this case and that it was true applicant from outset -- Three-part threshold test for liability of person who promotes litigation was met in this case -- Court found city liable for costs of blood tests and ordered it to pay $450 to respondent.

Civil Procedure -- Costs -- Liability of non-party -- Three-part threshold test for liability of person who promotes litigation -- Applicant named in case was not true applicant -- City

welfare worker who approached 17-year-old mother prepared not only court application for child support that named respondent as child's father, but also mother's financial statement and arranged to have documents served -- Worker also negotiated consent between mother and respondent for blood tests, witnessed mother's signature on consent and then herself signed consent as "agent" for city -- Mother never had her own lawyer but thereafter, worker regularly appeared beside her in court to speak to case, identifying herself on court record and in subsequent court documents as "agent" for city -- Admittedly, as welfare recipient, mother had statutory duty to pursue money that might have been available to her but conduct of city's worker went beyond "advising" mother of this duty -- Worker's warning to teenage mother that, if she failed to co-operate in case against respondent, her welfare benefits would be suspended was "direction", not "advice" -- Worker was never mother's agent and never promoted herself as such -- Worker had no business in independently executing consent between parties, in speaking to court as "agent" for city and in affixing her name as "agent" for city on court documents unless city had real interest in outcome of case -- In fact, city had financial interest in outcome of case for, if successful, city could reduce mother's welfare payments by amount of support ordered by court, whereas mother's financial position would stay unchanged -- Mother was not "true plaintiff" in this case -- City was "directing mind of the litigation" and was true applicant in this case from outset -- Second branch of three-part threshold test satisfied.

Civil Procedure -- Costs -- Liability of non-party -- Three-part threshold test for liability of person who promotes litigation -- Applicant named in case was puppet shielding true applicant from costs liability -- Case was simple and straightforward, without any hint of long and bitter contest involving motions, discoveries and numerous conferences -- Respondent never challenged welfare mother's claim for custody -- Responded earned low income and city's welfare agency had no reason to expect that his finances would be complicated -- In these circumstances, city had no logical reason for not exercising its statutory authority to launch legal proceedings in its own name -- Instead, city welfare worker forced mother to start case against respondent -- Court drew inference that city began this case in mother's name, rather than its own, precisely to insulate itself against costs, however modest -- Third branch of three-part threshold test satisfied.

Civil Procedure -- Costs -- Liability of non-party -- Three-part threshold test for liability of person who promotes litigation -- Person promoting case had status to launch case -- Under clause 33(3)(b) of Family Law Act and clause 65.1(1)(c) of Ontario Works General Regulation, municipal welfare agency had status to start and conduct case for child support of parent on social assistance -- First branch of three-part threshold test satisfied.

Statutes and Regulations cited:

Children's Law Reform Act, R.S.O. 1990, c. C-12 [as amended], section 10.
Courts of Justice Act, R.S.O. 1990, c. C-43 [as amended], section 131.
Family Law Act, R.S.O. 1990, c. F-3, subsection 33(3).
Family Law Rules, O. Reg. 114/99 [as amended], subrule 24(1).
Ontario Works Act, 1997, being Schedule "A" to the Social Assistance Reform Act, 1997, S.O. 1997, c. 25.

Ontario Works General Regulation, O. Reg. 134/98, subsection 13(1) and clause 65.1(1)(c).

Cases cited:

Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd., [1972] 3 O.R. 199, 27 D.L.R. (3d) 651 (Ont. C.A.).
Smith v. Canadian Tire Acceptance Ltd. (1994), 19 O.R. (3d) 610, 118 D.L.R. (4th) 238, 15 B.L.R. (2d) 286, [1994] O.J. No. 1816, 1994 CarswellOnt 242 (Ont. Gen. Div.); costs awarded at (1995), 22 O.R. (3d) 433, 36 C.P.C. (3d) 175, [1995] O.J. No. 327, 1995 CarswellOnt 133 (Ont. Gen. Div.); affirmed at (1995), 26 O.R. (3d) 94, 40 C.P.C. (3d) 129, [1995] O.J. No. 3380, 1995 CarswellOnt 991 (Ont. C.A.).
Sturmer and Town of Beaverton, Re (1911), 25 O.L.R. 190 (Ont. H.C.), affirmed at 25 O.L.R. 566, 2 D.L.R. 501 (Ont. Div. Ct.).
Television Real Estate Ltd. v. Rogers Cable T.V. Ltd. (1997), 34 O.R. (3d) 291, 99 O.A.C. 226, 12 C.P.C. (4th) 381, [1997] O.J. No. 1944, 1997 CarswellOnt 1580 (Ont. C.A.).

Counsel:

Steven D. Benmor, for the applicant mother.

S.C., on his own behalf.

Carol J. Smith, for the City of Toronto.

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1 **M. COHEN J.**:-- This is a ruling in a child support application on the issue of awarding costs of blood testing against a non-party. The parties to the application consented to an interim order under section 10 of the Children's Law Reform Act, R.S.O. 1990, c. C-12 (as amended), for the purpose of determining whether the respondent was the father of the child. The consent order provided that the respondent would pay the costs of the testing "subject to reapportionment of the costs once results are obtained and the matter returns to court." The respondent paid the sum of $450 and the blood tests were conducted. The respondent was excluded as the father of the child and the action was discontinued. The respondent seeks an order of costs to reimburse him for the cost of the blood tests. The applicant mother is dependent on public assistance and asks that any order of costs be made against the City of Toronto. The City of Toronto is not a party to the proceeding.

2 The applicant has filed a financial statement showing a monthly income of $1,350.75. On this income, she supports herself and her four-year-old child. Her rent is $677 per month. The balance of her monthly income must cover all her remaining expenses, most of which appear, from her financial statement, to be child-related. A costs order would have a substantial impact on her and the child. The respondent is of modest means and maintains that he can ill afford the cost of the blood tests.

3 Subrule 24(1) of the Family Law Rules, O. Reg. 114/99 [as amended], provides that there is a presumption that a successful party is entitled to the costs of the case. The city

submits that, since it is not a party to this proceeding, it is immune from any order of costs. Neither rule 24 of the Family Law Rules nor section 131 of the Courts of Justice Act, R.S.O. 1990, c. C-43 (as amended), specifically refers to the possibility of awarding costs against a non-party. Subsection 131(1) of the Courts of Justice Act provides that:

> 131. Costs.--(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Although, generally, the words "by whom" have been interpreted to mean "by which party", there is authority for awarding costs against a non-party, provided certain criteria are met.

4 In the case of Television Real Estate Ltd. v. Rogers Cable T.V. Ltd. (1997), 34 O.R. (3d) 291, 99 O.A.C. 226, 12 C.P.C. (4th) 381, [1997] O.J. No. 1944, 1997 CarswellOnt 1580 (Ont. C.A.), Appeals Justice George D. Finlayson stated the following:

> The phrase "by whom ... the costs shall be paid" has been judicially interpreted to mean "by which of the parties to the proceedings before the court or judge": see Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd. (1972), 27 D.L.R. (3d) 651 (Ont. C.A.) at p. 659. Arnup J.A., for the court, was dealing with section 82 of the Judicature Act, R.S.O. 1970, c. 228, the predecessor to section 131 of our present Act. Accordingly, this section of the Act provides no basis for an award against two of the three principals of the corporate plaintiff. Eberle J. recognized this but relied upon what he described as an exception to the salutary rule in Rockwell. In point of law, the exception was expressed earlier by Middleton J. in Sturmer v. Beaverton (Town) (1911), 25 O.L.R. 190 at 192 (Ont. H.C.); affirmed at (1912), 25 O.L.R. 566 (Ont. Div. Ct.). Middleton J. was dealing with an applicant in a proceeding to quash a by-law who, in the view of all the judges who dealt with the case, was not the true applicant but was put forward by others, who themselves had status to bring the proceedings. They all characterized the applicant as a "man of straw". Middleton J. stated at p. 191:
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> > The court has inherent jurisdiction to prevent abuse of its process, and, as part of this jurisdiction, will stay proceedings, as being taken against good faith, when a man of straw is put forward by those really litigating, until they either give adequate security or consent to be added as parties, so that an order for costs may be made against them in the event of failure.
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> In Rockwell, supra, at p. 663, Arnup J.A. for the court held that Sturmer was "express authority for the proposition that, under section 82, the court has jurisdiction to award costs against a person proved to have been the real litigant', who had put forward a man of straw' in his desire to avoid becoming liable for costs" ...

> ... in order to bring the appellants within the exception of Sturmer as applied in Rockwell, it was incumbent upon the respondent to show (1) that the appellants had status to bring the action against Rogers Cable themselves; (2) that TVR was not the true plaintiff and (3) that TVR was a "man of straw" put forward to protect the appellants and presumably Burry from liability for costs.

5 At a later point in the decision, Appeals Justice Finlayson considered the case of Smith v. Canadian Tire Acceptance Ltd. (1995), 22 O.R. (3d) 433, 36 C.P.C. (3d) 175, [1995] O.J. No. 327, 1995 CarswellOnt 133 (Ont. Gen. Div.), affirmed at (1995), 26 O.R. (3d) 94, 40 C.P.C. (3d) 129, [1995] O.J. No. 3380, 1995 CarswellOnt 991 (Ont. C.A.). Smith v. Canadian Tire Acceptance Ltd. involved a class action, instituted in the name of Smith, for restitution of alleged unlawful interest charges levied by Canadian Tire on its customers. The action was dismissed on a motion for summary judgment at (1994), 19 O.R. (3d) 610, 118 D.L.R. (4th) 238, 15 B.L.R. (2d) 286, [1994] O.J. No. 1816, 1994 CarswellOnt 242 (Ont. Gen. Div.). Appeals Justice Finlayson described the trial judge's ruling on a motion for costs against non-parties to the action as follows:

> Winkler J. heard the costs motion and found as a fact that a Larry Whaley and the Borrowers' Action Society were the true plaintiffs in the proceedings. They had instigated, promoted, financed and controlled the conduct of the proceedings throughout, even to the point of appointing and instructing counsel. If the litigation had been successful, Whaley and the Society of which he was president, would have gained financially because of the contingency fee basis upon which the lawsuit was organized. Winkler J. found as a fact that the litigation had been structured in such a way as to avoid all cost consequences in the event of failure. He awarded costs against Whaley and the Society on a solicitor-and-client scale because he was satisfied that they were the real plaintiffs in the proceedings. This court was not prepared to interfere with that decision and dismissed the appeal.

6 Do the facts in the case at bar bring the applicant within the "exception of Sturmer [(1911), 25 O.L.R. 190 (Ont. H.C.), affirmed at 25 O.L.R. 566, 2 D.L.R. 501 (Ont. Div. Ct.)] as applied in Rockwell [[1972] 3 O.R. 199, 27 D.L.R. (3d) 651 (Ont. C.A.)]", as articulated by Appeals Justice Finlayson in the case of Television Real Estate Ltd. v. Rogers Cable T.V. Ltd.? In my view, they do.

7 Under the first criterion, the applicant must establish that the city had the status to bring the action itself. The city concedes this criterion is satisfied. Under subsection 33(3) of the Family Law Act, R.S.O. 1990, c. F-3, the city has the status to commence and conduct litigation for the support of a parent on social assistance. In addition, under clause 65.1(1)(c) of the Ontario Works General Regulation, O. Reg. 134/98, to the Ontario Works Act, 1997, being Schedule "A" to the Social Assistance Reform Act, 1997, S.O. 1997, c. 25, family support workers are specifically authorized to:

> (c) undertake legal proceedings, including variation motions and applications, for support for a member of a benefit unit on behalf of the member or the delivery agent;

The regulations thus contemplate that a family support worker, on behalf of the city, can and will initiate child support applications. Hence, it is clear from the legislation that the city has the status to bring the application itself.

8 The second branch of the test articulated in Television Real Estate Ltd. v. Rogers Cable T.V. Ltd. requires proof that the non-party is the "true plaintiff." To determine this issue the court must examine the specific facts of the case.

9 At the time she commenced the application, the applicant was 17, in grade X at high school and was dependent on social assistance. The child was a little over 2 years of age. According to documents filed by the city, the applicant stated that, at some point, she had discussed the issue of paternity with the respondent and he had denied being the father of the child. At that time, the applicant had offered to pay one half the cost of blood testing but the respondent had refused to undergo the tests. The applicant took no further steps.

10 The applicant deposed that, in January 2003, she was directed by her family support worker to attend at this courthouse to provide information for a support application. She was told that, if she did not co-operate, her financial assistance would be suspended. The applicant did subsequently meet with a family support worker at the courthouse. She was asked by the worker to identify the father. She states that:

> I advised the worker that I was not certain of the child's paternity, but believed that the respondent was the child's father.

11 According to the worker's notes, the applicant stated that she "was involved with another man but that other man was white" and the child "clearly has black features."

12 Notwithstanding the evidently tenuous nature of the identification of the father, the family support worker prepared a child support application naming the respondent as the father of the child. The worker prepared and commissioned the financial statement and arranged for service of the documents.

13 On the return of the application, a family support worker attended in court with the applicant. At that time, the parties entered into a consent that was then incorporated into a court order. I infer, from the circumstances I have described that the family support worker, engaged in the negotiations leading to that consent. The consent had only three terms. It provided for a return date, a term respecting disclosure if the respondent was found to be the father, and the following:

> Leave be granted to obtain blood tests of the applicant, respondent and the child T.N., born November 8, 2000, and to submit the results into evidence. The respondent shall pay the costs of such testing subject to reapportionment of the costs once results are obtained and the matter returns to court.

14 The family support worker stated that prior to the execution of the consent, she had a "long discussion with the applicant "in respect to the issue of paternity" and that:

> I advised her of possible costs or repayment that she could be required to make if the respondent was found to not be the father. Ms. D.N. stated she was anxious to proceed.

15 The family support worker witnessed the applicant's signature on the consent. Beneath the signatures of the parties, the family support worker herself signed the consent, as agent for Toronto Social Services. Although the consent provided, as a standard term, that each party obtained independent legal advice before signing, there is no evidence that the applicant received such advice prior to her execution of the consent.

16 After the signing of the consent, the family support worker appeared in court to speak to the matter and was noted as identifying herself as agent for Toronto Social Services. In court, the respondent was represented by duty counsel. The applicant, however, appeared in person, without representation. The family support worker continued to appear as agent for Toronto Social Services on all subsequent appearances of the matter in court, including the discontinuance and the motion for costs.

17 With respect to its involvement in the initiation of the proceedings, the city argued that the applicant, as a recipient of social assistance, had a statutory obligation to pursue money that may be available to her and that advising a recipient of this duty could not constitute the city as the true litigant. The city relied on subsection 13(1) to the Ontario Works General Regulation:

> 13. Obligation to pursue resources.--(1) If the administrator is not satisfied that a member of a benefit unit is making reasonable efforts to obtain compensation or realize a financial resource or income that the person may be entitled to or eligible for, the administrator may determine that the person is not eligible for basic financial assistance or reduce the amount of basic financial assistance granted by the amount of the compensation, financial resource or income that in his or her opinion is available or would have been available had reasonable efforts been made to obtain or realize it.

18 I would agree that advising the litigant of her duty to "make reasonable efforts to obtain compensation" does not, in and of itself, render the city the true litigant. However, although it is true that social assistance recipients are obliged to pursue support applications, it does not follow that the city is exempt from a finding that it is a true plaintiff in such an application. Whether or not the city has assumed this role will depend on the facts of the case.

19 In the case at bar, the applicant was not "advised" of a duty to seek support; she was told that, if she failed to co-operate in the litigation, her benefits would be suspended. In my view, it is disingenuous for the city to maintain that this kind of warning constitutes "advice" rather than "direction". This is a distinction without a difference. The applicant would reasonably have believed she was being told to make an application or lose her benefits. Her later statement that she was "anxious to proceed" must also be understood in the con-

text of this warning. The fact is that, until the conversation with the family support worker took place, the applicant had taken no steps to obtain a support order, or even a custody order, in the two years since the child's birth. It is also important to remember that, at the time that the "advice" was given, the applicant was 17 years of age and in grade X at high school.

20 The city argues that the family support worker does not conduct the action any more than an agent or lawyer. But if the city was not agent or lawyer, what was its role in this case? The city is shown as "Agent, Toronto Social Services" in the box reserved for lawyer for the applicant in the title of proceedings, yet the endorsements in the proceedings, as well as the consent filed, suggest that the worker either held herself out as, or was found to be, agent for the city. If the worker was agent for the applicant, why did she independently execute the consent? If she was agent for the city and the city was not a party, what authority did the family support worker have for signing the consent at all?

21 Family support workers, of course, are not authorized to provide legal advice. They are not lawyers and, in any event, they do not provide "independent" advice, since, however well-meaning the family support worker may be, the city has a financial interest in the outcome of the litigation. If the application proved successful, the respondent's payments would have reduced the amount of assistance paid by the city to the applicant. The applicant's financial position, on the other hand, would remain unchanged. Her monthly income would be the same.

22 It is evident that the family support worker's role in the inception, preparation and conduct of the proceedings in his case went well beyond the role of counsel or agent. A lawyer who directed a client to commence litigation, conducted the litigation on behalf of the client and who stood to benefit personally from the outcome of the litigation might well be accused of maintenance or champerty.

23 Having regard to all these circumstances, I find in the case before me that the city instigated and controlled the conduct of the proceedings purportedly commenced by the 17-year-old, unrepresented, applicant. The city was the "directing mind of the litigation" (Smith v. Canadian Tire Acceptance Ltd., supra) and the applicant was not the "true plaintiff". I find that the city is the true applicant in this proceeding.

24 The final branch of the test in Television Real Estate Ltd. v. Rogers Cable T.V. Ltd., supra, requires that the applicant establish that she was a "man of straw" put forward to protect the city from liability for costs. I have no direct evidence on this issue, but I draw the inference that the city commenced this application in the applicant's name, rather than its own, for precisely this reason.

25 This matter was relatively straightforward and routine. Except for the applicant's age, the facts were not unusual. There was one child. The applicant was on assistance. There was no reason to anticipate extended and acrimonious litigation. The respondent was not challenging the applicant's custody. There was no reason to expect that the respondent's financial affairs would be complicated. The respondent had a low income. There was no reason to anticipate protracted litigation, involving motions, discoveries and numerous conferences. The applicant had previously shown no particular interest in obtaining a support order or even a custody order. Why, in these circumstances, would the city not exercise its

authority to undertake the legal proceedings on its own behalf, rather than compel the applicant to initiate litigation? In my view the only reasonable inference is that the city wished to insulate itself against costs, however modest.

26 I conclude then that the applicant has successfully met the test set out in Television Real Estate Ltd. v. Rogers Cable T.V. Ltd., supra, and that the city can be found liable for costs in this case. The question remains whether the court should exercise its discretion to award costs to the successful respondent.

27 The basis for the paternity claim in this case was exceptionally weak. In her application, the applicant pleaded as follows:

> 2. The respondent and I met approximately September 1999 and started an intimate and sexual relationship approximately December 1999 [sic].
> 3. I was not sexually involved with any man of colour during the time of conception and the respondent is the father of my child as my child is of mixed blood.

28 The city was clearly aware that the applicant had been having sexual relations with more than one man at the time of conception. The city was also aware that the respondent had denied paternity when questioned by the applicant in the past. The city could not have reasonably concluded that the identity of the father was certain on the basis of the youthful applicant's statement that "my child is of mixed blood." The city must have anticipated that blood tests would be necessary to confirm the respondent's paternity. In the event that the respondent was excluded as the father, the city was aware, as the order itself provided, that the costs could be subject to reapportionment. In all these circumstances, the city had to be aware of the significant risk that costs would be awarded against the impecunious applicant.

29 The city argues that the respondent should pay the costs of the blood testing, since he benefited by having the question of his paternity resolved. I do not accept this argument. The burden was on the applicant to prove the paternity as part of her claim for support. The respondent denied paternity from the outset. He consented to blood testing only under compulsion of the litigation commenced by the applicant (at the instance of the city) and then only to an order that provided that the costs of the testing would be subject to reapportionment if he were found not to be the father. The respondent is himself impecunious. If the city had intended that the respondent pay the costs regardless of the outcome, the respondent should have been so advised and the consent worded accordingly, or an order to that effect should have been sought from the court.

30 Considering all of the above circumstance, I find that the city is liable for the costs of the blood tests, in the sum of $450, to be paid to the respondent forthwith.