SUPREME COURT OF YUKON

Citation: *Tupper* v. *Reddoch et al,* 2012 YKSC 39 Date: 20120508
Docket S.C. No.: 08-A0050
Registry: Whitehorse

BETWEEN:

CHRYSTAL LYNN TUPPER

Plaintiff

AND:

DR. ALLON REDDOCH, DR. GERALD B. DOERSAM, DR. ROGER S. MITCHELL, DR. WAYNE MACNICOL and DR. STEPHANIE STARKS

Defendants

Before: Ms. Justice R.S. Veale

Appearances:
Susan Roothman Counsel for the Plaintiff
Nigel Trevethan Counsel for the Defendants (via teleconference)

RULING ON ADJOURNMENT APPLICATION DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): This is an application by counsel for Ms. Tupper to adjourn the trial date, which had been set for June 11 to 23, 2012, on the grounds that the plaintiff's expert, Dr. Belanger, will be away and counsel has been unable to obtain an expert opinion from the general practitioner regarding the standard of care.

[2] The background to this matter is that it is a medical malpractice action. The plaintiff is seeking damages from Doctors Reddoch, Doersam, and Mitchell.

[3] An intrauterine device (IUD) was recovered from the plaintiff's rectosigmoid colon during a hysterectomy which was performed on July 17, 2006. It is alleged that the IUD was improperly inserted by Dr. Reddoch, a general practitioner, on March 18, 1985. It is also alleged that Dr. Reddoch failed to diagnose the retained IUD.

[4] Dr. Mitchell is a general practitioner who completed an abortion on the plaintiff on July 23, 1986. Dr. Doersam is an obstetrician and gynecologist who completed a laparoscopic tubal ligation immediately following the abortion on July 23, 1986. The plaintiff asserts that Doctors Mitchell and Doersam failed to determine the location of the IUD at the time, and that the abortion and tubal ligation were carried out.

[5] The action was commenced by Writ of Summons and filed on July 15, 2008. The Statement of Defence was filed on behalf of Doctors Reddoch and Mitchell on November 12, 2008. On June 25, 2009, a Statement of Defence was filed on behalf of Dr. Doersam. An Examination for Discovery by counsel for the doctors was conducted on June 29, 2010 for discovery of the plaintiff.

[6] The Case Management Conference was held on April 14, 2011, and a trial date was scheduled to commence on February 13, 2012 for two weeks. Counsel then began to file their expert reports and the counsel for the plaintiff served the report of Dr. Belanger, an obstetrician and gynecologist, dated February 28, 2011.

[7] I should indicate at this point that two of the doctors had been dropped from the action, ultimately, so it was just the three doctors that I have indicated, Doctors Reddoch, Doersam, and Mitchell. In any event, the counsel for the defendant doctors indicated that he would be objecting to the use of Dr. Belanger as an expert on the

issue of the standard of practice in the local community of Whitehorse, or the Yukon Territory. It was a supplementary report from Dr. Belanger on July 8, 2011, and delivered to the counsel for the defence on September 7, 2011. Then on December 9, 2011, counsel for the defendant doctors served three reports, a report of Dr. Cadenhead, a report of Dr. Wiebe, and a report of Dr. Neapole, on counsel for the plaintiff. Dr. Cadenhead and Dr. Wiebe are general practitioners, and Dr. Neapole is an obstetrician and gynecologist.

[8] In December of 2011, counsel for the plaintiff was intending to call a Dr. Graham Henderson, a family physician in the Yukon, to give the expert evidence on the standard of care. There were some clear difficulties with obtaining the assistance of Dr. Graham Henderson as an expert in this matter. Apparently, the counsel for the plaintiff and her spouse have a legal practice that they run together and there had been a criminal matter in which Dr. Graham Henderson was a victim, and that was of some concern, but that apparently got resolved. In any event, at the end of the day, Dr. Henderson, through his counsel, advised that he did not wish to be called as an expert on the standard of care. One must also bear in mind that Dr. Henderson is a local doctor who, undoubtedly, was very familiar with the three defendant doctors.

[9] In any event, on January 20, 2012, a case management conference proceeded to adjourn the February 13, 2012 trial dates because I had been unable to obtain a Deputy Judge to hear the matter, and I indicated to counsel that both resident judges were not in a position to hear the case because of their knowledge of the local doctors and their medical relationships with the local doctors. So there has been some difficulty for this Court to arrange for a Deputy Judge to hear the matter. It is not difficult to obtain

a Deputy Judge for a one-week matter, as deputies in this court can make themselves available on a one-week basis, but it is extremely difficult to obtain a Deputy Judge for a period of two weeks. However, I was able to have the Minister of Justice appoint a Supernumerary Judge from Alberta, who is prepared to hear the matter for the two-week period of June 11 through 23, 2012. At that case management meeting, counsel agreed that that was an appropriate date for the trial.

[10] It became apparent fairly quickly that counsel for the plaintiff was having some problems with respect to the appearance of Dr. Belanger at the June trial, and Dr. Belanger indicated that she would be taking a holiday. The matter was raised in case management and I indicated that a formal application would be required, and that adjournment application was made on April 10, 2012. Because of the difficulty of obtaining a Deputy Judge to hear the matter, I urged counsel for the plaintiff to pursue all the options available to keep that June trial date. I have also indicated that there would not be a trial date until the fall of 2013 if the matter were to be adjourned.

[11] With respect to Dr. Belanger, counsel for the plaintiff was prepared to do her evidence by video conference or video deposition in advance of the trial, but it appears, and the e-mails have been filed in this regard, that Dr. Belanger apparently has a very busy obstetrical and gynecological practice and the only date that she had offered was one day in Ottawa where she was presiding over some examinations. Counsel for the plaintiff indicated that that would be too difficult to arrange in Ottawa in terms of the time available and the preparation for the video examination.

[12] Counsel for the plaintiff, at my urging, has also been pursuing experts in the area of local practice for the standard of care but has not been able to firm anything up, although she has some possibilities that are being pursued by her agent, a Dr. Hodkinson, of Western Medical Assessments, who is running some names down for her. I should advise that the counsel for the plaintiff is using Western Medical Assessments to arrange for her expert doctors and, as a result, she does not have direct contact with the doctors involved, but I understand that Dr. Belanger is well aware of the urgency of this matter being dealt with in June, if at all possible.

[13] Counsel for Ms. Tupper submits that she simply did not know that Dr. Belanger would not be available for the two-week trial in June and also says that the video deposition simply cannot be arranged owing to the busy schedule of Dr. Belanger. As to the lack of an expert on the standard of care, those reports that were filed by the defendants on December of 2011, she has not been able to firm up dates with any of the proposed doctors and, therefore, at this stage, does not know whether she would be ready for trial or not.

[14] Counsel for the doctors submits that there has been a lack of diligence on the part of counsel for the plaintiff, and also that an adjournment is very prejudicial to the three defendant doctors, who have been facing this medical malpractice claim since 2006. I might add that it is also fair to say that it is very difficult to arrange for a mutually convenient trial date for three defendant doctors and also the three expert doctors that counsel propose to bring to trial.

[15] I must confess that I have been very reluctant to grant this adjournment, primarily based on the difficult management issues that face this Court in terms of setting the matter down for this two-week trial. However, as counsel knows, it is a matter of discretion to be exercised in the interest of justice when an adjournment application is made, and as it is the first application that has been made when there has been a judge available, I am prepared to grant the adjournment. I do so reluctantly, because I do think that it is going to result in a great deal of delay, which is prejudicial both to the plaintiffs and certainly, to the defendants.

[16] I am going to impose these terms on the adjournment:

1. The next trial date will be peremptory on the plaintiff.
2. The only additional expert evidence that can be presented by the plaintiff at this stage is the evidence of an expert on the standard of care or local practice.
3. There will be no new trial date granted until the counsel for the plaintiff has delivered the medical expert report to counsel for the defendants.
4. In the event that counsel for the plaintiff does not pursue the presentation of the expert evidence on the standard of practice or care it would be open to counsel for the defendants to seek a case management meeting for the setting of a trial date in any event.

[17] I am not going to set a specific timeframe for the evidence of the local expert, but I can indicate to counsel for the plaintiff that she should pursue that diligently.

[18] With respect to costs, I do think that this is a case where there is going to be substantial delay. It has been incredibly inconvenient for the defendants, certainly for the Court in terms of the effort spent to arrange for a Deputy Judge to hear the matter, and I am going to award costs on Scale A for the adjournment application payable forthwith, in any event, of the cause.

[19] That is my judgment, counsel, any questions arising?

[20] MR. TREVETHAN: My Lord, the number two on your terms, and I just want to make sure you heard me the first time, the term I was seeking was that the expert evidence was limited to GP evidence and its rebuttal, rather than a wide-open concept of expert evidence.

[21] THE COURT: Yes, that is what I mean.

[22] MR. TREVETHAN: Okay.

[23] THE COURT: Oh, I see, you are talking about a GP as a local expert, so to speak?

[24] MR. TREVETHAN: And that it's rebuttal evidence. I don't need -- see all of my --

[25] THE COURT: It is clear, I think, that it is rebuttal evidence and it is the evidence of a general practitioner.

[26] MR. TREVETHAN: Okay. I'll --

[27] THE COURT: If I can say an "expert general practitioner."

[28] MR. TREVETHAN: Yes, when I put -- I'll put the terms of the order in.

[29] THE COURT: Thank you.

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VEALE J.