

Costa v Sortino & Anor [2000] NTSC 70

PARTIES: CARLO COSTA by his litigation
guardian MASSIMO COSTA

v

GIANFRANCO SORTINO
and
TERRITORY INSURANCE OFFICE

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 9808742 77/98

DELIVERED: 11 September 2000

HEARING DATES: 25 August 2000

JUDGMENT OF: RILEY J

REPRESENTATION:

Counsel:

Plaintiff: S. Walsh QC, with P. Barr
Defendant: B. Priestley
Third Party: D. Peek QC, with I. Nosworthy

Solicitors:

Plaintiff: Hunt & Hunt
Defendant: Priestley's
Third Party: Ward Keller

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Costa v Sortino & Anor [2000] NTSC 70
No. 9808742 77/98

BETWEEN:

**CARLO COSTA by his litigation
guardian MASSIMO COSTA**
Plaintiff

AND:

GIANFRANCO SORTINO
Defendant

TERRITORY INSURANCE OFFICE
Third Party

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 11 September 2000)

- [1] I delivered reasons for judgment in this matter on 17 August 2000. On that occasion I indicated that I would hear the parties as to the form of orders and as to the issue of costs.
- [2] On 25 August 2000 the matter came before me for argument in relation to those matters. At that time Mr Priestley was granted leave to appear on

behalf of the defendant. The defendant had been unrepresented for the period commencing on the first day of the trial and throughout that hearing.

[3] On 25 August 2000 the plaintiff sought an order that the defendant and the third party pay the plaintiff's costs of the proceeding to date. The defendant sought an order that the third party pay his costs of the proceeding to date. The third party sought an order that it should have its costs of and incidental to the trial on the question of liability against the plaintiff and also against the defendant notwithstanding the finding that the plaintiff is entitled to an order for damages to be assessed against the defendant and that the defendant is entitled to be indemnified by the third party.

[4] It was agreed by all parties that I have the power to make each of the orders sought by each of the parties. The argument centred upon how I should exercise my discretion in the unusual circumstances of this case.

[5] I have a general discretion as to the awarding of costs. That discretion is absolute and unfettered except that it must be exercised judicially, not arbitrarily or capriciously or on grounds unconnected with the litigation: *Donald Campbell & Co v Pollak* (1927) AC 732; *Cretazzo v Lombardi* (1975) 13 SASR 4. However, as is acknowledged by each of the parties, the plaintiff was successful in his action against both parties and in the normal course would expect to receive his costs on the basis that costs follow the event: *Hughes v Western Australian Cricket Association (Inc) & Others*

(1986) ATPR 40-748 at 48,136; *Donald Campbell & Co v Pollak* (supra at 812); *Cretazzo v Lombardi* (supra at 12).

- [6] It was the submission of the third party that there is discretion to deny a successful party the costs of an action. That is undoubtedly so: *Cretazzo v Lombardi* (supra at 12); *Jones v NAALAS Inc* (1986) 82 FLR 264. The discretion is not limited to depriving a successful defendant of his costs, it also extends to a successful plaintiff: *Donald Campbell & Co v Pollak* (supra at 822). In considering the exercise of the discretion it is appropriate to look at the conduct of the party in the litigation and also matters which led up to and were the occasion of the litigation: *Bostock v Ramsey Urban Council* (1900) 2 QB 616 at 622.
- [7] The third party went on to submit that, in the circumstances of this matter, special circumstances existed which should result in me depriving both the plaintiff and the defendant from obtaining the whole or part of the costs of the proceedings against the third party. The basis of that submission was that a review of the reasons for judgment demonstrates that the conduct of the plaintiff, the defendant and those associated with them, led the third party to the view that there was a defence properly open to it on the ground that the plaintiff was the driver, not the passenger, notwithstanding the defendant's pleaded position. The conduct of the plaintiff, the defendant and their associates was dishonest when they initially claimed that the plaintiff was the driver of the vehicle and the defendant was the front seat passenger. Those people having assumed that position and then, as I found,

subsequently having changed their story to maintain that the defendant was in fact the driver and the plaintiff the front seat passenger, left the third party in the position that it was necessary for it to test the claims made in order to determine which story was false. The third party said that the delay involved in it being made aware of the changed story meant that it was denied the opportunity to carry out relevant investigations in a prompt manner and, in some respects, at all. The evidence in this regard is contained in the affidavit of Michael Patrick North sworn 1 September 2000. I accept that investigation opportunities were lost.

[8] In addition to the changing of stories by the various witnesses the third party also had available to it the expert opinion of Mr Griffiths that “the evidence is sufficient to show that Carlo Costa (ie the plaintiff) must have been the driver.” It was submitted that, in all of the circumstances, the third party acted reasonably in fully defending the matter. It was submitted that in those circumstances not only should the third party not be obliged to pay the costs of the plaintiff and the defendant but rather should recover its costs against those parties.

[9] The submission made by the third party was summarised in the following way:

“This is a most unusual case. There was an accident on the Arnhem Highway. There were potentially more than 30 witnesses as to matters relating to the rollover and to matters happening during the time leading up to the plaintiff’s collapse at the hospital. The question which the Court must consider in exercising its discretion on costs is whether if the witnesses had unanimously said that the

defendant was the driver right from the start rather than (of those who spoke) unanimously saying that the plaintiff was the driver – including the plaintiff – these proceedings on liability would have been contested as they have. The Court has found that a necessary consequence of telling the false story was that in all likelihood an insurer would have falsely suffered a liability. The plaintiff was one of four participants in that conduct. It could not have proceeded without his active participation. It is that conduct and the inferences to be drawn from it, which led to the question of liability being contested. In those circumstances, which are quite exceptional, the Court should exercise its discretion to order that the plaintiff, though successful, should pay the costs of the third party of the trial on liability pursuant to Order 63.03 of the Rules of Court.”

- [10] The written submissions did not refer to the position of the defendant, as at the time they were drawn, it was not expected that the defendant would appear. When the defendant did appear Mr Nosworthy, who appeared on behalf of the third party extended the submissions to include the defendant.
- [11] Whilst the third party was placed in the position it has identified it does not follow that the orders it seeks should be made.
- [12] It is true that the plaintiff, the defendant and others told a false story at the scene of the accident and at the hospital. That story was that the plaintiff had been the driver at the relevant time and the defendant had been a front seat passenger. The plaintiff did not ever correct the false story because he collapsed at the hospital and suffered the serious injuries identified in the report of Professor Lazazzera (Exhibit P26) with the consequent impact upon his ability to communicate at the relevant times.

[13] However the others immediately involved in the telling of the false story, being the defendant, Mr Pepe and Mr Iacorossi did correct the story. They did so at an early time in relation to these proceedings.

[14] I have been told that Mr Testa, Ms Nardi, Mr Pepe, Mr Iacorossi and Mr Randazzo were each attended upon by representatives of the third party and each allowed themselves to be interviewed. In addition the defendant made himself available to the third party. Indeed for the period April 1998 to February 1999 the third party funded the defendant's defence. Ms Nardi and the defendant were not called to give evidence. The other witnesses identified above were called to give evidence. It was not put to them in cross-examination that they had failed to co-operate with the third party or that they had provided information to the third party inconsistent in any significant way with their testimony before the Court. On the hearing of this application no submission was made by Mr Nosworthy that the identified witnesses had not fully co-operated with the third party or that their evidence was inconsistent with the information they had provided to the third party.

[15] As the third party submitted there were other witnesses to the events. These witnesses included the Italian people who occupied the other vehicles. Many of these people were not called to give evidence. I know that the third party carried out investigations both in Australia and in Italy. Save for Ms Nardi and the defendant I do not know what witnesses were spoken to amongst the occupants of the other vehicles who were not called to give

evidence. I do not know whether there was any lack of co-operation on their part. What I do know is that the third party did not call any Italian witness whose evidence was inconsistent with the case presented on behalf of the plaintiff, including that part of the case that maintained that a false story was told at the scene and at the hospital but that the truth was told thereafter.

[16] In addition the third party was aware that the defendant claimed that he was the driver of the vehicle at the relevant time notwithstanding his initial involvement in the false story to the contrary. This was a fact that he admitted in his defence and one that he swore to in the answers to interrogatories.

[17] The third party elected not to accept the evidence of the defendant, Mr Testa, Mr Iacorossi, Mr Pepe and of others where it was inconsistent with the position adopted by the third party at trial. It was not submitted that it did not have available to it all of the information necessary to determine how it should proceed and, in particular, whether it should accept the accuracy of the version of events provided by the witnesses. There was nothing more that those who represented the plaintiff could have done to lead the third party to accept that version of events. The same observation applies to the defendant. The position of the third party is a position in which insurers and administrators of compensation schemes must find themselves on many occasions. The third party elected not to accept the information provided to it by the various witnesses. Rather it elected to

challenge their credibility and to fight the plaintiff's claim and to do so with vigour. In the end result I have found that the witnesses were credible and I found in favour of the plaintiff. I do not see the fact that the third party had a basis for being suspicious of the plaintiff's claim in the circumstances of this matter as being sufficient to warrant me exercising my discretion in the manner suggested by the third party.

[18] Both the defendant and the third party denied liability to the plaintiff and maintained that denial throughout the proceedings. In the circumstances I order that the defendant and the third party pay the plaintiff's costs upon the issue of liability in this proceeding to 25 August 2000. In the absence of agreement such costs are to be taxed forthwith and payable immediately upon agreement or the completion of the taxation process. Such costs are to include all reserved costs.

[19] The plaintiff invited me to widen the order for costs so that it included costs relating to the whole of the proceeding including issues of quantum. I do not accede to that request. To do so would involve the plaintiff becoming immediately entitled to costs which, after a full hearing of the remaining issues, may not be allowed.

[20] The parties were all agreed that I should certify that the retainer of senior and junior counsel by the plaintiff was warranted and I do so.

[21] In relation to the claim for costs made by the defendant against the third party I note that, notwithstanding the failure of the defendant to appear at

the hearing, he was successful in his claim. I do not regard the circumstances canvassed above as disentitling the defendant to his costs against the third party. The effect of the reasons for the plaintiff recovering costs also applies to the defendant. I order that the third party pay the defendant's costs upon the issue of liability in this proceeding to 25 August 2000. In the absence of agreement such costs to be taxed forthwith and payable immediately upon agreement or the completion of the taxation process.

[22] The plaintiff applied for a certificate pursuant to Rule 63.72(9)(a) of the *Supreme Court Rules* that the costs of the plaintiff's counsel's attendances on interlocutory applications be allowed. That application was not argued during the course of this hearing. I grant liberty to all parties to apply in relation to that matter.

[23] There will be judgment and orders as follows:

- (1) There will be judgment for the plaintiff against the defendant on the issue of liability with damages to be assessed.
- (2) The defendant and third party pay the plaintiff's costs upon the issue of liability in this proceeding to 25 August 2000 including all reserved costs, such costs to be agreed or taxed forthwith and then payable immediately.
- (3) I certify that the retainer of senior and junior counsel by the plaintiff was warranted.

- (4) The third party pay the defendant's costs upon the issue of liability in this proceeding to 25 August 2000 including all reserved costs and costs to be agreed or taxed forthwith and then payable immediately.
- (5) I declare that, pursuant to s 6 of the *Motors Accidents (Compensation) Act*, the defendant is entitled to be indemnified by the third party to the extent of his liability to the plaintiff.
- (6) There will be liberty to all parties to apply.
