IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20161003
Docket: M157900
Registry: New Westminster

Between:

Kelly Lynn Berkey

Plaintiff

And

Caitlin Leigh Sylvestri, Timothy John Sylvestri and Cheryl Elizabeth Sylvestri

Defendants

- and -

Docket: M166950
Registry: New Westminster

Between:

Kelly Lynn Berkey

Plaintiff

And

Ian James Ferguson and Carolina Mercedes Ferguson

Defendants

Before: Master Baker

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff in both actions: R.B. McNeney

Counsel for Defendants in both actions: J.V. Marshall

Place and Date of Trial/Hearing:	Vancouver, B.C. October 3, 2016
Place and Date of Judgment:	Vancouver, B.C. October 3, 2016

[1] **THE COURT:** There are cross-applications in these proceedings which concern claims of personal injury and damages sustained, Ms. Berkey, the plaintiff, says, as a consequence of two accidents which occurred in July of 2012, accident number 1, and in November of 2014, accident number 2.

[2] It seems to me, based on what I have heard today, that there is some serious consequence to her resulting from these accidents. I am not going to make findings, obviously, of whether she has been permanently affected or not, but she has been diagnosed with two frozen shoulders. She has been diagnosed with thoracic outlet syndrome. She had two, that is, I guess, bilateral -- in a manner of speaking -- surgeries for the frozen shoulders.

[3] In the four years since the first accident, she apparently has worked twice. There has been considerable, I understand, investment by way of Part 7 benefits, either through helping professionals such as occupational therapists or housekeeping assistance, some three hours a day for approximately a year, I understand, babysitting assistance, that sort of thing.

[4] Ms. Berkey is now 39 years of age. She has two children, aged 7 and 12. At the time of the first accident at least, she was married to Mr. Berkey. They are now separated. I am told by Mr. McNeney they are divorced. She is in a new relationship, but, notwithstanding that she and Mr. Berkey are divorced, apparently property issues are not resolved. I will explain why I have mentioned that aspect.

[5] The plaintiff's application is simple. The plaintiff was seeking an order that the defence produce the contact particulars for a Mr. Crawford, who was a passenger in a car driven by Mr. Ferguson, a defendant in one of the two accidents. Having drafted and sent the unfiled materials to counsel for Mr. Ferguson, and ultimately having filed the proceeding, Mr. Crawford's address was determined. So Mr. McNeney wants his costs on that application.

[6] The cross-application and the more substantive aspects are paras. 1, 2, 5, 6, 7 and 8 of the defence application filed the 21st of September. Paragraphs 3 and 4 are adjourned.

[7] What the defence is seeking is a functional capacity evaluation to proceed on November 21st at the offices of Ms. Jodi Fischer, an occupational therapist, at 1755 West Broadway. None of that is seriously problematic. What is problematic is the timing and scheduling of that. Ms. Fischer wants to commence the assessment at 8:30 in the morning, and Ms. Berkey says, for reasons I will describe in a few minutes, that she is unable to comply with that schedule.

[8] The second aspect of the defence application is for a cost of future care assessment by a Ms. Dimayuga. It is a shorter assessment, but the contentious issue there is that Ms. Dimayuga wishes to conduct her testing and assessing in Ms. Berkey's residence. That is resisted, again, for reasons I will describe.

[9] Finally, there is the issue of conditions that the plaintiff wishes to impose upon these two assessments.

[10] Taking Mr. McNeney's application first for the remaining outstanding issue, one of costs on his application to obtain Mr. Crawford's particulars, the address having been given, it is my view that the application was appropriate and possibly necessary, and he is entitled to his costs as a consequence, costs of the day to Ms. Berkey in respect of the application.

[11] I fully understand Ms. Marshall's response, and I suppose a degree of frustration, that her office was working on obtaining Mr. Crawford's particulars, but it was made difficult by the fact that Mr. Ferguson and his friend/passenger, Mr. Crawford, had parted ways: "had a falling out", I think was her phrase. In the face of a clear and absolute response by Mr. Ferguson on discovery when he was asked last July, "can you give us the particulars of Mr. Crawford?", "yes, absolutely", was the response. I may paraphrase very slightly, but I am almost verbatim. I think the plaintiff is entitled to take away from that that there will be no problem at all, and

for them to push on the matter, I cannot find anything to criticize in that. Any party that pushes the litigation, tries to get the information they need to prepare, particularly when liability is denied in this case, I think they have done right.

[12] Ms. Marshall says that liability has been denied because of the size of the claim. Fair enough, but it seems to me you either admit or you do not, you either deny or you do not, and they have denied liability. So Mr. McNeney was correct to push on the issue, and one wonders whether, had he not sent his application over, -- no criticism whatsoever of Ms. Marshall's office -- but it is the squeaky wheel that gets the grease.

[13] The other applications are by the defence, as I say. Taking Ms. Dimayuga's assessment of cost of future care, and I will deal with conditions in a few minutes, but she says, "yes, but not at my house". She says "it is an invasion of my privacy, and that privacy is sacrosanct". Many authorities cited by Mr. McNeney, all the way up to the Supreme Court of Canada, remind us that privacy is a constitutional right.

[14] Other than her sense of invasiveness or, as I say, violation of her privacy, there is little in evidence on her part as to why this should not proceed in her home. She says, "my earlier position may have been different because I lived in the family home. As part of the matrimonial proceedings we sold it, and I recently moved to temporary rental premises". It seems from what I can see in her response that it is a sense of flux or possibly an anomic sense on her part that she is less sure of her circumstances and a consequence does not want strangers coming into her home.

[15] Notwithstanding this, certainly in the previous residence lots of strangers came into the home. That may be a slight exaggeration but not by much. As Ms. Marshall has pointed out, four occupational therapists have gone to her residence. Kinesiologists have gone to her residence. I already referred to the housekeeping assistance she was given, some three hours a day. It was not that unusual for people to come to her home, mostly I guess as part of the Part 7 benefits.

[16] So conceptually I do not agree with her. I cannot see a significant difference in the circumstances. I do understand her position of people wandering into her home. There must be at some point, I suppose, limits, except that Ms. Dimayuga has given evidence as to why she wants to do this in the home. Yes, there is an alternative. They have a gym adjacent to their offices set up to have some of the – sounds like a movie set – a bed, counters, things like that. I do not doubt for a second that she is correct when she says it would be more accurate to do this in a person's home.

[17] Addressing the issue of transiency, and that is a little more pejorative than I intend, but flux on the part of Ms. Berkey, she says, "we have done it in rental premises before; it is still better". That is evidence. In weighing Ms. Berkey's sense of violation of her privacy against the evidence offered by an expert, I am inclined to accept the authorities, particularly then Master Chamberlist's reasons in *Mahoney v. Roland* where he says, basically, and I paraphrase, he is not prepared on the evidence of the expert to interrupt their process and essentially tell them how to do their job, I guess.

[18] I am of the same view in this case. I think whatever sense of violation or invasion of her privacy will be minimal, and that the proportionality requires that the matter weigh in favour of the defence because this is a potentially very significant claim, and I think that it is critical that the experts get it right or as close to right as they can. Again, I refer to Ms. Dimayuga's evidence.

[19] The second issue is the timing and scheduling of the functional capacity evaluation by Ms. Fischer. Again, Ms. Berkey is agreeable to the process. Her concern is that she is a single mom. She has two kids to look after. One is a seven year old. She walks that child to school. She says, "I need to do this, and I need to pick him up after school, which means I cannot commit to an eight-hour or even a six-hour unbroken assessment".

[20] The defence is prepared to provide transportation. They are prepared to accommodate her to an extent, but they are not prepared to accommodate that.

Ms. Fischer or her office representative says they need the eight hours. I am told that Ms. Fischer is not available for subsequent dates all the way up to the current trial date, which is in March of 2017.

[21] It is rarely referred to, and there have been times when I have not really understood its intent, but s. 33 of the *Law and Equity Act* says the following:

> 33 In questions relating to the custody and education of infants, the rules of equity prevail.

Rarely do we see that referred to even in family law, surprisingly, but it must mean something. The legislature has enshrined the concerns for children's interests in many ways and that is just one of them. I take that to be a law of general application. I pointed this out. I was very concerned about the interests of children, in this case the younger child.

[22] It is not for us to delve into the divorce file and find out, well, what are the circumstances there, where is Mr. Berkey in all of this. In fact, access to that court file is limited for very good reasons, with very limited access, certainly not without a court order for our purposes today.

[23] I take her to be a single mom doing the best she can in difficult circumstances of, firstly, injury in car accidents; secondly, in a divorce; thirdly, in having changed her children's circumstances by moving. If she needs to take her child to school, then she needs to take her child to school, and I am not prepared to interrupt that.

[24] As a consequence, I am not prepared to make the order on the terms that the defence is seeking. I will direct that she is to make herself available for assessment by Ms. Fischer on terms and conditions that take into account her parenting responsibilities. I absolutely contemplate, to be clear on the record, that as a consequence, she may well have to attend two, possibly more for all I know, assessments. That is for her to decide. That is for her to consider.

[25] Certainly the defence has posited the possibility of other caregivers looking after the child. Perhaps enlisting Mr. Berkey to assist in all of this. I leave it to

Ms. Berkey to consider those possibilities. Otherwise, indeed, she may well have to attend with an occupational therapist more than once.

[26] As far as the conditions, they are contained in the response, and they are, under Part 1, paras. 1 through 12.

[27] Paragraph 1 will go. CV will be provided.

[28] Paragraph 2 will go. That is conduct money.

[29] Paragraph 3, I am simply going to say that assessments, as I have already said, will accord with and acknowledge Ms. Berkey's child care obligations. I leave it to the parties to talk about timing.

[30] Paragraph 4 will go.

[31] I do not know what "an invasive test" means. I agree with Ms. Marshall in that respect. I will not make the condition para. 5.

[32] I will not make the condition para. 6. I accept the authorities, Madam Justice Hyslop's decision, that consent is reasonable and appropriate, lest the expert be exposed to potential allegation of assault. So condition number 6 will not be granted.

[33] Paragraph 7 will go.

[34] Paragraph 8 will go.

[35] Paragraph 9 will go on the *Stainer* basis.

[36] Paragraph 10 and 11 will go.

[37] I will not order in the circumstances para. 12. The parties may have to sort that out. That is a requirement that the defence expert be available for trial. I am told that Ms. Fischer in this case is available for the March trial date, but the defence is contemplating it may well apply for an adjournment. That may have to be decided down the road.

[38] MR. MCNENEY: I'm sorry, Your Honour. I'm sitting here and actually I'm holding my knees together for biological reasons, and I apologize, but I have you up to number 7. Number 7 will go. Number 8 will go. Number 9 will go.

[39] THE COURT: 1 will go. 2 will go. 3 will in accord with and acknowledge Ms. Berkey's parenting and child care responsibilities. 4 will go. I am not ordering 5. 6 will not go. I am not ordering 6. I have said a consent on the terms as proposed seems perfectly reasonable to me. Paragraph 7 will go. Paragraph 8 will go. Paragraph 9 will go on a *Stainer* basis. Paragraph 10 and 11 will go, and paragraph 12, as I said, will not go. I am not ordering 12 because now, with the potential for an adjournment, that is an issue, and you will have to deal with that down the road.

[40] So I am ordering conditions 1, 2, 3 on the terms I have described a couple times now. 4, 7, 8. 9 on a *Stainer* basis. 10 and 11.

[41] MR. MCNENEY: So, sorry, in terms of Your Honour's reference to the plaintiff's application having costs of the day, are those in any event of the cause?

[42] THE COURT: Yes.

[43] MR. MCNENEY: In terms of the cost of my friend's application, the plaintiff has had substantial success on the application, respectfully, so I would submit as well the costs of that application in any event of the cause.

[44] THE COURT: Ms. Marshall.

[45] MS. MARSHALL: I think success has been divided in relation to our application and each party should bear their own costs.

[46] THE COURT: I agree entirely with that. So in respect of defence application, Madam Registration, the parties will bear their own costs. Thank you.

"Master Baker"