

CANADA / JUDGMENT

Amezcua v. Norlander

2012 BCSC 719

COURT

Supreme Court of British Columbia

DECIDED

16 May 2012

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2012 BCSC 719 Amezcua v. Norlander IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Amezcua v. Norlander, 2012 BCSC 719 Date: 20120516 Docket: M051057 Registry: Vancouver Between: Justine Amezcua Plaintiff And Jennifer Norlander Defendant Docket: M001961 Registry: Vancouver Between: Justine Amezcua Plaintiff And Stephanie Taylor Defendant Before: Master D. Baker Ruling after Case Planning Conference Counsel for Plaintiff: J. L. Harbut Counsel for Defendant (Norlander) Counsel for Defendant (Taylor) T. H. Pettit P. Alma Place and Date of Hearing: Vancouver, B.C. May 4, 2012 Place and Date of Judgment: Vancouver, B.C. May 16, 2012 ISSUE

- [1] At the Case Planning Conference in these matters two questions arose and I took the unusual step of reserving on them. Broadly speaking Mr. Pettit for the defendant Norlander requests an order directing the plaintiff to deliver particulars of special damages to date. In the other action Mr. Alma seeks directions under Rule 5-3(1) that the plaintiff "...confirm which experts and expert reports it plans to rely on at trial". Each defence counsel supports the other's request.
- [2] Mr. Harbut opposes the requests. He argues that Hinkson J.'s decision in *Yousofi v. Phillips*[1] precludes the delivery of particulars and that Kloegman J., in *Galvon v. Hopkins*[2], reversing a Master's order at a CPC, concluded that an order that "...the plaintiff notify counsel for the defendant of the name of the neurologist with whom the appointment had been made..." together with ancillary or related information is beyond the jurisdiction of the Master or, indeed, any presider at a CPC.

BACKGROUND

- [3] I will not dwell on the history of these cases. It is sufficient to note that these claims arose as a result of accidents that occurred in 2004 (Norlander) and 1999 (Taylor) respectively. In the latter case the matter has gone to the Court of Appeal on the matter of adding defendants[3]. However one characterizes these proceedings, the wheels of justice have ground so slowly that at times they stopped. I think, frankly, that the chronology of the claims alone may distinguish the cases from the vast majority of personal injury claims. In any event, the matter is set for trial June 24, 2013 for nine days.

ANALYSIS

- [4] I will first deal with Mr. Pettit's request for particulars. At the CPC he requested particulars of both past wage loss and special damages. Mr. Harbut conceded that it is appropriate to provide particulars of past wage loss and agreed to do so. He opposed providing the same in respect of special damages, however, citing the reasons of Hinkson J. in *Yousofi v. Phillips*, but the only portion of the reasons he emphasized was at para. 6(c): Insofar as the past loss of earnings is concerned, this is information that can be identified and quantified and should be provided by the plaintiff to the defendant. It is not, in my view, appropriate that it be provided as particulars, but I am satisfied it should be provided in some fashion to the defendant, and I am going to direct that the plaintiff quantify his claim for past loss of earnings and provide that information to the defendant. Insofar as prospective loss of earnings is concerned, I am not satisfied that that is a matter that can be necessarily particularized, and I leave it to the defendant to pursue that through examinations for discovery. As I have mentioned, Mr. Harbut agrees in any event to provide particulars of past wage loss. In addition to the above, however, Hinkson J., in respect of special damages said at para. 6(h): These are matters that should be identified by the plaintiff for the defendant, but not as particulars of the pleadings. Mr. Pettit submits that this conclusion is clearly in error. It is, of course, hardly for me to review a Judge's decision in chambers, but there are occasions in which stare decisis need not apply. Wilson J. in *Re Hansard Spruce Mills Ltd.*[4] concluded that Judges may disagree: Therefore, to epitomize what I have already written in the Cairney case, I say this: I will only go against a judgment of another Judge of this Court if:
- (a) Subsequent decisions have affected the validity of the impugned judgment;
 - (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
 - (c) the judgment was unconsidered, a nisi prius judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority. I think that paragraphs (b) and (c) have application in this case.
- [5] With the greatest respect, I think that in the rapid fire process of chambers applications important and relevant authorities were overlooked by counsel. In particular leading authorities on pleading confirm that it is appropriate to expect a party to plead details of special damages and, if they are not given, to demand particulars. The author of *Odgers On High Court Pleading and Practice*[5] cites, as an illustration, *Hayward v. Pullinger & Partners Ltd.*[6]: But when any special damage is claimed, without sufficient detail, particulars will be ordered of the alleged damage... More recently and locally the authors of *Conduct of Civil Litigation in British Columbia*[7] comment: Special damages must explicitly be claimed and proved. And further, in relation to past wage loss: ...but the weight of the authority treats these as special damages which therefore must be specifically pleaded; the defendant is also

entitled to particulars. I cite this latter quote not in respect of wage losses per se, but for the implicit assumption that a defendant is entitled to particulars of special damages.

- [6] I cannot see, then, why a party should not be required to particularize his or her special damages to date. The same, of course, cannot be said for general damages, but the defence is not asking for that. The plaintiff will therefore give particulars of her special damages to date.
- [7] As I said above, the defendant Taylor asks for an order that the plaintiff "...confirm which experts and expert reports it plans to rely on at trial". In *Galvon v. Hopkins*, Kloege J. declined to order that a party name a neurologist consulted by the party, along with the date of the appointment, or to advise of the names of subsequent experts or the dates of their appointments. After considering several authorities, she concluded[8]: I do not see anything in Rule 5-3 governing case planning conferences that clearly, expressly, and specifically allows the presider to compel a party to provide another party with the details of any potential expert witnesses before that party has even consulted with the expert or made an election whether to call the witnesses' evidence at trial. Rule 5-3 does have clear and express provisions respecting experts: Rule 5-3(1)(k) permits the Court to direct the appointment of joint experts, to order that they consult, to limit the number of experts, to set dates for service of experts' report (i.e. other than those set by Rules 11-6(3) and (4)), or to direct what issues upon which they may be called. But none of these (other than by advancing the service date for reports) requires that a party disclose either the expert's identity, or the area of his or her expertise before serving the report.
- [8] Rule 5-3(1)(k) is not inconsistent, in my view, with the reasoning in *Galvon*. The disclosure aspects of that Rule assume that evidence has been gathered, assessed, and considered essential to a party's case. The only question remaining then is when it will be disclosed, thus Rule 5-3(1)(k)(iv), permitting service dates other than those provided by Rule 11-6. It is important and instructive to note the court's reference to "potential" expert witnesses; it seems to me that Kloege J. was concerned with protecting litigation privilege during the evidence-gathering phase, so that the party assembling his or her case is free to do so without the requirement of disclosing experts (or, I conclude, directions) that may prove fruitless and avoid adverse inferences[9].
- [9] The defendant Taylor's request, however, comes within Rule 5-3(1)(k) and does not ask the name or expertise of potential witnesses, but rather the details of the experts it will rely on at trial.
- [10] This case, as I have mentioned, has an extraordinary aspect. The first accident occurred approximately 13 years ago. Such delays sometimes occur when, for example, the plaintiff is an infant. That is not the case in this situation. The defence is justified in its frustration and perplexity in not knowing, in any reliable way and after 13 years, the nature or extent of medical injuries suffered by the plaintiff. That being the case, the plaintiff is ordered to deliver the reports of experts upon which she intends to rely at trial, no later than November

1, 2012. "D. Baker, M."

- [1] 2010 BCSC 1178 at para. 6(c)
 - [2] 2011 BCSC 1835
 - [3] 2010 BCCA 128
 - [4] (1954) B.C.J. No. 136, 4 D.L.R. 590 at para. 4
 - [5] (1991) Sweet & Maxwell, 23rd Ed.
 - [6] (1950) 1 All E.R. 581
 - [7] LexisNexis (2nd Ed.) 2007, at para. 11.8
 - [8] para. 18
 - [9] viz comments made at para. 24
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