

CANADA / JUDGMENT

Bemister v. Lindner

2021 BCSC 446

COURT

Supreme Court of British Columbia

DECIDED

21 January 2021

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2021 BCSC 446 Bemister v. Lindner IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bemister v. Lindner, 2021 BCSC 446 Date: 20210121 Docket: M170716 Registry: Vancouver Between: Kelsey Bemister Plaintiff And Paula Lindner Defendant Before: Master Bilawich Oral Reasons for Judgment re Application to Adjourn Trial In Chambers Counsel for the Plaintiff appearing by teleconference: H.T.H. Chiong Counsel for the Defendant appearing by teleconference: R.J. Bailey D.J. Winterton Place and Date of Trial/Hearing: Vancouver, B.C. January 21, 2021 Place and Date of Judgment: Vancouver, B.C. January 21, 2021

- [1] THE COURT: These are my oral reasons on the defendant's application to adjourn the trial of this action which is set for February 9, 2021. I am delivering this decision on an expedited basis due to the limited time available prior to the scheduled trial date and prior to a potential independent medical examination appointment tentatively set for January 22, 2021, in the event alternative relief sought by the defendant were to be granted. If a transcript of these reasons is requested, I reserve the right to edit it but the substance of my decision will not change.
- [2] The defendant applies for an order that:
- a) the trial currently set for February 9, 2021, and set for nine days, be adjourned to the first agreeable and available date;
 - b) alternatively, that the plaintiff be compelled to attend an independent medical examination by Dr. Eugene Okarie, on January 22, 2021;
 - c) alternatively, that the defendant be allowed to serve a forthcoming medical-legal expert report from Dr. Okarie past the 84-day deadline;
 - d) costs of the application, in any event of the cause.
- [3] This action arises from a motor vehicle accident which occurred on July 16, 2015, in Vancouver. The plaintiff filed a notice of civil claim on January 26, 2017, claiming for damage in loss arising from the accident. The plaintiff has pleaded the following particulars of her injuries:

- a) injury to the head;
 - b) injury to the neck;
 - c) injury to the upper, middle, and lower back;
 - d) injury to the buttocks and tailbone;
 - e) injury to the abdomen and pelvis;
 - f) injury to the hips and sacroiliac joints;
 - g) injury to the shoulders, arms, and legs, including numbness and tingling;
 - h) headaches;
 - i) nausea;
 - j) anxiety;
 - k) low mood;
 - l) reduced energy;
 - m) reduced concentration;
 - n) reduced sleep;
 - o) reduced coping ability; and
 - p) reduced standing and walking tolerance.
- [4] No amendments have been made to the notice of civil claim since it was originally filed.
- [5] On July 11, 2017, the defendant filed a response to civil claim denying liability for the accident. A notice of trial was filed on September 24, 2019, setting an eight-day trial commencing February 8, 2021. Based on that trial date, the corresponding deadline for service of expert reports was November 16, 2020.
- [6] The plaintiff is a teacher and is 35 years of age. It appears from the material filed that she was absent from work for a period of time following the accident, but eventually returned. There appears to be a second absence in or about 2017, around the plaintiff's second pregnancy, after which she returned to work on a full-time basis, albeit complaining of ongoing difficulties while doing so.
- [7] On October 10, 2019, the defendant examined the plaintiff for discovery. The defendant was represented by different counsel at the time. At that discovery, the plaintiff indicated that she was working full-time, she enjoyed being back at work, thought it was good for her mental health. She also stated she had not really noticed any anxiety.

- [8] On July 28, 2020, a Dr. Bentley conducted an independent medical examination, which I will refer to as an "IME" through the balance of these reasons, of the plaintiff. There was no mention of symptoms of low mood or depression in his report. The defendant argues that there was nothing from that examination for discovery or Dr. Bentley's IME to indicate a serious depressive disorder at that stage of the plaintiff's recovery.
- [9] On November 16, 2020, the 84-day deadline for service of expert reports arrived, with the plaintiff serving on the defendant several expert medical reports which disclosed that the plaintiff had recently been diagnosed with a major depressive disorder which had caused her to take an indefinite leave of absence from her work and for which she has been prescribed an antidepressant, vilazodone. The reports include: · September 3, 2020, report from Dr. Wai Yam (family doctor). This indicated that the plaintiff had disclosed low mood, that Dr. Yam had discussed with her the possibility of her taking a leave of absence from work, and that she had been prescribed an antidepressant, vilazodone. On September 15, 2020, the plaintiff had informed him that she intended to take a leave of absence from work to focus on her recovery and that he agreed with this approach. · October 28, 2020, report from Dr. Malgorzata Sudol (treating physiatrist). His report indicated that on August 17, 2020, the plaintiff had indicated that her plan was to restart full-time work teaching in September 2020. On September 14, 2020, the plaintiff indicated she had realized she was depressed, had started on an antidepressant, and was on medical leave. · October 23, 2020, report from Dr. Kathryn Fung (psychiatrist). Dr. Fung diagnosed the plaintiff as having a major depressive disorder, unspecified somatic symptoms and associated disorder caused by the accident. She opines that the plaintiff was totally disabled from working, but gave a prognosis of expected improvement in her major depressive disorder.
- [10] The defendant argues that her first notice of the plaintiff's alleged major depressive disorder and her September 2020 decision to take an indefinite leave from her work was November 16, 2020. She also argues that the notice of civil claim was not amended to plead that this new form of injury had been caused by the accident.
- [11] On December 7, 2020, and again on December 22, 2020, defendant's counsel requested a second examination for discovery of the plaintiff be scheduled in January 2021. On December 15, 2020, defendant's counsel wrote to plaintiff's counsel requesting that the trial be adjourned. On December 16, 2020, plaintiff's counsel responded, rejecting that request.
- [12] On December 30, 2020, new (current) counsel was appointed to act for the defendant.
- [13] On January 4, 2021, a trial management conference was held before Master Cameron. He ordered that the defendant's application to adjourn the trial be set for January 20, 2021, and set a schedule for exchange of application materials. His Honour also set deadlines for the exchange of witness lists, will-say statements, a document agreement, a common book of documents, a trial schedule, agreed statement of facts, chronology, and objections to expert reports prior to trial.

- [14] New counsel for the defendant argues that they have made considerable efforts to arrange an IME spot for the plaintiff with a psychiatrist. They describe efforts to secure appointments with three candidates, none of whom was able to offer an appointment in the time available before trial. Eventually an opening with a fourth candidate, Dr. Eugene Okarie, was successfully secured for January 22, 2021.
- [15] On January 12, 2021, defendant's counsel wrote to the plaintiff's counsel advising of the appointment with Dr. Okarie. On January 13, 2021, the plaintiff's counsel advised that they objected to the late IME by a psychiatrist.
- [16] Also on January 12, 2021, the defendant held a second (or continuation) of the examination for discovery of the plaintiff to explore the change in the plaintiff's circumstances. The evidence elicited included the following:
- a) the plaintiff had returned to work full-time as a teacher in September 2019 and continued working full-time until spring break 2020;
 - b) the plaintiff experienced a "point of crisis" with regard to her mental health in August 2020;
 - c) Dr. Yam (family doctor) recommended the plaintiff should not be working and prescribed an antidepressant;
 - d) the plaintiff made a formal decision to take a leave of absence from work on September 8 or 9, 2020;
 - e) the plaintiff had not yet started counselling for her major depressive disorder as recommended by her psychiatrist Dr. Fung.
- [17] The defendant argues that the major depressive disorder diagnosis is a new development and the plaintiff is still in her first stage of treatment. The available evidence has not adequately developed to the point that would allow proper evaluation at trial.
- [18] The plaintiff argues that there is adequate notice of her symptoms set out in the original notice of civil claim, from the October 2019 examination for discovery, and that the clinical records and employment records produced in the proceeding put the defendant on sufficient notice of this psychological injury issue. She says that she was not obliged to plead a formal medical diagnosis. The notice of civil claim refers to psychological injuries, including anxiety, low mood, reduced energy, reduced concentration, reduced sleep, and reduced coping ability.
- [19] The plaintiff points out several excerpts from the plaintiff's first examination for discovery held October 10, 2019, which she suggests ought to have put the defendant on notice that the plaintiff was claiming a psychological injury. These include evidence concerning her condition in 2015, 2017-2018, and 2019. I do not intend to repeat those here, but they include references to the plaintiff experiencing severe or unbearable pain in 2015 while on a medical leave after the accident, that work worsened her symptoms and that Dr. Yam had recommended medical leave at the time. In 2017-2018, a reference to the plaintiff

experiencing pain after returning to work full-time and taking early leave during a pregnancy. During 2019 time period, there are references to her condition after returning to work, including feeling exhausted mentally and emotionally, having low mood due to her physical symptoms, constant pain, and headaches. There are many more examples set out. Suffice to say that they are consistent with her having ongoing complaints and struggles following her return to work. However, they do not appear to signal a major depressive disorder of the sort diagnosed in Dr. Fung's report.

- [20] The plaintiff references excerpts from her second examination for discovery, January 12, 2021, regarding her return to work in 2019. Those are perhaps more pointed, but also benefit from hindsight.
- [21] The plaintiff also references information about her medical condition at various points in time between July 2015 and September 2020, and medical records she has produced during the litigation, arguing that those put the defendant on notice. These include references to persistent pain, low mood, anxiety, stress, sleep interruption, low energy levels, and emotional exhaustion at various times. Some of these relate to periods when she was taking leave from her work following the accident or following her return to work. None of these rise to the level of signalling that a major depressive disorder had been detected and was being treated.
- [22] The plaintiff also tendered evidence of her financial circumstances. I will not detail those here, but suffice to say they show the plaintiff has struggled financially since the accident and would be negatively impacted if the trial were to be delayed. Law - Adjournment
- [23] The defendant relies on Rules 1-3, 12-1(9), and 14-1 of the Supreme Court Civil Rules. Rule 12-1(9) provides that a court may order the adjournment of a trial.
- [24] Madam Justice Dillon summarized the factors considered on an application to adjourn a trial in *Navarro v. Doig River First Nation*, 2015 BCSC 2173 at paragraphs 18 to 21:
- [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made (*Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 at para. 13 (C.A.) (*Cal-Wood Door*)). The discretion must, of course, be exercised judicially in accordance with appropriate principles (*Dhillon v. Virk*, 2014 BCSC 745 at para. 8 (*Dhillon*)). The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant (*Sidoroff v. Joe* (1992), 1992 CanLII 1815 (BC CA), 76 B.C.L.R. (2d) 82 at paras. 8-11 (C.A.) (*Sidoroff*)). This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties (*Sidoroff* at para. 10). The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion (*Sidoroff* at para. 11; *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 at para. 36 (*Toronto-Dominion Bank*)).

- [19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (Cal-Wood Door at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (Graham)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (Graham at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (Graham at para. 12).
- [20] Other factors or considerations include (in no particular order of priority):
- the expeditious and speedy resolution of matters on their merits (Rule 1-3(1); *Sidoroff* at para. 10);
 - the reasonableness of the request (*Dhillon* at para. 16);
 - the grounds or explanation for the adjournment (*Dhillon* at para. 16; *Toronto-Dominion Bank* at para. 38);
 - the timeliness of the request (*Dhillon* at para. 16);
 - the potential prejudice to each party (*Dhillon* at paras. 16-17);
 - the right to a fair trial (*Dhillon* at para. 16);
 - the proper administration of justice (*Dhillon* at paras. 16 and 39; *Toronto-Dominion Bank* at para. 36);
 - the history of the matter, including deliberate delay or misuse of the court process (*Toronto-Dominion Bank* at para. 38); and
 - the fact of a self-represented litigant (*Toronto-Dominion Bank* at para. 39).
- [21] Securing a fair trial on the merits of the action is the ultimate goal. . . .
- [25] The defendant also refers to Master Dick's recent decision in *Gagne v. Armstrong*, 2020 BCSC 2118, which she argues has many similarities to the current application. Expeditious and speedy resolution of matters on their merits
- [26] This accident occurred on July 16, 2015. The plaintiff started the action on January 1, 2017. The length of time to bring this matter from commencement to trial appears to be appropriate, given the nature and duration of the plaintiff's complaints. This appears to be the first trial date and the first time an application to adjourn the trial has been entertained. Reasonableness of request / grounds or explanation for the adjournment

- [27] This request for adjournment is grounded in a relatively recent change in the plaintiff's status. She had taken a period of time away from her work following the accident and then returned. She took a second period of time away from work around the time of her second pregnancy, but again was able to return to work full-time, albeit with ongoing serious complaints.
- [28] The plaintiff's decision on September 8, 2020 to take an indeterminate leave from work represents a significant change in the arc of her recovery and potentially in the scope of her damage claim. The recently disclosed diagnosis of major depressive disorder, the prescribing of an antidepressant medication, and counselling likewise represent a significant development in the degree of her injury and her claim for loss. The timing of this development is unfortunate, but it is reasonable, given the nature of this new development, for the defendant to want additional time to investigate and formulate an appropriate defence.
- [29] I accept the reasons for the defendant's request to adjourn are reasonable in all the circumstances. Potential prejudice to each party / right to a fair trial / proper administration of justice
- [30] Prejudice to the parties if an adjournment is granted or not granted must be considered. Prejudice to each side must be weighed and balanced. In Navarro, supra, at paragraph 25, Madam Justice Dillon noted that non-compensable prejudice is pivotal.
- [31] The prejudice to the plaintiff if an adjournment is granted includes loss of her February 9, 2021, trial date in what will be undoubtedly a significant delay before a new trial date arrives. She has tendered evidence demonstrating that her financial circumstances have been strained since the accident and will be even more so should she have to wait a year or more for a new trial. I accept that this represents significant prejudice to her.
- [32] The plaintiff also argued that delay could adversely affect the memory of witnesses which she submitted was of even greater import, given the defendant has denied liability in the case. Some degree of delay is a feature in virtually all litigation. In any event, this point is speculative and I do not consider that it tips the balance in favour of the plaintiff.
- [33] The prejudice to the defendant if an adjournment is not granted includes inability to have a fair trial of the recently-disclosed psychological injury and related damage claim. The plaintiff's recovery arc has changed significantly from that of a person who had successfully returned to work full-time, albeit with ongoing complaints, to that of a person on an indeterminate leave from work. This is a significant development in the plaintiff's claim. The defendant is entitled to a reasonable opportunity to investigate and defend it.
- [34] I do not consider that a rushed and late-delivered IME report from Dr. Okarie constitutes a fair opportunity for the defendant to defend these new issues. When addressing the alternative argument for an IME, counsel for the plaintiff made the point that a late-delivered IME report from Dr. Okarie would also prejudice the plaintiff because she

would not have adequate time to arrange a rebuttal report. This highlights the importance of both parties having an opportunity to develop their respective cases to adequately address these issues. History of the matter / deliberate delay / misuse of court process

- [35] The plaintiff argues that the defendant should have taken immediate steps to arrange an IME after receiving the plaintiff's 84-day notice of expert reports it intended to tender at trial. Had she done so, she could have arranged a response report within the 42-day deadline. She says that the defendant chose instead to wait until mid-December 2020 before she asked for an adjournment of trial and to schedule a second examination for discovery. She also points out that on the evidence before me at this hearing, no steps were taken to schedule an IME until January 2021. She argues this delay is unreasonable and untenable.
- [36] While it is possible to suggest that things might have been handled differently, in view of the nature and apparent scope of the issues raised by this new diagnosis and the plaintiff's recently-disclosed decision to take an indeterminate leave from work, the broader public health circumstances, and the time of year, I do not consider that this delay or the decision to seek an adjournment was unreasonable.
- [37] The defendant requested an adjournment of trial by mid-December 2020, and pursued that while also changing counsel. She raised adjournment again at the trial management conference on January 4, 2021, and secured a schedule for exchange of materials and this hearing date. This application was brought forward within a reasonable time.
- [38] There are no allegations of wilful delay or misuse of court process made by either party.

Conclusion

- [39] The ultimate goal here is to secure a fair trial on the merits. I have concluded that in order to achieve a fair trial in these circumstances, it is necessary to grant an adjournment of the trial. I so order.
- [40] Costs of this application will be in the cause. "Master Bilawich"

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