
CANADA / JUDGMENT

D.S. v. J.S.

2021 BCSC 720

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Supreme Court of British Columbia

DECIDED

16 April 2021

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2021 BCSC 720 D.S. v. J.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.S. v. J.S.,

2021 BCSC 720

Date: 20210416

Docket: E191964

Registry: Vancouver

Between:

D.S.

Claimant

And

J.S.

Respondent

Before: The Honourable Mr. Justice Funt

Voir Dire Rulings - Reconsideration and Adjournment

Counsel for the Claimant, appearing via teleconference:

J.P. Lewis

The Respondent appeared on her own behalf via teleconference:

J.S.

Place and Dates of Hearing:

Vancouver, B.C.

April 7, 8, 13, 15, and 16, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2021

1. introduction

[1] The respondent applies for the following orders:

1. An order that the December 19, 2020 Psychological Assessment Report of Dr. William Koch, Ph.D., R.Psych. is admissible;
2. An order adjourning the April 2021 continuation of the trial, and re-setting the continuation to a date in June or July 2021; and
3. An order for a modified trial schedule to accommodate the respondent's post-traumatic stress disorder.

[2] The parties have two young children ages 7 and 13. In considering the respondent's application, I have been guided by the best interests of each child. Especially with the respondent's allegations of family violence, it is imperative that this action be resolved as soon as reasonably possible.

[3] I will address each of the orders sought below.

2. First order sought - Dr. Koch's December 19, 2020 report to be admitted as evidence

a. Prior Application

[4] The respondent had previously applied to have Dr. Koch's December 19, 2020 report admitted as expert evidence despite service offside the 84-day deadline. On February 2, 2021, the respondent's application was denied: D.S. v. J.S., 2021 BCSC 282.

b. Request to Reconsider

[5] The respondent says that I should reconsider my February 2, 2021 ruling for several reasons. First, as a result of the adjournment of the February 2021 scheduled hearing dates, the respondent says that the claimant has had the time to obtain an independent medical examination of her (which the respondent says she will attend). Second, in my February 2, 2021 ruling, the respondent says that I misconstrued or overlooked her financial ability to obtain an expert psychological report before trial. Third, without Dr. Koch's formal assessment, the respondent says that she did not have in her possession the opinion evidence "relating to the causation and impact" of the abuse directed to her by the claimant.

- [6] In her application, the respondent submits that the interests of justice require Dr. Koch's report to be admitted. She states:

The impact of various forms of family violence on a woman over a long period of time, and the resulting PTSD, on a victim's psychological and cognitive functioning and vocational capacity, and recommended future psychological treatment, are not matters within the experience and knowledge of a trial judge, and require expert evidence in order for the court to properly decide these aspects of the respondent's claim on their merits. A failure to admit the psychological expert evidence would be likely to result in the trier of fact drawing incorrect conclusions about how "ordinary folk" who are not suffering from any mental illness are likely to react to the stresses and strains of life, as opposed to how a woman in an abusive relationship is likely to have been affected (*R v. Lavallee*, [1990] 1 S.C.R. 852, at paras. 31-40; *R v. Mohan*, 1994 SCC 80, at paras. 25-26). Further, to reject the expert evidence in this case would have the result of essentially dismissing the majority of the respondent's damages claim without it having been heard on its merits (which would be contrary to Rule 1-3 of the Supreme Court Family Rules).

c. The Law on Reconsideration

- [7] The law on reconsideration was recently summarized by our Court of Appeal in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287 at paras. 63 to 64:
- [63] To hold that an evidentiary ruling made during a trial juridically constitutes an appealable order would be inconsistent with the long-accepted principle that it is always open to a trial judge to revisit such rulings: see *R. v. Adams*, [1995] 4 S.C.R. 707 at paras. 29-30; *R. v. Cole*, 2012 SCC 53 at para. 100, [2012] 3 S.C.R. 34. If such rulings gave rise to orders and those orders were formally entered, then the doctrine of *functus officio* would preclude reconsideration even in the face of a material change in circumstances. Accordingly, I agree with the following from the judgment of Madam Justice MacFarland in *Laudon v. Roberts*, 2009 ONCA 383, 308 D.L.R. (4th) 422, leave to appeal ref'd [2009] 3 S.C.R. viii:
- [25] There can be no question that a trial judge has full authority, during the course of a trial, to revisit rulings made earlier in the proceedings and there may be any number of reasons for so doing. In view of that jurisdiction, it is my view that rulings made intra-trial do not become final for the purposes of appeal until judgment has been entered. Such an approach is a sensible one which would preclude litigants having to adjourn trial proceedings mid-stream, as it were, to appeal particular rulings. The time-honoured practice of reserving to the conclusion of trial the appeal of various rulings made during the proceedings is sound in that it preserves court time and costs.
- [64] Indeed, the Supreme Court Civil Rules recognize that evidentiary rulings can be revisited. Rule 12-5 [Evidence and Procedure at Trial], which contains numerous provisions governing the presentation of evidence, also contains the following:

- (2) An order made under this rule concerning the mode of proving a fact or document or of tendering evidence may be revoked or varied by a subsequent order made at or before the trial.
- [8] The companion family rule is Rule 14-7(2) of the Supreme Court Family Rules [SCFR], which reads:
- (2) An order made under this rule concerning the mode of proving a fact or document or of introducing evidence may be revoked or varied by a subsequent order made at or before the trial.
- [9] As noted in my February 2, 2021 ruling, the respondent in her amended counterclaim, pleads, in part:
- 1) An order for general, special, aggravated and punitive damages, and damages for past and future wage loss for battery, sexual battery, intimidation and the intentional infliction of emotional distress stemming from:
 - a) the claimant's sexual assault of the respondent in or about 2008 or 2009;
 - b) the claimant's physical assault of the respondent in or about June or July of 2007, June of 2008, and April 13th 2016;
 - c) the claimant's threats, verbal, emotional, psychological and financial abuse of the respondent and coercive and controlling behaviour and coercive and controlling sexual behaviour throughout the parties' relationship; and
 - d) the claimant's break and enter into the respondent's residence in May of 2018.
 - 2) As a result of which the respondent has suffered:
 - a) physical pain and psychological distress;
 - b) feelings of guilt, worthlessness, embarrassment, shame and self-blame;
 - c) mental distress, anxiety, insomnia, nightmares and depression;
 - d) loss of enjoyment of life; and
 - e) such further injuries as may become known.
- [10] In her March 25, 2021 affidavit, the respondent outlines her claim for damages:
14. I understand that my damages claim is as follows:
- a. General damages as a result of the claimant's battery, sexual battery, intimidation and intentional infliction of emotional distress of me (range: \$175,000 to \$275,000 for adult sexual assault cases);

- b. Special damages: I have paid \$6,093.84 for psychological services from Dr. Swingle from June of 2017 through February of 2020, and \$1,970.00 for psychological services from Dr. Chotem from November of 2020 to present in an effort to manage and recover from my PTSD (for a total of \$8,063.82 in special damages to date);
 - c. Cost of future care: Dr. Koch opined that I would require 20 to 30 hours of CBT oriented treatment for my PTSD, as well as long-term therapy if I have to have continued interactions with the claimant, and 20 hours of treatment for depression (which I estimate at \$9,500 plus the cost of the long-term therapy);
 - d. Past wage loss: I was unable to get "back on my feet" following our separation as quickly as I otherwise would have been able to do because of the impairment I suffer from my PTSD (not to mention the fact that I was a stay-at-home mom without access to any childcare initially, and then only partial childcare). Even now, I find myself unable to work more than 4 hours per day before I can't function properly enough to work (and not consistently every day). I estimate my past wage loss for the past 5 years at over \$100,000.
 - e. Future wage loss: Dr. Koch opined that I have a partial vocational disability as a result of my depression and PTSD, and that I am at higher risk of continued disability long-term and early retirement. I estimate my future wage loss / loss of earning capacity at over \$30,000 per year for the rest of my working life.
 - f. Aggravated or punitive damages as a result of the claimant's deliberate, callous and morally-reprehensible actions, and lack of remorse. Punitive damages are required to achieve the goals of denunciation, deterrence, and punishment (\$25,000 to \$250,000 in sexual assault cases).
15. I understand that my claim for retroactive and prospective spousal support is calculated on an entirely different basis than my damages claim and amounts to only a tiny fraction of the amount of my damages claim.
- [11] As discussed during the September 2020 hearing and as noted by claimant's counsel with respect to the respondent's current application, Justice Brown, writing for the Supreme Court of Canada, in *Saadati v. Moorhead*, 2017 SCC 28, stated:
- [38] To be clear, however: while relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not required as a matter of law. Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. And, of course, it also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry. While, for the reasons I have given, the lack of a diagnosis cannot on its own be dispositive, it is something that the trier of fact can choose to weigh against evidence supporting the existence of a mental injury. [Brown J.'s emphasis.]

- [12] In short, my previous ruling to not admit Dr. Koch's report does not "essentially [dismiss] the majority of the respondent's claim without it having been heard on its merits".
- [13] Rule 13-7 of the SCFR serves to avoid surprise and to help ensure an orderly trial. As noted in my previous ruling, the respondent stated in her trial brief that an expert report was "to be obtained". The respondent did not qualify this statement that it was subject to her having sufficient funds. The respondent in her Form F8 Financial Statement states that she has borrowed \$280,000 from her parents. The parties also own a condominium townhouse, which I understand has an associated net equity of more than \$200,000.
- [14] With respect to the respondent's argument that the claimant has had the time to obtain an independent medical examination of her, Dr. Koch's report was served on the claimant on December 22, 2020, over two months after the conclusion of the first five days of trial which started on September 28, 2020. The respondent did not tell the claimant that she was seeking an expert report. The claimant's first knowledge of an expert report was on December 22, 2020.
- [15] With respect, if the Court were to accept the respondent's submission that the claimant could have obtained an independent medical examination of her, the Court would be condoning a disorderly process which Rule 13-7 is designed to prevent.
- [16] As noted, without Dr. Koch's report, the respondent's claim for damages is not essentially dismissed.
- [17] With respect to the respondent's argument that I need Dr. Koch's report in order to properly decide matters relating to the "impact of various forms of family violence over a long period of time, and the resulting PTSD, on a victim's psychological and cognitive functioning and vocational capacity and recommended future psychological treatment", our Legislature contemplated that trial judges would deal with family violence.
- [18] Under the Family Law Act, S.B.C. 2011, c. 25 [FLA], "family violence" is defined broadly. The definition reads:

"family violence" includes

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

(ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,

(iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence;

[19] Section 38 of the FLA provides that the Court must consider family violence in determining the best interests of a child. Section 38 reads:

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

(a) the nature and seriousness of the family violence;

(b) how recently the family violence occurred;

(c) the frequency of the family violence;

(d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;

(e) whether the family violence was directed toward the child;

(f) whether the child was exposed to family violence that was not directed toward the child;

(g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;

(h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;

(i) any other relevant matter.

[20] In addition to the Court's general and inherent jurisdiction, the FLA, under Part 9, provides a range of provisions designed to address family violence.

[21] In my view, the FLA also contemplates that its social context will be engaged. In Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, 5th ed. (Canada: LexisNexis, 2018), it is stated:

§19.51 Resort to judicial notice of social context facts has been increasing to permit courts to interpret legislation and legal rules, particularly in the family law area. In *Willick v. Willick*, [1994] 3 S.C.R. 670, Justice L'Heureux-Dubé pointed out that the courts must consider parliamentary or legislative intention as a basis for assessing statutory interpretation. That, in turn, requires that the courts be sensitive to the social and historical context of the legal rules as it forms an integral part of the law-making process. Additionally, social science research and socio-economic data may be of assistance to a court by illuminating the social framework in which the facts of particular case are to be decided. Justice L'Heureux-Dubé stated that courts

have taken notice of social facts in their analysis of the law in such areas where broad issues of public policy are important:

- (1) Family law: specifically, because of its prospective nature and because of the profound impact upon individuals and, more generally, public attitudes towards the institution of the family;
- (2) Charter interpretation specifically, to assist the court's contextual s. 1 analysis of a rights violation;
- (3) Human rights legislation: specifically, to understand the social environment which gave rise to the statutory provisions;
- (4) Criminal law: to debunk myths and expose stereotypes and assumptions which desensitize the law to the realities of those affected by it; to help define the requisite elements of an offence; to take notice of juries' reluctance to return directed verdicts of acquittal;
- (5) Aboriginal rights: courts have taken judicial notice of documents gathered independently for the purposes of assessing the nature and historical context of a treaty.

[Footnotes omitted.]

[22] In sum, the Court is equipped to hear and to decide fairly the respondent's claim for damages.

3. second order sought - adjournment

[23] With respect to an adjournment, the respondent submits:

4. The respondent advised the court on February 2, 2021 that she would not be available for a continuation of the trial in April, 2021, and it should not have been set for that date in the first place.
5. The factors to be considered on an adjournment application include:
 - a. the reasonableness of the request; the grounds on which the request is sought; the timeliness of the request;
 - b. the potential prejudice to the opposing parties;
 - c. the potential prejudice to the applicant if the adjournment is not granted and;
 - d. due administration of justice.
6. The respondent seeks an adjournment because: she advised the court at the outset that she would not be available in April due to the existing major life stressors she is facing (eviction, finding a new place to live, moving, the RTB hearing) exceeding her ability to manage any additional major life stressors or spare any time to begin learning how to self-represent and taking over her file.

7. The claimant would suffer no significant prejudice if this matter is adjourned to June or July, 2021, as the parties already have an interim parenting schedule, which is providing consistency and stability in the meantime, and is already greatly in excess of any role the claimant has previously played in the children's lives.
 8. The respondent would suffer significant prejudice in being unable to prepare for trial or obtain the "support person" services potentially available to her from the Battered Women Support Services or North Shore Community Resources if this matter proceeds in April 2021.
 9. The due administration of justice would be furthered by the adjournment. With the children doing reasonably well under the current schedule, and with the respondent now receiving a significantly greater portion of the child and spousal support she will likely be entitled to after judgment at trial, there is no great pressing need for the trial to resume in April, particularly at risk of the respondent being completely unable to represent herself or manage the stress of a continuation she is not ready for given her PTSD.
- [24] I will not grant an adjournment.
- [25] With the allegations of family violence, it is essential that this matter be resolved as soon as reasonably possible. I have had no evidence or allegation of physical violence directed at either of the children. That said, I am satisfied that the passage of time does not serve the psychological best interests of either child.
- [26] Where a child's parents are separating, a child will be affected by the related uncertainty. Every child wishes certainty. A child wishes to know where he or she will be living, when, and with whom. A child wishes to know what school he or she may be attending and where his or her friends will be. A child may often worry without expressing the worry. Often the worry may not be rational.
- [27] Where is family violence the child may have witnessed, the child's concerns and stresses are heightened. In short, the longer it takes for the matter to be resolved, the greater the potential for psychological harm or mental injury for the child.
- [28] It is imperative that the Court hears the evidence related to the allegations of family violence without pausing matters until June or July of this year.
- [29] I am satisfied that the respondent can put her pleaded allegations of family violence to the claimant and then when she takes the stand, she can testify as to her description of the pleaded events and behaviour.
- [30] I appreciate that the respondent wishes to have further time to prepare her counterclaim for damages. In the end, any award of damages is a monetary amount.

- [31] I find that the mental well-being of each child is best served by having this matter resolved much sooner rather than sometime later. In short, each child's mental well-being outweighs a possibly more refined computation of any monetary award under the respondent's counterclaim.
- [32] I also realize that the respondent says she has been diagnosed with Post-Traumatic Stress Disorder (PTSD), which she supports with a March 24, 2021 letter from Dr. M. Chotem, a registered psychologist.
- [33] Again, I must balance matters. Accepting, arguendo, that the respondent has PTSD, I must still consider the best interests of each child. The stress of the April continuation of the trial for the respondent is outweighed by the best interests of each of the children. First, if there is the potential for family violence affecting either child, it needs to be addressed as soon as possible. Second, the longer the resolution of this matter takes, the greater the risks to the mental well-being of each child. In this regard, the risk is heightened by the current pandemic and its affect on everyday life, including for children, school, play, friends, and fun.
4. third order sought - modified trial schedule
- [34] The Court is sensitive to the respondent's situation as a self-represented litigant presenting her evidence and challenging the claimant's evidence on very sensitive and emotional matters.
- [35] In the Court's view, it is best to proceed with the trial scheduled with full hearing days, which may be modified or tailored as the need arises.
5. conclusion
- [36] The respondent's application is dismissed.
- "Funt J."

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