

CANADA / JUDGMENT

Din v. Fraser Health Authority

2021 BCSC 1731

COURT

Supreme Court of British Columbia

DECIDED

2 July 2021

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2021 BCSC 1731 Din v. Fraser Health Authority

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Din v. Fraser Health Authority ,

2021 BCSC 1731

Date: 20210702

Docket: S211333

Registry: New Westminster

Between:

Yin Yin Hla Din, Min Aung, and Hla Shwe Din

Plaintiffs

And

Fraser Health Authority doing business as Royal Columbian Hospital,

Dr. Michaela Van Idour, Dr. Robert Sharpe, Dr. Phillip Fitzpatrick, Jane Doe,

John Doe

Defendants

Before: The Honourable Mr. Justice Giaschi

Oral Reasons for Judgment

Appearing on own behalf:

Yin Din

Counsel for Fraser Health Authority doing business as Royal Columbian Hospital:

M. Perry

Counsel for Dr. Michaela Van Idour, Dr. Robert Sharpe and Dr. Phillip Fitzpatrick:

M. Gill

Place and Date of Trial/Hearing:

New Westminster, B.C.

May 14 and July 2, 2021

Place and Date of Judgment:

New Westminster, B.C.

July 2, 2021

- [1] THE COURT: The named defendants bring two separate applications for summary dismissal of the underlying action. The applications are brought pursuant to Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. The plaintiffs are and have been throughout self-represented.
- [2] The underlying action relates to the death of Mrs. Hnin Myaing Din, the mother of the plaintiffs, on February 27, 2017, while at Royal Columbian Hospital. Mrs. Din was 90 years of age at the time of her death. She was admitted to Royal Columbian Hospital on February 23, 2017.
- [3] The notice of civil claim filed February 11, 2019, is poorly conceived and drafted. The action is brought pursuant to the provisions of the Family Compensation Act, R.S.B.C. 1996, c. 126. The notice of civil claim alleges murder, criminal negligence, battery and aggravated assault, intentional infliction of nervous shock, failure to obtain informed consent, and negligence.
- [4] I commenced the hearing of this application on May 14, 2021. After hearing the submissions of the defendants/applicants, and during the course of the submissions of the plaintiffs, I was asked to adjourn the matter to permit the plaintiffs to obtain counsel. Over the objections of the defendants, I adjourned the matter to today to permit the plaintiffs time to find counsel.
- [5] Upon the resumption of the hearing today, the plaintiffs advised they still had no counsel but that if the matter proceeds they intended to continue to look for counsel. The plaintiffs completed their submissions today.

Suitability for Summary Trial

- [6] The plaintiffs submit that this matter is not suitable for summary trial. They say it is a factually complex case, that there are issues of credibility that cannot be resolved on affidavit evidence at a summary trial, and that a full trial is needed to adequately address all of the issues.
- [7] The appropriate test for determining if a matter is appropriate for summary trial is whether the evidence is sufficient for the chambers judge to find the facts necessary to give judgment: *Barkwill v. Parchomchuk*, 2011 BCCA 207, para. 14; *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (B.C.C.A.) at 214-16.
- [8] In *Brisette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 at paras. 26 to 27, Justice Tysoe addressed the prerequisites for summary trial and the role of proportionality. He noted that the court must be able to find the facts necessary to decide the issues of fact and law, and the court must be of the opinion that it would not be unjust to decide issues.
- [26] The two prerequisites under the previous Rule 18A continue under the current Rule 9-7. The court must be able to find the facts necessary to decide the issues of fact or law and the court must be of the opinion that it would not be unjust to decide the issues. Proportionality will primarily be of importance in considering the factors relevant to the issue of whether it would be unjust to decide the matter on a summary trial application, but there may be occasions when proportionality is relevant to the issue of whether the court is able to find the facts necessary to decide the issues of fact or law (for example, the court could in an appropriate case order cross-examination on key affidavits under Rule 9-7(12) rather than dismissing the summary trial application on the basis that a conventional trial is needed).
- [27] As noted in *Inspiration Management*, the court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. This was recently reiterated in *Cory v. Cory*, 2016 BCCA 409 at para. 10: there must be documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another.
- [9] It is well established that upon an application for a summary trial, the parties are required and expected to put their best case forward. As Madam Justice Newbury emphasized in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 32, when a summary trial is brought, the parties are obliged to take every reasonable step to put themselves in the best position possible. They cannot simply insist on a full trial in the hope that something might turn up.
- [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988), 1988 CanLII 2879 (BC CA), 27 B.C.L.R. (2d) 378

(B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 1992 CanLII 1127 (BC CA), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R. 18A motion

- [10] The defendants have put their best foot forward. They have filed affidavits from Drs. Sharpe, Fitzpatrick and Van Idour. They have also filed the expert reports of Drs. Ronco and Grafstein. The plaintiffs have filed only one affidavit, that being the affidavit of Yin Yin Din. They have no expert evidence.
- [11] The failure of the plaintiffs to file expert reports must be understood in the context of what has transpired in this matter. Specifically, on December 19, 2019, more than one year before the summary trial application was filed, counsel for Drs. Sharpe, Fitzpatrick and Van Idour wrote to the plaintiffs. She strongly advised that they retain legal counsel, and referred them to various resources for self-represented litigants. She advised them that they would need to retain expert medical evidence to prove their claims. She further put them on notice that the defendants may seek a summary dismissal of the claim if expert reports were not provided. Notwithstanding being advised of the need for expert evidence and that a summary trial application could be forthcoming, the plaintiffs did not retain any experts or serve any expert reports.
- [12] The defendants did serve expert reports. Specifically, they served the expert report of Dr. Ronco on October 6, 2020, and the expert report of Dr. Grafstein on December 15, 2020.
- [13] On January 11, 2021, the plaintiffs were again reminded by counsel for Drs. Sharpe, Fitzpatrick and Van Idour that they needed to file expert reports if they wished to prove their claim. Again the plaintiffs did not retain an expert or file any reports.
- [14] On April 26 and 27, 2021, the defendants filed these applications for summary dismissal.
- [15] I am satisfied that this is an appropriate matter for summary trial. The case is not complex and any issues of credibility are irrelevant. The plaintiffs had notice of the possibility of a summary trial and of their need to file expert evidence as early as December 2019. Their failure to have expert reports is not a basis for dismissing the summary trial applications.
- [16] I am satisfied that I can find the facts necessary to determine this matter by summary trial, and I am of the opinion that it would not be unjust to decide the issues.

The Merits

- [17] Turning to the merits of the claim. The onus on this summary trial is on the plaintiffs: *Gichuru v. Pallai*, 2013 BCCA 60. The plaintiffs must prove all of the elements of their claims against the defendants. This means in relation to negligence that they must prove on a balance of probabilities that the defendants failed to meet the requisite standard of care and that as a result they caused damages to the plaintiffs.
- [18] The plaintiffs have not met the onus that is on them in respect of negligence, and have not met the onus on them in respect of the other claims, namely, battery and intentional infliction of nervous shock.
- [19] The only affidavit filed by the plaintiffs is that of Ms. Yin Yin Din. The affidavit is defective in many respects. It is argument in the guise of evidence and much of it is inadmissible. It is replete with expert opinion evidence that Ms. Din is not qualified to give. Examples include:
- a) Their mother's condition was stable when she was treated by paramedics;
 - b) Their mother's kidney was functioning normal;
 - c) Their mother could have fully recovered if she had been allowed to simply drink and eat;
 - d) The Albumen dosage administered to their mother was lethal and toxic;
 - e) The treating physicians failed to administer epinephrine, which would have saved their mother; and,
 - f) The Albumen administered caused a severe lung infection which in turn caused the mother's death.
- [20] Ms. Din is not qualified to give any of the above opinions.
- [21] The affidavit of Ms. Din also includes multiple extracts from websites, none of which are admissible as expert evidence.
- [22] The essence of the plaintiff's claim is that Mrs. Din was administered Albumen transfusions while at Royal Columbian Hospital and that she died from the side effects of the Albumen. The plaintiffs deny that Mrs. Din died as a consequence of pneumonia or her age.
- [23] The only expert reports before me are those of Drs. Ronco and Grafstein.
- [24] Dr. Grafstein comments on the care provided by Dr. Fitzpatrick. Dr. Grafstein opines as follows:
- a) Dr. Fitzpatrick met the standard of care expected of a reasonably prudent emergency physician with respect to his treatment and care of Mrs. Din;

- b) The likely cause of Mrs. Din's death was a progressive low level of oxygen in her blood due to her having pneumonia in both lungs and which ultimately affected all of her organs and caused her death; and
 - c) There was nothing Dr. Fitzpatrick did or failed to do that caused or contributed to the death of Mrs. Din.
- [25] Dr. Ronco is a specialist in critical care. He was asked to provide an opinion on the treatment provided by Drs. Sharpe and Van Idour. He opines as follows:
- a) The advanced state of Mrs. Din's illness and her age were predictive of her death during hospitalization;
 - b) The care provided by all those involved was in accordance with the standard of care and practice in British Columbia in 2017 and did not cause or contribute to her death;
 - c) The interventions of the family interfered with the delivery of optimal care to Mrs. Din. Specifically she did not receive appropriate anti-infective agents, nutritional support and pain and agitation control;
 - d) Dr. Van Idour's care and treatment of Mrs. Din was reasonable, prudent and at the level of care to be expected of an anesthesia resident in British Columbia in 2017;
 - e) Dr. Sharpe's care and treatment of Mrs. Din was reasonable, prudent and at the level of care to be expected of a critical care medicine specialist in Canada in 2017;
 - f) The recommendations for Albumen transfusions not only met the standard of care but were sound and clinically correct;
 - g) The administration of Albumen did not cause a lung reaction or contribute to Mrs. Din's death; and
 - h) The cause of Mrs. Din's death was a severe and overwhelming community acquired pneumonia and a urinary tract infection resulting in acute hypoxemic respiratory failure and multiple end organ dysfunction.
- [26] The admissible evidence before me allows of no doubt but that Mrs. Din died of pneumonia due to her advanced age. She was not murdered. She was not the victim of any type of assault. There is no negligence proven on the part of the doctors or nurses or any other hospital staff or ambulance personnel.
- [27] I appreciate that the plaintiffs want their day in court; that they want the opportunity to tell their story and make their arguments in a full trial. However, a purpose of the summary trial procedure is to resolve cases short of trial where that can be done with justness and fairness. Mrs. Din died over four years ago. Notwithstanding the passage of over four years, the plaintiffs have presented no evidence establishing any negligence or any of the other torts on the part of any of the defendants. It is appropriate that this action be dismissed, and I so order.

[28] The defendants are awarded costs.

[29] The signature of the plaintiffs on the draft order to be filed with the registry is dispensed with.

"Giaschi, J"

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