

CANADA / JUDGMENT

Ellison v. Abgrall

2020 BCSC 1063

COURT

Supreme Court of British Columbia

DECIDED

2 July 2020

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2020 BCSC 1063 Ellison v. Abgrall IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ellison v. Abgrall, 2020 BCSC 1063 Date: 20200702 Docket: M83723 Registry: Nanaimo Between: Kimberly Ellison Plaintiff And Roland Abgrall Defendant Before: The Honourable Mr. Justice Baird Oral Reasons for Judgment (Re: Adjournment Application) In Chambers Counsel for the Plaintiff, appearing by telephone: D. Kozlick Counsel for the Defendant, appearing by teleconference: L. Kohlruss Written Submissions Received: June 24, 2020 Place and Date of Judgment: Nanaimo, B.C. July 2, 2020

INTRODUCTION

- [1] THE COURT: This is an adjournment application brought by the defendant in a motor vehicle negligence action. The collision that forms its subject matter occurred on August 11, 2016. Pleadings opened on January 31, 2018 and closed on April 20, 2018. Document exchange was completed on March 7, 2019. Discoveries were conducted on March 19 and 20, 2019. The defendant filed the notice of trial on August 13, 2019. The trial is set for eight days commencing August 10, 2020. A mediation has been scheduled for July 27, 2020, a couple of weeks before trial.
- [2] The plaintiff referred to accident-related physical and psychological injuries in her pleadings. In the two and a half years thereafter she has disclosed an array of documents, and has testified on discovery, to the effect that she is unable to work and that she continues to suffer from not insignificant physical and psychological symptoms. There have been no previous applications filed in the litigation, including to oblige the plaintiff to be examined by defence experts. In fact the only order made so far in this case was a consent order requiring disclosure of police records related to the collision.
- [3] The 84-day service deadline for expert reports set out in Rule 11-6(3) passed on May 15, 2020. Before that date, the plaintiff served the defendant with reports from a psychiatrist, a functional capacity assessor, a vocational assessor, an orthopedic surgeon, a neurologist, a rheumatologist, a GP, and an economist. The defendant served a single report on the plaintiff from a physiatrist who, amongst other things, has rendered an opinion that the plaintiff is physically fit to return to her pre-accident job as a healthcare aide. THE

ADJOURNMENT APPLICATION

- [4] The defendant seeks an adjournment of the trial at this late hour because he wants to retain Dr. Colleen Quee Newell to perform an independent vocational assessment of the plaintiff, and Dr. Roy O'Shaughnessy to perform a second psychiatric evaluation of her. He claims to have been unable to do this in time because of the restrictions on everyday life and business activities caused by the onset of the Covid-19 pandemic. REMARKS
- [5] In my view, there is no justifiable basis for an adjournment. It was already mid-March when the defendant notified the plaintiff that he wanted her to submit to evaluation by Dr. Quee Newell. The plaintiff did not agree to this, apparently, and I note that no application was brought under R. 7-6(2) compelling her to do so, even though this court has been open throughout the pandemic for urgent applications. In any event, probably in an effort to ensure that the trial schedule stayed on track, the plaintiff subsequently offered the alternative of an online consultation with Dr. Quee Newell. The defendant rejected this suggestion for reasons that I find unpersuasive.
- [6] I see no compelling reason why a vocational assessment could not easily have been conducted by Skype, MSN Teams, or by some other suitable electronic medium. There is no any physical testing involved, after all, and in my view an exchange of relevant documentation followed by a virtual consultation would have been perfectly adequate to the task. This may not be Dr. Quee Newell's preferred method of evaluating her clients - such was the double hearsay evidence provided in the deposition of a paralegal in support of the adjournment application - but we have all had to make changes during this pandemic, and I can see no plausible reason for rejecting the plaintiff's good-faith compromise in suggesting this practical and workable approach to resolving the issue.
- [7] I would note, as well, that the plaintiff seems prepared to consent to a late response or "critique" report from Dr. Quee Newell under R. 11-6(4) as long as it is received within a reasonable time. Dr. Quee Newell often gives such rebuttal evidence to good effect in trials of this type: see, for example, *Martin v. First Truck Centre Vancouver Inc.* 2020 BCSC 240; *Macie v. DeGuzman* 2019 BCSC 1509; *Waddell v. Johal*, 2019 BCSC 1230; *Sharpe v. Koomson*, 2109 BCSC 558; *Domijan v. Jeon*, 2108 BCSC 1988; *De La Garza v. Carson*, 2018 BCSC 1858; *McColm v. Street*, 2018 BCSC 984; *Lakatos v. Lakatos*, 2017 BCSC 1990; and *J.J. v. Barton*, 2017 BCSC 1196.
- [8] Finally, as previously stated, the defendant has an expert physiatrist on tap who will be able to get across the point that the plaintiff is likely capable of working at her customary employment despite her claims to the contrary, and in any event the weight given to the vocational assessment evidence presented on the plaintiff's behalf will depend on the her own testimonial credibility, which I confidently expect will be skilfully and rigorously tested by defence counsel in cross-examination. In my view, the defendant will get a fair trial on this issue.

- [9] With respect to a second psychiatric opinion, the real problem is quite clearly that the idea of getting one did not occur to the defendant until it was too late. It has nothing at all to do with Covid-19. As I have said, the psychological dimension of the plaintiff's injury claim has been well-known to the defendant from the beginning, and yet he waited until mid-April, 2020 to first seek out the opinion of a second psychiatrist. He was promptly notified that his clinician of choice, Dr. Robertson, was too busy to get the work done before the trial, and by the time Dr. O'Shaughnessy was asked to do it, the 84 day deadline for service of completed reports had already lapsed.
- [10] Once again, the motor vehicle collision at issue in this case happened almost four years ago. It is time for the matter to be resolved. Most of the cases of this type that I deal with at trial are of roughly the same vintage. More pertinently, perhaps, the overwhelming majority of personal injury cases that are set for trial end up settling by agreement without one. My experience tells me that all an adjournment will likely achieve in this case is the needless delay of meaningful and determined settlement negotiations which, based on the probabilities, are almost certain to succeed, especially in view of the mediation scheduled two weeks before the present trial date.
- [11] If this truly is one of the small minority of cases that is destined to go to trial, which frankly I doubt, it will likely be delayed for many months if I grant an adjournment. By that time, in my view, it will have been on the court's docket for far longer than is conscionable in a case of its kind, which to my eye seems to have no unusual features. The defendant's denial of liability does not sound particularly sustainable to me on the facts as I appreciate them. The likelihood, then, is that this will be a garden variety damages assessment in a factually straightforward case. It is time to get on with it. The claimant is entitled to justice within a reasonable time, and I am satisfied that she will be prejudiced by a lengthy delay without accessing the compensation to which she claims to be entitled.
- [12] In *R. v. Jordan*, 2016 SCC 27, the Supreme Court of Canada referred to a "culture of complacency" in the conduct of criminal trials which, in my view, is an accusation that might just as aptly be leveled at our civil justice system. The Rules of Court comprise the only means devised to move matters along and guarantee the just, orderly, expeditious, and proportionate determination of civil disputes. The plaintiff has complied with these rules throughout this litigation. The defendant, meanwhile, has had ample opportunity to develop his case, and a lack of diligence is the culprit if he feels that he has not done it. The plaintiff should not be required to wait for many additional months as a consequence of this.

SUMMARY/DISPOSITION

- [13] In short, for the reasons stated, an adjournment would be unfair to the plaintiff and contrary to the interests of justice. To order one would compromise the reputation of the judicial system by failing to uphold the overall objective of the Rules of Court, especially R. 1-3, as in my view the present application is based solely on the defendant's failure to take timely and obvious steps to requisition the proposed evidence for a trial that he himself scheduled nearly a year ago.
- [14] The application is dismissed. The plaintiff will have her costs on Scale B in any event of the cause. "Baird J."
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