

CANADA / JUDGMENT

Hanson-Tasker v. Dr. D. Brian Ewart

2020 BCSC 1653

COURT

Supreme Court of British Columbia

DECIDED

9 September 2020

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2020 BCSC 1653 Hanson-Tasker v. Dr. D. Brian Ewart

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hanson-Tasker v. Dr. D. Brian Ewart,

2020 BCSC 1653

Date: 20200909

Docket: S162160

Registry: Vancouver

Between:

Kyrcee Hanson-Tasker

Plaintiff

And

Dr. D. Brian Ewart, Dr. Sara Jan Pegg, Dr. Sheila Ewart,

Northern Health Authority, Nurses Jane Doe #1-3 and

Her Majesty the Queen in Right of the Province of British Columbia

Defendants

And

Nadine Dray

Third Party

Before: The Honourable Mr. Justice G.C. Weatherill

On appeal from: A decision of the Master of the Supreme Court of British Columbia [Hanson-Tasker v. Dr. D. Brian Ewart (January 16, 2020), Vancouver S162160 (B.C.S.C.)]

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff, appearing by teleconference:

B.E. Webster-Evans

Counsel for Defendants, Dr. B. Brian Ewart,

Dr. Sara Jan Pegg, and Dr. Sheila Ewart, appearing by teleconference:

J. Morris

Counsel for the Defendant, Northern Health Authority, appearing by teleconference:

N. McKnight

Counsel for the Defendant, Her Majesty the Queen in Right of the Province of British Columbia, appearing by teleconference:

L. Lee

Third Party, Nardine Dray:

No appearance at this hearing

Place and Date of Hearing:

Vancouver, B.C.

September 9, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 9, 2020

[1] THE COURT: This is a complex medical malpractice action involving a claim by the plaintiff that she suffered severe injuries, including a brain injury, deafness, and cerebral palsy in the days following her birth in July 1996 as a result of the negligence of various defendants.

Introduction

[2] The action was commenced by the plaintiff's mother in March 2016. The trial was scheduled to commence on February 3, 2020 for six weeks.

- [3] In preparation for trial, the plaintiff served, including responsive reports, 25 separate expert reports relating to the issues of standard of care, causation, and damages. Collectively, the defendants have served 29 expert reports, including responsive reports.
- [4] Approximately one month prior to the scheduled trial, counsel for the plaintiff learned for the first time that one of the plaintiff's experts, a neuropsychologist named Dr. Joschko, had become ill, had relinquished his medical licence and was no longer able to be a witness at trial. The plaintiff immediately sought an adjournment of the trial on the basis that she required an opportunity to obtain the opinion of another neuropsychologist expert on the issue of damages.
- [5] The defendants, in their respective responses to the application, acknowledged that an adjournment of the trial was necessary but took the position that, as a condition of the adjournment, the plaintiff should be precluded from serving any further expert reports except on the issue of damages.
- [6] The adjournment application was heard by Master Vos on January 16, 2020. The adjournment was granted. In doing so, Master Vos determined that, because all of the parties had indicated they were ready to proceed to trial and had exchanged their respective experts reports and responding reports on the issues of standard of care and causation, the condition sought by the defendants for an adjournment was a fair one, as long as it applied to all of the parties, not just the plaintiff. Accordingly, Master Vos ordered that:

As a condition of the adjournment, no additional reports are to be served by any party from existing experts on standard of care or causation issues, unless the additional report(s) are consented to by all parties or permitted by court order.

("Condition One")

- [7] A new trial date commencing in January 2022 has been secured.
- [8] The plaintiff now appeals from Master Vos' order made regarding Condition One on the basis that he "erred" and was "clearly wrong" in imposing a condition on the adjournment that limits the plaintiff's ability to call expert evidence at a future trial for reasons that were unconnected to the need for the adjournment and without having conducted any analysis of whether the condition imposed was appropriate.
- [9] For their part, the defendants also appeal from Master Vos' refusal to order that the plaintiff be precluded from serving any expert report from a new expert other than a new neuropsychologist ("Condition Two") on the basis that such refusal was inconsistent with his ruling which resulted in Condition One.

Standard of Review

- [10] Regarding the standard of review, the parties are in agreement that because the order regarding Condition One was discretionary, the standard of review that must be applied is the "clearly wrong" standard.
- [11] The parties are also in agreement that the error allegedly made by Master Vos' refusal to order Condition Two is an error of law and that the standard of review is that of "correctness".

Analysis

The Plaintiff's Appeal

- [12] Rule 13-1(19) of the Supreme Court Civil Rules provides that the court may make an order on terms and conditions and give directions it considers will further the object of the rules.
- [13] The object of the rules is to secure the just, speedy, and inexpensive determination of every proceeding on its merits by conducting the proceeding in ways that are proportionate to the amount involved, the importance of the issues in dispute, and the complexity of the proceeding.
- [14] There is no question that the issues of standard of care and causation are of critical importance to the plaintiff in this case. However, the alleged misconduct in this case took place in 1996, almost 25 years ago. All of the evidence as to standard of care and causation relates to what took place at that time. I am satisfied that there is a high degree of probability that all of the evidence that exists relating to those issues has been investigated at length and has been considered by the parties' respective standard of care and causation experts. There is no evidence or even a suggestion that additional expert evidence is or may be required, other than the proposition by plaintiff's counsel that science may change between now and the date of trial.
- [15] The plaintiff advised Master Vos at the hearing of the adjournment application that she was ready to proceed to trial but for the sudden and unexpected inability of her damages expert to be a witness. All defendants advised that they, too, were ready to proceed. These factors were plainly at the forefront of Master Vos' mind when he made the order he did in respect of Condition One, applying it equally to all parties.
- [16] It is notable that no party is precluded from modifying or supplementing the opinion(s) of an existing expert on standard of care or causation--only that there will be a gatekeeping function in place to ensure that the additional expert evidence is relevant and necessary to the interests of justice. For example, if science changes.

- [17] If anything new arises between now and the new trial date in 2022 such that the reports of the causation and standard of care experts require modification or supplement, the party seeking the modification and/or supplement may seek an order to that effect if the parties are unable to agree. Undoubtedly, the judge hearing the application will have to be convinced that a sufficiently compelling reason for the additional expert report(s) exists.
- [18] Master Vos had a wide discretion to make the order he did. The proportionality option of the Rules is a vital prerequisite to an efficient and an effective justice system. The adjournment of the trial was sought by the plaintiff solely on the basis that it was necessary for her to obtain a further expert report from a new neuropsychologist on the issue of damages. There was no suggestion on the part of the plaintiff that additional opinion evidence regarding either standard of care or causation was necessary. In my view, Master Vos' order plainly recognized the proportionality objective in this case.
- [19] I am not persuaded that Master Vos' order, which was limited in its scope and applies equally to all parties, was "clearly wrong". The appeal is dismissed.

The Defendants' Appeal

[20] In his reasons for judgment, Master Vos stated at paras. 2 and 3:

[2] The first condition sought by the defendants is:

the plaintiff shall serve no reports from new experts, except for a report from a new neuropsychologist expert retained after the date of the adjournment, or with the consent of the parties or by court order.

- [3] The usual practice is that if a trial is adjourned, the parties can retain new experts and obtain additional expert reports for the eventual trial. There may be a significant delay between now and the new trial date for this matter. The plaintiff's circumstances may change during that period, requiring additional expert evidence. This condition is not granted.
- [21] The defendants submit that this determination by Master Vos is inconsistent in that the refusal to impose a condition because "the plaintiff's circumstances may change during that period" cannot be reconciled with Condition One. The defendants submit that Master Vos failed to consistently apply his own findings and therefore erred in the following respects:
- 1) he failed to address the distinction between experts on liability, namely causation and standard of care, and damages;
 - 2) he identified no rationale or justification for allowing a party to serve an opinion on standard of care and/or causation from a new expert but not from an existing expert; and
 - 3) it is plain from the transcript of the proceedings before Master Vos that his intention was to limit any further expert reports being served by the parties in respect of the issues of standard of care and causation other than as agreed by the parties or as ordered by a court.

[22] In particular, at page 23, lines 23 to 29 of the transcript of the proceedings, Master Vos stated as follows:

And it would -- and the reason I am thinking about making that order is because that will help you going forward to schedule your trial and work towards the new trial date. Everybody will know what they have to deal with on causation and standard of care, that that is already worked out and prepared.

[23] Counsel for the plaintiff conceded during her submissions that there is an inconsistency in Master Vos' decision in this respect.

[24] Where a decision-maker's reasons are internally inconsistent, that inconsistency can constitute an error of law.

[25] In *Enbridge Gas Distribution Inc. v. Ontario Energy Board*, 2006 CanLII 10734 (ON CA), the court stated at para. 22:

[22] Reasons are sometimes internally inconsistent and that inconsistency can demonstrate an error in law. However, the requirement that the reviewing court read reasons as a whole dictates that, where different parts of the same reasons can reasonably be read so as to maintain consistency within the reasons, that reading must be preferred over one which sends the reasons careening off in different directions and creates an error in law.

[26] In my view, having read the reasons for judgment of Master Vos in this respect, the reading of those reasons as a whole indicates that they cannot be reasonably read as to maintain consistency, again, as conceded by all counsel. Similarly, where a master commits an error in principle, such an error can be characterized as an error of law, subject to a standard of correctness.

[27] In *Cellular Baby Cell Phones Accessories Specialist Ltd. v. Fido Solutions Inc.*, 2017 BCCA 50, at para. 64, our Court of Appeal stated:

[64] The trial judge's decision regarding the potential sale of the business raises a question of mixed fact and law. It involves applying a legal standard to a set of facts. Matters of mixed fact and law lie along a spectrum. Where an error can be attributed to the application of an incorrect legal standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36.

[28] In my view, it was inconsistent and, therefore, an error of law for Master Vos to impose a term that the adjournment would be granted on the condition that the parties would serve no additional expert reports on the issues of standard of care and causation from existing experts but refused to impose such a term in respect of new experts.

- [29] Master Vos clearly intended that all parties would not be permitted to serve any new expert reports on the issue of standard of care and/or causation without the consent of the parties or an order of the court.
- [30] Equally plain, in my view, is that he intended that the right of a party to serve new expert reports be limited to the issue of damages, again, subject to agreement or court order. The appeal of the defendants is allowed.
- [31] Now, subject so any submissions counsel wish to make, my view and that there should be no order as to costs in this case.

[SUBMISSIONS ON COSTS]

- [32] THE COURT: My sense was that there was confusion, and the order itself was not quite as consistent as it perhaps could have been. I am, in the circumstances, of the view that there should be no order as to costs in this case.

"G.C. Weatherill J."

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