

CANADA / JUDGMENT

Hanson-Tasker v. Ewart

2022 BCCA 411

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2022 BCCA 411 Hanson-Tasker v. Ewart COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Hanson-Tasker v. Ewart, 2022 BCCA 411 Date: 20221122 Dockets: CA48233; CA48239 Docket: CA48233 Between: Kyrcee Hanson-Tasker Appellant (Plaintiff) And Dr. D. Brian Ewart, Dr. Sara Jane Pegg, and Dr. Sheila Ewart Respondents (Defendants) And Nadine Dray Respondent (Third Party)

- and - Docket: CA48239 Between: Dr. D. Brian Ewart, Dr. Sara Jane Pegg, and Dr. Sheila Ewart Appellants (Defendants) And Kyrcee Hanson-Tasker Respondent (Plaintiff) And Northern Health Authority and His Majesty the King in Right of the Province of British Columbia Respondents (Defendants) And Nadine Dray Respondent (Third Party) Before: The Honourable Madam Justice DeWitt-Van Oosten (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated March 16, 2022 (Hanson-Tasker v. Ewart, 2022 BCSC 432, Vancouver Docket S162160). Oral Reasons for Judgment Counsel for Kyrcee Hanson-Tasker: C.E. Hunter, K.C. C.V. van Wiltenburg Counsel for Dr. D. Brian Ewart, Dr. Sara Jane Pegg, and Dr. Sheila Ewart: J.A. Morris Place and Date of Hearing: Vancouver, British Columbia November 17, 2022 Place and Date of Judgment: Vancouver, British Columbia November 22, 2022 Summary: This appeal arises out of an action in medical negligence. The respondents brought an application for security of costs of the appeal and of the trial. HELD: applications dismissed. An order for security of costs would prevent the appellant from pursuing the appeal. In the circumstances of this case, an order for security of costs is not in the interests of justice.

[1] DEWITT-VAN OOSTEN J.A.: The respondents, Drs. Brian Ewart, Sara Pegg and Sheila Ewart, apply for security for costs in appeal file CA48233. More specifically, they seek orders that:

- a) the appellant post \$19,500 in security for costs of the appeal;
- b) the appellant post \$147,000 in security for costs of the trial;
- c) the appeal be stayed pending the posting of security; and,
- d) the respondents receive leave to apply to have the appeal dismissed as abandoned if the appellant fails to post security as required.

- [2] Although the respondents have specified the amounts of security they say is warranted in this case, they acknowledge that the Court has discretion to order substantially lesser amounts, particularly in relation to security for costs of the trial. Background Facts
- [3] This appeal arises out of a medical negligence action alleging that between the plaintiff appellant's birth on July 29, 1996, and her transport to BC Children's Hospital on August 6, 1996, she received negligent medical care and treatment from the respondent physicians. That negligence is said to have caused or contributed to brain damage and other severe injuries that resulted from dangerously high levels of bilirubin in the appellant's blood. (In simple terms, bilirubin is a yellow-coloured pigment made during the breakdown of red blood cells that passes through the liver before being excreted from the body.) Among other things, the appellant suffers from hearing impairment, dental decay, cerebral palsy and developmental delay, all of which are expected to impact her for her lifetime. She is 26 years old.
- [4] Reasons for judgment in the trial are indexed as 2022 BCSC 432.
- [5] The judge found that Dr. Pegg met the standard of care expected of a reasonably prudent physician in her assessment and treatment of the appellant. As such, there was no basis for liability against her.
- [6] The judge made contrary findings in respect of Dr. Brian Ewart and Dr. Sheila Ewart.
- [7] The judge found that Dr. Brian Ewart's clinical charting was inadequate and did not communicate sufficient information for subsequent readers. Moreover, although he examined the appellant on August 1, 1996, and described her in his notes as "icteric", he spent no more than two to three minutes with her and did not discuss the jaundice with her mother. In his examination for discovery, the doctor explained that in using the descriptor "icteric", he would have been referring to the fact that the appellant was displaying yellow in the whites of her eyes, as well as a slight tint over the whole of her skin, including her trunk and extremities. At the trial, he pulled back from this observation, saying that had the appellant actually been displaying jaundice in her trunk and extremities, he would have ordered a bilirubin test and likely initiated phototherapy.
- [8] The judge found there was "no reliable evidence" that Dr. Brian Ewart considered the need for follow-up after the observations he made on August 1, or information received about the appellant thereafter. Based on what was known to him at the time, a reasonably prudent family physician would have recognized the increased risks associated with the appellant's condition and "would have known that close monitoring of [that] condition was warranted". The judge found that Dr. Ewart should have arranged for further assessment and possible intervention, including a follow-up bilirubin test. Instead, he "did nothing" and failed to meet the standard of care expected of him.

- [9] Similar findings were made in respect of Dr. Sheila Ewart. On August 2, she received a call from a public health nurse describing the appellant as "icteric". The trial judge found that with this information in hand, a reasonably prudent family physician would have taken steps to ascertain the extent of the jaundice and whether it had worsened since birth. Dr. Sheila Ewart "did nothing", other than possibly pass the information on to Dr. Brian Ewart. She too failed to meet the standard of care expected of her.
- [10] Despite these findings, the medical negligence claims against Drs. Brian and Sheila Ewart were dismissed. The judge found the appellant did not prove that their failure to meet the requisite standard of care contributed to the debilitating injuries she sustained.
- [11] The appellant called expert opinion evidence to establish that after birth, the trajectory of the appellant's bilirubin level likely did not follow the ordinary and expected path. Instead, it rose steadily from birth in a straight, linear fashion. The expert witness, Dr. Kaplan, opined that in light of this trajectory, had the appellant's levels of bilirubin been appropriately monitored and re-tested before they reached neurotoxic levels, she likely would have been treated with phototherapy or possibly an exchange transfusion, and would not have suffered the injuries that she did.
- [12] The judge rejected the appellant's expert opinion evidence. There was evidence from at least one witness (the appellant's aunt "Shari"), that the appellant's jaundice was becoming "more obviously yellow" in the days following her birth. Photographs taken of the appellant on August 2, 3 and 5, 1996, showed her "skin colour [as] being a deep yellow shade, progressing from her head, chest, torso, and arms on August 2, to her legs by August 5". However, the judge found that, overall, the evidence surrounding observations made of the appellant's physical condition prior to midnight on August 5, 1996, was inconsistent with the theory of steadily increasing levels of bilirubin. The expert did not address this evidence in formulating his opinion or make any attempt to reconcile it with the theory of a rising, linear trajectory. From the judge's perspective, Dr. Kaplan's opinion on trajectory stood in "stark contrast" to those of other medical witnesses and was "at odds with the uncontroverted evidence [of the appellant's mother] regarding how [the appellant] had consistently presented prior to August 6".
- [13] As such, the judge found there was a "glaring hole" in the appellant's case. The factual foundation upon which Dr. Kaplan's expert opinion evidence rested had not been established. The judge found it was more likely than not that the severe anemia suffered by the appellant on August 6, 1996 was "the result of sudden oxidative or hemolytic stress" (emphasis added).
- [14] In this context, the judge was not satisfied that had either of Drs. Brian or Sarah Ewart ordered a follow-up bilirubin test prior to August 5, the appellant's injuries would have been avoided. The medical condition that caused the appellant's injuries had not yet manifested itself. The evidence he accepted showed that the appellant "did not exhibit prodrome or symptoms indicative of elevated levels of bilirubin warranting treatment until, at the

earliest, midnight on August 5, 1996". At that point, the "level of hemolysis that occurred was so extreme that it would have overwhelmed the ability of any liver to process it" (emphasis in the original).

- [15] The appellant's claim was dismissed. On Appeal
- [16] On appeal, the appellant seeks to have the dismissal set aside and judgment entered in her favour on the issue of liability. (The quantum of damages in the event of liability had been agreed upon by the parties.) Alternatively, the appellant asks for a new trial. Security for Costs - Legal Principles
- [17] Jurisdiction to order security for costs is found in s. 34(1) of the Court of Appeal Act, S.B.C. 2021, C. 6. The guiding principles are well-established.
- [18] Specific to costs of the appeal, the appellant bears the onus of showing why security is not required: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 (Chambers) at para. 9. The overriding question is whether it would be in the interests of justice to order security: *Lu v. Mao*, 2006 BCCA 560 (Chambers) at para. 6. Factors that inform the interests of justice analysis include: (a) the appellant's financial means; (b) merits of the appeal; (c) timeliness of the application; and (d) whether costs will be readily recoverable.
- [19] Security for costs of the trial are treated differently. In this scenario, the applicant bears the onus of showing that security is warranted. The applicant must show prejudice if the order is not made. In assessing the interests of justice, the court must consider the merits of the appeal and the effect of an order for security on the appellant's ability to take their appeal forward: *Creative Salmon* at para. 11.
- [20] As a general rule, this Court will not order security for costs against an appellant who has a meritorious appeal, but no financial capacity to post funds that would allow the respondent to recover some or all of their costs in the event the appeal does not succeed. However, if the appeal is "virtually without merit", security for costs may well be ordered even though an appellant is impecunious. In its practical effect, this would mean that the appeal likely does not proceed; however, a "successful [party] should not be required to respond to an unmeritorious appeal when there is no real prospect of recovery": *Creative Salmon* at para. 12. Positions of the Parties Appellant
- [21] The appellant deposes that she has never been able to work at any job for more than a few months because of her disabilities. Her income consists of disability benefits that amount to less than \$1,400 per month. She has no savings and no way to pay security for costs. If ordered to pay security, she will not be in a position to pursue her appeal. Trial transcripts have been ordered and paid for; however, the funds have been advanced by the law firm representing her.
- [22] The appellant alleges several errors by the judge, including: (a) he improperly allowed the respondents to rely on their own negligence (the failure to order tests to check the appellant's bilirubin levels), to argue against causation; (b) he misapprehended evidence

that was material to his reasoning process; (c) he accepted the respondents' expert opinion evidence on causation even though he had already rejected one or more of the assumptions underlying those opinions; (d) in his causation analysis, the judge failed to consider or give proper effect to evidence that the appellant's skin was becoming increasingly yellow over time; and (e) failed to consider that had the respondents complied with their duty of care, it would have included the ongoing monitoring of bilirubin levels. Respondents

- [23] The respondents say the appeal lacks merit. This was a fact-intensive, five-week trial and the judge made concrete findings of fact about the circumstances surrounding the appellant's physical condition at the material time. These findings are subject to a deferential standard of review and this Court is unlikely to interfere with them. The respondents say it was reasonably open to the judge to reject the evidence of Dr. Kaplan, and to find that his theory of steadily increasing bilirubin levels was contradicted by the observations made of the appellant, including by her mother, who was caring for her day-by-day. The judge accepted these observations as true. Dr. Kaplan was the expert most relied upon by the appellant to establish causation. Once his theory was rejected because it was not sufficiently supported by an evidentiary foundation, there was nothing from which the judge could reasonably find that further tests ordered by Dr. Brian and Dr. Sheila Ewart, or other forms of close scrutiny, would have detected an abnormal bilirubin trajectory requiring intervention.
- [24] The respondents say that the inability to successfully challenge the judge's findings of fact means that allowing the appeal to proceed without security would cause undue financial prejudice to them and squander funds that could otherwise be used to pay their litigation expenses in the trial court. From their perspective, the recoverability of costs is unlikely in this case, both on appeal and from the trial. The appellant's income is exempt from attachment, execution or seizure. She did not obtain after-the-event insurance. She has no exigible assets in British Columbia. In this context, to add to the respondents' expenses by forcing them to respond to an unmeritorious appeal is unfair. Discussion
- [25] I accept that this will not be an easy appeal for the appellant, given the judge's assessment of the evidence and his findings of fact. This Court will not interfere with findings of fact in the absence of palpable and overriding error. The judge was entitled to accept all, some or none of the expert opinion evidence adduced at the trial. It was for him, with the advantage of hearing from the witnesses, to grapple with the differences between the expert opinions and to decide which of those opinions found evidentiary support in the record, considered as a whole.
- [26] However, on my reading of the application materials, I cannot say there is "virtually no merit" to the appeal.
- [27] It is not necessary, for present purposes, to address each of the appellant's proposed grounds of appeal. It is sufficient, in my view, to focus on one of them, namely, that in finding the appellant did not prove causation, the judge erred by failing to consider or apply what has been referred to by counsel as the "Ghiassi principle". This principle holds that

where a gap in the evidence surrounding causation is the product of a defendant's negligence, the defendant should not be permitted to rely upon the gap in defending the action. See, for example: *Ghiassi v. Singh*, 2018 ONCA 764 at para. 29; *Benhaim v. St-Germain*, 2016 SCC 48; *Goodwin v. Olupona*, 2013 ONCA 259 at paras. 72-74; and *B.S.A. Investors Ltd. v. DSB*, 2007 BCCA 94.

- [28] I understand that the appellant advanced this principle at the trial and there was argument about its application. The judge refers to *Ghiassi* in his reasons for judgment, but only with respect to the standard of care expected of a nurse (at para. 220), and for the principle that in a delayed treatment case, the negligence of an additional defendant does not allow the originally negligent party to escape liability (at para. 266). It is unclear to me whether he considered *Ghiassi* specific to the issue of causation, or in any meaningful way.
- [29] The appellant says a proper consideration of this principle realistically could have affected the outcome in this case. As I understand it, she sought to argue at the trial that in advancing her claim, she was not able to establish her actual levels of bilirubin between August 1 and August 6, 1996, or the fact that they were steadily rising consistent with Dr. Kaplan's opinion, because the respondents were in charge of her professional care and did not arrange for proper follow-up assessment or tests. The judge found that the failure to do so amounted to a breach of the standard of care expected of them. He made this finding on the basis that an "increased risk of kernicterus" would have been readily apparent from observations made of the appellant as early as August 1.
- [30] In reaching this conclusion, the judge accepted the evidence of Dr. Feinstadt (at para. 243), who testified that given the appellant's pre-term birth and the likelihood that her "bilirubin was probably rising", on learning that she was still jaundiced as at August 2, both Dr. Brian Ewart and Dr. Sheila Ewart "should have been aware [that] she was in the "high risk zone" of kernicterus and intervention was required", including daily testing of the appellant's bilirubin level. Had that testing been done, it would have provided evidence of whether the appellant's bilirubin levels were holding steady, decreasing over time, or rising in a manner that was supportive of Dr. Kaplan's opinion.
- [31] The respondents say the failure to mention the *Ghiassi* principle does not mean the judge did not consider it. Reasons for judgment are to be read as a whole and in the context of the record and the live issues at trial. The respondents also say that in subsequent jurisprudence, the Ontario Court of Appeal has held that the principle does not apply in cases such as this one, where both parties adduce evidence on the issue of causation. See *Hacopian-Armen Estate v. Mahmoud*, 2021 ONCA 545 at paras. 92-94. (I note, in respect of the latter case, that the discussion of *Ghiassi* appears to be obiter.)

- [32] The appellant has principled arguments to make on this issue, including the proper scope of the principle as it might apply in a case such as this, its relevance to the judge's analysis, the application of the principle to the evidence, and its potential legal effect. I cannot say those arguments are doomed to fail given the nature of the breach found to exist here, and its timing in relation to the acute event that resulted in the appellant's re-hospitalization on August 6, 1996.
- [33] I accept, for the reasons provided by the respondents, that if they succeed in the appeal, they will have difficulty in recovering costs from the appellant given her minimal income and non-exigible assets. This is, no doubt, an important factor for consideration in the security analysis. As the respondents have emphasized, there is already a substantial amount of costs owing from the trial (approximately \$147,000 in unassessed costs).
- [34] Although it has taken some time for the security for costs application to be heard, due to scheduling conundrums and changes in counsel, it has not been argued before me that the application has not been timely. The appellant was given notice of the respondents' intention to apply for security within two weeks of the notice of appeal having been filed.
- [35] However, to order security for costs of the appeal would effectively preclude the appellant from challenging the trial judgment and seeking a remedy for profoundly debilitating injuries in the face of clear findings that as an infant, she was not provided with the level of care she was entitled to. On balance, and in the particular circumstances of this case, I am satisfied that an order for security for costs of the appeal is not in the interests of justice.
- [36] In this sense, the matter before me is not unlike *Crouch (Guardian ad litem of) v. B.C. Women's Hospital & Health Centre*, 2002 BCCA 447 (Chambers). In that case, a judge dismissed the infant plaintiff's claim for medical negligence. The judge found "no evidence of a breach of the standard of care or any evidence of causation" (at para. 2). The plaintiff's family was impecunious. A law firm advanced the funds necessary to pay for transcripts. The proposed grounds of appeal raised errors of fact, which would be subject to a deferential standard of review. As a result, the appeal "may not have much chance of succeeding" (at para. 9). Nonetheless, Justice Rowles declined to order security for costs of the appeal because to do so "would likely deprive the appellants of the right to appeal".
- [37] I have reached the same conclusion in this case, in which there have been findings of a breach of the standard of care, and the proposed grounds of appeal are not restricted to the judge's findings of fact. Accordingly, I dismiss the application for security for costs of the appeal.
- [38] Security for trial costs are ordered less readily than security for costs of an appeal. The respondents bear the onus on this aspect of their application. For substantially the same reasons I declined to grant the first requested order, I do so here as well. Additional Application

- [39] The respondents have also filed an appeal from the trial judgment: CA48239. Their appeal is conditional upon the appellant succeeding in hers. CA48239 is also before me and, in that file, the respondents seek these orders:
- a) If CA48233 is allowed, orders made by the trial judge on March 16, 2022 dismissing the third party claim against Nadine Dray be set aside and judgment entered against Ms. Dray, with costs.
 - b) In the alternative, if CA48233 is allowed, the dismissal of the third-party claim be set aside and the matter remitted to trial, with costs.
- [40] The respondents ask that their appeal be stayed pending this Court's resolution of CA48233. Ms. Dray consents to a stay. The appellant takes no position. Section 33(1) of the Court of Appeal Act allows me to impose a stay, including pending the occurrence of a certain event: *Hollander v. Nelson*, 2013 BCCA 83 (Chambers) at paras. 18-21.
- [41] I grant the requested order on the basis that what has been proposed by the respondents makes good sense in light of the conditional nature of their appeal, the efficient use of resources (both judicial and by the parties), and it avoids bringing the third party into the proceedings unless and until it becomes necessary to do so. Ms. Dray is the appellant's mother.
- [42] Once judgment has been released in CA48233, the stay of the second appeal will be deemed to be at an end. At that point, the parties should expeditiously arrange for a case management conference on CA48239 for consideration of next steps, including possibly, the extent to which additional material may (or may not) be necessary for a hearing of CA48239, the setting of filing deadlines, and whether the second, but related appeal should be scheduled before the same division that heard and resolved CA48233.

Disposition

- [43] For the reasons provided, I dismiss the respondents' application for security for costs of the appeal and of the trial.
- [44] I also stay appeal file CA48239 pending this Court's release of judgment in CA48233. "The Honourable Madam Justice DeWitt-Van Oosten"

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