
CANADA / JUDGMENT

Kenny v. Bateman

2016 BCSC 863

COURT

Supreme Court of British Columbia

DECIDED

3 May 2016

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2016 BCSC 863 Kenny v. Bateman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kenny v. Bateman,

2016 BCSC 863

Date: 20160503

Docket: M138077

Registry: New Westminster

Between:

Marjorie A. Kenny

Plaintiff

And

Jayna Anne Bateman, Kathryn Laverne Manning,

Darrell Manning and Lawrence Robert Anklewich

Defendants

Before: Master Caldwell

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

R. McMullan

Counsel for the Defendant Bateman:

No one appearing for the Defendants Anklewich and Manning

E. Clavier

Place and Date of Hearing:

New Westminster, B.C.

April 28, 2016

Place and Date of Judgment:

New Westminster, B.C.

May 3, 2016

- [1] THE COURT: The application that I heard last Thursday was brought by the defence to have the claimant attend for a neuropsychological assessment by Dr. Lysak on May 5 and 6, which, if my numbers are right, are Thursday and Friday of this week. That is opposed by the claimant.
- [2] The background information, basically put in a nutshell, seems to be that the claimant, who was in her early 60s in 2010, was a worker with the Ministry of Children and Family Development. She was unfortunate enough to have been in two motor vehicle accidents in 2010, one in January and one in July. She has, as I understand, not worked since the accidents and it is unlikely that she will be, according to her evidence, in a position to return to gainful employment. I also understand that it was and remains her position that she would have worked until the time of retirement and would have continued to work as a contractor consulting person through the Ministry of Children and Families or some related Ministry subsequent to her retirement and accordingly the claim is reasonably large and involves a significant aspect of loss of income.
- [3] I heard extensive arguments last Thursday and had an opportunity to review the matter. There are a large number of medical and other such experts who have become involved in this case.
- [4] On the claimant's side of the ledger, and not all of these are people who have submitted expert reports for purposes of the litigation, but many of them are and I will try and identify those, but others are treating individuals.
- [5] We have a physiotherapist by the name of Priest; a general practitioner, Dr. Borg (phonetic); a psychologist, Dr. Young; and a treating psychiatrist, Dr. Mistry. There is also a treater, Dr. Gandhi (phonetic) I believe, although I could not in my review put my finger on exactly where they fit, but I do have notes of a Dr. Gandhi. There is another psychiatrist who has submitted reports with respect to this litigation, that is, Dr. Anderson, again on the plaintiff's side of the ledger. Those reports are dated June 2010, February 2012, March 2013 and

December 2013. There is a physiatrist, Dr. Travlos, with reports dated September 2010, January 2012, and December 2012. There is an otolaryngologist, otherwise known as an E.N.T., Dr. Longridge, with reports dated March 2011 and June 2011; a functional evaluation report of May 2013, of Louise Craig (phonetic), occupational medicine reports of Dr. Han (phonetic), dated June 2013 and December 2013; occupational therapist Kim Gibson's reports of May 2014 and February 2015.

- [6] The defence has had a psychiatric medical examination by Dr. Russell who tendered a report of May 2013. It appears, unless people tell me differently, that all of these reports have been exchanged between the parties and have not been held subject to the 84-day deadline. As the reports are generated they appear to be exchanged which is, in my view, always good for purposes of knowing where one stands and knowing the case one has to deal with and probably improves the situation in terms of negotiations and discussion.
- [7] As I said, at the discovery of the plaintiff in January 2016, she indicated that she would have kept working past the age of 65 but has been unable to work and cannot continue to work because of cognitive disability.
- [8] The defence, in a nutshell again, says that a neuropsychological report will assist the opinions that have already been provided by the psychiatrists, among other people, and points to the fact that there is a method of objective testing of cognitive function, one of the problems that the plaintiff complains about. By administering a variety of tests and comparing the results of those tests to populational averages much like doing an LSAT and comparing the results of that to other individuals who take the test.
- [9] The question comes down to what is, or is there, an overlap between the psychiatrist, Dr. Anderson, and more particularly Dr. Russell, who has already done an examination for the defence and provided a report, and the neuropsych.
- [10] The claimant presses upon me that this is nothing, but in his words, bootstrapping, that the report of Dr. Russell is as good a report as the defence can hope to get, that it stands on its own two feet, and that a neuropsych is basically just another angle at the same kind of psychiatric testing, which as I say again, will simply bootstrap or reinforce the report of Dr. Russell so that there are two voices singing in harmony the same basic song.
- [11] The defence puts a different take on it. They say that no, this is an entirely different approach. The psychiatrist has examined this individual. There is a difference of opinion between the plaintiff's psychiatrists and the defence psychiatrist, the plaintiff's psychiatrists finding that she suffers from psychiatric conditions, the defence psychiatrist basically saying that she is a malingerer and is manufacturing the symptoms. Many of the other plaintiff's doctors indicate that there really is not much, if anything, problematic physically with the plaintiff and that all of her difficulties seem to be psychiatric in nature.

- [12] The defence says that there will be the battle of the two psychiatrists but that a neuropsychological exam will give some objective assessment from a slightly different take or different angle to the claimant's concerns.
- [13] The tests are not really disputed. I have to consider if this is the first examination. If I determine that it is a first examination in this field, then the hurdle for the defence is not overly high. We are looking at trying to level the playing field without playing matchy-matchy for experts. If it is a second exam in the same or significantly related area, then the hurdle is higher. It includes questions such as, is there new information that the first expert, in this case Dr. Russell, did not or could not reasonably have had? Is the situation significantly changed? Is the aim to provide a level playing field or is it to allow one more opportunity as I say to bolster the already existing opinion? Sometimes the passage of time is an important consideration, not merely because of the passage of time but because of the difference or the material changes that can occur.
- [14] So that is the first test I have to look at. Is it a first or is it a second? Are these different areas? Frequently it is not clearly an on all fours duplication. It is not a situation frequently where we have one orthopod and we want another orthopod, or we have one physiatrist, we want another physiatrist. It is frequently we have an orthopod and we would like a physiatrist, or we have an orthopod and we would like a neurologist, or we have a neurologist and we would like a rheumatologist.
- [15] There are overlaps, but there are also distinct areas of difference in all of those. Sometimes because of the leaning and the specialities, there is too much of an overlap and they are disallowed. Sometimes there is not, and each of those specialists is taking on their own sphere of enquiry and they are allowed.
- [16] Here, it is a psychiatrist and a neuropsychologist. I have reviewed in here some of the differences that the neuropsychologist explains is the case between neuropsych and psychiatry. It is clear that they have a different approach. They come at the problem from different angles and the neuropsychologist does more in terms of objective testing and as I say comparing against a known population.
- [17] Interestingly, of the several psychiatrists that are involved, there is a common thread. The claimant's psychiatrist, Dr. Mistry, suggests that it would be beneficial to have a neuropsych exam to assist with moving forward. Dr. Anderson, the psychiatrist of the plaintiff that has provided four medical-legal reports, says in at least two of them, the June 2010 and February 2012 reports, that I think it is fair to say he contemplates a neuropsych or indicates it would be beneficial. Dr. Gandhi, I believe, also suggests that a neuropsych would be of assistance. The defence expert, Dr. Russell, clearly recommends in light of his findings that a neuropsych would be of assistance.

- [18] There is some overlap, but it is clear that all of the psychiatrists that have looked at this situation think that neuropsychological reports or investigation would be important to assist the parties, and I think the Court, in understanding better what is happening here.
- [19] There is sufficient difference in the two approaches that I take on the first question to be a request for a first independent medical examination or defence medical examination. On that basis, clearly the hurdle is met, or is clear, and I would order the report or the attendance.
- [20] Even if I am wrong on that and there is greater overlap between psychiatric examinations and opinion and those of a neuropsychologist, I am convinced that on the basis of the comments made by all of the psychiatrists involved here, that they would all view a neuropsychological exam to be of assistance to them. I would take that to mean it would also be of assistance to the Court and it may also be of assistance to both of the parties in cross-examining the other's experts because it would provide further information with respect to what is actually going here on a more objective basis.
- [21] I also have checked on the trial date. The trial is not until the Fall of next year and accordingly we are not in a situation where ordering the attendance of the claimant for these examinations is going to prejudice the trial date. Were this brought at a later date much closer to trial, the outcome might be different because at that point I would be weighing off potential loss of the trial date, but I am satisfied here that we are far enough ahead and that is not a concern that I need to spend much time on.
- [22] The order will go as sought that the claimant attend. There is no dispute about the terms. The standard *Stainer v. Plaza* are the kind of terms that are broached. The only disagreement was whether the testing would occur on one or two days. I am with Mr. McMullan that I would like it to be shorter rather than longer, but I am also very aware of the fact that as one gets older, one tires a little more quickly and I am hesitant to force the plaintiff to continue to attend beyond four or five hours to what may be a six- or seven-hour test. I frankly think it would be a benefit to her to allow for the testing to occur over two days. If they can accomplish it in one day and the claimant is content to stay for that to happen, I think efforts should be made to clean it up in one day so she does not have to come back, but I am allowing for the second day because I know that people in their fifties can get tired after four or five hours. It is something that certainly people in their mid-sixties should be given at least as much deference. As I have already said, if they can accomplish it in one day, let us do it, but if they need to come back and give her a rest and come back a second day, the order will go to cover both days.
- [23] As to costs?

[SUBMISSIONS RE COSTS]

- [24] THE COURT: Well, I expect that as this was closer to a court trial and there may already be these things in the works, that there may be offers to settle and there may be significant argument about costs and all the rest of it at trial, I think the appropriate order here is costs to the defence in the cause. So if in the overall issues and there is not going to be a liability issue, but it may sharpen the pencils in terms of offers to settle out there. If in the overall costs situation the defence proves to be successful then they will have costs for today. All right?
- [25] MR. McMULLAN: Just one other matter just so we are clear on the order, Your Honour, the standard Stainer v. Plaza conditions -
- [26] THE COURT: But your friend did not have any problems with the other terms. It was just the two days.
- [27] MR. McMULLAN: Right. Then the last item is that the plaintiff has been treated for driving anxiety and was made aware - obviously aware that she may have to attend and she has asked that she be allowed to go by taxi instead of having of course to drive herself into Vancouver so the plaintiff would be seeking return taxi fare for both - if both days are required.
- [28] THE COURT: That sounds to me rather small potatoes and -
- [29] MR. CLAVIER: I don't have any objection to that, Your Honour, the only thing is I don't know whether the examination being so close whether we would be in a position to get the taxi fare prior to the IME. I would ask that we recompensate her on (indiscernible)
- [30] THE COURT: If you can do it, great, otherwise she will get it back.
- [31] MR. McMULLAN: Thank you, Your Honour.

Master Caldwell

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