

CANADA / JUDGMENT

Mcaulay v. Ryan

2023 BCSC 1307

COURT

Supreme Court of British Columbia

DECIDED

12 July 2023

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2023 BCSC 1307 Mcaulay v. Ryan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mcaulay v. Ryan,

2023 BCSC 1307

Date: 20230712

Docket: M192628

Registry: Vancouver

Between:

Brittany Ann Mcaulay (Kennedy)

Plaintiff

And

Michael Anthony Ryan,

Uzair Asif Chaudhry and Maha Asif Chaudhry

Defendants

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A. Rangar

Counsel for the Defendants, Uzair Asif Chaudhry and Maha Asif Chaudhry:

K. Rotheisler

Place and Date of Hearing:

Vancouver, B.C.

July 12, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 12, 2023

- [1] THE COURT: The application before the court is one that regularly arises, but not in this context.
- [2] It is an application to cure what appears to be an error on the part of plaintiff's counsel that was readily admitted, followed by a decided-upon course of action that did not address the error, leading to them now changing course.
- [3] In particular, the error here was that the plaintiff did not seek their own medical reports on time with independent medical providers, namely Dr. Waseem, physiatrist, and Dr. Cameron, neurologist, and rather than address that error at the outset by seeking an extension of the 84-day deadline, they then chose to rely on those reports as rebuttal reports. The reports were then delivered on that basis, within the 42-day deadline. The defence objected to their admission on the grounds that they are, in the defence opinion, not proper rebuttal reports at all. As such, the plaintiff now seeks to cure their initial error, by having the court grant an extension of the 84-day deadline. Alternatively, they seek to adjourn the scheduled July 31, 2023 trial.
- [4] By way of background, the motor vehicle accident occurred on October 16, 2017. The plaintiff was 25 at the time and working as a licensed practising nurse. She was unable to work for approximately two and a half years after the accident and has returned to work, although does continue to suffer or claims to be suffering an ongoing impact and inability to work at her previous levels, resulting loss of capacity and future loss claims.
- [5] There is a diagnosis of a concussion as well as soft tissue injuries, mostly to the neck, back, and, I believe, the hip. The notice of civil claim was filed in March of 2019, with the response being filed thereafter and liability being admitted by the end of 2019. Examinations for discovery were completed in March, 2023.
- [6] Trial of the matter is scheduled for 8 days commencing July 31, 2023.

- [7] The expert report deadline was May 5, 2023. The day prior to that, defence counsel served the defence's primary reports on plaintiff's counsel and, having not received any reports from the plaintiff, the defence counsel reached out on May 9, 2023, by way of email, to inquire whether the plaintiff would be relying on any expert reports.
- [8] Plaintiff's counsel replied that they would be relying on responsive reports and direct testimony of the plaintiff's various caregivers.
- [9] Ultimately that is what occurred. Response reports were obtained by the plaintiff to the defence reports from Dr. Cameron and Dr. Waseem and delivered on June 14, 2023, with June 16th being the 42-day deadline.
- [10] Upon their review, Counsel for the defence immediately objected to the reports, specifically taking the position that they were not proper rebuttal reports. Part of the basis for that view is that in the case of both reports, the authors commented that they had been instructed to provide a medical opinion regarding the medical condition arising from the motor vehicle accident as the reason for the report or the nature of opinion being sought, with the terminology being slightly different in each report. Nonetheless, the scope of their investigation as set out in their reports is not noted to be rebuttal or responsive.
- [11] The letters of instruction that were included with the reports do, however, include the following:

We request that you do an IME assessment and prepare a rebuttal to defence counsel's report with respect to Ms. Mcaulay's injuries sustained in a motor vehicle accident on October 16, 2017.

- [12] In both instruction letters, the authors were also told that the plaintiff would need the report by June 12th in order to meet the requirements to serve the "rebuttal report" on opposing counsel.
- [13] After the objection letter was sent, plaintiff's counsel did not say anything specific to indicate that there had been a change of course or an intention to attempt to treat these opinions as primary or first instance reports, as is being sought today.
- [14] Rather, a Trial Management Conferences ("TMC") was held, with an order being made to reschedule a second one on July 6, 2023. At the July 6, 2023 TMC, the plaintiff, for the first time, indicated that they would be seeking to tender the reports as primary expert reports and the time limits abridged accordingly. Given that position, at the TMC, the court made the order for this application to be set on short leave, with the materials to have been delivered on Monday, which was done.
- [15] It was only upon receipt of the notice of application on Monday that counsel for the defence truly understood the nature of the relief being sought today and had not, in fact, appreciated until then that it would be as framed.

- [16] Nonetheless, they did reach out and have attempted to reach some middle ground, and in their response today make a proposal to address the balancing of the prejudice arising to the parties as a result of the mistake and what I will term a doubling down of the decision of the plaintiff to proceed on the basis of using rebuttal opinion only. The defence indicated that they would consent to the report of Dr. Cameron, neurologist, going in as a primary expert report, but that the report of Dr. Waseem would only go in as a rebuttal report, subject to the defence objections to admissibility which can be resolved at trial, and that the report of Dr. Hirsch, which was obtained by the defence, could be relied upon by the plaintiff if there are any concerns with respect to the evidence of a psychiatrist not being available before the court.
- [17] The plaintiff, reasonably, questions the motivation behind that proposal. In particular the plaintiff argues that the reason that the proposal is being made is that the defence is seeking to pick and choose the reports that will be most favourable to their position. The plaintiff argues that there will be significant prejudice if both reports are not available to the court as primary reports and that he should not be put in a potentially prejudicial position by having to rely on Dr. Hirsch's report in order to be able to have Dr. Waseem's report admitted. In this respect, Dr. Hirsch has made findings that are clearly against the plaintiff's position, particular that she is for the most part improved, and that Dr. Hirsch does not expect that any lingering pains would significantly affect her social or vocational endeavours.
- [18] The court has looked at the issue of extending an 84-day deadline in *Raniga v. Poirier*, 2020 BCSC 780 (Raniga). While there are some marked differences in that case, including that the plaintiff there was seeking an adjournment of the trial, the plaintiff there had similarly missed obtaining any expert reports given that there was a significant risk that the trial would otherwise proceed without any evidence from the plaintiff.
- [19] The court made one particular comment of relevance to today's application, at para. 18:
- In my view, the overall interests of justice strongly militate in favour of an adjournment of the trial in this case. The paramount consideration is to ensure there is a fair trial of the plaintiff's claim on the merits. The plaintiff is not responsible for the failure of his lawyer to diligently prepare for trial in a timely way. Liability has been admitted and there is no irreparable evidentiary prejudice that the delay in the trial will cause the defendant.
- [20] As was the case there, counsel for the plaintiff readily admits that the fault here lies with his offices in not having the May 5, 2023, as a date for service of the reports, properly diarized so that the reports could be obtained. What is slightly different here is that the plaintiff does not seem to acknowledge what I would consider to be the second misstep, that being choosing a path of proceeding on the basis of relying on rebuttal evidence only, a path that counsel for the defendant has relied upon since May 9, 2023 in conducting their own trial preparation.

- [21] The defendant argues that they have been prejudiced by that being the plaintiff's position, saying that things could have been different. I appreciate that it is somewhat hypothetical in what could have been, but had the position been taken on May 9, 2023 when the inquiry was made by their offices to whether or not reports would be forthcoming, that the plaintiff needed an extension and acknowledged their mistake then, and immediately sought the reports forthwith, things would have been much different.
- [22] Of course, the defence cannot say whether or not they would have agreed, but certainly it would have been likely that these reports would have been delivered much earlier, probably sometime in June. Based on that, the defence would have made the decision of whether or not they were going to oppose their late filing and if not, the plaintiff would have been in court a month or so ago seeking an extension, the effect of which would have been that the defence would still be in a position where they could obtain rebuttal reports if necessary upon such an order being granted, and the time for rebuttal also extended.
- [23] As things now stand and as a result of the delay, instead they are in court, approximately 2 weeks before trial, faced with the dilemma of essentially choosing which prejudice they should bear, namely the prejudice of an adjournment of a trial or the prejudice of not being able to respond to the plaintiff's reports.
- [24] That is not an enviable position for a defendant to be in and one that is very unfortunate, particularly when it arises as a result of fault of the counsel.
- [25] Nonetheless, I am guided by *Raniga*. The overall and more overriding prejudice is that to the plaintiff in possibly not having the evidence of both experts, Dr. Cameron and Dr. Waseem, before the court in the primary instance, and ensuring that there can be a fair trial on the merits.
- [26] As such I am, albeit somewhat reluctantly, prepared to make the order to abridge the time for the reports to go in late, and that they be treated as reports in the first instance.
- [27] In making this order, I do agree with counsel for the defendant that given the prejudice and, as I said, that they have been put in this position where they are having to choose the lesser of two prejudices, that it is an appropriate matter where costs can compensate them to some extent for that prejudice.
- [28] The position of the defence was, as a further alternative, that if the court was inclined to make some sort of order to address this in the favour of the plaintiff, that the better of the two bad options from their perspective would be as I have done, rather than adjourn the trial.
- [29] However, as they note, they did not lose time that ought to have been spent on trial preparation in dealing with this application and a second trial management conference that would not have been necessary if the plaintiff's counsel had acted promptly to address its error.

- [30] Counsel therefore argued that there ought to be costs against the plaintiff on a special costs basis, with the defendant relying on the usual decisions in that respect, such as *Chancery Estate Holdings Corp. v. Sahara Real Estate Investment Inc.*, 2012 BCSC 822, as upheld by the Court of Appeal at *Chancery Estate Holdings Corp. v. Jetha*, 2013 BCCA 145.
- [31] This is not the reprehensible conduct that is usually deserving of the rebuke that is indicated by a special costs award.
- [32] However, section 2(5) of appendix B of the Supreme Court Civil Rules does allow an award to be made for increased costs where there has been conduct or unusual circumstances such that the normal scale would be inadequate or unjust. This has sometimes been referred to as "costs with an uplift", as noted in *Vancouver (City) v. Zhang*, 2011 BCCA 138, and in *On Call Internet Services Ltd. v. TELUS Communications Company*, 2010 BCSC 1031.
- [33] I agree that this is an appropriate one to order the increased scale of costs and make that order, notwithstanding the success of the plaintiff. Costs will be payable by the plaintiff to the defendants for today's application as well as the two trial management conferences at one and a half times the usual scale, in any event of the cause.
- [34] I note that there has already been an order for costs with respect to one of those trial management conferences. I am sure counsel will not attempt to seek double recovery for those costs, but to be clear, to the extent those costs have already been ordered, this order is merely setting the scale at one and a half times of scale B. I will also comment as was done in *Raniga*, that I trust the cost consequence will not be visited upon the plaintiff.
- [35] In summary, the order is granted as sought in paragraph 1 of the notice of application, with costs to be paid to the defendant at 1.5 times Scale B for two trial management conferences and today's application, in any event of the cause.

"Master Robertson"

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