

CANADA / JUDGMENT

Schuetze v. Pyper

2021 BCSC 2599

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 2599 Schuetze v. Pyper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schuetze v. Pyper,

2021 BCSC 2599

Date: 20211124

Docket: S1810941

Registry: Vancouver

Between:

Katy Schuetze

Plaintiff

And

John [Redacted] Pyper

Defendant

These reasons have been redacted for publication purposes to anonymize the names of the parties' children and to redact other information related to their identities pursuant to an order made November 24, 2021.

Before: The Honourable Justice Fleming

Oral Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff

appearing via teleconference:

B.T. Lepin

Counsel for the Defendant

appearing via teleconference:

W.M. Finch, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

November 19, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 24, 2021

- [1] THE COURT: Mr. Pyper applies for an order sealing the court file in this civil action. In the alternative, he asks for an order anonymizing the trial decision I released to the parties on November 12, 2021 (indexed at 2021 BCSC 2209), through the use of initials.
- [2] The parties are separated spouses and also engaged in an ongoing family law proceeding.
- [3] In this action, Ms. Schuetze brought a claim for damages based on the tort of battery in relation to a violent incident that occurred on September 16, 2018, in the presence of their young children. In his counterclaim, Mr. Pyper did the same.
- [4] In the trial decision, I found Mr. Pyper committed a serious battery of Ms. Schuetze that caused her significant physical and psychological injuries. I dismissed his claim against her. I also found Mr. Pyper had been physically violent with Ms. Schuetze on previous occasions, as well as controlling and emotionally abusive toward her for a number of years before the battery. Significantly, I made very negative findings about Mr. Pyper's credibility.

Positions of the Parties

- [5] Mr. Pyper takes the position a sealing order or alternatively an order anonymizing the trial decision is necessary to protect the privacy interests of the children, given the nature of the case, my findings regarding his violent conduct and poor credibility, and what he refers to as the discussion of the children's conduct; namely, them providing information about the battery to a neighbour shortly afterwards.

- [6] Mr. Pyper suggests that without such an order they may face derision and exposure to harmful attention, perhaps through social media or some other means pursued by ill-intended persons. He also asserts their best interests would otherwise be harmed because the findings impugning his honesty and integrity may prevent or interfere with his ability to find employment as an accountant, and consequently pay child support.
- [7] Without denying the children's privacy interests are engaged, Ms. Schuetze takes the position the orders sought are unnecessary and suggests instead an order anonymizing the children's names only. She argues that for the very reasons Mr. Pyper suggests privacy is the paramount concern, that is my findings regarding the nature and extent of his misconduct, there is a pressing need not to limit the open court principle. Mr. Pyper's real objective, she asserts, is to shield himself. In support of her position, she notes he did not apply for the redaction of other reasons for judgment that are more favourable to him or unflattering to her that are in the public domain, namely the reasons for sentence available on the Provincial Court's website and, I note, LexisNexis.
- [8] In or about November 2020, Mr. Pyper pleaded guilty to committing the summary conviction offence of assault based on an agreed statement of facts that was prepared, I found, without Ms. Schuetze's involvement. The agreed statement of facts contained admissions to a very minor assault with significant elements of self-defence. It also formed the basis for the sentencing judge's conclusions about the seriousness of the offence, along with counsel's agreement that he not consider information that Ms. Schuetze provided about her injuries in her victim impact statement.

Legal Principles

- [9] I turn now to the legal principles that govern this application.
- [10] The right of public access to the courts is referred to as the open court principle. It is recognized as one of the hallmarks of our democratic society, and protected by the constitutionally entrenched right to freedom of expression. Arising from the open court principle is a strong presumption in favour of open court that applies in all judicial proceedings.
- [11] Very recently, in *Sherman Estate v. Donovan*, 2021 SCC 25, the Supreme Court of Canada reviewed the legal requirements for a discretionary order that limits the openness of court. Justice Kasirer determined the applicant must demonstrate as a threshold requirement that openness presents a serious risk to a competing interest of public importance, writing at para. 3:
- [3] That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

[12] At para. 38, he articulated the test to be applied:

[38] In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[13] Justice Kasirer held that privacy considerations may constitute an important public interest, but not all privacy interests qualify, noting the privacy of individuals will be at risk in many court proceedings. What is required is a risk to privacy that imperils the dignity of the person. He clarified:

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness.

[14] Prior to *Sherman Estate*, the privacy interests of children had been recognized as justifying limits on the open court principle. The public interest in protecting the privacy interests of children was discussed in *A.P. v. L.K.*, 2019 ONSC 4010. The case involved an application for an order prohibiting the publication of any information that would identify the parties' children in an arbitrator's decision declining to order them to be vaccinated.

[15] At para. 29, Justice Akbarali reasoned that permitting limits when necessary to protect the interests of children recognizes that although the focus of family law proceedings, they do not choose to be involved and, for the most part, have no ability or agency to protect themselves. As a particularly vulnerable group, their vulnerability may put them at greater risk of harm if their interests are not protected. Weighing against this, Akbarali J. observed, was the strong public interest in open discourse regarding the issue of vaccine hesitancy, as well as the family law arbitration process. She concluded a more tailored ban was justified and granted an order that prohibited publication of information that identified the children, including their names, dates of birth, address, schools, and genders, but not their ages, given the relevance of that information to the issues raised.

Analysis

- [16] Turning to apply the test in *Sherman Estate*, I accept that the privacy interests of the parties' children constitutes "an important public interest". *Sherman Estate* explains that making this determination can be done in the abstract, with reference to general principles extending beyond the specific circumstances of the case. In any event, given the trial decision's detailed discussion of the parties' relationship, acts of past violence, emotionally abusive and controlling behaviour, a particular incident of self-harm, the battery, the children's presence at the battery, and Mr. Pyper's misconduct after the battery, including an attempt at reconciliation for strategic reasons, clearly it contains information that is sufficiently sensitive to the children's biographical core.
- [17] The much more difficult question is whether a serious risk to their interests is made out in the full factual context of the case, as required by *Sherman Estate*.
- [18] Mr. Pyper emphasizes the possibility of future harm to the children emotionally and psychologically, given the reality they will be increasingly exposed to social media, for example, as they get older.
- [19] Although direct evidence is not necessarily required to establish a serious risk because objectively discernible harm may be identified by drawing logical inferences, inferential reasoning must be distinguished from impermissible speculation. The gravity of the fear of harm as well as its probability are relevant to the assessment.
- [20] Ms. Schuetze's affidavit evidence is relevant at this stage. She deposes that after the battery, many people in the community, including many parents of other students at the children's school, many teachers, and school staff, and persons at their place of worship learned that Mr. Pyper was subject to bail conditions and a Ministry of Children and Family Development safety plan, although she told very few people about those circumstances. Their awareness aided in alerting her to apparent breaches and in providing a sense of safety. She also deposes that since then, she and the children have received nothing but kind support from all of those who became aware. There is no indication the children have ever suffered any embarrassment or experienced any unwanted attention as a result.
- [21] I note that apart from the children's first names and their ages, the trial decision includes very little information related to their identities. I have not, for example, identified the name or location of their school, their church, or their community, or the location of the parties' homes. Mr. Pyper observes that Ms. Schuetze's last name is unusual. However, the children have a different last name.
- [22] Justice Kasirer in *Sherman Estate* observed that the extent to which information is already in the public domain is appropriately considered in determining whether there is a serious risk, recognizing, however, that additional dissemination does not preclude further harm to the privacy interests.

[23] Again, the reasons for sentence were published without redaction. They do not identify the children but they do identify Mr. Pyper by his first and last name, and Ms. Schuetze by her last name. Further, they discuss some of the same circumstances as the trial decision, including most significantly the violent incident. In stark contrast to the trial decision, however, and based on the agreed statement of facts, the sentencing judge found Mr. Pyper's misconduct to be at the low end of the spectrum of seriousness, commenting:

Specifically, there is no evidence that he struck Ms. Schuetze or that he was trying to inflict gratuitous pain, rather, he was protecting himself and trying to retrieve his property and it is in this context that he went too far.

[24] Anonymizing the parties' identities in the trial decision therefore would prevent the public from becoming aware that entirely different conclusions were reached in the civil proceeding, after a lengthy trial and based on a fulsome evidentiary record. Much like in A.P., the open court principle plays an especially important role in cases such as this one, in addition to providing transparency regarding the work of the court. Public access to reasons for judgment that identify a party who has denied and been found to have committed serious physical violence against their spouse serves the public interest by deterring both the perpetrator and others who may engage in family violence, as well as protecting victims and potential victims. In this case, the victims include the children, who suffered the harm of being exposed to Ms. Schuetze being seriously physically harmed by Mr. Pyper.

[25] The role of public access in facilitating deterrence and protection is also underscored by the fact that I denied Ms. Schuetze's claim for punitive damages, despite finding Mr. Pyper's conduct was egregious, precisely because I was satisfied my findings and the significant awards in compensatory damages, were sufficient to denounce and deter him, as well as others. Anonymizing Mr. Pyper's identity would thwart these critically important objectives.

[26] Ultimately, I am not satisfied that either the sealing order or the anonymity order sought by Mr. Pyper is necessary to prevent a serious risk to the children's privacy. In my view, a much more tailored order, one that redacts information that identifies the children, including their names, their month of birth, the name of the neighbour to whom they disclosed information about the battery, and the municipality in which they live, as well as Mr. Pyper's middle name, from the trial decision and other reasons issued in this action, along with an order that prohibits anyone who accesses the court file from communicating this same information, strikes the appropriate balance between protecting the public interest in the children's privacy and the open court principle.

[27] I reach this conclusion bearing in mind the principle of proportionality and the requirement that the benefit of the order sought must outweigh its negative effects on court openness.

[28] Before setting out the terms of the order, I will address briefly Mr. Pyper's further submission that anonymizing the trial decision is required because it refers to the absolute discharge he received in the criminal proceeding, relying on 6.1(1)(a) of the Criminal Records Act, R.S.C. 1985, c. C-47, and R. v. Montesano, 2019 ONCA 194, leave to appeal ref'd

[2019] S.C.C.A. No. 38615 (S.C.C.). On its face, the provision prohibits disclosure of a record of a discharge or the fact of a discharge in the custody of the Commissioner or any other Government of Canada agency after one year has elapsed, without prior approval of the Minister.

- [29] Montesano involved an appeal from a summary conviction appeal. The accused had pled guilty to one count of assault against his wife. The trial judge considered a previous discharge in refusing to impose a second discharge. The initial appeal judge concluded he had erred in admitting and considering the discharge because it had been expunged from the accused's record pursuant to s. 6.1.
- [30] The Ontario Court of Appeal expressed the view the provision "was complete" and clearly prohibited the disclosure of the record and the existence or fact of a discharge to any person beyond one year, unless the prior approval of the Minister had been obtained.
- [31] At issue was a handwritten notation to the accused's criminal record indicating he had obtained an absolute discharge for a previous assault against his wife.
- [32] Despite the Court's broad interpretation of the provision, I do not read Montesano as limiting the ongoing publication of reasons for judgment that refer to the imposition of an absolute discharge after one year. In other words, I am not persuaded the case supports the proposition that s. 6.1(1)(a) requires a claw back or redaction of previously published decisions that discuss the fact of a discharge. Such a result would be unwieldy if not wildly impractical. Further, in this case it could lead to the absurd result that information about Mr. Pyper's absolute discharge was required to be removed from the sentencing decision, but information about his guilty plea was not. It is also difficult to fathom a sentencing court being prohibited from having access to sentencing decisions where an absolute discharge was imposed more than a year earlier for the purpose of applying the parity principle.
- [33] I note that Montesano is persuasive not binding authority. Given the context, I am satisfied it is distinguishable. In any event, I am bound by contrary authorities from this court. In *Jay v. Hollinger Canadian Newspapers*, 2002 BCSC 23, s. 6.1 of the Criminal Records Act was discussed as follows:
- [29] Having considered the plaintiff's arguments, I am of the view that the protection afforded by s. 730 of the Criminal Code and [6.1 of] the Criminal Records Act does not render secret a "finding of guilt" or the fact of a discharge. Rather, as I have said, it serves to keep offences which have been dealt with by way of a discharge from forming part of a criminal record, and controls the use of such information by those with custody of, or, within the Federal realm, access to it.

[Emphasis in the original.]

[34] More recently in *R. v. Akumu & Boima*, 2017 BCSC 1051, this Court took the application of 6.1(1) a step further, stating a conditional discharge could be treated as a factor if relevant to the case at hand.

[35] Accordingly, I grant the following orders which shall continue until further order of the court:

1. My reasons and other reasons for judgment in this action must be redacted to remove information that identifies the children, including their names, their months of birth, the name of the neighbour to whom they disclosed information about the battery, the municipality in which they live, and Mr. Pyper's middle name.
2. The children will be referred to instead by an initial that I will determine.
3. Any person who accesses the court file in this action is prohibited from communicating to any other person information identifying the children, including the information that is to be redacted from the reasons for judgment in this action, as set out in the first term of my order.

[DISCUSSION WITH COUNSEL OMITTED]

"Fleming J."

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