

CANADA / JUDGMENT

Skibinski v. Community Living British Columbia

2009 BCSC 33

COURT

Supreme Court of British Columbia

DECIDED

15 January 2009

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2009 BCSC 33 Skibinski v. Community Living British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Skibinski v. Community Living British Columbia,

2009 BCSC 33

Date: 20090115

Docket: S18769

Registry: Chilliwack

Between:

Sheila Elizabeth Skibinski

Plaintiff

And

Community Living British Columbia and Her Majesty

the Queen in Right of the Province of British Columbia

as represented by the Ministry of Children and Family Development

Defendants

Before: Master Keighley

Reasons for Judgment

Counsel for the Plaintiff:

D. Sands

Counsel for the Defendants:

J.A. Rost

P. Chalmers, appearing on her own behalf

Date and Place of Trial/Hearing:

January 5, 2009

Chilliwack, B.C.

- [1] Beverley Lynn Shannon ("Lynn") suffered a severe hypoxic brain injury at birth over 46 years ago. In addition to mental deficits and behavioural abnormalities, she suffers from a range of physical afflictions, including Type 1 diabetes, hypertension, congestive heart disease, asthma, and kidney failure. Numerous medications are administered to her and she undergoes hemodialysis three days a week. She is unable to care for herself. Her mother, Pat Chalmers, is her committee.
- [2] The plaintiff has, with Ms. Chalmers' approval and indeed her emphatic endorsement, assisted in Lynn's care since 1979, when Lynn was 17 years of age. From 1982 through 2007 the plaintiff cared for Lynn in the plaintiff's residence during the daylight hours. For part of that period, from October 1, 2001 to December 31, 2007, the plaintiff was paid for her services by Community Living British Columbia ("CLBC"). For reasons which appear to be in dispute, the contract was not thereafter renewed and CLBC has declined to pay further remuneration to the plaintiff, who now sues for compensation for services provided to Lynn and for her benefit which she alleges falls within CLBC's statutory mandate to provide care for adults with developmental deficiencies. CLBC, for its part, says that, in the absence of an agreement with the plaintiff, it is prepared to fund Lynn's care in an alternate facility. The trial is scheduled to begin on March 23, 2009.
- [3] The plaintiff and Ms. Chalmers vigorously oppose any suggestion that Lynn may be adequately cared for by an alternate care provider in another facility. As a result of her behavioural difficulties and cognitive impairment, Lynn is verbally and physically aggressive. She is unresponsive socially. She has, within the past year, physically assaulted Ms. Chalmers, her neighbours, medical staff at the Abbotsford hospital and ambulance crew members. The police have been engaged on a number of such occasions. The plaintiff, both women say, from her long association with Lynn and her special skills, is able to keep Lynn calm, and, when necessary, under her physical control.
- [4] In support of her assertion that Lynn requires care provided by the plaintiff and no other, the plaintiff refers to a recent letter from Dr. Robert Starko, a nephrologist and the current medical director of the Fraser Valley Renal Program. Dr. Starko says, in part, as follows:

I have noticed a significant improvement in Lynn's overall condition since being cared for on a full time basis by Ms. Skibinski. When Lynn first started hemodialysis, she was very agitated and restless, and this made her treatments difficult, however Ms. Skibinski has the tremendous ability to calm Lynn down, and Lynn seem[s] to be content and settled as long as Ms. Skibinski is present, and at her bed side. Ms. Skibinski also monitors her medications very closely, and would adjust doses accordingly. I have had multiple conversations with Ms. Skibinski, and she has tremendous understanding of Lynn's complex medical issues, her medications and dialysis treatment.

Lynn's condition has improved over the last one year compared to previous, and her multiple medical conditions seem to be relatively under control and stabilized. I believe that the care provided by Ms. Skibinski has been excellent and a routine has been worked out which has greatly contributed to Lynn's stability. I believe that a change in this routine and a move into in [sic] another living condition or facility would be detrimental. In particular, a change in routine may result in Lynn becoming agitated or unsettled which would make her dialysis treatments very difficult. In summary, Ms. Skinbinski [sic] accompanies Lynn to her dialysis treatments and will sit with her until she is settled. She manages and adjusts her medications, performs her daily care, and has an excellent understanding of Lynn's medical condition. Ms. Skinbinski [sic] also brings Lynn to her dialysis treatment three times per week, and otherwise, she would likely need to come by ambulance.

Therefore, as Lynn's Nephrologist, I support her continuing to live with, and being cared for by Ms. Skinbinski [sic]. I believe this is in Lynn's best interest, and any change may result in a significant deterioration in her condition.

[5] As a nephrologist, Dr. Starko is trained in the diagnosis and management of kidney disease. While his observations concerning the interaction between Lynn and the plaintiff are helpful insofar as they support the plaintiff's suggestions that she exerts a calming influence on Lynn, he would likely concede that in expressing the opinion that "a change in this routine and a move into in [sic] another living condition or facility would be detrimental", he is drifting from his area of expertise. The plaintiff also refers to a recent letter from Dr. Daniel Schwartz, Medical Director at the Abbotsford Regional Hospital Renal Program. Dr. Schwartz offers the following:

I am writing this letter in support of Sheila Skibinski, who provides care for Beverley Shannon.

Beverley Shannon is a patient in the Abbotsford Regional Hospital Renal Program, and I have cared for her at this hospital, as well as the Royal Columbian Hospital. As you likely are aware, Beverley has significant cognitive, psychological, emotional and neurologic impairment which make providing dialysis a significant challenge.

At the best of times, co-operating with dialysis treatments can be a challenge for any patient, but Beverly [sic] has an even more difficult time with this given her clinical status. Sheila Skibinski has proven herself expert and critically important at managing Beverly [sic] both before, during and after her dialysis sessions. I can say with confidence that if we did not have Sheila's

assistance, our nursing staff would not have enough time or expertise to manage Beverley's unique needs and she would likely need to be maintained as a hospitalized patient or in an alternate facility.

I might also point out that Sheila is a pleasure to have in the renal unit. She is a strong advocate for Beverley while at the same time, she is highly respectful of the renal unit's clinical staff.

Please don't hesitate to contact me if you need further clarification.

[6] Dr. Schwartz does not purport to assess the plaintiff's skills as a caregiver in general terms, but does confirm as Dr. Starko does, that she is skilled in managing Lynn's behaviour before, during, and after dialysis sessions. Helpful as these letters are, however, they do not establish, for the purposes of the application before me, that the level of care provided by the plaintiff could not be provided by someone else.

The Application

[7] The defendants apply for the following orders:

1. the Plaintiff and Pat Chalmers permit Dr. Douglas Lee to attend at the Plaintiff's residence and attend at one of Beverley Lynn Shannon's dialysis treatments, at such date(s) and time(s) to be arranged between counsel for the Plaintiff and counsel for the Defendants within two weeks of the date of the order, for the purpose of observing and assessing Ms. Shannon in order to render an expert opinion;
2. the Plaintiff and Pat Chalmers co-operate with Dr. Lee in fully responding to his questions and completing any assessment checklists or questionnaires Dr. Lee requires;
3. the Defendants be awarded costs of the application; and,
4. such further and other relief as this Honourable Court deems just.

[8] The application is brought pursuant to Rule 30 of the Rules of Court. Rule 30 reads as follows:

- (1) Where the physical or mental condition of a person is in issue in a proceeding, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order, it may make
 - (a) an order respecting any expenses connected with the examination, and
 - (b) an order that the result of the examination be put in writing and that copies be made available to interested parties.
- (2) The court may order a further examination under this rule.
- (3) A person who is making an examination under this rule may ask any relevant question concerning the medical condition or history of the person being examined.

- (4) Where the court considers it necessary or expedient for the purpose of obtaining full information or evidence, it may order the production, inspection and preservation of any property and authorize samples to be taken or observations to be made or experiments to be conducted on or with the property.
- (5) For the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter upon any land or building.
- (6) Rule 27 (26) applies to examinations and inspections ordered under this rule.
- [9] Dr. Lee is a psychologist. His qualifications are not in issue. The application is, however, opposed and for the reasons expressed below I have determined that it must be dismissed.

Discussion

- [10] The rationale for Rule 30 was simply stated by the British Columbia Court of Appeal in the case of *Stainer v. Plaza*, [2001] 4 W.W.R. 635, 87 B.C.L.R. (3d) 182, 5 C.P.C. (5th) 81, 250 W.A.C. 5, 2001 BCCA 133, as being "to put the parties on an equal footing with respect to medical evidence. What steps are necessary to achieve that end is a matter of discretion for the chambers judge to assess in the circumstances of each case".
- [11] In support of the application the defendants rely on the affidavit of Emily Clough, an articulated student, who deposes as follows:
 - 1. I am an articulated student with Alexander, Holburn, Beaudin & Lang LLP, the solicitor for the Defendants and as such have personal knowledge of the facts and matters hereinafter referred to, save and except where stated to be on information and belief, and where so stated I verily believe them to be true.
 - 2. Attached hereto and marked Exhibit "A" to this my Affidavit is a copy of a letter from Dale Sands, counsel for the Plaintiff, to Judy Rost, counsel for the Defendants, enclosing two expert reports regarding Beverley Lynn Shannon's condition and her ability to move to another care home or facility.
 - 3. Attached hereto and marked Exhibit "B" to this my Affidavit is a letter from Judy Rost to Mr. Sands requesting his client's consent to an assessment of Ms. Shannon by an expert, in part, as a response to the expert report of Dr. Starko and to address issues raised in the Plaintiff's pleadings.
 - 4. Attached hereto and marked as Exhibit "C" to this my Affidavit is a letter from Mr. Sands in response indicating that his client is not in a position to consent to the assessment and suggesting that Dr. Lee can do the assessment simply by reviewing Beverley Lynn Shannon's files.
 - 5. Attached hereto and marked Exhibit "D" to this my affidavit is the curriculum vitae of Dr. Lee.

6. Attached hereto and marked Exhibit "E" to this my affidavit is a letter from Dr. Lee dated December 9, 2008.

[12] With respect to paragraph 4 of the affidavit, I have reviewed Mr. Sands letter and note his suggestion " that Dr. Lee can do the assessment simply by reviewing Beverley Lynn Shannon's files": a suggestion which does not appear to be entirely without merit, as least with respect to a preliminary assessment.

[13] As to Dr. Lee's letter, referred to in paragraph 6 of the affidavit, that letter reads, in full, as follows:

It is my understanding that the purpose of my involvement is to assess the possible behavioral effect on Beverley Lynn Shannon, if she is moved to another caregiver's home as opposed to remaining in the care of Sheila Skibinski. I understand that there are concerns voiced by some professionals that such a move may be detrimental to Ms. Shannon.

To render an expert clinical judgment relevant to the issues at hand it is required that I complete a direct assessment of Ms. Shannon's behavior and capabilities. This is in keeping with the standards for behavioral psychology and applied behavior analysis in particular, which are my areas of clinical expertise. I would also need to be able to interview Ms. Shannon (if she is capable) as well as relevant other respondents such as her caregivers and family members. It is also typical to have caregivers and, if possible, the client complete various behavioral assessment checklists or questionnaires. These are the standard aspects of a functional behavioural assessment. I would anticipate that these would take no more than two days worth of time to complete. To complete my assessment I would of course need to review all the relevant documents on Ms. Shannon's CLBC file and any documentation from the caregiver and her family. (emphasis added)

To provide an expert opinion as to whether Ms. Shannon could be moved from her current placement it is necessary to be able to try and outline a reasonable transition plan. Only if a reasonable transition plan can be defined is it then possible to evaluate the potential for her to move. This cannot be done without the above mentioned assessment being completed.

From the point of my observations I would need to see Ms. Shannon in her current living conditions as well as in regards to her behavior related to her dialysis which I understand is a significant factor in relation to the issue of her residential options.

I hope this clarifies my requirements for conducting a functional behavioral assessment. If you have any further questions please feel free to contact me.

[14] The material filed in support of this application falls short of the standard required. I would have expected, on an application such as this, to have had the benefit of an affidavit from Dr. Lee deposing as to the necessity for the examination sought or at least an affidavit from counsel setting forth similar allegations on information and belief. I have neither. Neither has Dr. Lee reviewed the extensive file material collected over the years relating to Lynn's care. (CLBC's list of documents alone runs to 77 pages). Dr. Lee proposes to interview Lynn

and have her complete "various behavioural assessment checklists or questionnaires" as part of his assessment process, although it appears that she will be unresponsive and that engagement by a stranger might be upsetting and even harmful to her. In the result, the material filed by the defendants is simply inadequate to support the granting of the orders sought. I am also concerned that any report prepared by Dr. Lee might not be delivered within 60 days prior to the commencement of the trial leading to rebuttal reports and, possibly, adjournment of the trial. The application is dismissed.

[15] Mr. Sands took the position, during argument, that the Court lacks jurisdiction to order an examination of a non-party, except in the case of "tissue testing". In light of the decision I have reached, I will not deal with that issue.

[16] The costs of this application will be to the plaintiff in the cause.

"Master Keighley"

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