Citation: Dewetter et al v. Robertshaw
2000 BCSC 1518

Date: 20001017
Docket: 27627
Registry: Kamloops

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FAY JOANNA LOUISE DEWETTER, AN INFANT BY HER MOTHER AND GUARDIAN AD LITEM, HEATHER ANN LOUISE DUMAIS, AND THE SAID HEATHER ANN LOUISE DUMAIS

PLAINTIFFS

AND:

CARMEN ROSITA ROBERTSHAW

DEFENDANT

REASONS FOR JUDGMENT OF MASTER GROVES (IN CHAMBERS)

Counsel for the Plaintiffs — T. J. Delaney

Counsel for the Defendant — R. B. Babki

Date and Place of Hearing: August 28, 2000 Kamloops, BC

[1] The plaintiff Fay Joanna Louise Dewetter (the "plaintiff") is an infant who at the time of a motor vehicle accident on the 8th of January, 1995 was just over 12 years old. She is currently 17. The plaintiff's claim is that on the date of the accident she was injured while riding as a passenger in a motor vehicle owned and operated negligently by the defendant Carmen Rosita Robertshaw (the "defendant").

[2] The circumstances surrounding the accident were that the motor vehicle slid on snow and ice, the defendant lost control and the vehicle left the road on the Trans Canada Highway just west of Salmon Arm, British Columbia.

[3] The plaintiff's claim is that as a result of the collision and the negligence of the defendant she suffered physical injuries including injury to the neck and spine, injury to the head and brain, injury to muscle and soft tissues of the neck and back, lacerations and bruises, and nervous shock.

[4] The plaintiff further claims that as a result of the injuries she has suffered pain and suffering, loss of enjoyment of life, mental anxiety, depression, and an increased susceptibility to further injuries in the future all of which restrict the plaintiff's ability to take part in her normal activities.

[5] An action was commenced by the plaintiff as represented by her *guardian ad litem* on the 6th of January, 1997 and it is not clear from the materials if this matter is currently set for trial. Liability has been admitted by the defendant.

[6] The defendant's application is set out in a notice of motion filed the 3rd of August, 2000. The defendant seeks to have the plaintiff attend for an independant medical examination at the Vancouver Hospital and Health Sciences Centre, Third Party Assessment Clinic. Though not

specifically set out in the motion, the affidavit in support filed by Peter Rinaldi, Insurance Adjuster, sets out that the desires of the defendant is to have this plaintiff attend before a battery of physicians at the Third Party Assessment Clinic. The physicians include Dr. Peter Wing, an Orthopaedic Specialist, Dr. Phil Teal, a Neurologist, and Dr. Ken Craig, a Psychologist.

[7] It appears further from the materials filed that plaintiff's counsel would consent to have the infant plaintiff attend at an assessment before an appropriate specialist such as an orthopaedic surgeon, a rheumatologist, or a physical-medicine and rehabilitation specialist, but they do not consent to the attendance at the Third Party Assessment Clinic for a battery of examinations as proposed by the defendants.

[8] The medical-legal reports which have been exchanged, so opines Mr. Rinaldi in his affidavit after he has reviewed these reports and clinical records, suggest that the plaintiff's initial complaints were of pain in her neck and back with tender points over her trapezius, mid back, low back and sternum. She also claimed to be having headaches. The plaintiffs concede that the medical-legal reports of the plaintiff, specifically that of Dr. B. Daniel McLeod, a rheumatologist, find that the plaintiff is suffering from my myofascial pain syndrome. It is also conceded by the plaintiff that the plaintiff has a history of personal problems and family problems.

[9] Turning to the law on multidisciplinary assessments, I am satisfied that the leading decision on the question of when a multidisciplinary assessment may be ordered by the court is ***Wildemann v. Webster*** (1990), 50 B.C.L.R. (2d) 244. This decision of the British Columbia Court of Appeal stresses that a multidisciplinary assessment is permitted under the Rule 30(1) and 30(2) of the **Rules of Court** but is sets a test that "exceptional circumstances" must exist. Since ***Wildemann v. Webster***, there have been a number of subsequent decisions of Masters of this Court including the decision of Master Brandreth-Gibbs in ***Westenberg v. Leung*** [1996] B.C.J. No. 2163 and subsequent decision of Master Brandreth-Gibbs in ***Trahan v. West Coast Amusements Ltd.*** [2000] B.C.J. No. 847, as well as an unreported decision of Master Joyce in ***Jopling v. Krystik*** (19 September, 1990), New Westminster Registry, C891473 (B.C.S.C.). In addition, the Court of Appeal has also spoken further on this issue in the case of ***Guglielmucci v. Makowichuk*** (1996), 18 B.C.L.R. (3rd) 68.

[10] A review of the Court of Appeal case law in this area is appropriate. As pointed out the decision in ***Wildemann v. Webster*** (supra), suggests that a multi-disciplinary assessment is possible under the rules which I am called upon to consider. Hollinrake J.A., states on p.246 of this decision that:

> ...such an examination as has been ordered here should be reserved for those cases in which it can be said there are exceptional circumstances.

He then goes on to review the complaints of the plaintiff as set out in a doctor's report to the Insurance Corporation of British Columbia, which complaints are numerous and all encompassing. He further quotes from this doctor's report on p.247 in which the doctor comments that:

> She states that since the accident her life has changed completely. She cannot do heavy housework or gardening. Her recreation is nil. Her skiing, dancing, and hiking have been halted. She is unable to do sewing due to neck problems. In addition Sunday family drives have been halted.

[11] The report of Dr. Lazarchuk noted above goes on to show that the plaintiff in this case saw a number of specialists including three neurosurgeons, one neurologist, one orthopaedic surgeon, one general surgeon and one physical-medicine and rehabilitation specialist in addition to one other general practitioner and Dr. Lazarchuk.

[12] Chief Justice McEachern adds to the test as set out by Hollinrake J.A. in this case and states on p. 250 by stating that in addition to the "exceptional circumstances" test, a multi-disciplinary assessment may be ordered where:

> ...it is necessary to ensure reasonable equality between the parties in preparation of a case for trial.

[13] In the case of ***Guglielmucci v. Makowichuk***, (supra), the Court of Appeal again speaks on this issue of multi-disciplinary assessments. In that case, the plaintiff had suffered a soft tissue injury in a motor vehicle accident. Prior to the accident she had worked for 20 years as a data entry operator and since the accident she had worked only nine days intermittently. The plaintiff was claiming to be unable to work outside the home at any gainful employment. The plaintiff had been treated by a number of specialists and they have had difficulty accounting for her continuing disability. In this case, there were competing diagnoses from a Dr. Caroline Patterson who is a rheumatologist and a Dr. Hunter who is a rheumatologist as to whether or the not the plaintiff suffered from fibromyalgia. A Dr. Yu, an orthopaedic surgeon also disagreed with the diagnosis of fibromyalgia and was unable to find any objective signs of any physical impairment. In this case, counsel for the defence sought the advice of a Dr. R. J. O'Shaughnessy, a psychiatrist. Dr. O'Shaughnessy wrote that he had reviewed the medical material pertaining to Ms. Guglielmucci, he noted that part of her claim was for personality change and depression, he noted in the medical reports that she claimed to be suffering from fibromyalgia. Dr. O'Shaughnessy opined that it is possible that a psychiatric assessment could be of assistance in describing what part of the conditions of the injuries allegedly suffered by Ms. Guglielmucci were caused by psychological versus organic problems. The Court of Appeal found in this case that the plaintiff had had a battery of doctors who had diagnosed her as suffering from fibromyalgia and that was

her claim. Counsel for the plaintiff argued successfully before a master and a chambers judge on appeal that nothing the clinical records from the general practitioner would indicate that a psychiatric or psychological assessment or treatment was necessary. Essentially, that none of the treating physicians had "opened the door" in the case to a psychiatric assessment and that was essentially the end of the issue.

[14] The Court of Appeal however found that the master and the learned chambers judge's view the decision of ***Wildemann v. Webster*** was too narrow. They found in the circumstances in the ***Guglielmucci*** case that an examination by Dr. O'Shaughnessy would go a considerable distance to ensuring the parties stood on an equal footing when it came to medical assessments. They found the test not to be as restrictive as the master and chambers judge found it. They concluded on the facts, that a further assessment was necessary to place the parties on an equal footing for trial, and that it was not necessary for a treating physician to "open the door" to a psychiatric assessment for the courts to order one.

[15] Of the decisions of masters noted above, the ***Westenberg v. Leung*** decision I find the most helpful. The facts in that case are very similar to the present case before me. In ***Westenberg v. Leung***, the application was brought on after proceedings had been filed prior to an examination for discovery or trial date being set. In that case, the plaintiff Westenberg had seen a number of specialists. The defendant had not sought a traditional medical assessment, in other words an assessment of one medial practitioner. Instead, the defendants sought a multidisciplinary assessment including a neurologist and an orthopaedic surgeon, and psychologist, as is requested here, as well as a physical-medicine specialist. Master Brandreth-Gibbs in reviewing authorities states at para.19:

> In ***Wildemann v. Webster and Webster*** 50 B.C.L.R. (2d) 244 (B.C.C.A.) it was held that exceptional circumstances are required to support an order for a multidisciplinary assessment. Alternatively, Mr. Justice McEachern stated such may be ordered, where the parties require to be put on an even footing as regards medical opinion evidence. As to the latter consideration, all that would be required to put the instant parties on an even footing at this juncture would be to have the plaintiff examined by a specialist in physical medicine and rehabilitation of the defendants choosing, together with x-ray analysis.

[16] I find in the present case that counsel for the defendants have not made any argument which would qualify as exceptional circumstances. I further find that what may be needed to place the defendants on an even footing in ***Wildemann v. Webster*** noted above, would be for the plaintiff to be examined by one expert of the defendant's choosing. They have not, as of to date, made that application. Counsel for the plaintiff have indicated that they would consent to such examination. In those circumstances, I will leave it to counsel to agree on the terms of an independent medical assessment by one expert with liberty to apply in the event the details of that could not be worked out between counsel. I will consider myself seized of this matter for that purpose.

[17] Multi-disciplinary assessments are clearly reserved for cases and fact patterns which create unique circumstances, the rare case where an independent medical exam cannot place the parties on an even footing. Further, the rare case where perhaps the medical evidence is contradictory, where the injuries alleged by the plaintiff are such that they cannot in the usual circumstances be reasonably drawn back to what, on the face of the facts, suggested would be the likely injuries resulting from the accident. Further, it would be a rare case indeed where a multi-disciplinary assessment would be ordered prior to a request for an independent medical assessment.

[18] The application of the defendant is dismissed and the plaintiff is entitled to their costs in the cause.

"Master J.R. Groves"