IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20101021
Docket: M084365
Registry: Vancouver

Between:

Donna Corene Helgason

Plaintiff

And

Natalia R. Bosa

Defendant

Before: The Honourable Mr. Justice Silverman

Oral Ruling

October 21, 2010

Counsel for the Plaintiff:	V. LeBlanc
Counsel for the Defendant	M. Gibson & J. Joudrey
Place of Trial:	Vancouver, B.C.

[1] **THE COURT**: This is an oral ruling made during the course of trial concerning the admissibility of certain medical evidence. If a transcript of this ruling is ordered, I reserve the right to edit, although that process will not involve a change in the decision or in the reasoning.

[2] This issue involves, in part, a consideration of *Supreme Court Rule* 11-6(6), a subrule which did not exist under the previous *Supreme Court Rules*. Counsel are both unaware of any prior ruling concerning this new subrule and believe that this case may be the first opportunity for it to be considered. Consequently, it has been suggested to me that I might take this opportunity to discuss the Rule in some detail, and perhaps provide some guidelines or commentary that might assist the legal profession at large. However, I have decided not to take that course of action in the circumstances of this case. I propose instead to address only those facts and issues that are necessary for me to make a decision in this case.

[3] The defence objects to the admissibility of certain opinion evidence intended to be presented by the plaintiff.

[4] Briefly, on May the 11th of 2009, Dr. Nordahl prepared a medical report. There is no objection taken to the admissibility of that report.

[5] On October the 6th of 2010, Dr. Nordahl signed what is referred to as a supplementary report. It was served on October 7th. It is in an odd form. In fact, it is a will say statement, but the defence does not take objection to its form. However, the defence does argue that the opinion or opinions expressed in it are materially different from those expressed in the initial report and that it was served late, not in accordance with the *Rules*. It objects to its admissibility on that basis and argues that it has been prejudiced and it will be prejudiced if it is admitted into evidence. It objects not only to the filing of the report, but to the doctor giving oral evidence with respect to the change of opinion expressed in the report.

[6] The issue before me engages, in my view, three subrules. I have already referred to 11-6(6). It also engages 11-7(1) and 11-7(6). I will quickly paraphrase those parts that will be important here.

[7] 11-6(6) deals expressly with supplementary reports where an expert's opinion has changed in a material way and deals with how and when such a change is to be served.

[8] Rule 11-7 deals generally with the need to comply with the *Rules* before opinion evidence is admissible and states that such evidence, whether oral or written, is presumptively inadmissible unless properly served. Again, I paraphrase.

[9] 11-7(1) also provides for a discretion in the court to allow something less than strict compliance, and it does so by opening the subrule with the words "unless the court otherwise orders".

[10] Rule 11-7(6) deals with the basis upon which the court might exercise the discretion I previously referred to and upon which the court may allow expert evidence when there has been something less than strict compliance with, in this case, the service provisions, and it says that it may do so upon a consideration of three factors. One is the question of due diligence. Second is the question of whether or not prejudice will be caused to the other party, and the third is the question of whether or not the interests of justice require the report to be admissible.

[11] A quick timeline is necessary. I have already indicated May 11, 2009, the initial report was prepared. It was not until April 23 of 2010 when plaintiff's counsel advised defence counsel of that report. As a consequence of that information, the defence scheduled an independent medical examination for June the 8th of 2010.

[12] On April 30, the initial report was actually served.

[13] On May 25, 2010, there was a trial management conference.

[14] On June the 7th of 2010, counsel agreed to adjourn an already existing trial date of June 28th on the basis that Dr. Nordahl was not going to be available and

alternate arrangements could not be worked out. A new date was set for October 20, and that is, indeed, when this trial commenced.

[15] June the 8th was the date set for the IME, and while it is not clear precisely when, it is clear that sometime after April 30, that is after the initial report was served, the defence decided to cancel the June 8 IME after assessing the initial report, and the prejudice now complained of arises in large part from that having occurred.

[16] On October the 6th of 2010, plaintiff's counsel left a voice message for defence counsel indicating that the supplemental report I have already referred to would be forthcoming, and the next day, indeed, it was. And as I have already indicated, it was in the form of a will say statement, although its form is not taken issue with.

[17] On October the 8th, defence counsel advises plaintiff's counsel of its objection to the admissibility of the evidence.

[18] On October the 14th, plaintiff's counsel advises defence counsel of his position on that, and also that if the defence wished to adjourn the pending trial and notified plaintiff's counsel forthwith, there would be a consent to that.

[19] October the 18th, the defence advised that it would not be seeking an adjournment.

[20] October the 20th, that is two days ago, this trial commenced, and the first order of business was the raising of this matter. Argument was made yesterday, and I am giving the decision now.

[21] Now, very briefly, the differences in the two reports are vital to understanding the concern of the defence. There is a material change, and they bear on the issue of various future losses. Of greatest concern is the claim for future loss of earning capacity.

[22] The May 11 report, simply paraphrasing, says, amongst other things, the following. And I will paraphrase, although I will indicate them in quotes. In any event, these are paraphrases.

> I do not feel that the plaintiff's symptoms will get any worse.

And farther down:

> I am not advising that the plaintiff change her current employment, but I will agree that her current employment does exacerbate her symptoms to a moderate degree.
>
> You have asked me to comment with regard to the plaintiff's loss of earning capacity. I do not feel that the plaintiff is less capable overall from earning income from all types of employment, and I do not feel she is less marketable or attractive as an employee to potential employers as a result of the motor vehicle accident.

And one more quote:

> The plaintiff may not have a desire to pursue jobs of a more physical nature, but it is my understanding from her employment history that this was not something that she had aspired to do.

[23] I should note that, as I read those quotes, the only paraphrasing I did was I inserted the word the "plaintiff" in place of the name of the plaintiff. Otherwise, they were precise quotes.

[24] As I have indicated, the defence cancelled the IME on the basis of the report and particularly those comments and other comments in the same vein.

[25] The October 6, 2010 report contains material changes, as I have indicated, and says the following.

> This supplementary report presents a change in my opinion concerning the plaintiff's loss of earning capacity.

And farther down:

> Accordingly, it is now my opinion that the plaintiff is less capable overall from earning income from all types of employment, and she is less marketable or attractive as an employee to potential employers as a result of the motor vehicle accident. I believe that there are

> numerous job opportunities which she will not reasonably be able to take advantage of because of her injury. She will be at a disadvantage in a competitive job environment.

[26] There can be no doubt that there is a material change in the opinion of the doctor. The defence argues that it is more than material, that it is a 180-degree change, that it received notice of it 13 days before trial, and that it is prejudiced as a result because of:

1. the lost opportunity for an independent medical examination and insufficient time to schedule another one;
2. not sufficient time for a realistic opportunity for a subsequent examination for discovery;
3. insufficient time to do any meaningful further investigation at all on the topic; and
4. that the defence case was virtually already prepared or at least well on the way to being prepared 13 days ago on the basis of the initial report which it had received in April.

And summing all of that up, that the defence is simply surprised by what has occurred.

[27] The plaintiff argues that counsel did not become aware of the change in opinion until October 6th when it was actually doing trial preparation for the doctor who was then, shortly after that, leaving town until her evidence would be required. That explains the will say form of the report that was forwarded.

[28] Counsel tells me – and I accept – this is the reason why notice was given late. Counsel also tells me that the report was prepared immediately for the doctor's signature in the abbreviated form that it is, and it was sent along the very next day. Of course I accept that as well.

[29] Counsel then tells me and argues that Rule 11-6(6), together with those facts, provides a complete answer to the defence objection. It points out that subsection (6) does not set a specific deadline by number of days before trial. Rather, it says that – and I will now quote subsection (6)(a):

> The expert must, as soon as practicable, prepare a supplementary report and ensure that that supplementary report is provided to the party.

[30] And counsel argues that is precisely what was done; that as soon as he became aware of it, the report was prepared and served all within the space of one day, and that the short, abbreviated form of the report was in order to facilitate the quickness that was required to get that report out and served; and therefore, the plaintiff has complied with the section and the *Rules*, the argument goes.

[31] Alternatively, the plaintiff argues that if that has not been complied with, then I should exercise the discretion I am afforded to allow evidence in, that falls short of strict compliance as found in Rule 11-7(1), where it says "unless the court otherwise orders", as guided by 11-7(6).

[32] And in that regard, as I have indicated, there are three areas for my consideration. The first is due diligence. And the plaintiff's counsel argues, for the reasons already noted about the short notice that he himself had, that due diligence has been complied with.

[33] And with respect to the second of those considerations, that the non-compliance may cause prejudice to the defendant. The plaintiff argues, well, not such serious prejudice that it should result in the exclusion of this information.

[34] First, the defence can cross-examine the doctor on the changes; and importantly, the plaintiff, through counsel, offered an adjournment of this date if the defence felt itself to be prejudiced and caught by surprise, and the plaintiff would have consented to that had the defence sought it. Although, the plaintiff does not seek an adjournment now and made it clear to the defence that it would not be able to do so because the doctor has been paid in advance, and costs are of course something that are of concern to everybody.

[35] The third consideration to have regard to is the question as to whether or not the interests of justice require the information to be admissible. And there, the plaintiff argues simply this, that it is necessary that this information be admitted for a

fair resolution of the issues because this doctor is the only doctor who is going to be giving any medical evidence at all, and if it does not come into evidence, then the only medical evidence available will be the initial report, which is out of date and apparently no longer the doctor's opinion.

[36] I note again that subsection (6) allows me a discretion. It says the word "may", and it also makes it clear that those various requirements of due diligence, prejudice and the interests of justice requires it are joined by the word "or" rather than the word "and".

[37] The plaintiff also provides me with a case which it suggests is useful. *Shariatmadari v. Ahmadi*, 2009 BCSC 1569.

[38] All right. With that long introduction, I regret for the plaintiff that I am unable to exercise my discretion in this case in her favour. Rule 11-6(6), and particularly the words "as soon as practicable", cannot be interpreted in a vacuum. They must be interpreted in conjunction with the provisions of 11-7(6).

[39] There is no question that I do have a discretion, as noted in 11-7(1), but it also is informed by 11-7(6). With respect to that and the question of due diligence, a reading of the subsection is necessary, and it says this: The evidence may be allowed – I will paraphrase at this point – if (a) -- and this is 6(a), and I now quote:

> Facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part.

[40] I am unable to make that finding, and indeed, I come to the opposite conclusion. The facts that are in the supplemental report could have been known if the doctor had been interviewed at an earlier time. They also could have been known if the plaintiff had revealed that information to her counsel at an earlier time.

[41] The plaintiff has already given her evidence in this case, and there is no question that she had mentioned to the doctor long before October that she was having the kinds of difficulties which I infer give rise to the change in opinion.

[42] So it is the late trial preparation interview of the doctor which causes this information to have been obtained in a way which does not fall in the plaintiff's favour when it comes to my considering subsection (6)(a).

[43] In terms of subsection (6)(b), the question of whether the non-compliance is unlikely to cause prejudice, in my view, the reverse is the case. It is likely to cause prejudice if only because an IME cannot be obtained on the short notice available, and of course, that one was previously cancelled on the basis of the earlier report.

[44] It is true, and I also consider on the question of prejudice, that the defence could have sought an adjournment, and the plaintiff would have consented to it. However, in that regard, I also have to consider that this is a Rule 15-1 trial, meaning a fast track trial, and that there has already been one adjournment of the matter; coincidentally for the inability of the same doctor to attend.

[45] But I also, on the question of prejudice, have to ask myself whether or not it is really the defence that should be in the position of asking for an adjournment on this case. Surely, it is at least as reasonable to suggest that it is the plaintiff who should have been seeking an adjournment in the circumstances so that it could better comply with the *Rules* with respect to the service of the medical information.

[46] I turn then to the question of the interests in justice, which has concerned me the most because, as plaintiff's counsel says, this evidence has an element of necessity to it for the plaintiff, and I concede that it may indeed weaken an important aspect of her claim, but I am satisfied that that argument is not totally lost. As I have indicated, she already gave evidence on this point. And without wanting to indicate, not having heard argument from counsel about what weight I should give her evidence, she did give evidence about her concerns for her future and her future employment. I am satisfied it is evidence which at least will merit serious consideration on the kinds of issues that are at stake here, and consequently while, as I have indicated, I am certain it is weaker, all is not necessarily lost, again, subject of course to arguments at the end of the case.

[47] I have to also note on the questions of the interests of justice that what the plaintiff calls the "necessity" of the admissibility of this evidence merely increases the prejudice to the defence if I permit the evidence in. When it is the only medical evidence in the entire case, surely that means that a responding IME would be all the more important for the defence, and the lack of it and the inability to provide it is all the more prejudicial. I have to also weigh that in on the question of the interests of justice, and having done so, subsection (6) of 11-7 simply does not fall in favour of the plaintiff.

[48] The same comment could be made about the case that the plaintiff referred me to. An assessment of the circumstances of that case makes it clear that its facts in terms of prejudice and in terms of due diligence and in terms of interests of justice were much stronger in favour of the party seeking an exception to the strict compliance Rule than is the case here.

[49] It follows that the defence objection is upheld. The supplementary report will not be admissible nor will oral evidence on that subject.

The Honourable Mr. Justice Silverman