Citation: Freake v. Wilson
2000 BCSC 695

Date:20000428
Docket: 07100
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEBORAH ANNE RUTH FREAKE

PLAINTIFF

AND:

MICHAEL WILSON

DEFENDANT

DECISION

OF

HIS HONOUR MASTER BAKER

564-3400

Counsel for plaintiff: Dennis Smith (for D. Byl)

Counsel for defendant: Max Durando

Date and Place of Hearing: March 15, 2000
Prince George, BC

[1] Deborah Freake was injured in a motor vehicle accident April 23 1997. She suffered whiplash-type injuries, but also developed rotator cuff syndrome and possible acromioclavicular joint sprain in her right shoulder. Her claims were settled at mediation December 21, 1999, with the exception that the parties could not agree on one disbursement, namely the expense of a vocational consultant's report dated August 24, 1999. They agreed, therefore, to submit that expense to assessment.

[2] Ms. Freake's claim was set for trial in October 1999, after two previous adjourned trial dates. Her counsel thought it advisable to commission the report of Mr. J. Lawless into loss of future earnings of Ms. Freake due to possible residual shoulder problems. That report was requested July 19 1999 and eventually cost $2,974.60. There is an indication that at the time of the report Ms. Freake's shoulder problems were still developing.

[3] Defense counsel objects to the cost of the report on three principal grounds;

- it was premature, given the likelihood of an adjournment of the October trial date;

- it was deficient, in that certain medical and clinical information was not available to Mr. Lawless;

- certain of the facts upon which the report was premised were contradicted or compromised by Ms. Freake's examination for discovery.

A fourth objection, namely that the cost of the report was excessive, is essentially a conclusion based on the preceding three objections.

[4] I recently considered an issue very similar to this, in **Leverman v. City of Prince George** (BCSC Prince George No. 25657 April 26, 2000). I will not repeat all of the considerations from that case, but several authorities should be revisited. In **Bell v. Fantini (#2)** (1981) 32 B.C.L.R. 322, the court listed nine possible reasons for reducing or disallowing the cost of experts' reports, of which only one may have application to this case: when the contents of a report are significantly recanted on cross-examination;

[5] The assessing officer is not to step into the shoes of the ultimate trier of fact, but rather is to focus "on whether, in the circumstances, it was a proper expenditure to fully and properly prepare the case for trial" (**Morrissette v.**

Smith (1990) 39 C.P.C. (2d) 30). Similarly, in considering disbursements incurred in matters ultimately settled, with "…no evidence…that this report could be considered as useless at trial…" the disbursement will generally be permitted (**Loopstra, Nixon, and McLeish v. Sopko** (1992) O.J. No. 1875).

[6] As well, the court in **Fung v. Berkun** (1982) 36 B.C.L.R. 352 disallowed an expert's report when it concluded that the plaintiff had not ascertained sufficiently the true factual matrix, prior to commissioning the report. Facts reasonably available to counsel for the plaintiff, and which would likely have affected the expert's opinion, should have been determined and provided to the expert. Failure to do so, in the view of the taxing officer, seriously compromised the value of the report.

[7] I am not persuaded that the timing, alone, of Mr. Lawless' report reduces its value. Defense counsel argues that an adjournment of the October trial date was likely in view of Ms. Freake's developing shoulder problem. That may be so, but I cannot assume that the defendant, at the time the report was requested, would have adjourned by consent, or that the court would necessarily have granted an adjournment on application.

[8] I am more persuaded by the question of medical information available to Mr. Lawless. It is clear from a comparison of the first paragraph of Mr. Lawless' report, listing all of the medical information made available to and considered by him, with the volume of medical information and records then in the possession of Ms. Freake's counsel, that there was likely considerable information not forwarded to Mr. Lawless. Counsel for the defendant characterized this undelivered information as "one-half inch" of clinical records, and that seems about right. Ms. Feake's counsel argues that the lack of this information should not have presented a problem and that this information was likely reviewed and digested by other experts, whose reports Mr. Lawless did have.

[9] I agree that the information not delivered to Mr. Lawless may reasonably have affected his report. Given the extensive reports and letters of other, medical, experts, it is possible that the clinical records would not have profoundly changed Mr. Lawless' opinion, but he should have had all of the information then available to plaintiff's counsel.

[10] Ms. Freake's counsel argues that apparent contradictions arising from Ms. Freake's examination for discovery should not weigh heavily in this matter, and that her examination for

discovery comprises only a portion of the evidence that would emerge at trial. This aspect of the submissions points to the difficulty of considering the matter in the absence of a trial. A trier of fact would doubtless have heard Ms. Freake's cross-examination, would have compared it to her examination for discovery, and would then have been able to weigh Mr. Lawless' report. Nevertheless, some of the salient facts not mentioned in Mr. Lawless' report include the apparent fact that Ms. Freake at the time of impact was turned in her seat, and was not wearing a seatbelt. These may well be salient facts that Mr. Lawless should have known.

[11] I conclude that these elements, namely the incomplete medical record before the vocational consultant, as well as the potential for contradicted facts, justify a reduction in the expense allowable for the report, and conclude that the report ought to be allowed in the sum of $2,000.00.