

Case Name:

Ziebenhaus v. Bahlleda

RE: Alexander Ziebenhaus, Christopher Ziebenhaus and Victor Ziebenhaus, minors by their Litigation Guardian Sylvia Ziebenhaus, Gordon Ziebenhaus, Frederick Ziebenhaus, Gisela Ziebenhaus, Hildegard Wickert and the said Sylvia Ziebenhaus, personally, Plaintiffs, and Robert Bahlleda, Delvin Chomiak, Catherine Marinelli, Gordon Spears, York Catholic District School Board and 621198 Ontario Inc. operating as Mount St. Louis Moonstone Ski Resort Ltd., Defendants

[2012] O.J. No. 3542

2012 ONSC 3787

Court File No. 60252/01

Ontario Superior Court of Justice

M.L. Edwards J.

Heard: June 13, 2012.

Judgment: June 28, 2012.

(21 paras.)

Civil litigation -- Civil procedure -- Discovery -- Physical or psychological examination -- Motion by defendant for non-medical vocational assessment of plaintiff allowed -- Plaintiff suffered brain injury in ski accident -- Plaintiff underwent neuro-psychological and psycho-vocational assessments that commented on plaintiff's vocational potential -- Plaintiff placed past, present and future medical condition at issue and claimed a substantial award for past and future wage loss -- There was no inherent unfairness in having plaintiff seen for vocational assessment -- Such assessment was reasonable under circumstances given plaintiff's alleged cognitive difficulties and was not overly intrusive -- Courts of Justice Act, s. 105.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 105, s. 105(1), s. 105(2)

Ontario Rules of Civil Procedure, Rule 33

Counsel:

Darcy W. Romaine for the Plaintiffs.

Robert A. **Betts** for the Defendants.

ENDORSEMENT

M.L. EDWARDS J.:--

Overview

1 In an action where the plaintiff has allegedly suffered a brain injury arising out of a skiing accident, under what circumstances is the defence entitled to an assessment by a non medical practitioner specifically a vocational assessment. The credentials of the assessor do not amount to a medical qualification but the assessor is certified as a "vocational evaluator". The plaintiff argues there is no jurisdiction under the Courts of Justice Act or the Rules of Civil Procedure to allow for such an assessment. The defence argues that this court has an inherent jurisdiction to order a vocational assessment.

The Facts

2 The plaintiff was involved in a skiing accident at Mount St. Louis Moonstone Ski Resort (hereinafter "MSL") on February 15, 2001. The plaintiff was seen by Dr. Saint-Cyr at the request of counsel for MSL in January 2012. Dr. Saint-Cyr is a specialist in neuropsychology. Dr. Saint-Cyr offered various opinions in his report one of which was that the plaintiff had suffered a "moderately severe traumatic brain injury with radiologically documented petechial haemorrhages in the posterior line of the right internal capsule". Dr. Saint-Cyr goes on in his report to offer the opinion that the symptoms suffered by the plaintiff are concordant with a frontal lobe injury and that the plaintiff likely qualified for the diagnosis of post concussion syndrome in the period immediately following the accident.

3 As is typical in a claim like the one advanced on behalf of the plaintiff the Statement of Claim makes various allegations including allegations that the plaintiff has suffered a head injury, as a result of which he will suffer various losses including past and future income losses.

4 The plaintiff has been seen by a number of psychiatrists. In September of 2010 counsel for the plaintiff arranged for the plaintiff to undergo a neuropsychological and psychovocational assessment with Dr. Voorneveld. The first paragraph of Dr. Voorneveld's report of September 30th states:

At your request Mr. Ziebenhaus was seen for a neuropsychological and psychovocational assessment in order to determine his current psychological neurocognitive and vocational status as it pertains to the above referenced accident (my emphasis).

5 Dr. Voorneveld, like Dr. Saint-Cyr, expressed various opinions with respect to the extent of the injuries suffered by the plaintiff. It is noteworthy that both Dr. Voorneveld and Dr. Saint-Cyr had the

plaintiff take various tests, many of which were common to both experts. Dr. Voornveld in her report, in addition to the opinions that she expresses concerning the nature of the injury suffered by the plaintiff, also comments on his vocational potential and his ability to pursue competitive work. Specifically Dr. Voornveld in her report states:

... this would suggest that he would be a viable candidate for work that involves design and schematics. He exhibited above average motor coordination of the right hand that involved making quick and precise movements, although his finger dexterity was much below average, ruling out work that involves manipulation of the hands and fingers, such as in duties involving keyboarding, repair and assembly work. His clerical checking skills fell on the average range indicating that he could consider work involving proof reading.

6 Later in Dr. Voornveld's report the following commentary is found with respect to the plaintiff's vocational potential:

From a competitive perspective Mr. Ziebenhaus vocational potential and ability to pursue and sustain competitive work is viewed as guarded. ... the severity of his neurobehavioural issues would disable him from effectively engaging in competitive employment in the future, as well as severely impair his ability to function in his social and personal life. Even now, he is limited in his social interactions, and is extremely limited in his personal life.

... In any future vocational goal Mr. Ziebenhaus will require a high degree of support. While he has the ability to complete his university studies, the ongoing neurocognitive and neurobehavioral deficits will continue to negatively impact on his potential to pursue a career and sustain employment. ...

7 Plaintiff's counsel has produced an economic loss report that seeks to calculate the plaintiff's past and future wage loss claim. The economic loss is calculated in the range of \$1,500,000.00 to approximately \$3,500,000.00. Unquestionably the issue of what, if any, residual earning capacity the plaintiff may have, taking into account his vocational capacity and injuries, will be a fundamental part of any trial in this matter.

The Position of the Plaintiff

8 Plaintiff's counsel takes the position that there is no jurisdiction to order a vocational assessment as there is no provision made in the Courts of Justice Act or the Rules for such an assessment. In addition counsel for the plaintiff takes the position that the defence has effectively obtained an opinion with respect to the plaintiff's vocational capacity from Dr. Saint-Cyr who was specifically asked by counsel for MSL to comment on the plaintiff's future vocational capacity.

Position of the Defendant MSL

9 Contrary to the position taken by counsel for the plaintiff, defence counsel argues that the court, regardless of the provisions in the Rules and the Courts of Justice Act, still has an inherent jurisdiction to ensure fairness between litigants in the discovery and trial process and that in the exercise of that inherent jurisdiction the court can order the examination of the plaintiff by a non medical practitioner.

The Law

10 The starting point with respect to a motion that seeks an order for a defence medical or as in this case an assessment by a vocational specialist is Section 105 of the *Courts of Justice Act* and Rule 33 of the *Rules of Civil Procedure*. Section 105(2) of the *Courts of Justice Act* provides:

Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners (my emphasis).

11 Health practitioner is defined in Section 105(1) as follows:

In this Section "health practitioner" means a person licensed to practice medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction (my emphasis).

12 There is no issue between the parties that the vocational assessor in this matter does not fall within the definition of "health practitioner". Equally there does not appear to be any issue between the parties that the plaintiff in this case has suffered an injury that may be considered both physical and/or mental.

13 Plaintiff's counsel notes that the plaintiff has already been seen at the request of the defence by four health specialists including a neurologist, a neuropsychologist, a neuropsychiatrist, and a future care expert. To be fair it equally has to be pointed out that the plaintiff's have reports from similar specialists.

14 The divergence in the judicial views on the issue before this court is best expressed by B.T. Granger J. in *Vanderidder v. Aviva Canada Inc.* [2010] O.J. No. 5011 where at paragraph 23 the following is found:

The jurisdiction to order non-medical expert assessments is an area of controversy in Ontario courts. The decisions on this topic divide into two streams at the Superior Court of Justice level, and there does not appear to be a Court of Appeal decision settling the matter. In the first set of cases, courts generally interpret s. 105 and R. 33 narrowly, allowing non medical assessments only if required as diagnostic aids for medical practitioners. The divergent stream invokes the discretionary inherent jurisdiction of the court to ensure justice is done in any particular case. In these cases, a non-medical expert assessment is usually ordered in the interests of fairness and justice.

15 From my review of the jurisprudence it is not necessary to come down on one side or the other of this debate. Even in those cases where the courts have looked to the jurisdiction found in Section 105 of the *Courts of Justice Act* it becomes readily apparent that there is a greater tendency now to order an assessment by a non medical practitioner, where after a review of all of the evidence, the court can come to the conclusion that such an assessment is *reasonably* required and will not result in an *inherent unfairness* to the plaintiff.

16 I have found the analysis of Shaughnesy RSJ. in *Bernier v. Assan et al.*, [2006] O.J. No. 1978, 2006 CanLII 16481 (ONSC), to be of considerable assistance in determining the appropriateness of

the request for a vocational assessment on the facts before this court. As well the analysis of McDermid J. in *Cook v. Glanville*, [2012] O.J. No 133, is also of assistance in this court's determination.

17 The plaintiff in this case has placed his past, present, and future medical history at issue. The plaintiff is seeking a substantial award for past and future wage loss that has been quantified in an amount ranging between \$1,500,000.00 and \$3,500,000.00. Under the circumstances it cannot be said that the plaintiff would not have reasonably contemplated, with the advice of his counsel, that he would have to attend various assessments at the request of the defence. The real issue is whether or not there is any inherent unfairness now in having the plaintiff seen for the purposes of a vocational assessment and whether it is reasonable under the circumstances. In coming to the conclusion that a vocational assessment as requested by MSL is appropriate I have taken into account the following:

- (a) The vocational assessment sought by MSL is directed to an important issue in this case, specifically what if any residual earning capacity the plaintiff may have in terms of vocational potential given his alleged cognitive difficulties;
- (b) While the assessment undoubtedly will involve the plaintiff taking time away from his normal day to day activities (as it is anticipated the assessment could take upwards of 1 day) such an assessment is not unnecessarily intrusive to the plaintiff;
- (c) While Dr. Saint-Cyr was asked to comment on issues concerning the plaintiff's vocational capacity, there is no evidence to suggest that Dr. Saint-Cyr has any expertise in vocational assessments and does not hold himself out as having the same qualifications as Dr. Voorneveld who in her report notes that she was requested to undertake a psychovocational assessment and who administered vocational tests to the plaintiff. There is no indication from my review of the report of Dr. Saint-Cyr that such vocational tests were put to the plaintiff by Dr. Saint-Cyr in his assessment;
- (d) I am satisfied that the report sought by the defence may, if this matter proceeds to trial, be of assistance to the trier of fact, as the court will benefit from the testimony of expert witnesses like the vocational assessor who possesses special knowledge as it relates to the potential vocational capacity of the plaintiff;
- (e) While plaintiff's counsel points to the fact that the plaintiff will have to submit to an interview with the vocational assessor and thereby effectively submit to a form of discovery over which plaintiff's counsel will have no control, I am not satisfied that even with such concern the plaintiff will not suffer any undue hardship or prejudice.

18 Plaintiff's counsel raised a procedural issue with respect to the necessity for the vocational assessment, in the form of an argument that the defence did not put any evidence before the court that would establish a proper evidentiary basis for the assessment. It was argued that there was no affidavit evidence from any qualified health practitioner indicating that an assessment with a vocational assessor was required. While plaintiff's counsel is entirely accurate that there are many cases in

which the evidence of a health practitioner supporting the need for an assessment by a non health practitioner is required, I do not see this as an impediment in this, or for that matter, all cases.

19 Where a plaintiff advances a past and future wage loss claim of the nature advanced in this case, it can hardly be said that the plaintiff would not have anticipated the potential for a vocational assessment. Similar concerns were expressed by Granger J. in *Vanderidder* (supra) to the following affect:

In my view, given the facts of this case and the claim being made by the plaintiff for future care costs, fairness can only be achieved by ordering Vanessa Vanderidder to participate in a life care assessment by a person other than "a health practitioner" notwithstanding that there is a lack of evidence before me from a health practitioner that such an assessment is needed by a health practitioner as a "diagnostic aid."

20 Under the circumstances while in many cases it would be preferable to have an evidentiary basis, through the report of a medical practitioner expressing the necessity and the reasons why a vocational assessment is required, this court does not see it as an impediment on the facts of this case to require the plaintiff, in the interest of fairness, to attend a vocational assessment as requested by MSL. An order will therefore issue requiring the plaintiff to attend an assessment with Graham Pett on a date to be agreed upon between the parties. If there are any qualifications as to how the assessment is to be undertaken I may be spoken to by way of written argument.

21 As to the costs of this motion if the parties cannot resolve this issue, submissions may be made in writing through the trial coordinators office, to be received within 15 days limited to five pages in length.

M.L. EDWARDS J.

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