CITATION: SUPPA v. WAWANESA 2013, ONSC 679
COURT FILE NO.: 07-CV-337908
DATE: 20130131

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SALVATORE SUPPA, CATERINA SUPPA and GREGORIO SUPPA, Plaintiffs

AND:

WAWANESA MUTUAL INSURANCE COMPANY, Defendant

BEFORE: CHIAPPETTA, J.

COUNSEL: *Theodore P. Charney and Andrew J. Eckart*, for the Plaintiffs

Troy Asselin, for the Defendant

HEARD: January, 25th 2013

ENDORSEMENT

Overview

[1] The plaintiffs seek to set aside the order of Master Abrams dated August 9th, 2012 requiring the plaintiff Salvatore Suppa to be assessed by Sandra Vellone, a Rehabilitation Counselor and Life Care Planner. The plaintiffs submit that as the relief sought is not available under any rule of civil procedure, and a Master does not enjoy inherent jurisdiction, the appeal must be allowed on this ground alone. The defendant agrees that the Master exercised inherent jurisdiction in granting the relief but submits that Masters have the jurisdiction to do so such that the appeal should be denied.

[2] This matter is scheduled to proceed to trial for two weeks on February 25th, 2013. In the interest of preserving the scheduled trial date, prior to hearing submissions, I suggested that as both parties agree that the relief sought requires inherent jurisdiction and that sitting as a Superior Court Judge, I enjoy discretionary inherent jurisdiction, they should discuss the option of arguing the merits of the motion before me on a fresh first time basis, in lieu of arguing the appeal. Upon discussing my suggestion amongst them, counsel advised of their consent to proceed on this basis. The defendant also agreed to waive the cost award from the original motion before Master Abrams even though her order was not limited to the within issue.

[3] The issue is therefore whether or not it is appropriate in these circumstances for me to exercise the discretionary inherent jurisdiction of the court and order Mr. Suppa to attend a future

cost of care assessment at his home with Sandra Vellone, a Certified Rehabilitation Counselor and a Certified Life Care Planner.

BACKGROUND

[4] This action arises from a motor vehicle accident on August 7, 2006 wherein the plaintiff Salvatore Suppa was struck by an unidentified vehicle. Mr. Suppa, age 77, is alleged to have sustained serious orthopedic injuries and claims damages against the defendant under a family protection endorsement in the amount of $1,000,000.00 plus interest and costs. The *Family Law Act* plaintiffs claim damages of $50,000.00 plus interest and costs.

[5] In his Statement of Claim, Mr. Suppa alleges in part that as a result of the motor vehicle accident:

> 1. He is unable to carry on with his normal tasks of living and is restricted from participating in many recreational activities.
>
> 2. He is under the care of medical specialists and continues to require treatment, therapy and rehabilitation.
>
> 3. He will continue to require attendant care, medical and health care expenses in the future.
>
> 4. He suffered impairments, which will prevent him from carrying out a number activities of daily living and handyman tasks.
>
> 5. He will require assistance with housekeeping and home maintenance as his ability to perform these activities in the future has been diminished.

[6] In furtherance of his damages as claimed in part, the plaintiff retained Mr. Clae Willis, a Certified Care Manager, Certified Return-to-Work Co-ordinator and Certified Life Planner, to complete a future cost of care assessment and report dated January 9, 2009. The plaintiffs served the report on the defendant prior to the injured plaintiff's examination for discovery on June 10th, 2009 (the "Willis Report"). As a result of an in-home assessment, the Willis Report recommends numerous medical, rehabilitation and future care costs including initial costs of $13,454.48, one-time costs of $108,859.00 - $188,359.00, annual costs of $30,364.04 and a home elevator at a cost of $79,500.00 to $159,000.00.

[7] At his examination for discovery the plaintiff refused the defendant's question formed as follows: "If I arrange to have an occupational therapist or someone similar come in to assess the plaintiff with respect to his cost of care claim, will you consent to that visitation?"

[8] A defence medical took place on consent with Dr. Finkelstein, an Orthopedic Surgeon on November 30th, 2011. Dr. Finkelstein's report comments on the Willis Report and opines on Mr. Suppa's future care needs (the "Finkelstein Report").

[9] A second in-home assessment to further opine on Mr. Suppa's future care costs and needs was completed on behalf of the plaintiffs on October 11th, 2012 by Dimple Mukherjee, Occupational Therapist and Certified Life Planner (the "Mukherjee Report"). The plaintiff was, as well, reassessed by his Orthopedic Surgeon on December 5th, 2012 wherein Dr. Langer reviews the Finkelstein Report and he too opines on Mr. Suppa's future care needs (the "Langer Report").

[10] The defendant is now seeking to have Mr. Suppa attend a future cost of care assessment at his home with Sandra Vellone, a Certified Rehabilitation Counselor and a Certified Life Care Planner.

ANALYSIS

[11] The parties agree that the relief requested is outside of Rule 33 of the *Rules of Civil Procedure* which addresses the request of an adverse party to order a party to undergo a physical or mental examination by a health practitioner as that term is defined under s. 105(1) of the *Courts of Justice Act*. Section 105(1) does not encompass life care planners or rehabilitation counselors. The parties therefore agree that the relief can only be granted by invoking the discretionary inherent jurisdiction of the court.

[12] Counsel provided me with recent jurisprudence on this issue (as will be summarized below) which permits non-medical assessments in the interests of fairness and justice by invoking the discretionary inherent jurisdiction of the court. The plaintiffs submit that the recent jurisprudence has been wrongly decided from the start. In every decision, the judge has failed to consider the fundamental principle that inherent jurisdiction is not available when the subject matter forms part of a complete procedural code. Rule 33 and s. 105 have for decades, the plaintiffs submit, been established as a complete procedural code without functional gap and therefore inherent jurisdiction cannot operate. As discussed by Perell J. and relied upon by the plaintiffs "inherent jurisdiction does not operate when the Legislature or the Civil Rules Committee has acted and not left any procedural gaps," see P. Perell, "The Authority of the Superior Court of Justice, the Legislature and the Civil Rules Committee to Make Rules of Civil Procedure" (2006) 31 Advocates Quarterly).

[13] I agree with the statement of Justice Perell set out above. I also agree with the recent jurisprudence on this issue. I find that the two can be reconciled and are not in conflict.

[14] Counsel for the plaintiffs submit that the purpose of what is now Rule 33 and s. 105 remains as it was in 1940; to enable the court to obtain the best possible evidence as to the extent of the injuries of the party. The language does not include the damages associated with such injuries or any other similar language. Further he submits that physiotherapists, kinesiologists, ergonomic consultants, chiropractors, occupational therapists, functional capacity evaluators, nurses, accountants and vocational assessors, unlike medical practitioners, do not have the professional qualifications to give a diagnosis as to the injuries or mental or physical condition of a party.

[15] I agree with these two submissions. Rule 33 and s. 105 together operate in tandem as a procedural code to obtaining an adverse party medical examination for the purpose of assessing and diagnosing physical or mental injuries. They do not operate, however, as a statutory code or prohibition for all adverse party examinations. The defendant is not seeking to have the plaintiff's injuries assessed or diagnosed by a non-health practitioner. If it were, I would agree that resort to the court's inherent jurisdiction may be improper. Rather, as set out in the affidavit of Charles Gluek, the assessment will not consist of a physical examination of the plaintiff. Consistent with the Willis and Mukherjee Reports, Ms. Vellone will interview Mr. Suppa at his residence. Having had the injuries assessed and diagnosed pursuant to Rule 33 and s. 105, the defendant is seeking a non-medical examination for the purposes of assessing damages as they relate to future care needs and costs, in light of and accepting the injuries as previously assessed and diagnosed by a health practitioner. There is nothing within Rule 33 or s.105 which governs or limits the relief sought and would therefore preclude invoking the discretionary inherent jurisdiction of the court.

[16] In *Desbiens v. Mordini*, [2003] O.J. No. 368 (Div. Ct.), Justice Campbell heard an application for leave to appeal to the Divisional Court from an order of Justice Cameron invoking inherent jurisdiction to order the plaintiff to attend a non-medical assessment for the defence's cost of care report. In refusing to grant leave he states at paras. 8 and 9:

> I agree with Cameron J. that the suggestion that s. 105 is the only basis for future care cost or vocational assessments amounts to an error in law.
>
> In *Yusuf v. MacLean*, [1999] O.J. No. 4348 (Ont. S.C.J.) O'Driscoll J. referred to a number of authorities that confirm the inherent jurisdiction in this court to exercise discretion in permitting future care assessments where appropriate. These commence with *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (Ont. C.A.) at 282 down to *Beresford-Last (Litigation Guardian of) v. Dworak*, [1998] O.J. No. 872 (Ont. Gen. Div.).

[17] Both *Yusuf* and *Desbiens* followed the Court of Appeal's decision in *80 Wellesley East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.) wherein the Court of Appeal directed that the Superior Court of general jurisdiction has all of the powers that are necessary to do justice between the parties except where a statute provided specifically to the contrary. Although not explicitly reasoned, in referring to and applying this jurisprudence, both Justice O'Driscoll and Justice Campbell would appear to have concluded that Rule 33 and s. 105 do not act as a complete procedural code for any and all adverse party examinations.

[18] Justice Howden followed *Desbiens* in *Moore v. Wakin*, 2010 ONSC 1991, [2010] O.J. No. 1492, wherein he states, at para. 4:

> I agree with the conclusion of C. Campbell J. and Cameron J. in *Desbiens v. Mordini*, [2003] O.J. No. 368 (Ont. Div. Ct.) and the handwritten endorsement by Cameron J. of December 11, 2002 that the "diagnostic aid" ground related to s. 105 of the *Courts of Justice Act* is not the only jurisdictional base for ordering a future care assessment and that the Court has inherent jurisdiction to exercise its discretion to order it in proper cases. Paraphrasing Cameron J. in *Desbiens*,

> on appeal from a Master's Order, a credible report is vital to the final result in this case where future care and its costs are principal issues.

[19] Justice Granger also applied *Desbiens* in *Vanderidder v. Aviva Canada Inc.*, 2010 ONSC 6222, 7 C.P.C. (7th) 219, wherein the defendant sought to compel the plaintiff to participate in a life care plan assessment. In granting the order states, at paras. 34-35:

> 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 [the plaintiff] to participate in a life care assessment by a person other than a "health practitioner" as a "diagnostic aid".
>
> In my view, the courts should always strive to achieve fairness in the trial process and order a "level playing field" at trial which will ensure a fast result. To allow the plaintiff to adduce evidence of her future care needs through an expert retained by the plaintiff while denying the defendant the ability to have an expert in life care needs of its choosing would not create a "level playing field".

[20] Most recently Justice McDermid followed *Desbiens* in *Cook v. Glanville*, 2012 ONSC 405, [2012] O.J. No. 133, wherein he considered the defendant's request to have the plaintiff undergo an in-home occupational therapy assessment. In granting the relief he states, at para. 11, "I am persuaded to follow the decision of the Divisional Court in *Desbiens* as enunciating the proper approach to this issue".

[21] I am equally persuaded. I find, for the reasons set out above, that Rule 33 and s. 105 do not preclude the exercise of the court's discretion to invoke inherent jurisdiction when determining whether or not to have Mr. Suppa attend a future cost of care assessment at his home with Sandra Vellone, a Certified Rehabilitation Counselor and a Certified Life Care Planner.

[22] I agree with counsel for the plaintiffs that the assessment should not be granted on a "me too" basis simply because the plaintiffs have retained a future care cost expert who assessed the plaintiff and produced a report. Rather, the court should carefully apply the test in terms of when an order should be made pursuant to the court's inherent jurisdiction, cited in *Yusuf*, derivative from the Court of Appeal's decision in *Bellamy v. Johnson* (1992), 8 O.R. (3d) 591 (C.A.). When a court makes such an order it should consider (a) the opposing party's ability to learn the case it has to meet by obtaining an effective evaluation; (b) the likelihood of achieving a reasonable pre-trial settlement if the order is granted; and (c) the fairness and effectiveness of the trial if the order sought is or is not granted.

[23] In considering the first factor, while there have been three examinations for discovery in which defence counsel had the Willis Report in hand and canvassed questions with respect to the same and while Dr. Finkelstein also asked Mr. Suppa about the Willis Report and provided his comments, the defendant cannot fully know the case he has to meet before the trier of fact until an expert in future care needs and costs interviews the plaintiff and provides her opinion. At present, the defendant is aware of the case the plaintiff wants him to meet. He is aware of the plaintiffs' lay opinions on the Willis report and an orthopedic surgeon's opinion. He remains unaware of a best evidence defence to the plaintiffs' expert evidence as this can only be rendered

with an effective evaluation by a like expert conducting an assessment in a like manner. Further, the Mukherjee Report remains without review or discovery.

[24] In terms of the second factor, there is no evidence before me with respect to the likelihood of achieving a reasonable pre-trial settlement if the order is granted and I hesitate to speculate beyond the obvious likelihood that the more credible the evidence in response, the more incentive the plaintiffs may have to resolve the matter prior to trial.

[25] It is the third factor that lies at the heart of the analysis. "Necessary to do justice"," vital to the final result in this case", would "achieve fairness in the trial process" and would "order a level playing field at trial which will ensure a fast result" enjoys frequent use in recent case law discussing the third factor. There is nothing on the record before me that would distinguish this case from those reviewed above.

[26] The Statement of Claim identifies future care and its costs as principle issues at the trial of this matter. The Willis and Mukherjee Reports confirm future care and its costs as a significant portion of the damages claimed. The trier of fact should have the best possible evidence as to the extent of this critical head of damage. If the order sought is not granted, the plaintiffs' two expert opinions will stand as against the defence counsel's questions on examination for discovery of the Willis Report and the defence medical assessor's comments on the Willis Report; neither of which may be admissible as expert evidence on this issue and if admissible neither of which will hold credible weight as against the Willis or Mukherjee Reports. I find the same would be so if the order was not granted and the defendant was left with having his expert prepare a responding assessment without an examination. The conclusions and recommendations of the Willis and Mukherjee Reports are based in part on an in-home assessment. Anything less in response would likely carry little weight and be subject to effective cross-examination. For these reasons I find that fairness and effectiveness in the trial process would be compromised if the order sought is not granted.

[27] In exercising the court's discretion and ordering the future cost of care assessment, I have also considered if there were any mitigating factors such as prejudice to the plaintiffs, violation of privacy rights or undue hardship, particularly in light of the request for an in-home assessment. I find that there are no factors on the record before me sufficient to mitigate against granting the order.

DISPOSITION

[28] For reasons noted above, the defendant's motion is granted. The plaintiff is ordered to attend a future cost of care assessment at his home with Sandra Vellone, a Certified Rehabilitation Counselor and a Certified Life Care Planner on a date within 7 days of this date to be agreed upon by counsel provided that the trial as scheduled should not be delayed.

COSTS

[29] The parties agreed that costs would be awarded fixed at $3,000.00 payable within 30 days to the successful party.

[30] To this end, as agreed, costs are awarded in favour of the defendant fixed at $3,000.00 payable by the plaintiffs within 30 days.

CHIAPPETTA, J.

Date: January 31, 2013