Date of Release: April 21, 1995 ***No. B934125***

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)

)

REASONS FOR JUDGMENT

CATHERINE LYNN KOCH)

)

PLAINTIFF)

OF

)

AND:)

)

MASTER BOLTON

BRADLEY WALKER and KEVIN)

STAPLETON)

(IN CHAMBERS)

)

DEFENDANTS)

K. Price Appeared on behalf of the plaintiff

T.H. Pettit Appeared on behalf of the defendants

Date and Place of Hearing: April 12, 1995

Vancouver, British Columbia

1 The defendant has sought an examination of the plaintiff by a doctor pursuant to Rule 30(1). The plaintiff agrees to an examination, but objects to the particular doctor chosen by the defendant.

2 The plaintiff was injured in a motor vehicle accident on December 14, 1992. The injuries she has pleaded include a strain of her neck and upper back, head injury, shock and injury to the right arm and shoulder. One of her doctors, Dr. N. Smith, wrote a medical report on December 14, 1994. Dr. Smith is a specialist in physical medicine and rehabilitation. A copy of this report was sent to the defendants' solicitors on January 16, 1995.

3 On January 26, 1995, the defendants' solicitor spoke to the plaintiff's solicitor. He said he had instructions from his instructing insurance adjuster to arrange an independent medical examination by Dr. Reebye, another specialist in physical medicine and rehabilitation. The plaintiff's solicitor said he could not consent to an examination by Dr. Reebye, whom he believed not to be objective. He would consent to an examination by any of the other physical medicine and rehabilitation specialists in the province. But the defendants' adjuster apparently has great confidence in Dr. Reebye's expertise and his ability to explain his opinions in court, if necessary. The parties have maintained these positions, which has led to the present application.

4 The plaintiff takes no issue with respect to Dr. Reebye's formal qualifications. The only issue is the question of his objectivity. In support of her position, the plaintiff's solicitor has filed an affidavit deposing that he has practiced law for almost eighteen years, almost exclusively in the area of personal injuries. I will set out the rest of the allegations concerning Dr. Reebye's suitability in full:

"7. THAT on April 11, 1995, I was informed by Mrs. Robotham at the College of

Physicians and Surgeons for the Province of British Columbia, or which I verily believe to be true, that there are presently 32 certified specialists in physical medicine and rehabilitation practicing in the Province of British Columbia.

8. THAT I have advised the Plaintiff that, in my opinion, and based on my experience as counsel, Dr. Reebye is not objective in his medical/legal opinions and that he favours the Defence.

9. THAT I have also advised the Plaintiff that, in my opinion, Dr. Reebye is not independent.

10. THAT I have been instructed by the Plaintiff, and verily believe to be true, that she accepts my advice in this regard and that she distrusts and fears attending with Dr. Reebye."

5 I had contemplated giving fairly extensive reasons for judgment on this issue of apprehended bias, but I was asked to give these reasons prior to the anticipated examination date of April 21st, and as a great amount of detail is not strictly necessary, these reasons will be briefer than I had intended.

6 Much of the plaintiff's argument deals with the line of cases that established the proposition that questions of anticipated bias on the part of a defendant's doctor should not be dealt with in interlocutory applications such as this, but should be reserved for evidence and argument before the trial judge. Counsel sought to distinguish that entire line of cases by going back to what he said was the case which first established the general principle;***Gursky v. Horanski*** (1968) 68 W.W.R. 490 (Man. Q.B.). There, the court did state:

" Plaintiff's position that defendant's solicitor's strong preference for Dr. Tucker warrants the belief that the examination will not be 'impartial' and will 'favour' the defendant must be rejected. The acceptance of that principle would block the use of any doctor named by a defendant should plaintiff object."

However, later the court goes on to give one of the reasons for rejecting the plaintiff's argument:

" With a bench of few members, the judges are soon acquainted with the specialists who appear frequently either for plaintiffs or for defendants. The doctor who is consistently over-sanguine or over-pessimistic about the condition or prognosis of claimants will lose effectiveness and be dropped by solicitors."

Counsel argues that this underlying principle is not applicable in current conditions in the Lower Mainland of British Columbia, with a bench of many members and many doctors available to give evidence in personal injury litigation. He says that given the inapplicability of the premise, the conclusion is no longer valid.

7 I would reject that argument, as a general proposition, for a number of reasons, but I do not find it necessary to do so here, given the time constraints I have to work under. I will accept, only for the purposes of this application, that it is proper to deal with questions of apprehended bias in interlocutory

applications, rather than leading evidence to attempt to prove the point at trial. But even with that concession, in my view the plaintiff's case falls far short of establishing a risk of bias rendering Dr. Reebye's opinion unreliable.

8 The only evidence is that Mr. Price, the plaintiff's solicitor, believes Dr. Reebye to be objective and biased in favour of defendants. There is no evidence of the number of reports Mr. Price has seen from which he draws that conclusion. There is no evidence that Dr. Reebye has testified in court on any occasion and been held to be unreliable. There is no evidence of Mr. Price's qualifications to detect bias on the part of an expert working within his area of expertise, beyond the fact that he himself has been eighteen years in the business.

9 In my view, it is outrageous for a professional person to say of another that he is unable to give a trustworthy opinion, and to support this dramatic, damaging (and potentially defamatory, were it not privileged) allegation by saying merely "trust me - I have eighteen years' experience."

10 Basically, there is no evidence at all, where a great deal of fairly compelling evidence would be necessary. Without any acceptable evidence of bias, there is absolutely no reason why the examination should not proceed as proposed by the defendant. The application is granted, with costs to the defendants in any event of the cause.

Dated at Vancouver, British Columbia this 20th day of April, 1995.

"A. Neil Bolton"

A. Neil Bolton

Master