IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Colbeck v. Kaila et al and Dytuco v. Low,*** 2007 BCSC 689

Date: 20070515
Docket: M052202
Registry: Vancouver

Between:

Gary Colbeck

Plaintiff

And

Dashan Kaila and A-1 Group of Companies Dev. Ltd.

Defendants

- And -

Docket: S79630
Registry: New Westminster

Between:

Mario Antonio Dytuco

Plaintiff

And

Gar Wah Low

Defendant

Before: Master Taylor

Reasons for Judgment

Counsel for the Plaintiffs:	F.E. Hayman
Counsel for the Defendants:	L.G. Harris
Date and Place of Hearing:	March 14, 2007, New Westminster, B.C. and April 4, 2007, Vancouver, B.C.

[1] Occasionally, while engaged in activities related to their files, lawyers disagree about the nature of the rules which govern court proceedings as well as those which guide their behaviour and discourse. Even less frequently do counsel seek the court's intervention in relation to the professional difficulties which exist between them. Unfortunately, this is such a case.

[2] As a result of some basic disagreements between counsel in relation to two separate motor vehicle accident claims, the defendant in each action thought it necessary to bring an application to court to seek the court's reproach of certain behaviour of plaintiff's counsel by application to dismiss the plaintiff's action, or, in the alternative, to force the plaintiff in each case to attend examinations for discovery, and for costs thrown away for earlier failed examinations, or alternatively, special costs.

[3] In one of the matters, the plaintiff seeks orders compelling the defendant to attend an examination for discovery *de novo* or in the alternative to attend an examination for discovery and in both cases to answer questions put to him without interference from his counsel. As well, the plaintiff seeks costs of the application as well as costs thrown away of the aborted examination for discovery on March 30, 2005, or alternatively, special costs paid to the plaintiff.

[4] In each case, the plaintiff is represented by Mr. Maryn and the defendant is represented by Ms. Stevens. Each is counsel of experience in the court's process. Each is generally known for representing only one side of the plaintiff/defendant

dichotomy. I think it fairly said that Mr. Maryn is known as a plaintiff's counsel, while Ms. Stevens is known to mainly represent defendants.

[5] The relations between counsel on the two cases became so fractious that each side had to retain counsel to represent them as it appears all semblance of objectivity has been lost. Accordingly, Mr. Harris was retained for the defendants and Ms. Hayman represented the plaintiffs, although representation by these two counsel was essentially for Ms. Stevens and Mr. Maryn respectively, and not for the original litigants.

Background Facts

[6] ***Colbeck v. Kaila et al*** involves a motor vehicle accident which occurred on June 7, 2004. Liability is in issue. This matter was commenced in the Vancouver Registry. The trial is set to commence on November 19, 2007 with a jury. Two half-days were scheduled for examinations for discovery of the plaintiff and defendant on July 11 and 12, 2006. On July 11, 2006, counsel were informed that there was no court reporter available. Mr. Maryn suggests Ms. Stevens' office was responsible for not booking the court reporter as that office had said it would. The court reporters' office told counsel that they would try to get a reporter in for the litigants.

[7] By 10:20 a.m., Mr. Maryn advised Ms. Stevens he would only wait until 10:30 a.m. and if a court reporter had not arrived by that time, then he and his client would leave. Apparently, a court reporter arrived at approximately 10:50 a.m., but Mr. Maryn and the plaintiff had already left, so the examination did not proceed.

[8] On the following day, Mr. Maryn and his client arrived but the defendant was not present. Mr. Maryn agreed that Ms. Stevens could proceed with her examination of the plaintiff but tried to limit her examination of the plaintiff to the issue of damages only. His justification for this position is said to arise from the plaintiff's right to discover the defendant first, especially where liability is in issue. He claims this to be part of his litigation strategy.

[9] Ms. Stevens did not agree with Mr. Maryn's strategy. She attempted to ask the plaintiff questions about the accident but was prevented from doing so by Mr. Maryn. As a result of this disagreement, Mr. Maryn and his client left the discovery.

[10] Since that time, counsel have been unable to agree on dates or how to proceed on a subsequent examination for discovery. Mr. Maryn insists on being able to examine the defendant first at any subsequently scheduled discovery. As well, Mr. Maryn insists that his client is unable to sit through a full day of discoveries and, accordingly, two half-day discoveries should be scheduled. Mr. Maryn also claims to be unable to commit to afternoon discoveries as he must pick up his children from school at 3:00 p.m.

[11] ***Dytuco v. Low*** involves a motor vehicle accident which occurred on September 18, 2002. This action was commenced in the New Westminster Registry. Liability is in issue. There was to have been a trial with judge and jury commencing November 28, 2005 for 15 days but has now been adjourned to January, 2008. Apparently most of the issues in this case surround the plaintiff's

pre-existing conditions of kidney failure which requires regular dialysis, as well as ongoing orthopaedic problems and prior hip surgery.

[12] Five appointments were taken out for examinations for discovery on this file, commencing with the first appointments for April 20, 2004. Both counsel wished to proceed with discoveries on that day, but, unfortunately, Mr. Maryn found it necessary to seek a new date as he was required to appear in Chambers on April 20, 2004. His office informed Ms. Steven's office of the need to reschedule on April 14, 2004.

[13] A new date of August 11, 2004 was agreed to between counsel for the discoveries in this action, however, sometime in May, Mr. Maryn's office contacted Ms. Steven's office seeking to reschedule the discoveries. The date of July 29, 2004 was agreed to.

[14] On July 29, 2004, both parties and counsel attended the offices of All Star Reporting in New Westminster, however, no discoveries took place. Apparently, Mr. Maryn took a telephone call and then advised Ms. Stevens that his young son had cut his hand and that his wife was taking the child to hospital. Ms. Stevens offered Mr. Maryn the opportunity to examine the defendant before departing but he declined. He took umbrage that Ms. Stevens would question him on the seriousness of the injury and then left the discovery.

[15] Another date for discoveries was arranged between the offices of counsel for September 14, 2004, however, these discoveries did not proceed as Mr. Maryn's office requested an adjournment. The reason given for the adjournment request

was that Mr. Maryn was required to attend Chambers on that date. The request for adjournment had been made the day before the scheduled discoveries were to be held.

[16] Discoveries were then arranged to be held on March 30, 2005. On this date both the plaintiff and defendant were in attendance with counsel at All Star Reporting in New Westminster. Ms. Stevens takes the position that Mr. Maryn unilaterally terminated the discovery at 10:35 a.m. when he and the plaintiff left the discovery. She also takes the position that Mr. Maryn's behaviour at that time was disrespectful to herself, the defendant and the discovery process itself.

[17] On the other hand, Mr. Maryn takes the position that Ms. Stevens interfered with his questioning of the defendant and did not allow the defendant to properly or completely answer the questions put to him by Mr. Maryn. He also asserts that the defendant had not properly informed himself of the information relevant to the issues such that he was able to provide complete and accurate responses to the questions.

[18] The behaviour complained of by Ms. Stevens includes Mr. Maryn using inappropriate language during the discovery and subsequently putting his feet up on the boardroom table while engaged in an examination of the defendant. Mr. Maryn says he was frustrated by the constant interruptions by Ms. Stevens while he was examining the defendant. Portions of the transcript of that discovery are reproduced here:

29 Q And how far were you away from Mr. Dytuco when you first put your brakes on? How far away, what distance?

A I would say about – I don't remember. It's –

MR. MARYN: Ten feet?

MS. STEVENS: Don't guess. If you can give an estimate, you can give an estimate, but don't make a wild guess

A I can give an idea how far.

33 Q I understand. Was he already stopped when you first put on your car – your brakes? Mr. Dytuco, was he already stopped?

A This is what, four years ago.

MS. STEVENS: If you don't know, don't guess.

A I'm not sure either.

MR. MARYN:

34 Q So you can't tell me if he was stopped or still going when you put on your brakes?

A I think he's in the process of stopping.

46 Q Before you took your foot off the gas pedal you were doing the normal speed for Broadway?

A Uh-huh.

MS. STEVENS: What do you mean by normal speed?

MR. MARYN: Posted speed.

MS. STEVENS: The posted speed limit. And what is that?

MR. MARYN:

47 Q Do you know what the posted speed limit is?

A Yeah, 50.

MR. MARYN: It's 50 or 60. I don't know which one. But you are doing one of those.

MS. STEVENS: Wait a second, the speed limit in the city is 50 and I think we all know that.

MR. MARYN: There are some streets that are 60. I'm not sure if that's one of them.

48 Q So you are doing the posted speed limit, whatever it was?

A Uh-huh.

MS. STEVENS: Do you understand what that means?

A No, I don't know what he's trying to say.

MR. MARYN:

49 Q What don't you understand?

A I'm going at around 35, I would say, you know, or so- you know, but I'm not sure about the speed limit. I know – as far as I know speed limit is 50 in Vancouver.

50 Q So why would you be going slower than the speed limit?

A I beg your pardon?

51 Q Why would you be driving on one of the main streets in Vancouver –

A I'm a slow driver. I'm not a speedy guy. My car is – doesn't go fast.

54 Q I'm not asking if you are speeding. I'm asking you simply, sir, why you weren't doing the speed limit, which is 50, why you were going below the speed limit?

A Maybe I sense the traffic is a bit bad traffic.

55 Q Are you guessing?

A Well, I'm not guessing. I mean this is what happened. You asking me why. I can't tell you why.

56 Q Do you remember going less than the speed limit before this car crash happened?

A I remember, yes.

57 Q You remember going 35 kilometres an hour before this car crash happened? You remember that?

A Well, I can't say exactly. I would say around 35 to 40.

58 Q Or 50?

A Well –

59 Q I'm trying to understand why you wouldn't be doing the speed limit on a street in Vancouver. I can't imagine that the cars behind you wouldn't be honking their horns for you to do the speed limit. This is Vancouver.

A Yeah, I know what you're trying to say but the point is that there's traffic around and – you know.

MR. MARYN: All right. So you were doing less than the speed limit because that's why you normally do?

MS. STEVENS: And he said because there was traffic around.

MR. MARYN: Okay. Do you normally do less than the speed limit even if there's no traffic around?

MS. STEVENS: Okay, that's not relevant because this is an accident that happened in traffic.

…

MS. STEVENS: Thirty-five to forty and he did not say he looked at his speedometer.

MR. MARYN: How do you know you were doing 35 to 40?

MS. STEVENS: He said that was his best estimate.

MR. MARYN: Did you look at your speedometer?

MS. STEVENS: He said he didn't.

MR. MARYN:

77 Q You didn't look at your speedometer?

A No.

78 Q So your best estimate is that you're going 35 to 40. Would therefore Mr. – according to your evidence was Mr. Dytuco also travelling 35 to 40 kilometres an hour according to your estimate?

A I can't – I didn't even look at my – I just know what – I can't tell what he's driving, what speed.

79 Q Was he zipping away from you or were you getting closer or what was going on?

A You have to ask him that.

MR. MARYN: I'm asking you.

MS. STEVENS: You have to go from your own memory. Do not guess.

MR. MARYN: I'm asking what you remember, sir. Your lawyer will get a chance to ask my client a lot of questions. This is my chance to ask you. What do you remember? Was he going the same speed as you, faster, slower, which one?

MS. STEVENS: Or if you don't have any memory then you don't have to answer.

A I have no memory how fast he's going about.

MR. MARYN: So you don't remember if you were keeping pace with him or not?

MS. STEVENS: You haven't really defined that. Over the course of two miles they may have stopped at stop lights.

MR. MARYN:

80 Q Do you know what I'm asking you? Mr. Low, do you know what I'm asking you? I know your lawyer doesn't understand but I want to know if you understand. Do you understand what I'm asking you?

A You explain to me.

MR. MARYN: I'm asking you in the period of time before Mr. Dytuco stopped his car, for some period of time on Broadway somewhere before the accident happened the two of you must have been travelling down the road, you following him; do you understand?

MS. STEVENS: But he's already said he doesn't know when the plaintiff came –

MR. MARYN: Don't interfere.

MS. STEVENS: – in front of him.

MR. MARYN: He's asked me to explain and I'm explaining. I didn't ask you to explain. If I want you to explain I'll ask you to explain, but I don't want you to explain so don't.

81 Q So you're travelling together down the road together. Is your car going the same speed as Mr. Dytuco's car as you're travelling down Broadway?

A I can't guess, probably not.

82 Q No?

A I don't know.

MR. MARYN: Okay. Which one was going faster and which one was going slower?

MS. STEVENS: He said he doesn't know.

MR. MARYN: He said probably not.

MS. STEVENS: He said I don't know.

MR. MARYN: No, I think he said probably not. Can you read it back?

(READ BACK)

83 Q Probably not. Did you mean probably not you were going the same speed?

A Yeah.

MR. MARYN: All right. So which one of you was going faster and which one of you was going slower?

MS. STEVENS: Now remember you're not allowed to guess.

MR. MARYN: Jesus Christ, Linda.

MS. STEVENS: You have to give answers from your memory.

MR. MARYN: Stop interfering.

MS. STEVENS: I'm not.

MR. MARYN: Yes, you are. Look, I got a whole transcript of this. Keep the tape please. Stop doing this, all right? Stop. Stop prying him. Stop giving him the answers. Stop telling him when there is a problem question coming. Stop cuing him, all right?

MS. STEVENS: I'm just—

MR. MARYN: No, no just – if you do it one more time we're leaving. I'm going to get a court order and I'm going to bring this tape with me and I'm going to let the court hear how you're interfering with my discovery.

MS. STEVENS: He's saying he doesn't remember.

MR. MARYN: The purpose of a discovery is to test his memory, all right?

MS. STEVENS: But I don't want you then saying that he does remember when you've pried a guess out of him but go ahead.

MR. MARYN: You know, you get a thing called a redirect at the end of your discovery, all right? That's when you can talk, unless there's something objectionable. But don't give your client answers anymore. If you do it again we're leaving and I swear I'm going to get a court order and I'm going to bring this thing with me and I'm going to get costs, special costs, because I'm tired of this. You cannot give them the answers.

MS. STEVENS: I'm not giving answers.

MR. MARYN: Yes, you are Linda. Yes, you are.

…

MR. MARYN: Do you mind? I might as well get comfortable.

MS. STEVENS: For the record Mr. Maryn is putting his feet on the boardroom table and leaning back in his chair.

MR. MARYN: Thank you. So for the one or two minutes you were probably behind Mr. Dytuco were you travelling at the same speed as him?

MS. STEVENS: I believe he's already said that he cannot recall.

MR. MARYN: You know, I'm going to just stop right now. Thank you. I'll take a transcript of this please. Preserve your tape recorder. I've had enough of this, Linda.

MS. STEVENS: Fine. We still have to do Mr. Dytuco.

MR. MARYN: No, we are not. I'm in the middle of discovering your client. I'm going to get a court order for you to stop interfering.

MS. STEVENS: This is the third time that you have left the discovery and I'm going to proceed with the discovery of Mr. Dytuco.

MR. MARYN: Mr. Dytuco, please follow me. I'll take the transcript original.

MS. STEVENS: Look, Michael, we have to proceed with your client's discovery or I will be seeking costs against you.

(PROCEEDINGS ADJOURNED AT 10:35 a.m.)

Discussion

A. *Dytuco v. Low*

[19] By way of affidavit sworn March 15, 2007, Mr. Maryn tenders an apology for his behaviour at the examination for discovery on March 30, 2005, at paragraph 4, in the following words:

> During the discovery of the defendant on March 30, 2005, I put my feet up on the boardroom table and said “Jesus Christ, Linda” to Ms. Stevens. I recognize that these actions were wrong. I regret these actions and apologize to the court and to my colleague, Ms. Stevens. I wish to state that it was because of extreme frustration that these actions resulted. Ms. Stevens and I have been involved in many cases on opposing sides. I have, on more than one occasion, felt that she has interfered when her clients are being discovered, by signalling the answers or by interrupting me during my questioning. During my discovery of Mr. Low, she repeatedly reminded her client not to guess before he had even stated that he did not remember, signalled him when a tough question was coming, and stated his answers incorrectly rather than allowing him to speak.

[20] And again at paragraph 7:

> On March 30, 2005 at the discovery of the defendant, due to my frustration with Ms. Stevens’ interference, combined with my past experiences with Ms. Stevens as outlined and referred to above, I reacted strongly and in a regrettable manner. The interference with my questioning, however, rendered my discovery of the defendant ineffective, as I could not determine whether the defendant had answered questions from his own memory or from prompting.

[21] In the same affidavit, Mr. Maryn also deals with his actions at the examination for discovery of July 29, 2004 when he received a phone call about his son as follows at paragraph 4:

> Ms. Stevens mentions the discovery date of July 29, 2004, when I received a call telling me that my youngest son, Matthew, had cut himself and had to go to the hospital. To give some background, in June 2004, Matthew nearly drowned, resulting in coma and hospitalization for an extended period of time. It was an extremely difficult and upsetting time for my family and me emotionally, as we did not know whether Matthew would even survive. At the time, I was a sole practitioner and had no one readily available to handle my files. Colleagues stepped in where they could to assist me, but clearly could not manage my entire practice. As a result of Matthew's accident, I was faced with very difficult personal circumstances as well as a backlog in my workload and files. Ms. Stevens was defence counsel in a case of mine set for trial on June of 2004 and due to the severity of Matthew's accident, I needed to adjourn the trial. A colleague assisted me with the matter and later informed me that it had not been smooth for him to obtain Ms. Stevens' consent to adjourn the trial.

[21a] Ms. Stevens filed an affidavit sworn March 30, 2007 in which she deposes she did not have any dealings with Mr. Maryn's colleague, but rather it was a co-defence counsel with whom Mr. Maryn's colleague had dealings regarding the adjournment of the trial.

[22] In my view, the apology provided by Mr. Maryn in his affidavit is half-hearted at best. His actions were disrespectful and rude to all present as well as to the process of examination for discovery. He then seeks to justify his behaviour by suggesting that Ms. Stevens was inappropriately interfering with his discovery of the defendant. While it may be that Ms. Stevens was interfering, it is not justifiable to act in the way Mr. Maryn did.

[23] The plaintiff seeks relief from the court based upon the assumption that Ms. Stevens for the defendant was interfering with the examination of the defendant by Mr. Maryn, and the defendant seeks relief by way of an order directing the plaintiff to attend an examination for discovery. The defendant also seeks as part of the order

terms that the plaintiff be examined from 10:00 a.m. to 12:30 p.m. and from 2:00 p.m. to 4:00 p.m., with convenient breaks at appropriate intervals, at a court reporter's office in New Westminster, selected by counsel for the defendant on a date convenient to both parties, or a date specified by the court in the absence of agreement.

[24] This should have been a relatively simple matter. The plaintiff should have been able to examine the defendant in all of 20 – 30 minutes. After all, the accident was a rear-end collision. Simple questions, such as how fast was your car going when it collided with the car in front should be asked. The questioner shouldn't make statements or enter into argument with the party being examined. With a little preparation the examination should have proceeded smoothly and should have finished in the amount of time already used on March 30, 2005.

[25] In ***Discovery Practice in British Columbia*** the learned author has this to say about interjections by counsel at Section 3.113:

> Avoid any interjections that might suggest how the witness should answer the question. It is improper for you to make any interjection to assist the witness, unless specifically authorized to do so by examining counsel. The admonition "Don't guess", which is frequently used to prompt a witness, is improper in this context. Always ask examining counsel whether help is sought. For example:
>
> > Q. Perhaps I can be of assistance here, *[examining counsel]*, if you so wish?

[26] How then to assess what the remedies should be for the delayed/adjourned discoveries, the interjections, the perceived lack of preparedness and general

discourteousness. In my view, the actions of both counsel at the examination for discovery were regrettable.

[27] After giving this matter much consideration, I order the plaintiff, Mario Antonio Dytuco to attend for examination for discovery on a day or dates agreed to between counsel within the next ensuing 60 days from the date of these reasons. If Mr. Dytuco is unable to attend for a whole day of discovery, he should provide a doctor's letter through his counsel to defendant's counsel explaining why he cannot attend for the full day. Otherwise, Mr. Dytuco's examination will proceed immediately after the examination *de novo* of Gar Wah Low which will commence at 10:00 a.m. on the date agreed to between counsel and proceed for no more than 30 minutes. Thereafter, when Mr. Dytuco is being examined, and in the absence of a doctor's letter, the examination for discovery and health breaks will adhere to the same hours as those of the Supreme Court. As well, the plaintiff will pay to the defendant the sum of $400 as a contribution to the defendant's costs thrown away on March 30, 2005. Paragraph 1 of the defendant's Notice of Motion dated June 21, 2005 is dismissed.

B. *Colbeck v. Kaila et al*

[28] By agreement between counsel, the examinations for discovery of the plaintiff and the defendant, Dashan Kaila, were set for July 11 and 12, 2006. Mr. Maryn for the plaintiff took out an appointment for examination of the defendant on December 20, 2005. The defendant's solicitors took out an appointment for examination of the

plaintiff on January 30, 2006. The reason for the two consecutive days is that Mr. Maryn's office advised the plaintiff would not sit in discovery for a full day.

[29] By letter dated April 25, 2006, defendant's solicitors confirmed that their office would attend to booking both appointments with the court reporter's office. The same letter also confirmed that the examination of the defendant would proceed first, commencing at 10:00 a.m. on July 11, 2006, after which the discovery of the plaintiff, Gary Colbeck would begin.

[30] When counsel attended at the court reporter's offices at 10:00 a.m. on July 11, 2006 they learned there was no notice of the appointments for the discoveries in this matter.

[31] Upon learning of this mix-up, rather than waiting for a reporter to arrive, Mr. Maryn gave notice to Ms. Stevens that if a reporter had not arrived by 10:30 a.m. that day, then he and his client would leave. In fact, no reporter did arrive by 10:30 a.m. and Mr. Maryn and his client did leave. Mr. Maryn advised Ms. Stevens that he would return the following day and the receptionist for the court reporters confirmed a reporter would be available at 10:00 a.m. the following day.

[32] Thereafter, counsel exchanged correspondence later that day. Mr. Maryn sent a letter to Ms. Stevens' office by fax suggesting Ms. Stevens' office had overlooked booking a reporter for that day and advising he and his client would be attending the court reporter's office the following day.

[33] Ms. Stevens responded with a lengthy two-page letter purporting to set out in detail what took place between counsel earlier in the day at the court reporter's office. She also indicated in her letter that the defendant would not be attending the examination for discovery the next day or at any time in the future, absent a court order. Her justification was that the defendant had attended pursuant to Mr. Maryn's appointment and that Mr. Maryn chose not to proceed with the discovery. She also threatened to seek costs against Mr. Maryn personally for costs thrown away in relation to the earlier events that day. Lastly, Ms. Stevens confirmed she would conduct an examination for discovery of the plaintiff on the following day.

[34] On the following day, Mr. Maryn said he would only allow Ms. Stevens to examine the plaintiff on the issue of damages. He asserted his right to examine the defendant first on the issue of liability. In fact, before Ms. Stevens even asked the plaintiff to state his name, Mr. Maryn said on the record of the examination for discovery:

> If you ask him about liability, we're going to walk, so you can choose how you want to use this time.

[35] At Question 17, Ms. Stevens said:

> I'm going to ask you some questions about a motor vehicle accident that happened on June 7, 2004, and, if you don't understand my questions, would you ask me to repeat it.

[36] Thereafter, the examination for discovery disintegrated, which resulted in Mr. Maryn and his client leaving at 10:06 a.m. I reproduce in full the transcript of the exchange between counsel after the first 17 Questions on July 12, 2006:

MR. MARYN: Counsel, we have had this discussion before we started this and I put on the record I didn't want my client asked any questions about liability until such time as is right. I'm entitled to discover your client before mine, my action, on the issue of liability.

Now, you have chosen not to produce your client and I've told you before that I don't want you asking questions of my client on liability. You're entitled to ask him questions on the damages issues, but if you insist on asking, then we will have to leave this discovery.

MS. STEVENS: My position is that I produced my client yesterday pursuant to an appointment taken out by your office and he was here. You elected to leave because a court reporter was going to be late.

MR. MARYN: You know, Ms. Stevens, it's simple. Your office screwed this up; by not making the appointments, your office caused the delay. We waited a reasonable amount of time, we left.

The problem was created by your office. Take responsibility for it. Don't blame me for it and why don't we start from there.

I'm now – I'm doing what I think is a reasonable thing, producing my client only on issues of damages. If you insist on going on the issue of liability, then I will have no choice but to ask my client to leave with me.

MS. STEVENS: With respect to the event of yesterday, I do not know whether it was your secretary or my secretary that failed to notify the court reporters.

MR. MARYN: It was yours.

MS. STEVENS: I do know that there were no discussions about how that incident occurred.

At the time that you made up your mind to walk out and leave, a court reporter was coming on an urgent basis, at great inconvenience to herself, in amongst myself and my client. Standing here in the lobby of the court reporter's office, you made that election.

MR. MARYN: I'd waited half an hour past the appointment time.

Ms. Stevens, it's a reasonable position. Please, I'm asking you, if you want to do a discovery of my client on damages, go ahead, but I don't want you asking him questions about liability until after I've talked – I've done

a discovery of your client.

MS. STEVENS: You had that opportunity; you decided not to take advantage of it.

MR. MARYN: There was no court reporter.

MS. STEVENS: I'm proceeding today in the way I would normally in discovery.

MR. MARYN: This is just silly.

MS. STEVENS: I will not permit your actions to interfere with the way I conduct myself when I'm defending a file. I produced my client pursuant to the appointment in advance of my discovery appointment for your client.

MR. MARYN: So why don't you just come out and admit that your office screwed this up.

MS. STEVENS: My office had nothing to do with your decision to walk out of a discovery yesterday when a court reporter was on her way.

MR. MARYN: Did not your office screw up the appointment?

MS. STEVENS: I'm not answering questions.

MR. MARYN: Why not? That's the point here, Ms. Stevens. You don't want to take responsibility for something that your office did. It's clear to everyone that's why happened and you want everything to go your way.

By law, I'm entitled to go first. Now, I've made accommodation for you today to say okay, although I'm entitled to go first, I will let you do my client on damages only. If that's not good enough for you, we will have to leave now. You make the choice.

MS. STEVENS: I have never been able to influence your behaviour in any way, Mr. Maryn. If you want to leave now, it's up to you.

MR. MARYN: You're making the choice of whether or not you want to proceed down a path that you know will result in our leave or taking my offer up and discovering my client on damages until after I've discovered your client on

damages [sic].

MS. STEVENS: As much as you would like –

MR. MARYN: Liability, rather.

MS. STEVENS: As much as you would like to dictate the way in which I conduct my discovery, I cannot allow that to happen.

18 Q Now, Mr. Colbeck --

MR. MARYN: Let's go, Mr. Colbeck. Thank you, Ms. Stevens

(PROCEEDINGS ADJOURNED 10:06 A.M.)

[37] Where liability is in issue counsel sometimes jockey for position by asserting the right to examine first because their appointment was taken out first or served first or because that particular counsel mentioned discoveries first. While the order of discovery is not set out in Rule 27, the law seems to have evolved from positional jockeying to a rule which acknowledges the plaintiff generally has carriage of the action.

[38] In ***Hanke v. Francis,*** [1982] B.C.J. No. 520; 37 B.C.L.R 108 Houghton, Co.Ct.J. said at paragraph 10:

> The plaintiff generally has carriage of the action. When the plaintiff examines the defendant it often becomes apparent which of the allegations set out in the pleadings are really being pursued by the plaintiff. The object of the rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits (R.1(5)). Cooperation of counsel in scheduling examinations for discovery is to be encouraged and to avoid misunderstanding a general rule is desirable. On balance, it is preferable that the plaintiff examine first when the examinations of both parties are scheduled for the same time by agreement.

[39] In ***Zabolotiuk v. Tehcon Construction Services Ltd.,*** [1993] B.C.J. No. 986, Master Joyce (as he then was) considered ***Hanke*** as well as ***Taylor v. Ashley***, [1993] B.C.J. No. 373, a decision of Master Powers, and reasoned that the order of discoveries ought not to be determined according to the time of service of the appointment. In agreeing with Houghton, Co.Ct.J., he said:

> … if the parties have, by agreement (or, I would add, by coincidence) set the examinations for the same day and cannot agree as to the order the plaintiff, who ordinarily has conduct of the proceeding, should proceed first unless the defendant can show real prejudice if he does not proceed first.

[40] In this case, I am satisfied that the intent of the parties at the time the discoveries were arranged was for the plaintiff to examine the defendant first. Unfortunately, there were two intervening acts which prevented this from happening.

[41] The first is that, as now has been conceded by counsel for Ms. Stevens, there was an oversight in her office in not providing notice of the appointments to the court reporter's office. The second is that rather than waiting for a court reporter to attend, Mr. Maryn and his client left the court reporter's office. This occurred in spite of efforts being made to accommodate the discoveries by bringing a reporter in on short notice. Apparently, a reporter did attend at about 10:50 a.m.

[42] The position taken to leave at 10:30 a.m. was unfortunate. Consultation with the court reporter's receptionist could surely have provided Mr. Maryn and his client with sufficient information to allow them to know a court reporter was on the way and would be arriving soon.

[43] In my view, had Mr. Maryn and his client waited for a short while longer, none of these applications and cross-applications would have been necessary. The discoveries would have proceeded, albeit somewhat late, but the plaintiff would have been able to examine the defendant on the issue of liability and then the defendant would have been able to conduct a full examination of the plaintiff.

[44] It should now be apparent that rigid positions are not always helpful. There has to be some "give and take" between counsel. As McEachern C.J.S.C. in ***Allarco Broadcasting Ltd. v. Duke***, (1981) 34 B.C.L.R 7; [1981] B.C.J. No. 1707 at paragraph 26 observed:

> In the ultimate analysis, it is impossible definitively to furnish guidelines on what is permissible on discovery. It is, as I have said, a professional matter. Each case must continue to be decided on its particular facts, but I venture to hope that the profession may find it possible to make discovery less of a siege than it often seems to be.

[45] In the result, there will an order in the ***Colbeck v. Kaila et al*** matter which requires the parties to hold examinations for discovery within 60 days of the date of this judgment. The hours of the discovery shall be from 10:00 a.m. to 12:30 p.m. and from 2:00 p.m. to 4:00 p.m. with convenience breaks at times equivalent to those of the Supreme Court. Each party is to attend for discovery until their examination by opposite counsel is complete. Should either party wish to sit for only half days rather than a full day, that party must provide a doctor's letter to the other party explaining why that party cannot be examined for a full day. In the event the discovery of that party must continue for two half days rather than one full day, the opposite party shall be entitled to costs for the second day in any event of the cause.

Paragraph 1 of the defendant's Notice of Motion dated February 22, 2007 is dismissed.

[46] I assess costs against the plaintiff in the amount of $300 for costs thrown away on July 11, 2006. Both these costs as well as the costs assessed in ***Dytuco v. Low*** are payable forthwith.

[47] Lastly, the defendants shall have 2/3 of their costs at scale B for the hearings on March 14 and April 4 of this year.

"Master G. Taylor"

October 26, 2007 – ***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that the following should be inserted after paragraph 21:

> [21a] Ms. Stevens filed an affidavit sworn March 30, 2007 in which she deposes she did not have any dealings with Mr. Maryn's colleague, but rather it was a co-defence counsel with whom Mr. Maryn's colleague had dealings regarding the adjournment of the trial.