

Court of Queen's Bench of Alberta

Citation: Boudreau v Tarrant, 2020 ABQB 798

Date: 20201218
Docket: FL01 31893
Registry: Calgary

Between:

Daniel Matthew Boudreau

Plaintiff

- and -

Ashley Tarrant

Defendant

**Reasons for Decision
of the
Honourable Mr. Justice C.M. Jones**

I. Introduction

[1] Mr. Boudreau seeks annulment of his marriage to Ms. Tarrant on the grounds of non-consummation. While Ms. Tarrant agrees that the marriage was never consummated, she disputes that the reasons for that meet the test for annulment.

[2] Briefly stated, Mr. Boudreau asserts that the parties' lack of intimacy arises from Ms. Tarrant's mental condition and is not merely a manifestation of caprice or a lack of interest in him as a sexual partner.

[3] Ms. Tarrant argues that the parties' failure to consummate their marriage arose not from any physical or mental affliction, but from the gradual loss of intimacy in their relationship.

II. Brief Background

[4] The parties met in 2005 and were friends for a number of years. The relationship became romantic in 2013 and they began cohabiting in November of that year. The evidence of both parties is that they enjoyed a satisfactory sexual and emotional relationship.

[5] At some point, they mutually agreed to each have sex with other people, while still living together and engaging in sexual intercourse with each other. They state in their briefs that the relationship became polyamorous which, they assert, deepened their trust in and mutual

commitment to each other. There was evidence that Ms. Tarrant had a boyfriend in Nova Scotia with whom she was sexually active and that Mr. Boudreau was aware of this.

[6] In 2014, Ms. Tarrant was injured in a car accident. While it is undisputed that the accident limited her participation in some of her former activities, the extent to which it influenced her disposition towards sexual activity with Mr. Boudreau is a matter of contention.

[7] The parties became engaged in March 2017. They celebrated a civil marriage in Alberta on January 19, 2019. Subsequently, they and their invitees celebrated a destination wedding in Mexico from February 2 to 9, 2019.

[8] The parties separated on April 24, 2019. Ms. Tarrant filed a Statement of Claim for Divorce on July 19, 2019. Mr. Boudreau filed an Application for Annulment on September 5, 2019, alleging, *inter alia*, that:

[Ms. Tarrant] was incapable of consummating the marriage due to the severity of her psychological disability impeding her ability to do so. The last time [Ms. Tarrant] and [Mr. Boudreau] were intimate was July 2018, six months before the marriage.

III. The Applicable Law

[9] The mere fact of non-consummation does not provide grounds for annulment of marriage. The case law indicates that a marriage can be annulled for non-consummation only if there is an incapacity to consummate springing from physical or psychological limitations beyond the control of the refusing party. It is not sufficient that there is a conscious refusal to engage in sexual relations.

[10] Citing English authority, the Supreme Court of Canada held in *Heil v Heil*, [1942] SCR 160 at 163 that where the refusal was "...due, not to obstinacy or caprice, but to an invincible repugnance to the act of consummation resulting in a paralysis of the will which was consistent only with incapacity, the moving party was entitled to a decree of nullity."

[11] This Court confirmed in *C (SS) v C (GK)*, 1999 ABQB 822 at para 16 that willful refusal to engage in sexual relations does not afford grounds for annulment. Rather, there must be an inability or incapacity to engage in sexual intercourse. See also *Falk v Falk*, 1999 ABQB 570 at para 13 and *Trenholm v Trenholm (Tvncevic)* (1989), 91 NSR (2d) 167 (CA). The Court noted in *Falk* at para 14 that an annulment may be granted where one party is impotent or has an incapacity of some kind that prevents consummation; see also *Napier v Napier*, [1915] P 184.

[12] This Court in *Fyith v Sleiman*, 2016 ABQB 450 at para 2 reiterated that granting a decree of nullity requires a conscience based invincible repugnance to consummation in the circumstances. Mr. Boudreau argues that an invincible repugnance can arise not only from a structural defect or mental condition, as noted in *Heil*, but also from beliefs and attitudes: *Jomha v Jomaa*, 2010 ABQB 135 at para 6.

[13] The Court in *Foisy v Foisy (Loyer)*, [1954] 4 DLR 155 (Ont HC) held that inability to consummate where the refusing party lacks romantic feelings for the spouse but is capable of having sexual relations with someone else does not warrant annulment. Nevertheless, the repugnance may be restricted to sex with one's marriage partner, rather than the act in general: *Gajamugan v Gajamugan* (1979), 10 RFL (2d) 280 (Ont HC).

IV. The Evidence

[14] Thus, it becomes necessary to determine the reasons for an antipathy towards sexual relations. The party alleging that the marriage is void must provide sufficient evidence to prove that non-consummation was due to some incapacity.

[15] Ultimately, I must decide if non-consummation of the marriage occurred for reasons that support Mr. Boudreau's request for annulment. That determination requires me to consider any evidence of physical or psychological disability as well as the evolution of the parties' relationship.

A. The Medical Evidence

[16] I begin with the medical evidence, though I hasten to add that, for reasons which will become clear, I use that term somewhat loosely.

[17] Mr. Boudreau asserts that Ms. Tarrant suffered lasting psychological effects, including stress, depression and anxiety, from her 2014 car accident. He claims that what he terms her "psychological disability" became permanent and irreversible and explains her inability to have sexual intercourse with him.

[18] Ms. Tarrant acknowledges that she was injured in the accident, that she experienced pain and depression and that some of her activities were limited for a period of time. She asserts, however, that neither the accident nor her use of medications affected her ability to engage in sexual intercourse with Mr. Boudreau.

[19] In an affidavit, Mr. Boudreau states that in April and May 2017, Ms. Tarrant was off work for six weeks due to her "psychological disability". He testified that he chose the words "psychological disability" having reviewed the "medical documentation" and its many references to Ms. Tarrant's "mental illnesses".

[20] I find that Mr. Boudreau takes significant liberties in his use of these terms. When asked what he meant by "mental illness", he said he was referring to anxiety and chronic depression. He testified that he based his assertion of mental illness on a psychoeducational assessment Ms. Tarrant sought.

[21] That assessment resulted in a "Psychoeducational Assessment Report" signed by Brent Macdonald, PhD, Registered Psychologist and Caroline LaPierre, BA, BEd, MEd, Registered Provisional Psychologist. The last page of the report lists a number of psychological dimensions - namely somatization, obsessive compulsive, interpersonal sensitivity, anxiety, depression, hostility, phobic anxiety, paranoid ideation and psychoticism and assigns a score to each of them. The report shows that Ms. Tarrant had elevated scores for obsessive compulsive, phobic anxiety and paranoid ideation. Otherwise, her scores seem unremarkable.

[22] Nothing in this report links any of these scores to sexual incapacity or mental illness. Moreover, the report does not use the term "mental illness" nor does it state that Ms. Tarrant's scores are evidence of psychological disability.

[23] Without expert evidence, which was not provided, it would not be prudent to infer any connection between these scores and sexual incapacity devolving from psychological challenges.

[24] While Mr. Boudreau's evidence is that Ms. Tarrant was prescribed to meet with a psychologist every two weeks, there is nothing before me to indicate that this was undertaken with a view to addressing her alleged sexual dysfunction.

[25] Finally, Mr. Boudreau tendered a report prepared by Dr. S. Sundararajan dated February 2, 2018. It states under the headings "Diagnosis 1.1. Principal" and "Diagnosis 1.2 Secondary", respectively:

Moderate exacerbation of her depression, secondary as major.

depressive disorder, depression, not able to focus, concentrate, lack of sleep.

[26] This report, which appears to have been prepared for insurance purposes, does not link a decline in sexual capacity to any of these observations.

[27] Neither the Sundararajan Report nor the Psychoeducational Assessment Report provides any linkage to Ms. Tarrant's alleged sexual dysfunction. Further, Mr. Boudreau admitted that he never discussed Ms. Tarrant's "condition" with any of the practitioners who prepared these reports.

[28] At the hearing of this matter, Mr. Boudreau summarized his reasons for believing he has grounds for an annulment:

So my belief is based on those medical documents and my experience with Ashley and the interactions with Ashley, that is why I believe we meet the grounds for an annulment.

[29] Mr. Boudreau did not call expert medical evidence and his opinions are not medical evidence. Accordingly, both Mr. Boudreau's assertion that Ms. Tarrant suffers from a psychological condition sourced in the 2014 car accident and his assertion that her psychological profiles reveal mental illness preventing her from having sex with him are unsubstantiated.

B. The Evolution of the Parties' Relationship

[30] As noted above, the parties began a romantic relationship in 2013 and it is common ground that, at first, they had a satisfying sexual relationship.

[31] Mr. Boudreau asserts that around mid-2015, Ms. Tarrant started becoming more irritable with him. He claims that into 2016, it became increasingly difficult to get her to do things with him. His evidence was that their relationship changed and he describes a gradual decline in sexual intimacy.

[32] Mr. Boudreau's evidence is that sex was not a problem in 2014, 2015 and 2016, but started to fade away in the latter part of 2016 and into 2017. He states that in 2017, the parties were having sexual intercourse once every two months. At that time, Mr. Boudreau was working out of Calgary for two week stretches, followed by one week off. Both parties' evidence is that they ceased engaging in sexual intercourse in July 2018.

[33] Though he acknowledged having no training in matters of a medical nature, Mr. Boudreau attributes this to Ms. Tarrant's pain medication. He claims that her use of prescription drugs, marijuana and sleeping pills interfered with her sleep and made her lethargic, but there is no evidence that her alleged lethargy affected her capacity for or interest in sexual intercourse.

[34] Mr. Boudreau also cites the fact that she consulted medical practitioners and eventually went on disability leave from her employment as evidence that Mr. Tarrant was suffering from psychological issues. I note, however, that Ms. Tarrant currently works as a professional accountant with a major corporation. I am not convinced that her disabilities are so pervasive as Mr. Boudreau asserts.

[35] Mr. Boudreau testified that in August 2018, the parties discussed their intimacy issues. He claims Ms. Tarrant told him she could not engage in sexual intercourse with him because his touch and indeed his mere presence caused her anxiety and she did not feel safe. He claims that she repeated this on subsequent occasions when he attempted to initiate sexual intercourse.

[36] I do not find Mr. Boudreau's assertion credible. The parties continued to sleep in the same bed after they stopped having sexual intercourse. I find it strange that this should be the case if Mr. Boudreau's touch and mere presence caused Ms. Tarrant anxiety and left her feeling unsafe.

[37] Ms. Tarrant explains the deterioration in their sex life differently. When asked why they stopped having sex in 2018, she testified that the relationship was going through some challenges, that Mr. Boudreau was working more and not around as much and that a lack of opportunity and the fact that the parties were fighting contributed to the absence of sexual intimacy. She rejected counsel's assertion that her stress and general anger at Mr. Boudreau prevented her from having sex with him in 2018. She denies that she could not have sex with him because she found him annoying or repulsive. She testified that she married Mr. Boudreau even though they had not had sex since July 2018 because she was in love with him, stating, "And this wasn't something that we thought was going to be permanent."

[38] I accept Ms. Tarrant's evidence that the parties were having difficulties and that the lack of opportunity and occasional fights, combined with the stress of planning a wedding, were taking their toll. I believe her statement above was alluding to the parties' hope that relations between them would normalize once the wedding was behind them. That, however, was not to be.

[39] As noted above, the parties celebrated a civil marriage in Alberta on January 19, 2019 followed by a destination wedding in Mexico from February 2 to 9, 2019.

[40] Mr. Boudreau makes much of the circumstances surrounding these two events. His evidence is that the parties did not engage in sexual intercourse after either event. Ms. Tarrant readily acknowledges that the parties did not have sexual intercourse after July 2018.

[41] Mr. Boudreau testified that the night after their civil wedding he tried to engage in sexual intercourse with Ms. Tarrant but she responded that she could not have sex with him and was not ready.

[42] Mr. Boudreau testified that on the evening of January 31, 2019, shortly prior to their destination wedding, Ms. Tarrant cried uncontrollably but could not tell him why and refused to talk to him about it the next day.

[43] Mr. Boudreau testified that, on the night of the ceremony in Mexico, the parties were drinking heavily and taking party drugs. Ms. Tarrant was also taking Ativan for her depression. He testified that Ms. Tarrant's ex-boyfriend and one of her friends left the party arm in arm about 1:00 a.m. According to Mr. Boudreau, Ms. Tarrant was frantic and started crying because she did not want her two friends to have sex together.

[44] In questioning on his affidavits, Mr. Boudreau stated that, on their wedding night in Mexico, Ms. Tarrant raised the prospect of the two of them having sex. At the hearing, however, he testified that he thought what Ms. Tarrant really wanted was to have sex with the friends who had left the party together. In light of this contradiction, I find his evidence before me revisionist.

[45] Ms. Tarrant's evidence, consistent with Mr. Boudreau's evidence on questioning, was that she initiated sexual activity with Mr. Boudreau the evening of their destination wedding. I accept that this is what transpired.

[46] Ms. Tarrant's evidence was that Mr. Boudreau rejected her overtures, indicating that he did not expect the parties to have sex during their destination wedding excursion. While that may seem odd, it resonates somewhat in light of Ms. Tarrant's further evidence. She testified that Mr. Boudreau announced to her the morning after their arrival in Mexico that he and her bridesmaid had stayed up the night before sharing their mutual desire to have sex with each other. Mr. Boudreau, she claims, repeated his desire to have sex with her bridesmaid several times during the days following in Mexico. Ms. Tarrant testified that she was hurt by Mr. Boudreau's interest in her bridesmaid, since the week in Mexico was to celebrate their relationship. She testified that he did not seem to understand why she might conclude that he did not want to be sexually intimate with her.

[47] Mr. Boudreau claims he attempted to initiate sexual intercourse on three occasions after their return from Mexico – once just before Ms. Boudreau's mother arrived for a visit in March 2019, another time in March 2019 before Ms. Tarrant left to visit her boyfriend in Nova Scotia and once in April 2019 before the parties separated. He claims that each time he was met with the comment that she could not and was not ready. Mr. Boudreau claims that Ms. Tarrant's continuing explanation for this was that his touch caused her anxiety and that she did not feel safe with him.

[48] Ms. Tarrant denies that Mr. Boudreau ever asked her to have sex with him after their civil wedding in January 2019.

[49] Ms. Tarrant testified that, after separation, she advised Mr. Boudreau that she wanted a divorce. The parties exchanged some financial information and she claims he strongly encouraged her to meet with him to discuss asset division. She testified she advised him that she wanted legal advice. He then brought his application for an annulment.

V. Analysis

[50] It is important to bear in mind that, for purposes of this annulment application, I do not need to speculate on the reason the parties ceased to have sex if I conclude that, whatever the reason, it was not attributable to a physical or psychological condition experienced by Ms. Tarrant that rendered her unable to engage in sexual activity with Mr. Boudreau.

[51] I accept that, as discussed by this Court in *Jomha*, inability to consummate can arise from physical inability or a psychological incapacity. Attitudes and beliefs, rational or otherwise, can give rise to an invincible repugnance, creating a barrier to sexual intercourse that one of the parties to a marriage is unable to cross. Mr. Boudreau suggests that, even if Ms. Tarrant cannot be shown to have had a psychological condition, her attitude and feelings towards him evolved to the point where she was effectively incapable of having sexual intercourse with him.

[52] The parties are agreed that, up to July 2018, Ms. Tarrant experienced no repugnance to sexual interaction with Mr. Boudreau. However, Mr. Boudreau argues that evidence of sexual intimacy between the parties prior to their marriage in January 2019 should have no bearing on the Court's determination.

[53] I reject that assertion. The issue before the Court is why Ms. Tarrant did not engage in sexual intercourse with Mr. Boudreau after the marriage. I disagree that evidence of pre-marriage sexual intercourse is of no significance. On the contrary, evidence of the parties' pre-marriage sexual relations assists in establishing that Ms. Tarrant did not have an innate abhorrence to sexual relations with Mr. Boudreau.

[54] Mr. Boudreau's evidence that Ms. Tarrant experienced complications as a result of her 2014 car accident and that her demeanor changed causing her to be short and curt with him does nothing to establish the requisite "invincible repugnance" to engage in sexual intercourse. Ms. Tarrant was clear in her evidence that anxiety or depression she experienced after the accident did not interfere with her ability to engage in sexual activity with Mr. Boudreau. The onus is on Mr. Boudreau to establish a link between a decline in sexual intimacy and those alleged psychological issues. He has failed to do so. Neither has Mr. Boudreau established that failure to engage in sexual activities was a function of the medications Ms. Tarrant was taking.

[55] Mr. Boudreau also has failed to persuade me that Ms. Tarrant was unable to have sex with him because she found him repulsive or because she felt unsafe with him. In my view, Mr. Boudreau mistakenly characterizes Ms. Tarrant's unwillingness to have sex with him as an inability to do so. While Ms. Tarrant certainly seems to have lost interest in having sex with Mr. Boudreau, that does not mean she was unable to do so. The case law is clear that willful refusal is not grounds for annulment.

[56] Moreover, I find that Ms. Tarrant attempted to initiate sexual activity with Mr. Boudreau on their wedding night in Mexico and that Mr. Boudreau did not respond favorably to that initiative.

[57] Mr. Boudreau asserts that Ms. Tarrant's testimony was contradictory and misleading. My review of her testimony satisfies me that when questions were clearly and succinctly put to her, she gave clear and unequivocal answers. Her evidence indicates to me that the parties were not having sex, not because of some dysfunction on Ms. Tarrant's part, but because Mr. Boudreau was often away, the parties were experiencing conflict and the relationship was deteriorating. I found her evidence internally consistent, notwithstanding attempts to elicit contradiction.

[58] Frankly, by the time the parties got married, I do not think either one of them particularly wanted to engage in sexual intercourse with the other. I accept Ms. Tarrant's evidence that Mr. Boudreau wanted to have sex with her bridesmaid, which might explain why he did not expect to have sex with her. For her part, Ms. Tarrant had not had sex with Mr. Boudreau for almost six months but had recently returned from a visit to her boyfriend in Nova Scotia.

[59] That being the case, it is unclear to me why Mr. Boudreau sought an annulment, rather than a divorce, upon being advised by Ms. Tarrant that the relationship was over. But it is clear that a mere lack of interest in sexual relations with one's spouse does not justify annulment. The Supreme Court of Canada noted in *Heil* at 162-163:

The mere refusal of marital intercourse due to caprice is not sufficient ground to warrant a decree of nullity...it is now settled that there must be an incapacity of

some kind, which in certain cases is a structural defect, but which may also arise out of mental condition, with the resulting effect of creating in the mind of a woman an aversion to the physical act of consummation.

[60] The evidence before me falls far short of establishing such an incapacity on the part of Ms. Tarrant, whether by virtue of a physical ailment, a psychological condition or an insurmountable antipathy toward Mr. Boudreau. Even if Ms. Tarrant had lost interest in Mr. Boudreau as a sex partner, she was not rendered incapable of engaging in sexual intercourse with him. She just didn't want to.

VI. Conclusion

[61] Mr. Boudreau has not satisfied me on a balance of probabilities that Ms. Tarrant suffers from any invincible repugnance to consummating their marriage. There is no evidence before me to support any physical or mental incapacity.

[62] I therefore do not believe that Mr. Boudreau should now be permitted to change the legal consequences, whatever they might be, of marrying Ms. Tarrant. His application for a decree of nullity is dismissed.

[63] If the parties are unable to agree on costs, they may provide written submissions within thirty days of the date of these Reasons.

Heard on the 22nd day of September, the 13th day of October and 13th day of November, 2020.
Dated at the City of Calgary, Alberta this 18th day of December, 2020.

C.M. Jones
J.C.Q.B.A.

Appearances:

Rabie Ahmed

for the Plaintiff

Anthony Po

for the Defendant