

CANADA / JUDGMENT

Adams v. Merck Canada Inc.

2024 BCSC 298

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 298 Adams v. Merck Canada Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Adams v. Merck Canada Inc.,

2024 BCSC 298

Date: 20240226

Docket: S81706

Registry: Nanaimo

Between:

Kiesha Adams

Plaintiff

And

Merck Canada Inc., Options for Sexual Health,

F. Esmaeeli R.N., Jane Doe and John Doe

Defendants

Before: Associate Judge Hughes

Reasons for Judgment

Counsel for Plaintiff:

S. Finn and

C. Easterbrook

Counsel for Merck Canada Inc.:

C. Hildebrand

Counsel for Options for Sexual Health and F. Esmaeeli R.N.:

T.J. Wedge and

L. Doerr, Articled Student

Place and Date of Hearing:

Nanaimo, B.C.

February 8, 2024

Place and Date of Judgment:

Nanaimo, B.C.

February 26, 2024

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[1] In this medical negligence case, the plaintiff applies for orders regarding further examinations for discovery of the defendants F. Esmaeeli R.N. ("Nurse Esmaeeli") and Options for Sexual Health ("Options"). No relief is sought against defendant Merck Canada Inc. ("Merck"), and they take no position on this application provided no costs are sought against them.

Background

[2] Ms. Adams was born in Haida Gwaii and resided there until she was approximately 12 years old, when she was relocated to Nanaimo to live with her father. At some point later, the plaintiff lived in foster homes until she graduated from high school in 2014. After graduation, she was employed at a restaurant and planned to pursue post-secondary education.

- [3] In or about September 2013, the plaintiff began attending at the Options clinic for the purpose of obtaining birth control. Options is a non-profit society which provides sexual and reproductive health care, information and education. On or about January 20, 2015, when the plaintiff was just 18 years of age, she was seen by Nurse Esmaeeli, a registered nurse employed by Options. Nurse Esmaeeli provided the plaintiff with a contraceptive called NuvaRing, which is manufactured by the defendant Merck.
- [4] Shortly after inserting the NuvaRing, the plaintiff suffered a life-altering stroke, which has caused the plaintiff significant cognitive deficits and permanent visual field loss. She is now 27 years old, on social assistance and largely dependent on others.

Procedural history

- [5] A notice of civil claim was filed on behalf of the plaintiff by her previous counsel, Mr. Jordan, on May 26, 2017. The plaintiff alleges that her stroke was caused or contributed to by the NuvaRing. Her claims are founded in negligence, failure to warn, and failure to obtain informed consent of a minor.
- [6] On October 6, 2017, counsel for Options and Nurse Esmaeeli demanded particulars of the claims against Nurse Esmaeeli, pursuant to Rule 3-7(23), Supreme Court Civil Rules, B.C. Reg. 168/2009, noting that there were no specific particulars of the claim plead as against Nurse Esmaeeli. On October 12, 2017, Mr. Jordan declined to provide particulars.
- [7] On September 27, 2018, Mr. Jordan conducted an examination for discovery of Nurse Esmaeeli, both in her personal capacity and as a representative of Options. That discovery lasted just over one hour, and concluded with "subject to those questions that arise from those requests, I will adjourn the discovery." 17 requests for further information were left on the record.
- [8] Mr. Jordan retired in 2020, and the plaintiff's current counsel, Mr. Finn, filed a notice of change of lawyer on January 25, 2021.
- [9] On July 22, 2022, Mr. Finn filed an amended notice of civil claim on behalf of the plaintiff. The amendments include pleadings that:
- a) Nurse Esmaeeli failed to follow Options' policies and procedures;
 - b) Options failed to ensure that risks and potential side effects were properly explained to Ms. Adams;
 - c) Options failed to ensure that Ms. Adams understood the risks associated with NuvaRing; and
 - d) Options failed to ensure that NuvaRing was in Ms. Adams' best interests.
- [10] The amended notice of civil claim does not contain any pleadings of negligence on the part of Nurse Esmaeeli other than in her capacity as an employee of Options.

- [11] On July 9, 2023, in response to Options' renewed demands, the plaintiff delivered further and better particulars of her claim.
- [12] Counsel thereafter engaged in a series of communications regarding the plaintiff's request to continue discoveries of both Nurse Esmaeeli and a representative of Options. Since assuming conduct of this matter in 2021, Mr. Finn has consistently taken the position that Nurse Esmaeeli and Options are adverse in interest. Their counsel disagrees, and takes the position that the discovery of Nurse Esmaeeli has concluded, and that any further discovery of an Options representative should be limited to matters arising from requests left on the record.
- [13] On October 4, 2023, a continuation of the examination for discovery of Options occurred with a different representative, Nicole Pasquino. 20 requests were left on the record from the discovery of Ms. Pasquino. In addition, counsel objected to certain questions asked of Ms. Pasquino on the basis that the topics had already been covered in the first discovery (of Nurse Esmaeeli) or that the question sought opinion evidence. The plaintiff now seeks an order that Ms. Pasquino answer the questions that were objected to.

Issues

- [14] The issues to be determined on this application are:
- Is there a commonality of interests between Nurse Esmaeeli and Options such that the plaintiff is entitled to only a single examination of both defendants?
 - Is the plaintiff entitled to a further examination of Nurse Esmaeeli and/or Options and, if so, what is the scope of that examination?
 - Is Ms. Pasquino required to answer the questions objected to?

Commonality of interests

- [15] Rule 7-2(1) provides that, subject to subrule (2), each party of record to an action must make themselves available for examinations for discovery. The basic legal principles surrounding the scope of that discovery are discussed in *Kendall v. Sun Life Assurance Company of Canada*, 2010 BCSC 1556 at paras. 6 to 11.
- [16] The defendants take the position that there is a commonality of interests between Options and Nurse Esmaeeli such that the plaintiff is not entitled to separate discoveries of them. This is confirmed, they say, by the plaintiff's initial decision to examine Nurse Esmaeeli both in her personal capacity and as a representative of Options.
- [17] In this respect, the analysis in *Cowichan Tribes v. Canada (Attorney General)*, 2018 BCSC 2254 is helpful. *Cowichan Tribes* addressed an application by the defendant Canada to examine each of the four individual named plaintiffs in a representative proceeding, but the same principles apply to an application to examine multiple defendants (*Soprema Inc. v. Woolridge Mahon LLP*, 2014 BCCA 366, para. 25). In finding there is no separate rule dealing

with examinations for discovery in representative proceedings, the court considered several authorities which addressed commonality of interests:

Examinations for discovery

- [20] Canada relies on the interpretation of Rule 7-2(1) in *Henni v. Food Network Canada Inc.*, 2018 BCSC 276. The named plaintiffs alleged a breach of copyright and sought to strike the defendants' appointments to discover each plaintiff by asserting that only one representative should be examined because the five named plaintiffs had a commonality of interest. Master Muir noted that Rule 7-2(1) contains no discretion to limit the application of the mandatory rule which requires that each party of record to an action must make him or herself available for examination for discovery.
- [21] In *Kovacevic Consult Inc. v. Coastal Contacts Inc.*, 2015 BCSC 569, a single corporate defendant applied to examine a number of individual plaintiffs. Master MacNaughton, as she then was, concluded that the defendant was not limited to the examination of one of the plaintiffs because of the mandatory language in Rule 7-2(1). Master MacNaughton concluded that one of the individual plaintiffs did not have the authority to bind another individual plaintiff and the evidence of one plaintiff could not be read in as evidence and admissions against another or all of the individual plaintiffs. I note that like many of the cases relied upon by the parties, *Kovacevic* was not a representative action.
- [22] In *National Bank Financial Ltd. v. LePoidevin*, 2018 BCSC 1175, thirteen individual defendants sought to prevent the plaintiff from examining for discovery all of the defendants. At para. 13, Voith J. considered an excerpt from Frederick M. Irvine, ed., 3rd ed., vol. 1, *McLachlin & Taylor: British Columbia Practice* (Toronto: LexisNexis Canada, 2006) at 7-181: "Outside of the corporate context or representative proceedings, a 'commonality of interest' among parties does not modify the requirement in Rule 7-2(1) that 'each party of record' make himself or herself available for examination." Justice Voith agreed with the conclusions in *Kovacevic*, *Henni* and the above authority, concluding at para. 15:

Specifically, I do not consider that the language of Rule 7-2(1) confers any jurisdiction on the Court to limit the right of a party of record to conduct an examination for discovery of an individual or of individuals who are parties to the action and who are adverse in interest.

- [23] Justice Voith also considered whether the conclusions in *Kovacevic* and *Henni* should be broadened by the inherent jurisdiction held by judges of the court and concluded that they should not be: the court's inherent jurisdiction should be used to prevent abuses or efforts to thwart the court's processes or in extenuating circumstances, but "it is a power that is to be used sparingly absent a narrow range of circumstances, the court's inherent jurisdiction should not be used by the court to adopt practices inconsistent with the Rules" (para. 17).

- [24] The plaintiffs distinguish Kovacevic, Henni and National Bank as authorities that concern individual co-parties incapable of binding other co-parties. The plaintiffs argue that those principles do not apply to representative actions. An opposing party can make a representative plaintiff's evidence and discovery binding against the represented collective. I will discuss representative proceedings below.
- [18] The court concluded:
- [41] I find that Henni, Kovacevic and National Bank apply better to the present case than does case law turning on Rule 7-2(5). The named plaintiffs are parties in this action and as such are subject to the requirements set out in Rule 7-2(1). Each named party brings this action on his own behalf and on behalf of all other descendants of the Cowichan Nation. Again, accordingly the individual plaintiffs act both in a personal and in a representative capacity.
- [42] The cases relying on Rule 7-2(5) are distinguishable. In *Soprema*, the commonality of interest was conceded by the defendant, whereas in this action commonality remains an important issue to be discovered and tried. In *Bower*, the contrasting adverse interest between defendants was the diametric opposition of multiple drivers in a tort action, whereas here the plaintiffs' relation remains in question and more subtly.
- [19] The defendants submit that they have a commonality of interests by virtue of their relationship as employee and employer. They rely on *Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP*, 2020 BCSC 1344, where the court found that there was a commonality of interests between the personally named defendant and the defendant law firm. In that case, there was no pleading or evidence to suggest that the interests of the defendant lawyer, who was a partner, could potentially differ from his law firm.
- [20] In the case at bar, Nurse Esmaeeli is an employee of Options, and has never been a director or officer. The particulars provided by the plaintiff point to a potential divergence of interests, as those particulars allege that Nurse Esmaeeli failed "to meet the standards required of her both [by] virtue of her professional responsibilities, her professional training, her training as provided by Options, and/or the training and standards required of a professional providing health care to a minor". There is only a commonality of interests if Nurse Esmaeeli acted entirely within the scope of her employment. Despite the defendants' arguments to the contrary, the particulars call that issue into question. As in *Cowichan Tribes*, commonality remains an important issue to be discovered and tried.
- [21] Accordingly, the plaintiff is entitled to separate examinations of Nurse Esmaeeli and a representative of Options.

Further discovery

- [22] At the end of the examinations of each of Nurse Esmaeeli and Ms. Pasquino, plaintiff's counsel adjourned the discovery, having left requests on the record. The responses to those requests were provided by letter pursuant to Rule 7-2(23).

- [23] In *Li v. Oneil*, 2013 BCSC 1449, this court considered an application for a further examination for discovery where it was unclear whether the first examination had been concluded or adjourned:
- [11] The application before me, despite being framed as an application for a further discovery, was in reality an application that the examination of the plaintiff continue, both in accordance with R. 7-2(22) and generally, based on production of new material such as the list of special damages, medical records and employment records. In support, he relies on the decisions in *Cowan v. Davies*, 2008 BCSC 1239, and *Dhami v. Bath*, 2012 BCSC 2077.
- [14] With respect to the obligation to respond to questions left on the record, the rules provide that the examination can be adjourned and continued, even if responses are provided by letter:

Person must inform self

- (22) In order to comply with subrule (18) or (19), a person being examined for discovery may be required to inform himself or herself and the examination may be adjourned for that purpose.

Response may be provided by letter

- (23) If a person is required to inform himself or herself under subrule (22) in order to respond to one or more questions posed on the examination for discovery, the examining party may request the person to provide the responses by letter.

If letter provided

- (24) If the examining party receives a letter under subrule (23),
- (a) the questions set out in the letter and the answers given in response to those questions are deemed for all purposes to be questions asked and answers given under oath in the examination for discovery, and
 - (b) the examining party may, subject to subrule (2), continue the examination for discovery.
- [15] I am of the view that the examination for discovery was adjourned as contemplated by these rules. Thus, the defendant is entitled to continue its examination for discovery regarding questions left on the record and I am of the view that logically extends to questions based on documents requested at the discovery and subsequently produced.
- [16] As the examination for discovery was not concluded, the heavy onus required to justify a further discovery referred to in *Sutherland v. Lucas* is not engaged. Given the extensive document production since the examination for discovery was conducted, I am also of the view that the defendant is entitled to continue its examination for discovery based on the new material, whether or not it was produced in accordance with a request left on the record.

- [24] It is clear from the discovery transcripts in evidence that both examinations were adjourned, not concluded, with questions left on the record.
- [25] As *Li v. Oneil* is binding authority (*Brown v. Dhariwal*, 2013 BCSC 2419, paras. 34-36), the plaintiff may continue her discovery of both Nurse Esmaeeli and Ms. Pasquino regarding questions left on the record, questions arising from documents requested at discovery, and questions arising from new material, whether or not it was provided in accordance with a request left on the record. Insofar as the answers to those questions, documents, and/or new materials cover areas that were canvassed at the earlier discovery, counsel may deal with it again (*Zboyousky v Svetich*, [1996] B.C.J. No. 2421). The total of the first and continued discoveries may not exceed seven hours for each party unless the examinee consents.

Objections

- [26] Unless the court otherwise orders, a person being examined for discovery must answer any question within their knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action (Rule 7-2(18)).
- [27] Questions involving matters of law, such as what evidence the witness is aware of, are impermissible. Questions as to the witness' knowledge of facts relating to a matter are permissible. (*Northwest Sports Enterprises Ltd. v. Griffiths*, [1999] BCJ No. 637)
- [28] On the advice of her counsel, Ms. Pasquino refused to answer approximately eight questions put to her on discovery. The questions at issue fall into two general categories: questions about coercion or sexual abuse, and questions about what other contraceptive choices were offered to Ms. Adams. The bases of the objections were that the questions were or should have been canvassed on the first examination (of Nurse Esmaeeli) or that the questions improperly sought opinion evidence.
- [29] Nurse Esmaeeli was not asked any questions about screening for the possibility of coercion or sexual abuse. Counsel's objections to those questions being asked of Ms. Pasquino, on the basis that they were or should have been asked of Nurse Esmaeeli as the Options representative, are unfounded.
- [30] Questions that were framed as asking about evidence - such as question 555: "have you seen any evidence that ?" -- are improper.
- [31] Questions about other contraceptive options were canvassed with Nurse Esmaeeli. Further questions on that topic can only be asked if they arise from the answers to questions left on the record, documents requested at discovery, or new material provided subsequent to Nurse Esmaeeli's 2018 examination.

Conclusion

- [32] To summarize, the plaintiff is entitled to separate examinations for discovery of Nurse Esmaeeli and a representative of Options. Further, the plaintiff may continue her examinations of each of those defendants, subject to the following terms.
- [33] The continued examination of Nurse Esmaeeli shall not exceed a further 5 hours and 57 minutes without consent of the examinee. The continued discovery may include questions arising from answers to questions left on the record, questions arising from documents requested at discovery, and questions arising from new material.
- [34] The continued examination of Ms. Pasquino, as the representative of Options, shall not exceed a further 2 hours and 15 minutes without consent of the examinee. The continued discovery may include questions arising from answers to questions left on the record, questions arising from documents requested at discovery, and questions arising from new material. It may also include questions regarding screening for the possibility of coercion or sexual abuse.
- [35] As success has been somewhat mixed, costs will be in the cause as between the plaintiff, Options and Nurse Esmaeeli.

"Associate Judge S. Hughes"

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