

CANADA / JUDGMENT

Baxter v. Shelton

2017 BCSC 953

COURT

Supreme Court of British Columbia

DECIDED

23 March 2017

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2017 BCSC 953 Baxter v. Shelton IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Baxter v. Shelton, 2017 BCSC 953 Date: 20170323 Docket: M152336 Registry: New Westminster Between: Jessica Gracie Baxter Plaintiff And Matthew Jeremy Shelton, Trevor Burton Larlee and Allen Frank Lambright Defendants Before: Master Keighley Oral Ruling In Chambers Counsel for the Plaintiff: N.W. Peterson Counsel for the Defendants: N. Gill Place and Date of Hearing: New Westminster, B.C. March 23, 2017 Place and Date of Ruling: New Westminster, B.C. March 23, 2017

- [1] THE COURT: This is an application which arises in litigation concerned with two motor vehicle accidents: one of which occurred April 24, 2013, and the second of which occurred December 3, 2015. Liability with respect to both accidents is disputed.
- [2] The plaintiff, as a result of the accumulation of injuries allegedly suffered in both accidents, makes claims with respect to injuries to her head, neck, claims of tingling of the fingers of the left hand, injuries to upper mid and low back, to the chest, to her rib cage, hips, right leg, left foot and ankle. She alleges memory problems, headaches, anxiety, panic attacks, vision problems, fatigue and also indicates an injury to her left knee.
- [3] As a result of those complaints the plaintiff claims damages for pain and suffering, discomfort and disability, loss of enjoyment of life, lost wages past, present and future, delayed re-entry into this workforce, loss of pension contributions and health benefits past and prospective, loss of capacity to earn income, loss of opportunity to earn income, cost of future care, loss of housekeeping capacity and she also makes an in-trust claim on behalf of third parties.
- [4] The plaintiff was examined for discovery on May 15, 2015, and again on February 21, 2017. A trial of this matter is scheduled for 15 days commencing July 10, 2017. There has been an order by consent to have both actions heard at the same time. The 84-day deadline as a result is April 23. The 42-day deadline is May 26.
- [5] It appears at that at the most recent of the two examinations for discovery, the plaintiff was asked questions about her plans for return to work. Her responses at question 164: Q We were talking about whether you had made any applications, and the answer is no for any

type of work; that's correct? A Yes. I did not apply for any work since either accident.

Question 165: Q Do you plan to at any point or do you have any plans right now? A I do not have any plans right now. I am not sure what I am capable of doing of what-- like, entirely what my limitations are surrounding work.

- [6] As a result, counsel for the defence determined to have a vocational rehabilitation assessment done and scheduled an appointment for March 24, 2017, before Dr. Colleen Quee Newell, a vocational rehabilitation consultant. Plaintiff's counsel took objection to the plaintiff's attendance at that appointment and indicated in any event that the plaintiff was going to be away at the time of that appointment.
- [7] It appears that another appointment has now been arranged but with a different expert, a Dr. Dennis Magrega, who is an expert in vocational psychology, and his assistant Kim Eyril. That appointment is scheduled for April 5, 2017, at 9:00 a.m. at the offices of IMA Solutions in Vancouver.
- [8] To date the plaintiff has not served any expert reports. As I indicated the 84-day deadline is April 13. This is not the first examination sought to be conducted on behalf of the defence. There was an assessment done at the behest of counsel for the defence by Dr. Auby Axler on October 15, 2015. To date the defence has not commissioned a written report from Dr. Axler.
- [9] The application is brought pursuant to Rule 7-6 of the Rules of Court. The purpose of an examination under that rule is to put the parties on an equal footing with respect to medical evidence where the physical or mental condition of a person is in issue in a proceeding. In determining whether an order under Rule 7-6 is appropriate, the court exercises its discretion. The legal principles upon which that discretion is to be exercised were set out in detail and evocatively by Mr. Justice Bracken in the case of *Hamilton v. Pavlova*, 2010 BCSC 493. I will not recite the principles, which are well known to the court and to counsel, but I may make reference to them in my following remarks.
- [10] During the course of submissions I raised with Mr. Gill, counsel for the defence, my primary concern, which was essentially that here the plaintiff has been examined by a defence psychiatrist from whom a report has not yet been requested. I was concerned that there may be some significant overlap between not only the expertise of the expert for whom the most recent assessment is sought and the psychiatrist, but also that the areas covered by the referral and the examination might not also be the same or similar.
- [11] Rule 7-6, in my words, not the words of Justice Bracken, is not meant to be applied to darn every hole in the diagnostic sock so to speak. Justice Bracken expresses that principle a little more eloquently when he says: Reasonable equality does not mean that the defendant should be able to match expert for expert or report for report.
- [12] Now, I asked if there was, in the material before me, a letter of instruction relating to the referral to Dr. Axler, and I have been referred to it. It is a letter from Harris & Brun, specifically from Mr. Gill, counsel for the defence, to Dr. Axler dated October 6, 2015. It says

in the third complete paragraph of that letter: Prior to providing a written report I ask that you please contact me to discuss your opinion following the examination. We are content with you preparing a written draft report but ask that you not forward it to us unless we request it. Please feel free to contact the [indiscernible] to have your assistant arrange a conference call with us.

- [13] By inference, says Mr. Peterson, there was a conversation following that examination which resulted in a determination by counsel and Dr. Axler that a report would not be prepared. I do not know. Of course there is no obligation on a party, the defendant here, to disclose a report resulting from an examination performed on the rule or otherwise.
- [14] The letter goes on to indicate in the fifth complete paragraph on the first page of the letter: The opinions we are seeking from you within your field of specialization relate to the issues of causation, prior and subsequent medical conditions if any, the extent and duration of any disability or impairment, including whether such disabilities or impairments were caused by the accident or are due to some other cause, and whether Ms. Baxter requires any current or future care, either as a result of injuries sustained in the accident or as a result of some other cause.
- [15] Justice Bracken went on to say in *Hamilton v. Pavlova* at paragraph 13: A second exam will not be allowed for the purpose of attempting to bolster an earlier opinion of another expert. That is, there must be some question or matter that could not have been dealt with at the earlier examination.
- [16] Now, here we do not know specifically what issues Dr. Axler dealt with during the examination. We know what he was asked to do. We do not have a report. There is nothing in the material to suggest to me that there is some issue which has arisen since the time that referral was made which could not have been dealt with at the time of that examination.
- [17] It is difficult in circumstances where a report of an expert with an overlapping expertise has not been produced to make a determination as to whether that subsequent examination is required for the purpose of levelling the playing field or addressing some issue which could not have been raised at the time of the original examination. The onus is on the defendant to establish those issues. I am not satisfied on this application that the defendant has done so.
- [18] The application is dismissed.
- [19] What about costs?
- [20] MR. PETERSON: Your Honour, liability is denied, so we would respectfully seek costs in any event of the cause.
- [21] THE COURT: Mr. Gill.
- [22] MR. GILL: Your Honour, costs in the cause is my request. Could I also ask that we have leave to reapply in the -- after service of the plaintiff's expert reports, the 84-day mark.

[23] THE COURT: Why do we need that? You can always make an application.

[24] MR. GILL: Okay.

[25] THE COURT: Okay. Costs will be to the plaintiff in the cause. Thank you both. "Master Keighley"

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