

CANADA / JUDGMENT

Broumand v. McEdwards

2020 BCSC 803

COURT

Supreme Court of British Columbia

DECIDED

29 May 2020

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2020 BCSC 803 Broumand v. McEdwards IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Broumand v. McEdwards, 2020 BCSC 803 Date: 20200529 Docket: M186962 Registry: Vancouver Between: Saeed Niazi Broumand Plaintiff And Peter Stephen McEdwards and Eltec Elevator Ltd. Defendants Before: The Honourable Mr. Justice N. Smith Reasons for Judgment Counsel for the Plaintiff: V. Sewell Counsel for the Defendants: K. Jamieson Place and Date of Hearing: Vancouver, B.C. May 26, 2020 Place and Date of Judgment: Vancouver, B.C. May 29, 2020

- [1] The defendants in this personal injury action seek an order that the plaintiff attend an independent medical examination ("IME") by a neurologist, Dr. Dean Johnston. The trial is scheduled for September 20, 2020 and the deadline for serving expert reports pursuant to R. 11-6 is June 19, 2020.
- [2] The Plaintiff opposes the application to the extent the defendants seek a "full" neurological examination and argues that the examination be limited to his claim that he suffered a concussion in the motor vehicle accident at issue. He says he already agreed to attend an IME by an orthopedic surgeon, Dr. Adam Sidky, which was to take place on May 25, 2020. Because there is "considerable overlap between the two disciplines", he says Dr. Sidky will be able to deal with all alleged injuries other than the concussion and a full second IME with Dr. Johnston is not necessary to put the parties on an equal footing.
- [3] This application was considered on the basis of written submissions only, pursuant to the Court's COVID-19 Notice No. 14, dated April 27, 2020, and the accompanying order of the Chief Justice.
- [4] This action arises from a motor vehicle accident that occurred on May 15, 2017. The defendants deny liability. In his notice of civil claim, the plaintiff pleads the following injuries:
- a) Concussion;
 - b) Injury to head;
 - c) Injury to neck;

- d) Injury to back;
 - e) Injury to right arm;
 - f) Injury to shoulders;
 - g) Dizziness; and
 - h) Other injuries as may be identified by medical reports
- [5] The defendants' response to civil claim denies that the plaintiff suffered any injuries and pleads that any loss or damage is the result of previous and/or subsequent injuries or pre-existing conditions. That is a standard form defence pleading, but some evidence has emerged that may support it. In August 2015, almost two years before the accident, the plaintiff was referred to a pain specialist for assessment and treatment of a shoulder injury. The records of the plaintiff's family physician include reports of back pain in 2016.
- [6] The primary purpose of R. 7-6, under which orders for IMEs are made, is to put the parties on an equal footing with respect to medical evidence: *Tran v. Abbott*, 2018 BCCA 365 at para. 40.
- [7] In *Tran*, the plaintiff attended an IME by a neurologist, whose report referred to some musculoskeletal issues. The defendant applied for a second IME by an orthopedic surgeon. The Court said at para. 27, that a party seeking a second IME is not required to show "exceptional circumstances":
- [27] In my view, there is nothing in the language of the Supreme Court Civil Rules, or in logic or reason, that would mandate exceptional circumstances as a requirement for a second IME. As noted by Justice Blok in *Kenny* [*Kenny v. Bateman*, 2017 BCSC 900], a plaintiff displaying multifactorial injuries may appropriately be required to attend IMEs by a number of specialists: at para. 62. There is nothing exceptional in that.
- [8] At para 35, the Court said:
- [35] In medicine, a differential diagnosis is the distinguishing of one disease or condition from others that present similar clinical features. When the etiology of illness is uncertain, and one examination concludes that a potential source of the plaintiff's symptoms can be eliminated, in general, and subject to questions of timeliness and proportionality, that should not preclude a second IME in order to consider further alternatives.
- [9] In *White v. Fan*, 2019 BCSC 785, a plaintiff who had attended IMEs by an orthopedic surgeon and an occupational therapist opposed a further IME by a neurologist. Justice Iyer noted at para. 12 that while the plaintiff had not specifically pleaded a neurological injury, the notice of civil claim included certain injuries that could have neurological origin. She said at paras. 16 and 17:

- [16] In light of all of this, I am satisfied that the circumstances in this case bring it within the reasoning in *Tran*, in that denying the application would "preclude the defendant from obtaining a report from an expert with appropriate qualifications on a live issue, the etiology of the plaintiff's complaints": at para. 37. The defendants are not required to accept the plaintiff's theory that the source of his ongoing cognitive symptoms is not neurological.
- [17] It follows that I reject the plaintiff's submission that a party seeking a subsequent IME must tender medical evidence demonstrating that there are issues - here, neurological issues - that require an examination by someone with that expertise. That would impose too high a burden on a defendant, contrary to the reasoning in *Tran*. While there must be a real basis for the request in that it is grounded in the pleadings and supported by evidence, "medical" evidence is not an independent requirement. [Emphasis in original]
- [10] In this case, the plaintiff has pleaded injuries to a number of areas of the body without specifying the precise nature or etiology of those injuries. Injuries to those areas could involve bones, soft tissue, nerves or some combination of sources. I would not expect the plaintiff to plead a specific etiology, given the limited medical information that was likely available when the action was commenced. But neither would I expect the plaintiff to now abandon his claim for any accident-related injuries that are found to have a neurological rather than an orthopedic explanation.
- [11] I find that, as was the case in *White*, the etiology of the plaintiff's current complaints is a live issue, particularly in light of evidence of prior injuries and/or pain complaints affecting parts of the body now alleged to have been injured in the accident. The defendants are entitled to inquire whether there is a neurological component to the plaintiff's current complaints and, if so, whether it is related to a pre-existing or subsequent condition.
- [12] The plaintiff says there is no evidence that the defendants' orthopaedic surgeon, Dr. Sidky, is unable to address any neurological complaints or that he will decline to comment on them because they are outside his area of expertise.
- [13] It would certainly have been preferable to have had the orthopaedic surgeon's report in order to determine if a further IME by a neurologist is necessary. But in view of the timing of the orthopedic examination, the upcoming trial date, and the deadline for service of expert reports, that does not appear to be practical. Counsel for the plaintiff has not agreed to any extension of time for service of expert reports. I adopt what was said by Master Elwood in *Shannon v. Cook*, 2019 BCSC 1139 at para 28:
- [28] This case would be easier to decide if the existing independent examiners had indicated that some aspect of Ms. Shannon's condition was outside their expertise. However, such evidence is not in my view a requirement of the case law. Nor does the case law require in every case that the defendants submit the reports of the agreed upon experts, first, to demonstrate that a further examination is justified.

- [14] In the circumstances, the need for the best evidence and a just determination on the merits-- along with the fact that access to the court has been restricted during the COVID-19 pandemic--overrides any concern I may have about the timeliness of the first IME or of this application.
- [15] I therefore order that the plaintiff attend for an IME by Dr. Johnston at the time and place set out in the notice of application. Costs of this application are in the cause. "N. Smith J."
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Prepared on 26 October 2026 · Esheria