

CANADA / JUDGMENT

Chaudhary v. Mehlenbacher

2025 BCSC 1439

COURT

Supreme Court of British Columbia

DECIDED

10 July 2025

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2025 BCSC 1439 Chaudhary v. Mehlenbacher IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Chaudhary v. Mehlenbacher, 2025 BCSC 1439 Date: 20250710 Docket: M-204165 Registry: Vancouver Between: Nikhail Chaudhary by his Litigation Guardian Navdeep Chaudhary Plaintiff And Bethany Lynn Mehlenbacher and Robin Gill-Chaudhary Defendants Before: Associate Judge Robertson Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: C.R. Still Counsel for the Defendant Mehlenbacher: E. Haupt E. Chang Counsel for the Defendant Gill-Chaudhary: K.D. Cowan Place and Date of Hearing: Vancouver, B.C. July 10, 2025 Place and Date of Judgment: Vancouver, B.C. July 10, 2025

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, including adding the background which, in the interests of time, I did not include in my oral submissions but do so now for context, without affecting the substance or final disposition.
- [2] The application before the court today is brought by the plaintiff to have certain disbursements and additional expert reports excluded from the limitation of the Disbursements and Expert Evidence Regulation, BC Reg 210/2020 ("DEER") and s. 12.1 of the Evidence Act, R.S.B.C. 1996, c. 124 (the "Act"). Background and Summary of Evidence
- [3] The plaintiff's claim is for loss and damages arising from a motor vehicle accident that occurred on July 18, 2007 (the "MVA"). The plaintiff was a young infant, just under 2 years old at the time of the MVA, restrained in a car seat located in the back seat of the car being driven by his mother.
- [4] He claims that various medical conditions, symptoms and learning disabilities that he now suffers, and the attendant impact or delay to his studies and ability to meaningfully enter the workforce, are the result of the MVA and have impacted "every aspect of his life". Examples of difficulties he has experienced include failing to obtain his driver's license and failing a psychology course 3 times. He currently has a persons with disabilities designation. He is, however, working modest part time hours with the Canucks Autism Network, attending post secondary schooling, and is active with volunteer activities.

- [5] As plaintiff's counsel describes it, one issue arises as a result of his young age at the time of the MVA in that there is little to no medical benchmark against which to judge or measure his current medical condition. Thus there is a more complex component to the medical evidence that will be lead, and causation will be in issue, at trial, which has been set for 15 days commencing January 26, 2026. The 84-day deadline will fall on January 2, 2026.
- [6] In anticipation of trial, the plaintiff has arranged, or attended, examinations with the following experts:
- a) Dr. Cohen, neuropsychologist, who has conducted his assessment and prepared a report which has not yet been served;
 - b) Dr. Smith, psychiatrist, who has conducted his assessment and prepared a report which has not yet been served;
 - c) Dr. Foti, neurologist, whose assessment of the plaintiff is scheduled for July 31, 2025;
 - d) Dr. John Lawless, whose assessment of the plaintiff is scheduled for July 24, 2025;
 - e) Dr. Purtzki, physiatrist, whose assessment just occurred on July 7, 2025;
 - f) Wendy Duke, speech language pathologist, whose assessment just occurred on July 1, 2025; and
 - g) Jacquelyn Abel-Barr, in respect of cost of future care and functional capacity, whose assessment is scheduled for July 21, 2025.
- [7] Notably, the specifics of this schedule of appointments was not in evidence, but rather presented through a chart prepared by counsel when she commenced her submissions. From the way it was framed in the notice of application, the plaintiff sought an order that the following disbursements be excluded under s. 5(2) of DEER:
- (a) Physical and Rehabilitation Medicine Report, expert preparation, and trial attendance fees;
 - (b) Neuropsychological Report, expert preparation, and trial attendance fees;
 - (c) Neurologist Report, expert preparation, and trial attendance fees;
 - (d) Psychiatrist Report, expert preparation, and trial attendance fees;
 - (e) Speech-Language Pathology Report, expert preparation, and trial attendance fees;
 - (f) Vocational Consultant Report, expert preparation, and trial attendance fees;
 - (g) Cost of Future Care Report, expert preparation, and trial attendance fees; and
 - (h) mediation fees.
- [8] When commencing submissions, counsel agreed that given that the assessments with the neuropsychologist and psychologist had already occurred, with the report being delivered, that those two items were no longer eligible for an exemption.

- [9] As to the number of reports, the relief sought as set out in the notice of application is that the plaintiff be permitted to allow additional expert evidence despite the limit set out in subsection (2) of the Act, specifically the seven experts listed as (a) to (g) above. It was not stated in the application which reports would be the "additional" ones.
- [10] When asked specifically which reports the plaintiff will be relying upon as core reports, the plaintiff's counsel advised the core reports would be those of the psychiatrist, neurologist, psychiatrist, and vocational consultant.
- [11] On the defence side, assessments have been conducted or scheduled with a psychiatrist, a neurologist, and a vocational consultant.
- [12] The plaintiff did not tender into evidence any medical reports or clinical records. Rather, the evidence being relied upon was affidavit evidence of the plaintiff's father which includes, among other things, his observations of the plaintiff and difficulties he has had.
- [13] At the outset of the application the defendants opposed the admissibility of this affidavit on the basis that it was hearsay, lacking in a proper foundation, and simply not helpful on any of the medical matters. The plaintiff's counsel indicated that the father made the decision to swear the affidavit instead of his son doing so, as they do not want the plaintiff to be consumed with thoughts of what he cannot do, as it has a negative effect on him given his anxiety.
- [14] I allowed the affidavit to be admitted, as properly attributable hearsay and evidence as to the father's observations is admissible on an interlocutory application such as this and that individual passages that were not attributable or improper argument or medical opinion could be severed.
- [15] In his affidavit, the plaintiff's father deposes that the plaintiff suffers from severe anxiety, and has been diagnosed with attention deficit disorder, processing disorder, and speech deficit disorders, and has specific problems with math, all of which has impacted his educational pursuits. The plaintiff is currently in school part-time but, as an example of some of his difficulties, his father deposes that the plaintiff failed a psychology course three times and in one mid-term exam, received a grade in the 30s, can only work two to four hours a week and "cannot cope" with more hours than that, and failed to pass his driver's licence or obtain his driver's licence after several attempts. The final paragraph of that evidence being that:
23. Nikhail requires significant support in all aspects of his life, including financial support from his parents. I have faced ongoing financial difficulties as we operate as a family of one income since my wife and Nikhail's mother has taken an absence from work to help support Nikhail. After covering our monthly expenses, I have very little, if any, disposable income.
- [16] Also introduced into evidence is an affidavit from an employee of the plaintiff's counsel's office, which confirms:

- a) In the notice of civil claim the alleged injuries are sleep impairment, psychiatric/psychological injuries, and general pain and suffering;
- b) Based on a review of the medical records, the plaintiff has ongoing musculoskeletal pain despite medical intervention;
- c) The plaintiff has ongoing headaches despite medical intervention;
- d) The plaintiff has ongoing learning disabilities, PTSD, ADHD, depression and other psychological symptoms that have impacted his mental well-being;
- e) The plaintiff has ongoing problems with movement, impulse control, depression and irritability;
- f) The plaintiff has speech and language impairments that led to difficulties with communication;
- g) The plaintiff is limited in his employment ability due to learning disabilities and cognitive impairments; and
- h) The plaintiff has ongoing future care needs.

[17] Much of that is inadmissible as opinion evidence, particularly given that there is no source other than a general "review of medical records" to support the evidence. There is no explanation as to why the excerpts of the medical records which, presumably, record the treatment provider's observations as to these issues has not been put into evidence.

[18] None of the experts CV's were in evidence. There was no evidence from any medical experts or specifics as to what medical issues or conditions any particular expert would be addressing through their examination and report. There was no evidence as to what they would be addressing as opposed to or as distinct from the other experts.

Legal Framework

[19] There is no dispute as to the requirements for either application. The statutory requirements, with respect to the Act, in order to rely on more than three reports, a party must include the following in their application:

- a) the name of each expert whose evidence the party intends to tender at trial;
- b) the scope of expertise of each expert whose evidence the party intends to tender at trial; and
- c) records that support the need for the additional evidence.

[20] While I read the word "records" as a broad term, they must be admissible evidence.

[21] With respect to DEER, the conditions that are required to be met as set out in s. 5(8) are that:

- a) the application is made before the disbursements are incurred, with case law confirming that "made" means filed, not necessarily heard before they are incurred;

- b) were the disbursements not excluded, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the vehicle injury proceeding.

[22] Pursuant to s. 5(9) of DEER, the application must include evidence that:

- a) there is a reasonable risk that the total amount of disbursements the party intends to incur to resolve the vehicle injury proceeding will exceed the disbursement limit;
- b) the disbursements that are the subject of the application are necessary to justly resolve the vehicle injury proceeding in light of the complexity of the vehicle injury proceeding or the importance of the issues in dispute, and
- c) the party would be unable, without undue hardship, to incur the disbursements that are the subject of the application were those disbursements not excluded.

[23] The legislation also requires that where there will be excessive reports and an application under DEER, they must be brought at the same time.

[24] Thus, given the criticism of the applications failure to include the specifics of the medical practitioners the plaintiff was proposing to engage illustrates an inherent timing issue in terms of a plaintiff's right to privilege over their litigation strategy in terms of which medical experts they intend to call.

[25] In order to effectively bring a DEER application to exclude the costs for an assessment and report preparation to be delivered by the 84-day deadline, the DEER application would have to be filed well before the time that a plaintiff would otherwise have to disclose its experts' identity. However, because of the requirement that the application under the Act that such evidence be presented, by having the applications heard together such disclosure becomes necessary.

[26] As a result, in order to balance the importance of solicitor client privilege as referenced in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, and summarized in *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at paras. 77 to 81, notwithstanding that such rights may be circumscribed by statute as noted in *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (C.A.), chambers judges have adopted a rather flexible approach to the evidence that is required under the DEER legislation.

[27] There is, generally, no expectation that the party presenting the application need to open up their file cabinet, and, for example, release or disclose expert reports prior to the 84-day deadline, which they may not otherwise wish to disclose. See for example *Kwiatkowski v. Russo*, 2024 BCSC 278, at para. 25, *Fedor v. Fedirchuk*, 2024 BCSC 499 at paras. 78 and 80, *Tran v Ozee*, 2024 BCSC 20 at paras. 20 and 22.

- [28] Nonetheless, the statutory requirements must be met. It is notable that the word "evidence" is used repeatedly in the DEER legislation. In other words, this cannot be merely on speculation or submissions of counsel. There must be evidence, as the legislation requires the court to maintain a gatekeeper function.
- [29] It was stated as follows in *Garcia v. Gill*, 2024 BCSC 617:
- [37] The cases make clear that the evidentiary hurdle is not high. However, as discussed above, there is a hurdle to be cleared in order to comply with the Regulation

Analysis

- [30] The application materials are lacking evidence of many of the statutory requirements under DEER.
- [31] Specifically, the evidence in support of the application is largely within the affidavit of the plaintiff's father, as previously referenced. He deposes as to his observations of the plaintiff and understanding as to his diagnoses. There are no medical reports, clinical records, or consultation reports that could likely have been found in the clinical records.
- [32] Expert reports are not necessarily required to meet the evidentiary hurdle for these applications. Information that could be found, and likely is, throughout clinical records is often sufficient for the purpose of these applications, as a roadmap of the medical condition, overall trajectory of the plaintiff's symptoms, diagnosis, and issues that would benefit from a particular expert opinion.
- [33] The overall tenor or the plaintiff's arguments are that this application is more unusual given the age of the plaintiff at the time of the MVA and that some issues, particularly with respect to causation, will be more complicated given that we do not have the typical situation where we have a bright line in a person's life from which we can compare their condition from before the accident, to afterwards. As such, as stated by the plaintiff, essentially the entirety of the plaintiff's life has taken place post-accident.
- [34] I agree that given the age of the plaintiff at the time of the MVA there is added complexity, which may justify the court adopting a more flexible approach regarding the evidence that could be expected to be led on an application such as this.
- [35] Nonetheless, as noted, some evidence is still required.
- [36] I have already referenced some of the evidence that could have been before the court. In addition to the medical records, the evidence could have been before the court includes the curriculum vitae of the named experts, which, although not necessary to be named on the DEER application, are necessary on the application under the Act, and the scope of the areas that would be investigated by each of those parties.

- [37] Absent sufficient evidence, I cannot find that the requirements as set out in the legislation have been met.
- [38] I am sympathetic to the plaintiff in that these applications may have been premature. It is certainly preferable for the court that these applications be brought early in the proceedings, rather than on the eve of trial or 84-day deadline, which means that not all evidence may be available. Instead of dismissing the application out of hand, I am going to adjourn it generally such that it can be brought once the medical evidence is further along in that respect.
- [39] CNSL K. COWAN: Would you consider yourself seized of this then, Your Honour?
[DISCUSSION]
- [40] THE COURT: I am not seizing myself. That being said, if you wish to, you can submit a request to reappear before me. Just looking at the timing, I am not sitting much in Vancouver in the fall, so it might not work out. If I can remember this matter sufficiently based on that request to reappear, I will consider if it is more efficient to find time before me. But I am not seized.
- [41] CNSL C. STILL: Thank you. "Associate Judge Robertson"

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