

CANADA / JUDGMENT

Christopherson v. Krah

2002 BCSC 1356

COURT

Supreme Court of British Columbia

DECIDED

8 August 2002

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2002BCSC1356

Citation:

Christopherson v. Krah

Date: 20020808

2002 BCSC 1356

Docket:

S064930

Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Ruling

The Honourable Madam Justice Smith

August 8, 2002

(IN CHAMBERS)

BETWEEN:

eileen helen christopherson

plaintiff

AND:

silas krah

tracy shannon ferguson

gordon alan christopherson

defendants

Counsel for the Plaintiff:

M. Sporer

Counsel for the Defendants:

L. Grady

- [1] THE COURT: This is an appeal from a Master's decision in which he granted an interim order that the plaintiff attend for a second independent medical examination ("IME"). The test on this appeal is whether the Master was "clearly wrong". It is a high threshold to meet, but I am satisfied the plaintiff appellant, in these circumstances, has done so.
- [2] The plaintiff was involved in a motor vehicle accident in March, 1999 in which she sustained rotary subluxion injury between C3 and C4, as well as injuries to her shoulders. At issue is whether those injuries are permanent in nature, as claimed by the plaintiff, or ones from which recovery can be expected or should have occurred, as claimed by the defendants.
- [3] In early 2001, the plaintiff was seen by Dr. Van Rijn, a physiatrist, Dr. Rees, a neurologist, and, a psychiatrist. All specialists have provided medical/legal reports on her behalf. The defendants were aware of these reports and any issues raised by them before deciding on the specialist for an IME.
- [4] At the defendants' request, and by consent (in November, 2001), the plaintiff attended an IME with Dr. Maloon, an orthopaedic surgeon. His opinion is contained in his report dated November 28, 2001, at p. 9 (paras. 2 and 3):

Based on her history and my evaluation today, I feel comfortable enough to reassure her that she did not sustain serious injuries to her neck in the acceleration/deceleration incident dated March 6, 1999. I have encouraged her to begin a graduated return to all normal work-related as well as recreational activities and have reassured her that although she may have mild discomfort, she is not necessarily doing herself any harm. I have stressed the importance of maintaining the strength of the muscles supporting her neck. This is best done with a gentle home-based strengthening and stretching exercise program. A graduated exercise program to improve her overall level of physical fitness may also be of benefit. I have advised against ongoing passive therapeutic modalities as these have not been shown to be of any long term benefit and may serve only to potentiate symptoms.

On evaluation today I could find no evidence to suggest that Mrs. Christophersen has been in any way physically impaired by injuries that she may have sustained in the motor vehicle accident of March 6, 1999. I would have expected her to have been partially disabled for four to six weeks after the acute soft tissue strain. She should then have been able to have resumed all normal work-related as well as recreational activities with no ongoing physical disability. I would like to review radiographs and CT scans that have been done at the Langley Memorial and Royal

Columbian Hospitals. No further investigation or active management is thought warranted. I do not believe that she will require medical or surgical treatment at any time in the future for injuries that she may have sustained in the March 6, 1999 motor vehicle accident.

- [5] Three-and-a-half months later, the defendant has requested a second IME by a physiatrist and a psychiatrist. The latter request was consented to; the former was not.
- [6] Counsel for the defendants submits they are entitled to a further IME with a physiatrist because the plaintiff has seen one and obtained a report from that specialist. He submits such an exam is necessary for the defence of this action. The plaintiff submits no further assessment is necessary, especially in view of Dr. Maloon's comments in his report, in which he states:

No further investigation or active management is thought warranted.

- [7] The issue, then, is whether the Master was clearly wrong in his application of the test in *Wildemann v. Webster*, [1990] B.C.J. No. 2304 (C.A.). That test was enumerated at p. 2 as follows:

I refer to *Milburn v. Phillips* (1963), 44 W.W.R. 637, a decision of Wilson C.J.S.C. where he said, at p. 639:

Regarded in its broadest sense, the examination is granted in order to put the parties on a basis of equality.

Those words are particularly significant in the case before us.

Rule 30 is discretionary and I cannot conclude that the chambers judge erred in principle or otherwise in making the order he did. I think an order such as this can be made as a matter of principle where there are exceptional circumstances.

I do not wish these reasons to be taken as sanctioning independent medical examinations of this nature, and in particular where there is more than one examiner in what I will call the usual case. I think such an examination as has been ordered here should be reserved for those cases in which it can be said there are exceptional circumstances. It follows that in my view the circumstances here are exceptional.

- [8] Further, in the words of Chief Justice McEachern, in that same decision, at p. 7:

I only wish to add two brief matters. First, I would like to add to what Mr. Justice Hollinrake has said about this kind of examination being limited to exceptional cases. To that I would add the words "or where it is necessary to ensure reasonable equality between the parties in the preparation of a case for trial".

- [9] This test of reasonable equality does not mean that for each specialist relied upon by the plaintiff, the defendant is entitled to an IME from a similar specialist.

[10] This proposition was also commented on by Master Nitikman in *Henry v. Derbyshire*, [1997] B.C.J. No. 1750 (S.C.) at para. 13, where she stated:

A third applicable principle is that the party seeking the examination is not limited to one independent examination but

The court will not order a second examination merely to permit the defendant to get a second opinion on the same matter. A second examination may be appropriate where there is some question which could not have been dealt with on the first examination. The applicant must show a reason why it is necessary for the second examination.

[11] With respect, in my view, there has been no valid reason identified by defence counsel for this second IME by a psychiatrist, other than the fact that the plaintiff has been examined by a psychiatrist.

[12] In reviewing the Master's reasons for granting the order, I agree with the appellant's submissions that they list a number of factors that, in my view, were not supported by the evidence:

- i) there is no medical evidence to support the Master's conclusion in para. 7 of his reasons that a further examination is necessary. Dr. Maloon was clear in his opinion that no further assessment was necessary. The Master did not refer to Dr. Maloon's opinion on this issue;
- ii) Dr. Maloon's opinion regarding the plaintiff's rehabilitation prospects as noted at p. 9, para. 2 of his report, was not mentioned in the Master's reasons;
- iii) the defence request for an IME by a psychiatrist was made only three-and-a-half months after receiving Dr. Maloon's report which appears to have fully addressed the issues in dispute.

[13] In short, the defendant's request for a second IME by a psychiatrist appears to be a request based on the principle of for equality rather than reasonable equality. In my view, this issue was carefully considered by Master Nitikman in both *Derbyshire* and *Matheos v. Pottle*, [1999] B.C.J. No. 1850 (S.C.). I adopt her reasons in both of those decisions.

[14] In conclusion, in my view, Dr. Maloon, the defence's independent specialist, fully canvassed the issue of the plaintiff's rehabilitation prospects in his report of November 2001, and no further IME is required at this time. The appeal is allowed. Costs will be in the cause.

"D.M. Smith, J."

The Honourable Madam Justice D.M. Smith

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Prepared on 28 October 2026 · Esheria