

CANADA / JUDGMENT

Clower v. Poeckert et al

2006 BCSC 287

COURT

Supreme Court of British Columbia

DECIDED

20 February 2006

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2006 BCSC 287 Clower v. Poeckert et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clower v. Poeckert et al,

2006 BCSC 287

Date: 20060220

Docket: S85390

Registry: New Westminster

Between:

Wendy Clower

Plaintiff

And

Roland Henry Poeckert, Thales North America Inc.,

Thales Geosolutions (Pacific) Inc.,

Thales Geosolutions Inc., John Doe Corporation Inc.

Defendants

Before: The Honourable Mr. Justice J.D. Truscott

Reasons for Judgment in Chambers

Counsel for the plaintiff:

J.M. Prodor

Counsel for the defendants:

G. Brown

Date and Place of Trial/Hearing:

February 10, 2006

New Westminster, B.C.

- [1] The defendants apply for an order that Ms Clower attend at the office of Dr. Wade, a rheumatologist, at 10:45 a.m. on March 1, 2006 for one half day for a medical examination, pursuant to Rule 30(1) of the Rules of Court, B.C. Reg. 221/90, and that the defendants pay the cost of the examination and the cost of Ms Clower's travel to Vancouver for the purpose of the examination.
- [2] Rule 30(1) authorizes the court to order that a person submit to an examination by a medical practitioner or other qualified person.
- [3] In this case Ms Clower has already been examined by an orthopaedic surgeon, Dr. McGraw, at the request of the defendants. He examined her on October 18, 2005 and submitted a report of his findings dated November 4, 2005. This report was served on Ms Clower's counsel on November 9, 2005.
- [4] Dr. McGraw carried out an orthopaedic examination on Ms Clower and dealt with her orthopaedic injuries in his report. With respect to fractures to her left wrist and hand he said the following:

There is an ongoing disability referable to the left hand and wrist (dominant hand). There is reduced strength. The mobility of the left thumb is reduced (lacks opposition). The forearm rotation (supination and pronation) is moderately reduced. There is local tenderness about the left wrist joint and carpus. The findings are consistent with possible derangement of the distal radioulnar joint and arthrofibrosis of the wrist joint.

Spontaneous improvement in the left hand and wrist disability is not anticipated. Further surgery for the left wrist disability is not anticipated. The ongoing complaints of pain and weakness in the left hand and wrist appear to correlate directly with the injuries sustained in the motor vehicle accident of March 17, 2002 and the subsequent iatrogenic closed fracture of the left ulnar shaft treated by open reduction and internal fixation with plate and screws. There is a possibility that with the passage of time, there will be further post-traumatic degenerative osteoarthritis with decline in function.

The writer acknowledges that there is ongoing pain and reduced strength in the left hand. The left hand is dominant. The ongoing problems with working in the stable and riding horses is appropriate for the injury. The complaint of easy fatigue at the computer keyboard is similarly appropriate, given the left hand and wrist disability.

- [5] Subsequent to Dr. McGraw carrying out his examination of the plaintiff and producing his report, on November 23, 2005 Ms Clower's counsel served a report of November 1, 2005 of Dr. Shuckett, a rheumatologist. Dr. Shuckett was retained directly by Ms Clower's counsel for her opinions.
- [6] The late delivery of Dr. Shuckett's report before the trial date of January 9, 2006, was one of the reasons why the trial date was adjourned.
- [7] Now that the trial is adjourned the defendants want to obtain their own rheumatological report from Dr. Wade to deal with some of Dr. Shuckett's opinions.
- [8] Specifically Dr. Shuckett has said in her report that Ms Clower "has some myofascial pain syndrome of the neck/shoulder girdle regions bilaterally", and "She has evidence to support mild dynamic or muscular neurogenic thoracic outlet syndrome of the left side with numbness in the ring and pinky fingers "
- [9] Dr. Shuckett's prognosis includes the following:

Her low back pain and left wrist problem may render her unable to maintain her clerical office job. Her left hand has very poor function and her computer work would be very limited. If she is let go from this job, she may very well not be competitively employable in another job. I consider it very plausible that she will not be able to continue with her present job or any other form of employment in the future. Her dominant left hand is very weak. Her low back pain limits her sitting tolerance. Any form of work is expected to be challenging and progressively more difficult as future osteoarthritis with increased pain and further loss of function afflicts her dominant left wrist.

- [10] Defence counsel says that the proposed examination by Dr. Wade is intended to address the following three issues:
- 1) whether or not Ms Clower is suffering from myofascial pain syndrome of the neck/shoulder girdle regions and thoracic outlet syndrome of the left side, as Dr. Shuckett claims;
 - 2) whether her injuries might interfere with her current employment, or her employability in alternate careers in the future, again as asserted by Dr. Shuckett, and;
 - 3) the extent which Ms Clower's pre-accident condition which included arthralgias (joint pain), fatigue and fibromyalgia (connective tissues and muscle pain) contribute to her current complaints and alleged disability.
- [11] The suggestion of pre-existing fibromyalgia comes from clinical records that defence counsel says were not obtained from plaintiff's counsel until after the adjournment of the trial date. These clinical records indicate that Ms Clower attended a rheumatologist in August 2001 when it was stated: "At this time I think one of the major problems is that she has fibromyalgia syndrome and she is using substances such as Valium and Ativan and alcohol to help her sleep and deal with stress."

- [12] Dr. Shuckett herself has said in her report that Ms Clower does not fulfil the criteria for fibromyalgia syndrome, but defence counsel wants Dr. Wade to give his opinion.
- [13] Defence counsel submits that these are not matters that Dr. McGraw could have dealt with at the time of his examination of Ms Clower as they are not the same subject matters that Dr. McGraw was examining for, being Ms Clower's orthopaedic injuries.
- [14] While defence counsel concedes that Dr. McGraw or any other orthopaedic surgeon does have some qualifications to diagnose and opine on matters of myofascial pain syndrome, muscular thoracic outlet syndrome, and fibromyalgia, these syndromes are particularly within the qualifications of a rheumatologist and therefore likely to be given more weight from that source.
- [15] Defence counsel also points out that these alleged syndromes were not the subject of any medical reports from Ms Clower's physicians served prior to the adjournment of the trial, including a report from her own orthopaedic surgeon, Dr. Samelson.
- [16] He also points out that none of the reports from Ms Clower's physicians prior to Dr. Shuckett's report suggested that Ms Clower's injuries might prevent her from being competitively employable in the future.
- [17] Ms Clower's counsel submits that there is no cogent evidence or reason advanced why Dr. McGraw could not reasonably have dealt with the issues of chronic pain and fibromyalgia and he can still do that in a subsequent report without any further medical examination.
- [18] He submits that there is no evidence that only a rheumatologist can opine in these areas and he points out that on the law a reasonable equality between the parties does not mean that the defendants are entitled to match expert for expert or report for report, citing *Trahan v. West Coast Amusements Ltd.* (2000), 105 A.C.W.S. (3d) 1034, 2000 B.C.S.C. 691, for that proposition.
- [19] He also cites *T.K. v. Pettigrew*, 2005 B.C.S.C. 1418, as a case on all fours to this application denying a second examination, *MacNevin v. Vroom*, (21 Dec. 2004), New Westminster S072995 (B.C.S.C.)(unreported), a decision of Master Groves (as he then was) that he submits was also on identical facts and which denied a second examination; *Henri v. Derbyshire* (1999), 90 A.C.W.S. (3d) 35, a decision of Master Nitikman that confirmed that the court will not order a second examination merely to permit the defendant to get a second opinion on the same matter; and *Matheos v. Pottle* (1999), A.C.W.S. (3d) 360, another of Master Nitikman's decisions to the same effect.
- [20] On my review of the cases supplied by Ms Clower's counsel there are distinguishing features in each of those cases.

- [21] In *T.K. v. Pettigrew* the defendant sought further examinations after the adjournment of a trial, including an examination by Dr. Wade. In that case, however, Dr. Shuckett's report had been delivered more than a year before the trial date and the defendant did not seek an IME from a rheumatologist prior to the trial date notwithstanding that it was in possession of Dr. Shuckett's report.
- [22] Here the defendant and Dr. McGraw were not in possession of Dr. Shuckett's report at the time of Dr. McGraw's examination.
- [23] In *MacNevin v. Vroom* the issue was how many different specialties should be entitled to examine the plaintiff's right knee. That is not the situation here where the defendants want an examination with respect to Dr. Shuckett's opinions of myofascial pain syndrome and thoracic outlet syndrome and the possible pre-existing condition of fibromyalgia. They are not seeking another examination on the left wrist that Dr. McGraw has already examined.
- [24] In *Henri v. Derbyshire* the plaintiff produced a report from her physiatrist who said that the plaintiff was suffering from a chronic complex regional pain syndrome with significant psychological and emotional overlay, while the defendant had the plaintiff examined by an orthopaedic specialist who concluded that the plaintiff was malingering. Master Nitikman saw no reason why the defendant needed a second examination when the orthopaedic surgeon had dealt fully with the plaintiff's ability to return to work. That is not the situation here.
- [25] In *Matheos v. Pottle* the issue was whether the defendant was entitled to a second examination by a doctor of physical rehabilitation in medicine when the defendant had already had the plaintiff examined by an occupational therapist and there was nothing in that report that appeared to dictate a further assessment. Again, that is not the situation here.
- [26] In the end the issue of a second examination is a matter of the discretion of the court although that discretion must be exercised judicially considering the evidence adduced.
- [27] I am not sure from my consideration of Dr. Shuckett's opinion that she is opining that Ms Clower may not be able to continue with her present job or any other form of employment in the future because of anything other than her low back pain and left wrist problem, areas that Dr. McGraw did deal with in his report.
- [28] However, I assume that plaintiff's counsel commissioned the report of Dr. Shuckett for a purpose beyond Ms Clower's orthopaedic injuries, which Dr. McGraw did not deal with, and could not have been expected to deal with, and the issue of Ms Clower's pre-existing fibromyalgia has not been investigated by the defendant at all.
- [29] For these reasons, exercising my discretion I grant the defendants the orders sought in their notice of motion at paragraphs one and two.

- [30] With respect to the defendants' application for costs, in all the circumstances I consider that no costs should be ordered to either side.
- [31] I now request that the parties schedule this trial for May of this year if they are in agreement that it is to be untied from the Sexton action. Otherwise both actions will have to be set down for trial in 2007.

"J.D. Truscott, J."

The Honourable Mr. Justice J.D. Truscott

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