

CANADA / JUDGMENT

Cohen v. Torrenueva

2023 BCSC 1386

COURT

Supreme Court of British Columbia

DECIDED

26 July 2023

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2023 BCSC 1386 Cohen v. Torrenueva

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cohen v. Torrenueva,

2023 BCSC 1386

Date: 20230726

Docket: M-150615

Registry: Vancouver

Between:

Mitchell Cohen

Plaintiff

And

Justine Torrenueva and Elmer Torrenueva

Defendants

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

F. Balandari

Counsel for the Defendants:

D. Gorgis

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 26, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 26, 2023

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, context, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The application before the court today is for an order compelling the plaintiff's attendance at an independent medical examination ("IME") with an addiction specialist on July 28, 2023, as well as and order to compel the plaintiff to undergo required blood testing, urine testing, saliva testing, nail testing and hair or breath samples (the "Testing") as may be requested as part of that examination.
- [3] The plaintiff did not strongly oppose the examination itself, but opposed the Testing on the basis that it is invasive.

Background

- [4] The action arises out of a motor vehicle accident that occurred on May 27, 2014.
- [5] The plaintiff claims a number of ongoing injuries including soft tissue injuries, injuries to a knee, nervousness and stress, anxiety, headaches, jaw pain, in particular TMJ disorder, all of which continue to affect him and cause some disability, nine years post accident. In other words, the quantum of the claim has the potential to be significant.
- [6] Liability has been admitted. Trial had previously commenced, but was adjourned after three days of voir dire, with a new 19-day trial being rescheduled to commence on November 14, 2023.
- [7] The defence has had three medical examinations already. There is a fourth that is scheduled for today or tomorrow meaning that, if this order is granted, this would be one of five examinations.

Medical Evidence In Support of Application

- [8] The evidence being relied upon by the defendants in support of their application for an examination by an addiction specialist includes:

- a) The transcripts from two examinations for discovery of the plaintiff, where he initially deposed in 2016 that he was taking approximately two pills of Percocet a day. However, from the time of that initial 2016 discovery, and a further 2020 discovery the Percocet dosage had increased to as many as 15 pills a day at one point, although with some indication that it then was reduced to 8 pills per day.
- b) The clinical records of his treating practitioners which also indicate the increasing usage of Percocet as well as self medicating with as many as four or five alcoholic drinks, and marihuana products including edibles, from time to time.
- c) Entries from the same clinical records where his general practitioner ("GP") noted as follows:
 - i. June 17, 2019: They would be tracking daily usage over the next three weeks to look at optimizing effect with the least amount of use of them, that he would continue using the cannabis edibles for sleep, but that the GP would be his "sole prescriber going forward for opiates". The GP then had the plaintiff enter into an agreement, which is referred to as a contract, which was then reviewed and signed by the plaintiff. This suggests that there was some concern at that point in terms of where and how many doctors may have been prescribing opiates to the plaintiff, with the GP wanting to put some controls in place.
 - ii. May 27, 2020: The GP noted "I advised I'm very concerned about his significant increase in Percocet, well beyond what we had agreed on." While it is acknowledged that he varies his dose, the GP noted it is "likely counterproductive from a chronic pain perspective". While he agreed to using eight Percocet a day, and the GP prescribed him that amount, the GP did note that such a dosage was "far from ideal". In addition, he commented on the use of alcohol for pain management to be very concerning.
 - iii. June 7, 2021: Again there was a discussion of the use of the Percocet, although there appears to be an acknowledgment by that time of the plaintiff that perhaps there was a problem with it and there was some discussion of reducing the single dose daily, going down to six Percocet.
 - iv. July 2021: A locum for the GP saw the plaintiff, but explained to him the need and benefits of weaning off his medications with a further discussion about attending a pain clinic.
 - v. December 17, 2021: The plaintiff consulted with his GP following one of the defence IMEs which he had attended. His GP noted that they had "discussed multiple medications that could be problematic including Percocet, cyclobenzaprine, gabapentin, which may be impacting".
- [9] In terms of the expert opinions that have been obtained, the plaintiff's own doctors have commented upon his medication, which includes not only the Percocet but self medicating products such as CBD oil, THC and alcohol. The medical reports include comments, although not necessarily specific to addiction, as to the psychological impacts of the injury in terms of how he is managing his pain.

[10] In particular, Dr. Stacey, physiatrist, noted that the plaintiff was showing signs of "non-physiatric pathology which likely impacts upon his pain perception and reports". Similarly, Dr. Zhang, the plaintiff's physiatrist, noted that the plaintiff had exceptionally high pain catastrophizing scores, which suggested a need for psychiatric evaluation.

[11] Dr. Shuckett, a rheumatologist who conducted an IME for the defendants, wrote as follows in a report dated April 7, 2022:

This patient has taken a protracted, heavy dosage of Percocet over the years. He continues to be on a high dose of this. I believe he is dependent upon this medication and I believe that it has little role in chronic musculoskeletal pain management. I believe that he should be seen by a drug addiction specialist and he may even be a candidate for methadone to help him get off the Percocet. Percocet does not have a role for treatment of chronic non-cancer musculoskeletal pain, such as in this patient. There was an attempt to try gabapentin a non-addictive pain medication, but he did not appear to continue on this. He was referred to the CHANGE pain clinic and it appears that he did not elect to follow up there. I do believe he requires attendance at a multidisciplinary pain clinic and that he requires use of other medications that her [sic] opioid sparing in dealing with his chronic pain.

To get him off the Percocet, it might even be a consideration to enter Mr. Cohen in a methadone clinic to taper this off. His Percocet reliance is a major issue, in my opinion. It is an issue that the College of Physicians and Surgeons is very cautionary about in their guidelines re: chronic opiate usage for non-cancer pain. Mr. Cohen was also relying on excessive usage of alcohol to deal with his pain at one point. I believe Mr. Cohen has a high addiction risk. For his Percocet dependence, I believe he needs to see and be treated/followed by an addiction specialist.

[12] Dr. Durnin-Goodman, the addiction specialist that the defence has proposed for the subject examination has also provided a letter setting out what can be addressed by her in an examination such as this, and her qualifications. She also specifically addresses the tests that would be conducted, specifically the urine, blood, saliva, hair, nails and breath, writing that the results would provide:

... objective information intended to supplement, confirm, or refute the account of the individual as well as the available records. As noted earlier, substance use assessments take into account that important information may be omitted from the record, or from the individual's own narrative. Often, this is missing from provider information also, unless the care provider/assessor has undergone specific training in addiction medicine. I do note that in Mr. Cohen's file, several care providers/assessors did express concern about his opioid use, but further detailed assessment did not occur, although Dr. Shuckett did recommend consideration of obtaining an assessment for methadone maintenance treatment. ...

[13] And further:

Testing provides objective evidence of the presence or absence of any given substance in the matrix tested. This may or may not be in accordance with the history provided by the individual. As such, biological testing is an important aspect of substance use assessments, as it can impact positively or negatively the reliability and credibility of the individual's account of their substance use, which may impact other aspects of the matter to be decided before the courts.

Depending on the matrix selected, testing information can be provided for recent use, more remote use (such as within the last 3 months), or in some cases for longer periods of use, up to a year.

Such information is compared to the account of the individual as to what, if any, substances had been used, as well as the medical record/documentation/psychometric testing/collateral information, in order to assess congruence or otherwise of diverse sources of information. ...

It is not possible to provide a comprehensive assessment in evaluations respecting substance use without including such testing. Denial is often a common feature of substance use difficulties, if present. This may not mean that the individual is being deliberately deceptive, rather that reticence in disclosure of such issues is common.

[14] Finally, Dr. Durnin-Goodman concluded as follows:

Assessment in person can provide information concerning causation with respect to possible contribution of his medication/cannabis/alcohol or other substance use to his current and past complaints..

From review of the available information to date, some providers and assessors have expressed concern about the impact of opioid use, and possibly alcohol use, on Mr. Cohen's past and current level of function. This may impact issues of causation with respect to his complaints.

Legal Analysis

The Examination

[15] The parties do not disagree as to the general test for the court to apply in considering a subsequent IME by the defence. As the case law is well known, and the examination itself not seriously opposed, I will not go into detail as to how the law has evolved since *Tran v. Abbott*, 2018 BCCA 365.

[16] At a basic level, an order under Rule 7-6 for an examination such as this is a discretionary one. However, the court must be satisfied that the examination is necessary in order to put the parties on an equal footing.

- [17] That being said, equal footing does not mean that reports are to be matched report for report or expert for expert, or even issue for issue. There are often scenarios and cases where one party will rely on the expert opinion of one practitioner with an expertise in a particular modality and the other party will rely on an author or expert with a completely different specialty and modality. Despite having different diagnoses, there may be sufficient overlap between experts that not every type of expert need be retained.
- [18] Further, when there have already been previous examinations conducted, the determination of whether or not the examination is necessary requires some evidence that the proposed examiner is providing evidence that cannot be obtained by the other examiners. The examination will not be necessary if its results will only serve to bolster the evidence already obtained.
- [19] In short, just because there is no indication that the plaintiff will, or will not, be relying upon evidence of an addiction specialist, that there is a comment in the medical records as to concerning opiate use, does not necessarily mean that the defence is entitled to an examination by an addiction specialist.
- [20] Nonetheless, on the evidence before the court today, I find that there is a live question as to whether or not there is an addiction and, if there is one, what the effect is of such an addiction on the plaintiff's recovery and prognosis including his ability to maintain work. I do note that there are references throughout the clinical records that he is working, although there is a reference to the plaintiff himself being concerned that the drugs may be affecting his focus with respect to his work.
- [21] In addition, I am satisfied that the proposed examiner will be commenting on issues that have not been, and can not be, addressed by the existing examiners. The evidence of an addiction specialist is necessary for a fair trial on the merits based on evidence not only of the effects of the accident but any possible addiction, an issue that may inform as to the best treatment and resulting prognosis.
- [22] As such, I am ordering the examination to go ahead.

The Testing

- [23] As to the Testing that the proposed examiner wishes to undertaken, the plaintiff argues that such tests are intrusive and, to the extent they infringe upon his privacy rights, they do so to an extent that is not proportional to their probative value.
- [24] The defendant relies upon *Siemens v. Motruk and Coote*, 2000 BCSC 1593 ("Siemens"), where Justice Burnyeat looked at this issue at some length.

- [25] The plaintiff argues that that decision is largely distinguishable because the issue in Siemens included an allegation that there may have been addiction that predated the accident, suggesting that because this particular matter does not involve a situation where the court is having to determine whether or not a drug addiction is a pre-existing condition which may limit the plaintiff's recovery on the basis of causation, there is no basis to order the Testing.
- [26] I do not read Siemens that narrowly. After summarizing the evidence before it, the court noted as follows:
- [23] I am satisfied that the defendants have raised at least the possibility that there is an addiction to prescribed and non-prescribed medication which may be contributing to her current disabilities. The medical records for the period immediately prior to the accident raise the suggestion that there was a concern about possible addiction to medication. The same might be said of the post-accident records. While there is nothing to indicate that problems which were present between the time of the accident and March of 1998 remain problems, the plaintiff claims for continuing and present loss of income and earning capacity. Accordingly, I am satisfied that the current levels of medications which might be revealed by blood and urine analysis remain relevant to the issues which have been raised in the pleadings as well as the issues which have been raised by the defendants relating to the medical advisors who have examined the plaintiff.
- [24] It is also clear that blood and urine analysis will be the "best evidence" available on the issues raised by the defendants. In this regard, in *C.(M.) v. C.(L.A.)* (1990), 42 B.C.L.R. (2d) 379 (B.C.C.A.), the court ordered a blood test on the issue of paternity because it was the "best evidence" and indicated that it would be ordered "unless overriding interest showed to be in the child's detriment." Blood and urine tests are clearly the best evidence available on the issues raised and I find that there is no overriding interest of the plaintiff which would result in the order not being made. I am satisfied there is no available evidence other than blood and urine samples from which the independent medical examiner can rely when formulating his conclusions and opinions.
- [27] The plaintiff also raised a floodgates argument, suggesting that the court should be cautious in allowing intrusive Testing such as this, which will show the level of use of drugs and alcohol in the system, as it may be seen as permission for such tests to be done anytime a plaintiff in a personal injury action has taken Percocet, some other opiate, or undertaken any other similar self medicating practices, in order to test the veracity of their self-reporting of their medication use.
- [28] Although not stated this way, I appreciate the plaintiff's argument as being one that the Testing should not be permitted as a means to impeach the plaintiff's credibility on such issues, as that neither meets the test of necessity on applications such as this, nor is proportionate to the invasion of privacy that the Testing causes. On that, I would agree.

- [29] However, in this case there is evidence that that the use of alcohol, drugs, including Percocet, opioids generally, THC, and edible cannabis are being used by the plaintiff for his pain management.
- [30] There is sufficient evidence on this application to suggest that such practices may be interfering with his recovery, there may be an overuse of opiates and/or alcohol or other drags, and there may have been attempts to deal with it including recommendations for treatment that have not been undertaken by the plaintiff.
- [31] It is not necessary for the defendants to show that there is a dispute specifically between pre-existing and post-accident injuries with respect to addiction in order to meet the test of necessity for, firstly, the examination by an addiction specialist, or secondly, for appropriate testing to be undertaken. In the totality of the evidence on this application, the plaintiff's level of usage of opiates, alcohol and other drugs are issues that are present in this litigation in terms of treatment, prognosis, and damages.
- [32] As a final comment I do share the plaintiff's concern that the examiner may be using the Testing as a means to assess the veracity or credibility of the plaintiff. The purpose of an independent assessment by a doctor is not for the purposes of impugning the plaintiff's credibility but rather to get to the full and true nature of the physical injuries in order for there to be a fair trial on the merits.
- [33] It is unusual to seek tests to essentially confirm that the medications being taken are as reported by the plaintiff both at that assessment, and to his other treating practitioners. However, this is an unusual situation in that there is a well documented increased usage of Percocet and other self medicating substances since the accident, with a concern that there may be an addiction, or even a level of use of such drugs that is impairing his ability to deal with his pain management and/or recover to the degree to which he ought to, or may otherwise be able.
- [34] To use the words of Justice Burnyeat in Siemens, comments that were echoed by the court in Mund v. Braun, 2010 BCSC 1714, there is at least the possibility that there is an addiction to prescribed medication which may be contributing to the ongoing disabilities, and that the ability to fully determine the extent of that is aided by obtaining the Testing, as sought.
- [35] To the extent that the Testing is intrusive, such an invasion is outweighed by the probative value in having the Testing conducted in this matter.

Conclusion and Order Made

- [36] The application is granted as sought, although with the amendment noted by the defendant with respect to the Testing at para. 2 of the notice of application. Specifically, the wording in that respect will be that:

The plaintiff will submit to testing required by Dr. Durnin during the IME limited to blood testing, urine testing, saliva testing, nail testing and hair and/or breath samples.

[37] With respect to para. 3, I will vary that from the notice of application slightly. Paragraph three shall be that:

The plaintiff will fill out any forms and questionnaires required, provided that they are appropriately worded to indicate that the plaintiff is being compelled to attend by court order.

[38] CNSL D. GORGIS: Thank you, Your Honour. Will there be time for submissions on costs? There was -- I have aligned the arguments to my friend significantly prior to this application and there was a concession that he was not opposing the IME itself, even though the opposition on the response was to that effect. So we seek costs in any event of the cause.

[39] THE COURT: Any response on costs?

[40] CNSL F. BALANDARI: My submission on costs, Your Honour, is that it be left in the cause. This is a lengthy matter. There have been several other applications. As well, when we first provided a response much of the response has to do with the qualifications, which they later addressed, but I think it is just for a plaintiff in this matter to try to fight invasive actions or testing.

[41] THE COURT: Yes, I agree, the qualifications of the examiner should have been set out in the first instance and if they had may have narrowed the response.

[42] CNSL F. BALANDARI: Yes.

[43] THE COURT: In these circumstances, costs shall be in the cause.

"Master Robertson"

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