
CANADA / JUDGMENT

De Sousa v. Bradaric and Borthwick

2011 BCSC 1134

COURT

Supreme Court of British Columbia

DECIDED

21 July 2011

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2011 BCSC 1134 De Sousa v. Bradaric and Borthwick

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Sousa v. Bradaric and Borthwick,

2011 BCSC 1134

Date: 20110721

Docket: M054220

Registry: Vancouver

Between:

Lisa Marie De Sousa

Plaintiff

And:

Denis Bradaric and James S. Borthwick

Defendants

Before: Master Baker

Oral Reasons for Judgment

Counsel for plaintiff

J. Harbut

Counsel for the defendants

C. McIvor

Place & Date of Hearing:

Vancouver, B.C.

July 21, 2011

Place & Date of Judgment:

Vancouver, B.C.

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- [1] THE COURT: This is an application by the defence in proceedings relating to a motor vehicle accident which occurred in October of 2003, the consequence of which Ms. De Sousa says she was injured and suffered a variety of injuries, including soft tissue, but most, I think, compelling and entirely the focus of this application are psychiatric consequences.
- [2] The matter is set for a 20-day trial commencing the 13th of February, 2012, so we are still within the time of course to obtain and deliver expert's reports.
- [3] This is an application by the defence for a second IME in an area in which there has already been one IME, that is to say, the psychiatric condition or consequences for Ms. De Sousa. More particularly, Ms. De Sousa attended, by consent, as I understand, at an IME with Dr. Davis, a psychiatrist, in October of 2007, if memory serves, on October 24th.
- [4] Without putting too much on this, it is my view, having scanned Dr. Davis' very lengthy initial report, that he was, I think, primarily focussed on the issues of chronic pain and post traumatic stress. However, he did conclude that there was no psychosis in the case of Ms. De Sousa, and he says he did so having asked her whether she had any previous psychiatric involvement or contact or issues and her having told him no, and I think on his own observations of her. But I repeat it did not appear to me that he was focussed or placed a great deal of the effort of a two and a half hour, I believe, IME on the issue of psychosis.
- [5] What is very interesting about this, however, is that in July of that year, she was admitted to Burnaby General Hospital for one day for a psychiatric/psychotic event, and more concerning, in August of that year she was admitted to Vancouver General Hospital. In fact she was committed to the psychiatric unit there under the Mental Health Act, R.S.B.C. 1996, c. 288, emergency provisions and stayed there for six days. There is just no question but that she was diagnosed at that time as having a psychotic disorder, albeit of a brief nature at that time.
- [6] Things have not gotten better for Ms. De Sousa. There is just no doubt whatsoever that her psychosis has, I think, developed. She has had committals or admissions to hospitals or psychiatric units since due, to her ongoing and developing psychosis which has now been diagnosed, at least by I think Dr. Jahnke and her treating psychiatrists, as chronic paranoid schizophrenia.

- [7] The defence now requests a second IME, this with Dr. Maelor Vallance. The defence says that Dr. Davis is no longer available and that they have made reasonable efforts to locate him, but that he appears not to be practising anymore and possibly has medical issues of his own. So be it.
- [8] Dr. Vallance has read the materials, the earlier reports, and has produced a relatively long and detailed consult report based only, however, on the materials before him, and he does comment, and I possibly emphasize, that the weight and value of his report might be reduced by the fact that he has not had a hands-on, if you will, personal IME or examination with Ms. De Sousa. Fair enough.
- [9] I will take one step back and address the chronology because I think it is interesting and relevant. Then-counsel for Ms. De Sousa, Mr. Turco, in the summer of 2007 contacted then-defence counsel because she had been admitted to hospital. He did so because it required the rescheduling of at least one IME, that with Dr. Hashimoto, a neurologist. I cannot recall whether it involved the rescheduling of the psychiatric IME with Dr. Davis as well. It does not matter too much, but what is clear is that counsel advised the defence that she had been admitted to the hospital -- I believe it was the 6-day August admission -- and that she had been admitted for "cognitive issues", an interesting turn of phrase, but there is just no question that the defence by that should reasonably have been alerted to the fact that she had been admitted to the hospital for problems and issues other than physical ones.
- [10] The clinical or hospital admission records including the diagnosis of psychotic condition were delivered to counsel on or about October the 24th. I say "on or about" because it was sent by cover letter dated that day, and as Mr. McIvor quite rightly points out, we do not know whether it was sent by fax or courier or however, but it was sent quickly, and it was available to Dr. Davis very quickly, possibly within days, he having performed his IME on that day, i.e., October 24th.
- [11] I have to conclude that counsel would reasonably have been concerned or pointed out to Dr. Davis that there has been this event and there are these documents which suggest psychotic condition. What is really important, however, is that Dr. Davis on several subsequent occasions has reviewed the history of the matter with updated or further delivered reports and records but has stood by his opinion quite, in my words, rigidly and has categorically rejected any diagnosis of a psychotic condition.
- [12] In fact he says to carry on with that may do Ms. De Sousa harm as he says the duty of every physician and psychiatrist is to allay a patient's concerns, not to aggravate them, and he clearly feels, in my view, that to proceed down that road and to entertain the possibility with her that she may be suffering from psychosis is to aggravate and offer up problems to her that do not really exist or are justified, in his view. There is no question that apprised of the information as it developed for at least two years -- I think his last report was in 2009 -- he simply rejected the diagnosis of psychosis.

- [13] I am not satisfied at all that in these circumstances, with these facts and history, that a second IME is justified. It is easily as consistent in my mind that the defence now disagrees or is concerned about issues with Dr. Davis' position and report. It is easily consistent, in my view, that the application aims to mediate or improve upon Dr. Davis' opinions.
- [14] Yes, Mr. McIvor is absolutely correct that the psychosis, if any, was at a fairly nascent stage in 2007 when Dr. Davis saw her and that it has apparently, if one takes the evidence of the plaintiff, become full-blown. Well, so be it. In my respectful view, Dr. Davis is a psychiatrist. He is an expert in psychiatric matters. He has been consulted on, I am told, many occasions. That is not denied. I would expect him to be alive to the issue. He certainly inquired of Ms. De Sousa and very soon after was advised of the psychotic overlay or potential for it and has absolutely rejected that.
- [15] In all the circumstances, I just cannot see a basis for the second opinion. It is a multi-stage test, of course. There are aspects of this both counsel have properly put before the court, starting with as Mr. McIvor has pointed out the Chief Justice in *Wildemann* (1990), 50 B.C.L.R. (2d) 244 (C.A.). It must be an exceptional case that justifies the second IME or one that is required to place the parties on equal footing. I cannot see that in this particular case. What is, I think, concerning the defence, I infer, is concerns they have with the quality or reliability of a report obtained in this specific area of expertise.
- [16] The court should be concerned according to *McKay v. Passmore*, 2005 BCSC 570, that the matter is something that could not reasonably be seen or anticipated or dealt with at the time. Well, again, I do not see that that applies in this case. There was a previous committal for psychotic reasons. Counsel called and advised that she had been to the hospital, possibly not for psychotic reasons, possibly as I said earlier for cognitive reasons; possibly he did not have in hand the medical records. He probably did not. It sounds to me like it was on an emergency basis, but surely that should have given rise to real concerns on the part of any inquiring professional such as Dr. Davis.
- [17] The passage of time alone does not justify a second IME. That is true. However, that may be qualified, I suppose, when the passage of time allows for the development of a whole new area of concern or symptomology. Certainly, as I have said already a couple of times, her psychosis has really developed and become much more obvious, apparently. However, I do not think this aspect applies because it should have been evident to a reasonable inquiry at the time that there was a real issue about this.
- [18] It must be shown that there is a cogent medical reason to do the examination, and it is submitted by Mr. McIvor that that lies with Dr. Vallance's concerns that his opinion will have less weight if he does not do the IME. Well, there is a certain circularity to that, frankly. There is no question that Dr. Vallance is fully qualified and well known as an expert in these areas. I do not see the compelling medical reason for such an examination.

- [19] Another factor is that one should not allow a second IME if the time remaining to trial means that the rules would not be observed for the delivery of the reports. That does not apply in this case. I am satisfied that were an IME allowed with Dr. Vallance, he would have the report on time, but for other reasons I am dismissing the application.
- [20] Finally, Mr. McIvor rightly points out proportionality should be considered. Yes and no. Yes, to the extent that all matters now are considered with that in mind, of course. All applications are and in fact in many cases that issue alone is decisive. I think Mr. Harbut is correct to place limitations on that and point out that just because you have a larger claim or matter that is developing into a major claim does not mean all rules are off and now that becomes the dominant consideration. It does not at all. It simply adds possibly some qualification to the other rules and considerations I have already discussed.
- [21] Yes, this may be developing into a major claim, but that does not change all of the other considerations that I have applied and taken from the cases, all of which lead me to conclude that the application should be dismissed, and it is.

"Master Baker"

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