

CANADA / JUDGMENT

Debruyn v. Kim

2020 BCSC 1773

COURT

Supreme Court of British Columbia

DECIDED

4 November 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1773 Debruyn v. Kim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Debruyn v. Kim,

2020 BCSC 1773

Date: 20201104

Docket: M187414

Registry: Vancouver

Between:

Daniella Marion Debruyn

Plaintiff

And

Seung Ran Kim

Defendant

Before: The Honourable Mr. Justice Veenstra

Oral Ruling Re Application for the Plaintiff to Attend

Further IMEs with Three Different Specialists

In Chambers

Counsel for the Plaintiff:

V.L. Sewell

Counsel for the Defendant:

B.M. McFadden

Place and Date of Hearing:

Vancouver, B.C.

November 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 4, 2020

- [1] THE COURT: The defendant in this personal injury action seeks orders pursuant to Supreme Court Civil Rule 7-6 for the plaintiff to attend an independent medical examination ("IME") by each of three medical professionals: an orthopaedic surgeon, Dr. Leith; a neurologist, Dr. Grosch; and a psychiatrist, Dr. Axler.
- [2] The plaintiff is amenable to attending IMEs with the orthopaedic surgeon and the psychiatrist, provided they can be done remotely, but disputes the necessity of an IME with a neurologist. The defendant is amenable to having the IME with the psychiatrist conducted remotely by video. Thus, there appear to be two issues on this application:
- a) whether the defendant should be granted an order for an IME with the neurologist in addition to the other two; and
 - b) whether the IMEs with the orthopaedic surgeon and the neurologist, if ordered, should be conducted remotely by video or in person.
- [3] This action arises from a motor vehicle accident (the "MVA") which occurred on June 8, 2017. The action was commenced on June 18, 2018. The trial of this matter is scheduled to proceed on March 1, 2021, for five days. The deadline for service of expert reports is December 4, 2020, which is now one month away.
- [4] The plaintiff in the notice of civil claim alleges that she suffered the following injuries in the MVA:
- a) injury to the left shoulder;
 - b) injury to the neck;
 - c) injury to the back;
 - d) injury to the right hip;
 - e) injury to the left side of the chest;
 - f) injury to the left arm;

- g) injury to the right leg and foot;
 - h) soft tissue injuries;
 - i) headaches;
 - j) fatigue;
 - k) insomnia;
 - l) shock;
 - m) fear and nervousness in a vehicle;
 - n) difficulty sleeping;
 - o) posttraumatic stress disorder;
 - p) tension, anxiety and depression; and
 - q) other injuries as may be identified by medical reports.
- [5] The plaintiff has served and intends to rely at trial on three expert reports: one from her treating family physician, one from a psychiatrist, and one from an orthopaedic surgeon.
- [6] The plaintiff has been examined for discovery. One of the matters covered was an attempt in 2017 to take a program that would allow her to become a personal trainer. Her evidence indicated that she did not complete the program because of injuries, both mental and physical, and her inability to concentrate and properly take in information during the course. I note that the plaintiff's original insurance claim application from June 2017 described her occupation as homemaker. As well, the plaintiff's past medical records indicate numerous references to issues with headaches and other neurological symptoms.
- [7] Defendant's counsel scheduled IMEs for the plaintiff with all three of these medical professionals to occur in the fall of 2020 and advised plaintiff's counsel on May 11, 2020 of the IMEs with the psychiatrist and the orthopaedic surgeon, and on July 31, 2020 of the IME with neurologist. On August 6, 2020, plaintiff's counsel advised defendant's counsel that the plaintiff would agree to only two IMEs. A lengthy series of letters and emails ensued with plaintiff's counsel taking the position that the plaintiff would not agree to any assessments until the defendant agreed to limit itself to one IME for physical injuries and one for psychiatric/cognitive issues. The defendant would not agree to this, and the present application was filed on September 30, 2020.
- [8] On October 19, 2020, defendant's counsel served a notice to admit on plaintiff's counsel, seeking admissions that the plaintiff has not suffered either neurological injuries or cognitive impairment as a result of the MVA. Plaintiff's counsel replied to that notice to admit denying the assertions made.

- [9] Thus, it appears from the record that questions of neurological injuries are alive in the action and, based on the examination for discovery evidence, may be connected with a claim for loss of earning capacity.
- [10] The defendant argued in support of its application that given the plaintiff's pre-accident history of neurological symptoms including headaches and her ongoing complaints in some of these same areas as well as the pleadings, it is necessary for a neurological assessment to occur in order to assess those issues as they relate to the plaintiff's claim.
- [11] The plaintiff opposed the order sought. The plaintiff disputed whether a report from a neurologist, in addition to a report from an orthopaedic surgeon, was necessary. The plaintiff notes that none of the plaintiff's treating physicians have referred her to a neurologist, and that the plaintiff has not and does not intend to obtain a report from a neurologist (unless in response to a neurologist report from the defendant).
- [12] The plaintiff argued that the defendant should first obtain reports from the other IMEs and then apply for a further IME by a neurologist if those reports establish a need to do so. The plaintiff acknowledges that it is too late to take all of those steps in advance of the deadline for delivery of expert reports, but argued that this is the defendant's problem since it waited too late to bring its application. Ultimately, the plaintiff argued that the defendant bears the onus on this application, and that it has not been established that an additional IME is required to put the parties on an equal footing.
- [13] Both parties relied on the judgment in *Tran v. Abbott*, 2018 BCCA 365. In that case the plaintiff had attended an IME with a neurologist whose report included comments on musculoskeletal issues. The defendant subsequently applied for an IME with an orthopaedic surgeon. The application was dismissed in this court, but on appeal the order was granted. The Court of Appeal commented in the course of its ruling that (at paras. 11, 27 and 32-33):
- a) Rule 7-6 is a rule of discovery designed to balance the plaintiff's advantage in obtaining expert opinions by providing the defendant with access to the plaintiff for such prior to trial.
 - b) The purpose of an IME is to put the parties on an equal footing with respect to the medical evidence, and Rule 7-6 specifically contemplates more than one IME.
 - c) Multiple examinations may be appropriate and necessary where a variety of injuries are alleged or the etiology of illness is not straightforward.
 - d) In exercising its discretion on an application pursuant to Rule 7-6, the court must consider the effect of refusing the order sought on the conduct of the trial.
 - e) A line of authorities that mandated a requirement of "exceptional circumstances" before a second IME could be ordered was overruled.

[14] The court noted at para. 38 the judgment in *Guglielmucci v. Makowichuk* (1996), 18 B.C.L.R. (3d) 68 (C.A.). The plaintiff in that case had previously attended IMEs with an orthopaedic surgeon and a rheumatologist. The defendant's application for an examination by a psychiatrist had been dismissed, in part on the basis that the plaintiff's own physicians had not seen fit to refer her for psychiatric or psychological assessment. As explained in *Tran* at para. 39, the further examination in *Guglielmucci*:

... was ordered to allow the case to proceed with the parties on a basis of equality, i.e., to allow the defendants to advance their hypothesis as to the etiology of the plaintiff's complaints.

[Emphasis added.]

[15] The judgment in *White v. Fan*, 2019 BCSC 785, is to similar effect. As in the present case, the plaintiff had consented to an IME by an orthopaedic surgeon but would not agree to an IME by a neurologist. The plaintiff claimed that he was not alleging any nerve injury other than to his sciatic nerve, which was within an orthopaedic surgeon's expertise. Justice Iyer commented at para. 16:

In light of all of this, I am satisfied that the circumstances in this case bring it within the reasoning in *Tran*, in that denying the application would "preclude the defendant from obtaining a report from an expert with appropriate qualifications on a live issue, the etiology of the plaintiff's complaints": at para. 37. The defendants are not required to accept the plaintiff's theory that the source of his ongoing cognitive symptoms is not neurological.

[Emphasis added.]

[16] The judgment of Bracken J. in *Hamilton v. Pavlova*, 2010 BCSC 493, although partially overturned in *Tran v. Abbott*, includes at paras. 10 to 13 and 15 a convenient list of factors that are material to the exercise of the court's discretion on an application such as this. They include:

- a) The rules are designed to secure a just determination of every proceeding on the merits and to ensure full disclosure, so the rule should be given a fair and liberal interpretation to meet those objectives.
- b) While an IME is granted to ensure a "reasonable equality" between the parties in preparing for trial, that does not mean the defendant should be able to match expert for expert or report for report.
- c) A second exam will not be allowed for the purpose of attempting to bolster an earlier opinion of another expert.
- d) The application must be timely. That is, the proposed examination should be completed and a report available in accordance with the applicable rules.

- [17] The parties drew my attention to a number of cases dealing with applications for second or third IMEs. Every case turns on its own particular facts, and I will not refer to all of them. I note the following additional principles drawn from those cases that are an assistance in deciding the present application:
- a) A party seeking a subsequent IME is not required to tender medical evidence to demonstrate the need for the subsequent IME. While there must be a real basis for the request in that it is grounded in the pleadings and supported by evidence, medical evidence is not an independent requirement: *White* at para. 17 and *Shannon v. Cook*, 2019 BCSC 1139, at para. 34.
 - b) Similarly, while it would be helpful if initial independent examiners had indicated that some aspect of the plaintiff's condition was outside their expertise, such evidence is not a requirement: *Shannon* at para. 28; and *Broumand v McEdwards*, 2020 BCSC 803, at para. 13.
 - c) Where the etiology of the plaintiff's current complaints is a live issue, particularly in light of evidence of prior injuries and/or pain complaints affecting parts of the body now alleged to have been injured in the accident, the defendant is entitled to inquire whether there is a neurological component to the plaintiff's current complaints and if so, whether it is related to a pre-existing condition: *Broumand* at para. 11.
 - d) The need to have the best evidence on material issues available at trial is an important concern: *Irvine v. Bradley* (unreported, February 22, 2019, Vancouver Registry, M172655) at para. 5; and *Broumand* at para. 14.
- [18] Having reviewed the pleadings and the evidence put before the court on the application, I am satisfied that there is a "real basis" for the request for a neurological examination. There is a past history of neurological complaints, and there are complaints that could have neurological sources amongst those comprising the current claim. There is also, in the particular circumstances of this case, a linkage in the evidence of those complaints to a potential claim for loss of earning capacity.
- [19] The fact that the plaintiff does not intend to prepare and tender evidence establishing a neurological cause of her injuries does not prevent the defendant from exploring and advancing its own theories as to the etiology of the illnesses and injuries claimed.
- [20] While it could have been helpful in this case, as in *Shannon* and *Broumand*, to have reports from the other IMEs before deciding whether to order an IME by the neurologist, that is not a requirement of the cases. In any event, the positions taken by plaintiff's counsel in response to the requests made for IMEs rendered that course of proceeding unrealistic.
- [21] Although time is short, there is sufficient time in this case to conduct all three IMEs and obtain reports in advance of the deadline. Thus, the application is timely in the sense discussed in *Hamilton*.

- [22] Given that the provisions of Rule 7-6 are rooted in the importance of discovery and of putting the parties on an equal footing, and recognizing the importance of ensuring that the best evidence is available at trial, I will order that there be an IME by a neurologist in addition to the other two IMEs.
- [23] The second issue on this application relates to the location and method of conducting the IMEs that are sought. The parties appear to be agreed that the IME with the psychiatrist can be conducted remotely through video technology. I note that it appears that the plaintiff's psychiatrist conducted her examination by video technology. The defendant did not present any specific basis on which the IME with the neurologist needs to be in person. However, the defendant has asked that the IME with the orthopaedic surgeon be in person. The plaintiff objects to this.
- [24] The evidentiary foundation for the plaintiff's objection comes from the affidavit of a Ms. Brown, who is a medical scheduling coordinator in the office of the plaintiff's counsel. Paragraph 13 of her affidavit states:

The plaintiff has significant psychiatric condition limiting her to mainly being housebound. She is unable to leave her home except for short distances. Anywhere longer or unfamiliar causes her extreme anxiety. She is also deeply concerned over COVID-19.

- [25] Apart from being quite general in nature, this statement appears to me to be disguised hearsay evidence. It may be double hearsay. Whether that is the case is not clear, as the source of the hearsay is not identified.
- [26] The evidence also includes a report of Dr. Muir, a psychiatrist retained by the plaintiff to provide an expert report. The report indicates that the plaintiff:
- describes agoraphobia, which is a fear of leaving the home, because of worry she may have further panic attacks.
- [27] The report of Dr. Syal, an orthopaedic surgeon retained by the plaintiff to provide an expert report, indicates that the plaintiff attended at his office in person on June 19, 2020, amid the COVID-19 pandemic. Nothing in the evidence explains how the plaintiff was able to attend this appointment but could not attend an appointment with an orthopaedic surgeon arranged by the defendant.
- [28] I would expect that an orthopaedic surgeon would normally want and be expected to conduct a physical examination. However, there is no evidence to that effect. I am concerned that a trial judge in this matter faced with different opinions from two orthopaedic surgeons might, in evaluating those reports, give consideration to the opportunity each had to conduct an actual physical examination. That would undercut the purpose of putting the parties on an equal footing with respect to the medical evidence. As such, I would be concerned with ordering that the orthopaedic IME take place remotely.

- [29] On the other hand, given the present pandemic circumstances, I would be reluctant to order an in-person attendance without properly understanding the plaintiff's ability to reasonably participate and being confident it was necessary in order to ensure a fair trial.
- [30] Given the issues with the evidentiary record from each party on this point, I would ask the parties to consider options to deal with this situation and attempt to resolve it directly. If there is specific neurological testing that the neurologist would require to be done in person, that should be taken into consideration as well. If the parties are unable to work out how the IMEs may be conducted, then they may schedule a further brief hearing before me to resolve the issue on an improved evidentiary record.
- [31] Finally, I heard brief submissions on the impact of the amendments to the Evidence Act, R.S.B.C. 1996, c. 124, brought in by the Evidence Amendment Act 2020, S.B.C. 2020, c. 7, which among other things imposed a limit of three expert reports in certain circumstances and on certain conditions. As noted above, the plaintiff has prepared its case based on the three expert reports it has already delivered and has no present intention to obtain a report from a neurologist, unless it deems that to be necessary as a result of receiving a neurologist's IME report from the defendant.
- [32] It may be that s. 3 of the Expert Evidence Regulation, B.C. Reg. 210/2020, would permit such a report in any event. Out of an abundance of caution, I would order as a condition of the order I am granting today that, in the event that the defendant delivers a report from its neurologist arising from the IME, the plaintiff is entitled to provide its own report from a neurologist notwithstanding the new three report limit.

(SUBMISSIONS ON COSTS)

- [33] THE COURT: I do not see any basis to depart from the usual rule. In the circumstances, the defendant has been substantially successful on the application, but given that both liability and damages are live issues in the matter, I think the usual rule applies. Costs to the defendant in the cause.

"Veenstra J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/17/2020BCSC1773.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/debruyne-v-kim-2020>

Prepared on 25 October 2026 · Esheria