

CANADA / JUDGMENT

Ferguson v. Guthrie

2022 BCSC 1111

COURT

Supreme Court of British Columbia

DECIDED

10 June 2022

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2022 BCSC 1111 Ferguson v. Guthrie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ferguson v. Guthrie,

2022 BCSC 1111

Date: 20220610

Docket: M206087

Registry: Vancouver

Between:

Shental Louise Ferguson

Plaintiff

And

Philip Daniel Guthrie and Dawn Leslie Seabrook

Defendants

Before: Master Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff (by videoconference):

R. Fang

Counsel for the Defendant Seabrook (by videoconference):

K. Koltunska

Place and Date of Hearing:

Vancouver, B.C.

June 6, 2022

Place and Date of Ruling:

Vancouver, B.C.

June 10, 2022

Introduction

- [1] THE COURT: By application filed May 19, 2022, the defendant Ms. Seabrook applies for an order that the plaintiff attend for a functional capacity and cost of future care evaluation ("FCE / CFC") with Ms. Kim Dimayuga, Occupational Therapist, over two days on June 28 and 29, 2022. The first day would be held at Ms. Dimayuga's office for 7.5 hours, and the second day would be held at the plaintiff's home for 4 hours.
- [2] This would be the defendant Seabrook's fourth medical examination of the plaintiff. The three previous examinations include:
- a) Dr. Eugene Okorie, Psychiatrist, May 7, 2022;
 - b) Dr. Mark Crossman, Psychiatrist, May 12, 2022; and
 - c) Dr. Andrew Woolfenden, Neurologist, May 25, 2022.
- [3] The plaintiff opposes the proposed examination.
- [4] Counsel for the defendant Seabrook advises she has not received reports from any of the forgoing experts yet, so none were produced in support of this application. The plaintiff has not yet served any expert reports on the defendants.

Background

- [5] This action arises out of a motor vehicle accident which occurred on December 21, 2018, in Surrey, BC.
- [6] The plaintiff claims a variety of injuries resulted from the accident. These include to the head, neck, shoulders, back, hips, collarbone, arms, fingers, legs, pelvis, stomach, urinary tract, psychological / psychiatric injuries, sensitivity to light and sound, loss of bladder control, concussion, post-traumatic stress disorder, headaches, diminished quality and quantity of sleep and fatigue.

- [7] Claims made include for pain and suffering, loss of earnings, loss of earning capacity, past, present and future, loss of housekeeping capacity, loss of enjoyment of life, loss of physical health, cost of future care, special damages and general and in-trust claims for family members who are assisting the plaintiff.
- [8] At the time of the accident, the plaintiff was 38 years of age and is now 41. She was employed full-time as a pharmacy technician and also had an additional permanent part-time position secured with a second pharmacy which had not started prior to the accident date.
- [9] The plaintiff was examined for discovery on February 17, 2022, and indicated she has not been able to return to work since the accident due to ongoing physical and psychological symptoms.

Procedural Background

- [10] On June 3, 2020, the plaintiff started the action with one defendant, Mr. Guthrie.
- [11] On December 17, 2020, Master Muir ordered that Ms. Seabrook be added as a second defendant. An amended notice of civil claim was filed the same day.
- [12] On April 16, 2021, the plaintiff filed the notice of trial, returnable October 17, 2022, set for 15 days.
- [13] On July 7, 2021, the defendant Seabrook filed her response to civil claim.
- [14] On February 17, 2022, the plaintiff was examined for discovery.
- [15] On March 31, 2022, the defendant Seabrook filed an application for a medical examination by Dr. Crossman (physiatrist), set for May 12, 2022. On April 21, 2022, the application was heard by Master Vos, who granted the order. His oral reasons are indexed as *Ferguson v. Guthrie*, 2022 BCSC 962.
- [16] On April 29, 2022, defence counsel wrote to plaintiff's counsel requesting that the plaintiff attend a FCE / CFC with Mr. Dimayuga. On May 10, 2022, counsel for the plaintiff advised she would not consent to the proposed assessment.
- [17] On May 19, 2022, the defendant Seabrook filed this application.
- [18] The 84-day deadline for service of expert reported under Rule 11-6(3) is July 22, 2022.
- [19] As noted, trial is scheduled for October 17, 2022, for 15 days.

Position of the Defendant Seabrook

- [20] Counsel advised that during examination for discovery, the plaintiff indicated she experiences a multitude of mental and physical symptoms and limitations. These include:
 - a) significant neck, back and hip pain and instances during which her hip will lock;
 - b) loss of bladder control;

- c) severe depression, loss of hope, disassociation, social phobia and anxiety;
- d) sleep issues;
- e) difficulties with memory and concentration;
- f) pain and limited range of motion affecting her ability to bend and lift and answer phone calls;
- g) inability to sit or stand for more than ten minutes due to hip, back and neck symptoms;
- h) inability to look at a computer screen for more than ten minutes;
- i) difficulty showering and washing her hair due to ongoing neck pain and resulting in her limiting how frequently she washes her hair;
- j) inability to flat iron hair due to it being too painful to keep her hands up long enough;
- k) inability to bend and limitations in her ability to access kitchen cupboards, empty the cat's litter boxes, et cetera;
- l) limitations in terms of cooking due to pain caused by lifting anything heavy and bending over;
- m) limitations in her ability to walk a very slow pace for 10 to 20 minutes;
- n) difficulty doing stretches and inability to lift weights;
- o) pain in her neck, back and hip; and anxiety when taking public transit or riding in a vehicle.

[21] In an effort to illustrate the anticipated scale of the plaintiff's claim, counsel notes that the plaintiff's pre-accident income is stated as being about \$35,000 per annum. She has not worked since the accident, which is roughly three and a half years ago, meaning her past income loss claim is expected to be in the order of about \$125,000. If she is alleging permanent total disability, this could add a further \$840,000 over the balance of her anticipated working life. It is expected that her claim for future care and supports would also be substantial as well.

[22] Given the complexity of the plaintiff's alleged injuries and scale of her claim, the applicant says that in order to properly prepare to defend her claim, it is crucial they be allowed a functional capacity evaluation of the plaintiff to assess her capacity to perform work-related activities. The plaintiff is receiving ongoing massage therapy, chiropractic treatment and counselling and is alleging she has ongoing limitations on her day-to-day activities, making a cost of future care assessment essential.

[23] Counsel concedes that there undoubtedly be some overlap amongst the four specialties in issue here. They say overlap is not the test, otherwise defendants would never be allowed to arrange functional capacity assessments. The injuries first have to be diagnosed and that will include some kind of a statement regarding disability. None of the three specialists who

have assessed the plaintiff will have carried out the detailed functional capacity assessment that the plaintiff is now proposing. Dr. Okorie's assessment focuses on psychiatric issues. Dr. Crossman's assessment focuses on physical issues. Dr. Wolfenden's assessment focuses on neurological issues.

- [24] Ms. Dimayuga's assessment will focus on the plaintiff's physical condition, capacity to perform work-related activities, disability and potential cost of future care. The prior three specialties provide diagnosis and treatment, whereas occupational therapists assess and treat functional performance related to all health conditions and injuries.
- [25] Counsel argues that Ms. Seabrook was added late to the action and has scrambled to get her case prepared for trial. The recent surge of examination for discovery and multiple medical examinations is the product of that effort.
- [26] Considering the apparent scope of the plaintiff's claim, fairness and proportional considerations also favour a fourth examination being allowed. Counsel says they will be at a disadvantage if they are not able to obtain this type of evidence.
- [27] Ms. Seabrook argues that while the Evidence Act (BC) limits each party to no more than three experts at trial, she also notes that it provides that on application, the court can grant leave for additional expert reports to be tendered. See s. 12.1(5). The applicant may decide to pick and choose amongst the various reports when deciding which to tender at trial. In any event, they suggest it is premature to address this issue when no expert reports have yet been produced.

Position of the Plaintiff

- [28] The plaintiff argues the applicant has failed to discharge the onus of proof by putting forward evidence to establish why the additional assessment is necessary. The previous three specialists are qualified to opine on function, disability and work capacity, as well as provide recommendations regarding future care.
- [29] They rely on Master Muir's reasons in *Gray-Verboonen v. Mandurah*, 2019 BCSC 1697 ["Gray-Verboonen"], at para. 15, where she stresses that the Court of Appeal's decision in *Tran v. Abbott*, 2018 BCCA 365, did not change the requirement that a defendant must show the further independent medical examination is necessary. Nor did it change considerations regarding overlap and bolstering.
- [30] They say that a subsequent examination will not be permitted for the purpose of trying to bolster the opinion of an expert. They suggest this will likely happen if the fourth assessment is allowed.
- [31] They say proportionality is a central consideration in every proceeding. However, the fact that this may be a large claim does not discharge the defendants' onus to establish necessity, which it has failed to do.

[32] The plaintiff says the applicant's argument that the three previous defence experts will not assess disability is simply wrong and that functional capacity assessments are an integral part of the assessments those specialties can be expected to have performed.

Applicable Law

[33] The court-ordered medical examinations are governed by Rule 7-6(1) and (2):

Rule 7-6 -- Physical Examination and Inspection

Order for medical examination

- (1) If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make.
 - (a) an order respecting any expenses connected with the examination, and
 - (b) an order that the result of the examination be put in writing and that copies be made available to interested parties of record.

Subsequent examinations

- (2) The court may order a further examination under this rule.
- [34] This rule is intended to help balance a plaintiff's advantage in obtaining expert evidence by preventing the defendant a reasonable opportunity to arrange expert assessment and evidence.
- [35] In *Gennings v. Lum*, 2020 BCSC 1196, at paragraphs 9 to 14, Mr. Justice Gomery summarized the relevant considerations as follows:

Legal framework

- [9] Supreme Court Civil Rule 7-6(1) authorizes the court to order an independent medical examination of a plaintiff in a personal injury action. The purpose of an IME is to put the parties on an equal footing with respect to the medical evidence; *Tran v. Abbott*, 2018 BCCA 365 at para. 32 [Tran]; *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309 at para. 31. While an assessment of what steps are necessary to achieve the goal of putting the parties on an equal footing is discretionary, the court must consider the effect of refusing an IME on the conduct of the trial; *Tran* at para. 40.
- [10] The goal of putting the parties on an equal footing does not necessarily require matching expert for expert or report for report; *Hamilton v. Pavlova*, 2010 BCSC 493 [Hamilton] at para. 12, *Gray-Verboonen v. Mandurah*, 2019 BCSC 1697 [Gray-Verboonen] at para. 15.

- [11] The applicant bears the burden of showing that the IME is necessary; *Stocker v. Osei-Appiah*, 2015 BCSC 2312 [Stocker] at para. 19; *Rong v. Yelland*, 2019 BCSC 2071 [Rong] at paras. 9-12. It is not the law that a second or subsequent IME is only justified in exceptional circumstances; a dictum to this effect in *Hamilton* at para. 16 was repudiated in *Tran* at paras. 27-28. However, it is the case that a further IME is not necessary if it would only serve to bolster an opinion already obtained by the defendant; *Gray-Verboonen* at para. 15. In *Stocker* at para. 33, Justice Pearlman stated:
- [33] A second examination will not be permitted for the purpose of attempting to bolster an earlier opinion of another defence expert. In meeting the higher threshold for a further examination, the defendant must show that there is some question or matter that could not have been dealt with at the earlier examination.
- [12] Where the defendant has already obtained an IME or IMEs and the question is whether a further IME should be ordered, the court must assess the questions already addressed, the differing specialities of the assessors, and the often uncertain path taken in the development of a differential diagnosis in a difficult case; *Kim v. Lin*, 2010 BCSC 1386 [Kim] at paras. 21-27.
- [13] In every case, the court must consider whether the IME sought is proportionate having regard to the magnitude of the plaintiff's claims and complexity of the medical issues; *Kim* at paras. 33-35.
- [14] The court must also consider whether the application is brought in time to permit admissible evidence to be adduced by the defendant at trial without undue prejudice to the plaintiff; *Vermuelen-Miller v. Sanders*, 2007 BCSC 1258 at paras. 47-48; *Hamilton* at para. 15. It is common ground that timeliness is not a concern in this case.
- [36] The applicant relies on the broad principles highlighted in *Kenny v. Bateman*, 2017 BCSC 900, at paras. 52 to 67, which she summarizes as:
- a) Fairness and equality;
 - b) New and unforeseen or different matter or issue;
 - c) Proportionality; and
 - d) Timeliness of the application.
- [37] The applicant stresses it is not necessary for her to demonstrate exceptional circumstances in order to qualify for additional examinations.

Analysis

- [38] This application is taking place in somewhat of an evidentiary vacuum. Neither of the parties has served the other with the medical reports they intend to rely on at trial. Much of the argument focusing on supposed gaps in opinions and expertise is largely speculative.

[39] The plaintiff argues that failure to produce reports from the three preceding experts who have examined the plaintiff and failing to produce a copy of the letter of instruction to them or affidavit evidence from them indicating there is some relevant aspect of the plaintiff's injuries or disability on which they are unable to opine is a problem for the applicant.

[40] It is not necessary for the applicant to prematurely disclose expert reports as a precondition to proving additional reports are necessary or appropriate. Master Vos indicated this in para. 16 of his reasons [2022 BCSC 962]:

16 These submissions on behalf of the plaintiff suggest that a defendant applying for an order to compel a plaintiff to attend a second or subsequent examination must produce all other expert reports the defendant intends to rely on, as a pre-condition to an order under Rule 7-6. This suggested prerequisite cannot apply. It would force defendants to serve their expert reports early if they seek an expert examination. There is no such requirement in Rule 7-6. The rule concerns discovery on matters in issue in the action, not early disclosure of expert evidence. Both parties may choose to wait until the 84-day deadline for service of their expert reports.

[41] That said, the defendant still bears the onus of tendering some evidence to establish that the examination is necessary.

[42] In Gray-Verboonen at paras. 17 to 22, Master Muir addressed the difficulty of ascertaining the need for a subsequent opinion in circumstances where the scope of the early opinion is unknown:

[17] Many courts have considered the difficulty of ascertaining the need for a subsequent opinion when there is overlapping expertise and the scope of the earlier opinion is unknown.

[18] Here, we know that a very broad request was made to both Dr. Thompson and Dr. Wiseman. We know that both doctors have expertise in assessing workplace functioning, but we have no idea whether either of those experts concluded there was any work impairment whatsoever on the part of the plaintiff, and, if so, if they commented on the extent of that impairment.

[19] Counsel for the plaintiff points out that the onus is on the plaintiff to show that there has been impairment of the plaintiff's functional capacity. If both Dr. Thompson and Dr. Wiseman conclude that there is no such impairment, then that is the answer for the defendants. That is the defence. There is no necessity for a FCE. If they have assessed the amount of any functional impairment of the plaintiff, then a FCE would be bolstering those opinions.

- [20] The defendants allege that, without the FCE, they will be left in doubt as to the plaintiff's current state of functioning, which will prejudice them in trial preparation. We are left, unfortunately, in the position of not knowing if that is the case or not, given the instructions to and expertise of both Dr. Thompson and Dr. Wiseman. We cannot know if a FCE would provide vital expert evidence, be unnecessary, or simply inappropriately bolster the prior opinions.
- [21] This is one of those cases where experts apparently qualified to provide opinions on work capacity have had the benefit of very recent assessments of the plaintiff, and we do not know the scope of their opinions.
- [22] I am of the view that the defendants have not established the necessity for an independent medical examination by a functional capacity expert, and the application is therefore denied.
- [43] See also Master Harper's reasons in *Hunter v. Martell*, 2021 BCSC 1962, at paras. 5 to 8:
- [5] I also agree that Master Keighley's decision in *Khan v. Cabrera*, [unreported, New Westminster Registry Action M201147], is similar to the case before me. At para. 15, Master Keighley said:

The Court has to be satisfied, however, that there is evidence to suggest that the preparation of a further report is necessary to achieve that equality. There are a number of ways in which that evidence might be adduced.

- [6] It could be a medical report, which obviously was not commissioned in this case. It could be an affidavit of the prior defence IME doctors to say that it is outside their scope of expertise to opine on functional capacity or vocation. That evidence might theoretically exist, but, as I say, is not before the court today. I cannot assume that the psychiatrist and physiatrist were incapable of opining on the issues that would be opined on by the functional capacity evaluator or vocational assessor.
- [7] The fact that this might be a significant claim does not, in and of itself, establish grounds for the two IMEs that are sought. It is simply an evidentiary issue today, and I agree with counsel for the plaintiff, who says that the court is in an evidentiary vacuum in this case.
- [8] Further, the plaintiff has provided evidence that both the defence IME doctors, the psychiatrist and the physiatrist, have expertise in the areas that would otherwise be examined at the functional capacity evaluation and the vocational assessment, and their evidence has been accepted by our courts. The defence is stuck with the result of their decision not to seek reports of their two previous experts. That strategic decision might be a good one, but the application fails because the court simply does not have the required evidence before it to justify the necessity of the two further IMEs.

- [44] On this application, there is a notable lack of alternatives to address the absence of actual reports. The applicant has produced a letter from Ms. Dimayuga which provides an outline of her qualifications and expertise and identifies opinions that are provided as part of the proposed FCE / CFC evaluation and how these are different from opinion and expertise provided by experts in other medical examinations.
- [45] This approach to the issue was rejected in *Anderson v. Steffen*, 2021 BCSC 252, at paras. 54 to 58. There, Justice Milman considered an appeal from a master where the plaintiff had been assessed by a physiatrist, and the defendant sought an order for the plaintiff to attend a functional capacity evaluation. The evidence before the court included a letter from the occupational therapist describing differences in their manner of assessment from that of a physician:
- [54] Although, as I have noted already, Mr. Winter wrote that letter in answer to a query about the added value of an FCE over an earlier IME by a neurosurgeon, his comments are clearly directed more broadly at the distinction between an FCE and the work product of "physicians" in general. But there is of course no analysis in the letter speaking specifically to the added value of an FCE over Dr. Waseem's report, which is now before me.
- [55] Nevertheless, the master took Mr. Winter's letter from the *Johal* case at face value and treated it as determinative on the issue of the value to be added by an FCE over Dr. Waseem's report, sight unseen. As a surrogate for Dr. Waseem's missing instructions or report, the master looked instead to Dr. Waseem's qualifications as a physiatrist, as reflected in the fact that he "has been qualified in this Court as an expert in physical medicine, rehabilitation and assessing a person's pain and function." Given those qualifications, the master recognised that:

Dr. Waseem will have assessed Mr. Anderson's physical injury and impairment. Given that he routinely opines on such matters, it is reasonable to infer that Dr. Waseem may also provide an opinion on Mr. Anderson's vocational disability.

- [56] On the other hand, the master reasoned:

there is no suggestion that Dr. Waseem performed an FCE with the testing described by Mr. Winter. An FCE would provided the defendants, and in turn the trial judge, with relevant evidence of Mr. Anderson's actual functional abilities, including his capacity, tolerance and productivity.

- [57] In my view, the master thereby underestimated the potential for overlap in the two reports. In fact, Dr. Waseem has also been held to have the requisite qualifications to address the extent of a plaintiff's "actual functional abilities, including his capacity tolerance and productivity" (as opposed to just his "vocational disability"). There are many decisions of this Court in which his opinion has been accepted on those very questions: See, for example, *Khademolhosseini v. Ji*, 2019 BCSC 854, *Saunders v. Rempel*, 2019 BCSC 2177, *Faizi v. Thandi*, 2019 BCSC 434 and *Carleton v. Warner*, 2020 BCSC 436. Indeed, in *Carleton* his opinion in

that regard was even preferred over that of another occupational therapist, precisely because of what were found to be his superior qualifications in that area. Justice Verhoeven made the following findings in that case at paras. 111-112:

- [111] The occupational therapist Mr. Padvaiskas states that [the plaintiff] is "best suited" to work activities between 60% and 80% of full-time work. He suggests this is "3 to 4 days per week". She is in fact working four days per week now.
- [112] I place more weight on the opinion of Dr. Waseem about the plaintiff's work capacity than that of Mr. Padvaiskas. As a medical doctor and physiatrist, Dr. Waseem has the more relevant expertise to predict the plaintiff's capacity long term from a physical and medical perspective. Mr. Padvaiskas cannot provide a medical prognosis.
- [58] In arriving at his conclusion, the master therefore appears to have misdirected himself as to the applicable test. In particular, the outcome should not have turned on the fact that Mr. Winter has "different qualifications" and will apply a "different methodology" from those of Dr. Waseem. Such a test would be far too permissive, having regard to the authorities cited above. Rather, the outcome should turn instead on whether, in light of that fact, the defendants have shown that the proposed FCE can answer a question that Dr. Waseem could not have answered in his report.
- [46] In my view, Ms. Dimayuga's letter suffers from the same difficulties noted in Anderson. Her having different methodology, different qualifications or a different approach to assessment does not sufficiently establish that further examination is necessary.
- [47] One of the primary points of contention on this application is whether the proposed examination by Ms. Dimayuga will overlap and improperly bolster opinion already available from one or more of the three specialists who have already examined the plaintiff. The plaintiff produced a schedule for each of these specialists identifying reported cases in which the court had accepted opinion evidence from each regarding functional capacity and disability.
- [48] I conclude that the applicant has failed to tender evidence sufficient to establish that the proposed FCE / CFC assessment is necessary, considering there have already been recent assessments by a physiatrist, neurologist and psychiatrist.
- [49] Given that conclusion, it is not necessary for me to consider the plaintiff's argument that the Evidence Act's limitation on a number of reports is an obstacle to a further report being ordered.

Conclusion

- [50] I dismiss the defendant Seabrook's application with costs to the plaintiff.

"Master Bilawich"

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