

CANADA / JUDGMENT

Ferguson v. Guthrie

2022 BCSC 962

COURT

Supreme Court of British Columbia

DECIDED

21 April 2022

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2022 BCSC 962 Ferguson v. Guthrie IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ferguson v. Guthrie, 2022 BCSC 962 Date: 20220421 Docket: M206087 Registry: Vancouver Between: Shental Louise Ferguson Plaintiff And Philip Daniel Guthrie and Dawn Leslie Seabrook Defendants Before: Master Vos Oral Reasons for Judgment In Chambers (Hearing proceeded via MS Teams) Counsel for the Plaintiff: R. Fang Counsel for the Defendant, Dawn Leslie Seabrook: K. Koltunska No one appearing for the Defendant, Philip Daniel Guthrie. Place and Date of Hearing: Vancouver, B.C. April 21, 2022 Place and Date of Judgment: Vancouver, B.C. April 21, 2022

- [1] THE COURT: The defendant, Dawn Leslie Seabrook, applies for an order that would compel the plaintiff to attend for a medical examination on May 12, 2022. The examination would be conducted by Dr. Mark Crossman, a physician with specialty certification in physical medicine and rehabilitation, also known as psychiatry. The application is pursuant to Rule 7-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"). The plaintiff opposes the order sought. An application response was not filed on behalf of the defendant, Philip Daniel Guthrie.
- [2] This decision is being delivered as oral reasons. If the oral reasons are transcribed, I may edit the reasons to include references to background information and to clarify the judgment in written form. The result and the core analysis will not change.

Background

- [3] The plaintiff claims damages for personal injuries and losses she sustained as a result of a motor vehicle accident that occurred on December 21, 2018.
- [4] The trial of this action is scheduled for a 15-day hearing starting on October 17, 2022. The 84-day deadline for service of expert reports pursuant to Rule 11-6(3) is July 22, 2022.
- [5] The plaintiff is 42 years old. At the time of the accident she was employed as a pharmacy technician. She apparently worked a few shifts after the accident, but then did not continue to work as a pharmacy technician. Aside from those pharmacy technician shifts, she has been unemployed since the date of the accident.

- [6] The plaintiff has not yet served any expert reports for this case.
- [7] The plaintiff has agreed to attend for two other expert examinations scheduled by the defendant, Ms. Seabrook. They are an examination by Dr. Eugene Okorie, a psychiatrist, on May 7, 2022, and an examination by Dr. Andrew Woolfenden, a neurologist, on May 25, 2022.

Analysis

- [8] If the plaintiff's physical or mental condition is in issue in the action, a defendant can apply under Rule 7-6 for an order to compel the plaintiff to submit to an examination by a medical practitioner or other qualified person.
- [9] Rule 7-6 is designed to balance the plaintiff's advantage in obtaining expert reports by providing the defendant with access to the plaintiff in order to obtain the expert assistance they require: *Tran v. Abbott*, 2018 BCCA 365, at para. 17. The primary purpose of Rule 7-6 is to put the parties on an equal footing with respect to medical evidence: *Tran*, para. 40. Multiple medical examinations may be appropriate and necessary where a variety of injuries are alleged or the etiology of illness is not straightforward: *Tran*, paras. 32-33.
- [10] The applicant/defendant bears the onus to establish that the proposed examination is warranted. The plaintiff has not yet served any expert reports she intends to tender at trial and is entitled to postpone service of her expert evidence until the deadline under Rule 11-6(3). As the plaintiff has not served any expert reports, the defendant cannot point to a specific issue raised in an expert report the plaintiff will rely on that would require an examination in order to put the defendant on equal footing with respect to expert evidence. This application therefore must be considered on the clear intent of the rule. Rule 7-6 is a rule of discovery: *Tran*, para. 17. To succeed on the application, the defendant needs to show that the proposed expert examination is required to properly discover a matter in issue in the action involving the physical or mental condition of the plaintiff. In addition, the court must consider the effect of refusing the order sought on the conduct of the trial: *Tran*, para. 33.
- [11] The Factual Basis section (Part 2) of the notice of application provides the following outline of injuries and problems the plaintiff alleges in this action:
6. The Plaintiff advised during her discovery that she experiences a multitude of different 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 10 minutes due to hip, back and neck symptoms.
 - h. Inability to look at a computer screen for more than 10 minutes.
 - i. Difficulty showering and washing her hair due to ongoing neck pain resulting in her limiting how frequently she actually washes her hair.
 - j. Inability to flat iron her hair due to it being too painful to keep her hands up long enough.
 - k. inability to bend and therefore limitations in her ability to access kitchen cupboards, empty the cats' litter boxes, etc.
 - l. Limitations in terms of cooking due to pain caused by lifting anything heavy or bending over.
 - m. Limitation in her ability to walk at a very low pace for 10-20 minutes.
 - n. Difficulty doing stretches and inability to lift weights.
 - o. Pain and anxiety with taking public transit or riding in a vehicle in her neck, back and hip.
- [12] The response to civil claim filed on behalf of Ms. Seabrook places all damages claimed by the plaintiff in issue. As the damages claimed are based on the injuries the plaintiff sustained in the accident, the plaintiff's physical or mental condition is in issue in the action.
- [13] The Legal Basis section (Part 3) of the notice of application provides the following submissions with respect to the order sought:
- 7. The defence has scheduled a psychiatric independent medical examination to assess the plaintiff's claim from a psychiatric standpoint in order to assess the nature and extent of the plaintiffs alleged injury to her mental state, resulting in psychological/psychiatric injury and post-traumatic stress disorder.
 - 8. The Defence has scheduled a neurological independent medical examination to assess the Plaintiff's claim from a neurology standpoint in order to assess the nature and extent of the Plaintiff's alleged head injury, concussion, headaches, sensitivity to light and sound and loss of bladder control.
 - 9. The Defence seeks an order that the Plaintiff submit to an independent medical examination by a physiatrist, Dr. Crossman, to assess the nature and extent of the Plaintiff's injury claim from a physical medicine standpoint in order to assess the nature and extent of the plaintiff's injury to her neck, shoulders, back, hips, collarbone, arms, fingers, legs, pelvis, etc.

10. The Defence should be permitted to address the allegations with expert evidence squarely in the appropriate field and not have to rely upon lesser expertise from a related field of medicine (*Barbosa v. Castillo*, 2010 BCSC 212 at para. 22).
 11. It would place the Defendant at a disadvantage at trial if the Defence were limited to psychiatric and neurological opinion and the Plaintiff were free to argue that these specialists lacked the qualifications to opine on issues relating to the complaints of musculoskeletal and soft tissue injuries (*Kim v. Lin*, 2010 BCSC 1386).
 12. Dr. Okorie is a psychiatrist who was retained to address the plaintiff's psychiatric/psychological complaints. Dr. Okorie's area of expertise is entirely distinct from the concerns which the Defence is seeking to have Dr. Crossman address.
 13. Dr. Woolfenden is a neurologist who was retained to address the Plaintiff's neurological complaints including, but not limited to, her claims of head injury, a concussion and headaches, as well as to assess whether there are neurological causes to her allegations of loss of bladder control, hip symptoms, urinary tract symptoms, etc. Dr. Woolfenden's area of expertise is entirely distinct from the concerns which the Defence is seeking to have Dr. Crossman address. While both of them might comment on the plaintiff's hip complaints or other areas of the body, they are assessing different sources, or determining potentially different etiology of the Plaintiff's symptoms.
- [14] The plaintiff opposes the orders sought. At page 1 of her application response the plaintiff sets out the following: Summary of the Plaintiff's Position: The defendant has failed to discharge the onus on them (i.e. prove that the assessment with Dr. Crossman is necessary). The plaintiff is already attending assessments with Dr. Okorie (psychiatrist) and Dr. Woolfenden (neurologist) on May 7, 2022 and May 25, 2022 respectively. Their opinions are unknown because the appointments have not happened.
- [15] The plaintiff presents the following submissions in the Legal Basis section (Part 4) of her application response:
2. The Defendant has failed to establish the evidentiary burden for an assessment with Dr. Crossman. An independent medical examination with Dr. Crossman is not necessary to level the playing field.
 6. The Plaintiff is already awaiting assessments with a psychiatrist and a neurologist. The Defendant cannot provide reports from these doctors because the assessments have not taken place. The Defendant also has not produced the instructing letter(s) to their experts, presumably because they have not been prepared as the assessments are weeks away.

7. Therefore, the scope of their reports remain unknown. The Defendant is concerned that Dr. Woolfenden does not have the qualifications to opine on physical injuries. However, this not a valid concern because it is clear that Dr. Woolfenden can opine on physical injuries and his opinion on musculoskeletal and soft tissue injuries have been accepted by this court. The court is not able to assess the scope of Dr. Okorie and Dr. Woolfenden's opinion because the assessments have not happened.
- [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.
- [17] The plaintiff's objections seem to be directed to an argument that the proposed examination might result in evidence that would overlap evidence from another defence expert. Experts assist the court by providing opinion evidence on matters within their expertise. The medical specialties of neurology, psychiatry and physiatry are quite distinct. Examinations by doctors specializing in those fields may result in some overlap with respect to expert analysis of a particular symptom, as medical practitioners who practice in different specialties would be expected to provide opinion evidence about the causation and possible treatment of the symptom from the perspective of their expertise. However, such overlap does not necessarily disqualify an examination. The focus when determining whether an examination should be allowed must be on whether the applicant requires expert assistance within the proposed examiner's expertise.
- [18] The plaintiff has alleged a number of physical symptoms and limitations resulting from the injuries she sustained in the accident. Returning to the notice of application, Part 2, para. 6:
- a. Significant neck, back and hip pain and instances during which her hip will lock.
 - 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 10 minutes due to hip, back and neck symptoms.
 - i. Difficulty showering and washing her hair due to ongoing neck pain resulting in her limiting how frequently she actually washes her hair.
 - j. Inability to flat iron her hair due to it being too painful to keep her hands up long enough
 - k. inability to bend and therefore limitations in her ability to access kitchen cupboards, empty the cats' litter boxes, etc.

- l. Limitations in terms of cooking due to pain caused by lifting anything heavy or bending over.
 - m. Limitation in her ability to walk at a very low pace for 10-20 minutes.
 - n. Difficulty doing stretches and inability to lift weights.
 - o. Pain and anxiety with taking public transit or riding in a vehicle in her neck, back and hip.
- [19] Assessment of such physical symptoms, and potential rehabilitation options for the symptoms, is generally known to be within the field of expertise of a doctor certified as a physical medicine and rehabilitation specialist. The defendant has shown that the proposed expert examination is required to discover a matter in issue in the action involving the physical or mental condition of the plaintiff.
- [20] Refusing the proposed examination could impact on the conduct of the trial. The plaintiff alleges very significant symptoms and limitations. The issues at trial would include assessment of the physical disabilities the plaintiff sustained as a result of the accident, the future care needed for those disabilities and the extent the disabilities may reduce her earning capacity. The defendant has shown that, in the particular circumstances of this case, the proposed examination is needed to properly discover the nature of those claims. In addition, the expert evidence that may result from the examination could be of assistance to the court when determining those claims. These factors favour granting the proposed examination. Result
- [21] The applications presented in Part 1, paras. 1, 2 and 3 of the notice of application filed on behalf of the defendant, Ms. Seabrook, on March 31, 2022, seeking an order that would compel the plaintiff to attend for an examination by Dr. Crossman and related orders, are granted.
- [22] Are there submissions on costs? [DISCUSSION RE: COSTS]
- [23] The defendant, Ms. Seabrook, was successful on this application. She is awarded costs relating to the application. Those costs are summarily assessed at \$500, rounding out the costs that would apply under items 21 and 22 in the Tariff at Appendix "B" of the Rules and are payable by the plaintiff to the defendant at the conclusion of this litigation. "Master Vos"

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