
CANADA / JUDGMENT

Gee v. Basra

2015 BCSC 2495

COURT

Supreme Court of British Columbia

DECIDED

7 December 2015

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2015 BCSC 2495 Gee v. Basra

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gee v. Basra,

2015 BCSC 2495

Date: 20151207

Docket: M136276

Registry: Vancouver

Between:

Jodene Gee

Plaintiff

And

Baltej Basra

Avtar Basra

A-G Tej Construction Ltd.

Defendants

Before: Master Harper

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

M. Burtini

Counsel for Defendants:

S. Read

Place and Date of Hearing:

Vancouver, B.C.

December 7, 2015

Place and Date of Judgment:

Vancouver, B.C.

December 7, 2015

[1] THE COURT: There are two applications before me. The first is a defence application for an authorization for the production of certain medical records of the plaintiff, and the next is an application that the plaintiff attend an independent medical examination with a neurologist.

Application for an authorization for the production of certain medical records of the plaintiff

[2] I will deal with the application for the production of medical records first. The application is framed as follows:

That within seven days of the date of this order the plaintiff do provide to counsel for the defendants, or alternatively do provide signed authorizations for the release of the following documents and information:

...

(e) the complete clinical records from the massage therapist in Burnaby who treated the plaintiff post-accident,

(h) the complete clinical records of all optometrists, ophthalmologists and eye surgeons who have treated the plaintiff post-accident.

[3] The application, in my view, is couched in a rather unusual way. Counsel for the defendants says that an application for the production of signed authorizations is a more efficient way than giving notice to third party record holders. While it might be efficient to proceed in this way, in my view, it is not good practice to apply without notice to third party record holders.

[4] In my view, an order that the plaintiff sign authorizations does nothing to compel the third party to produce records, and it is the third party who should be bound by the court order and not the plaintiff. However, both counsel seem to agree that the application is not irregular, and with some reluctance, I will accede to the method that has been adopted here.

- [5] Counsel for the plaintiff says that the plaintiff has no objection to signing an authorization, but wants it to go in a Halliday form. Again, this is an example of some kind of a hybrid position. A Halliday order is more properly the subject of an application that a third party produce records. However, again, acceding to counsel's request to get this matter resolved, I will deal with the application on the basis on which it is framed.
- [6] Counsel for the plaintiff says that since he has yet to receive the massage therapist and eye doctor records, he cannot say what is in those records. Therefore, out of an abundance of caution and in order to protect his client's interests, he says that the order should go in Halliday form.
- [7] Halliday orders should not be granted without good reason. There has to be evidence of some sort that the records may contain confidential or private information, and there is no evidence before me that such privacy interests are paramount.
- [8] However, again, and returning for a third time as to how irregular this application is, the application is for an authorization signed by the plaintiff that documents go directly to counsel for the defendants. I do not think that is appropriate, and I am going to accede to the plaintiff's position, without setting any kind of precedent whatsoever, that the plaintiff sign an authorization for the release of the requested documents, but that the documents go to counsel for the plaintiff in a Halliday form.
- [9] I do not know how counsel is going to draft that order because it is a strange hybrid of a Halliday order, but in the interests of efficiency, I will make the order. However, I have to say that, when it comes to time to make court applications, it is my view that the application should be made in the conventional way. The non-party record-holder should be given notice and the application should be framed as requiring the record-holder itself to produce the records, whether by Halliday or some other form.

Application for the plaintiff to attend an independent medical examination with a neurologist

- [10] I now turn to the application for the independent medical examination with a neurologist. The plaintiff was injured in a motor vehicle accident and claims that she has sustained injuries. The injuries as set out in the application response are as follows:
- a) chronic mechanical neck pain,
 - b) chronic mechanical low back pain,
 - c) cervicogenic headaches,
 - d) whiplash associated disorder,
 - e) chronic myofascial pain syndrome,
 - f) sleep disorder, and

- 9) headache attributed to trauma or injury to the neck (headache occurring within seven days of trauma and persisting for greater than three months in duration).

This action is a fast track action, which gives us some idea as to proportionality.

[11] At the request of the defendants, the plaintiff has seen an orthopaedic surgeon, Dr. Rickards, and his report is before me. The plaintiff has delivered two expert reports, one from a neurologist and one from a physiatrist.

[12] In the letter of instruction to Dr. Rickards, counsel for the defendants sets out that Dr. Rickards is to include his diagnosis of any orthopaedic injuries currently affecting the plaintiff. Then the letter of instruction goes on to request Dr. Rickards' opinion as to the likely causation of the plaintiff's orthopaedic injuries, his current prognosis for the plaintiff's orthopaedic injuries, and his opinion as to treatment recommendations for these orthopaedic injuries. However, the letter of instruction further goes on to state as follows:

Whether in your opinion the plaintiff has been rendered disabled, in whole or in part, to this point in time as a result of any injuries sustained in this motor vehicle accident with regard to her regular employment as a project manager for a fibreglass production company as well as employment generally, and further, whether there is any ongoing disability now and into the future.

In my view, the letter of instruction, although mostly clear in terms of requesting an orthopaedic opinion, seems to go further than just that.

[13] The statement of assumed facts provided to Dr. Rickards sets out the history of the plaintiff's injuries, which includes the history of the headaches. It is quite clear that Dr. Rickards had before him the plaintiff's entire medical history, which includes headaches.

[14] Dr. Rickards does address the headache issue in his report, and counsel for the plaintiff takes the position that the issue of headaches has been thoroughly canvassed. The reason for the independent medical examination with a neurologist is stated to be to address the headache issue.

[15] Dr. Rickards' report does not set out any limitations that he sees with respect to not being able to opine on any issues that he might think are properly the sole purview of a neurologist. He does deal with the headaches in a thorough way, in my view.

[16] One of the difficulties I think that the defendants are facing is that the "Clinical Diagnosis" section of Dr. Rickards' report states:

- 1) possible cervical facet joint syndrome;
- 2) possible lumbar facet joint syndrome; and
- 3) left sacral iliac joint strain, low back.

[17] Dr. Rickards further goes on even to talk about causation of the possible cervical facet joint syndrome. Quite oddly, even though he makes a finding of a possible cervical facet joint syndrome, he says with respect to causation as follows:

The relationship in time between motor vehicle accident of October 2011 and onset of neck/shoulder headaches, as well as low back symptoms, suggest these two events are related in a cause-effect relationship. [Emphasis added.]

[18] Dr. Rickards' report does go further and talk about the headache issue, and counsel for the plaintiff in his application response pulls out certain references. For instance, Dr. Rickards says:

Ms. Gee presents with occipital headaches, symptoms which can be associated with inflammation to the C2/C3 facet joint level affecting the third occipital nerve, and further, at the C2/C3 level, irritation of the TON can result in significant and disabling headaches.

[19] And he goes on to discuss the treatment that Ms. Gee received for her neck pain and refers to the occipital nerve block, which he says did not provide significant pain relief. He says that:

This would suggest that irritation of the occipital nerve is likely at the level of the C2/C3 facet joints.

He says:

Medial branch blocks at this level would be appropriate.

Further, he says:

For TON symptoms there is a high expectation of success with or without ongoing litigation. In my experience, the very least that can be expected from a successful RF with accompanying decreased pain in the neck, shoulder, lower back, as well as decreased headaches, is the opportunity for the patient to participate in a more active rehabilitation program and a more rapid return to normal lifestyle and activity.

Further, Dr. Rickards' report includes various illustrations, such as a cervical facet pain map, the occipital nerve and occipital neuralgia.

[20] One might think that this is a thorough neurological report, even though it is prepared by an orthopaedic surgeon. However, counsel for the defendants requested Dr. Rickards' opinion as to whether he believes it is necessary for a neurologist to assess her in regard to her headaches or her neck and back pain issues. Dr. Rickards replied and said:

Yes, a second neurology opinion as to headaches would be of value. Dr. Woolfenden, neurologist, has performed occipital nerve blocks in March 2013 with no improvement in symptoms. I find this puzzling as symptoms are certainly suggestive of occipital nerve irritation.

- [21] Dr. Rickards here seems to be couching his possible diagnosis with respect to neck pain in a way that might open the door to a neurological independent medical examination. However, in my view, the rather minor limitation set out in Dr. Rickards' response to the request for his opinion on whether a neurological assessment would be appropriate does not go so far as to justify making the order for a neurological independent medical examination in this case.
- [22] An order for a subsequent independent medical examination is a discretionary order, and the onus is a high one on the defendants to establish that a further independent medical examination is necessary to put the parties in a position of reasonable equality.
- [23] In my view, the fact that Dr. Rickards' opinions about the headaches seem to be a possible diagnosis does not render his opinion a non-opinion on the headaches. He is simply stating that his opinion is that there is a possible diagnosis of cervical facet joint syndrome. His opinion is thorough, and the territory has now been fully occupied by Dr. Rickards.
- [24] I see that Dr. Rickards does address causation, prognosis and treatment, even though his opinion seems to be rather tenuous. However, in my view, the defence has to live with Dr. Rickards' report the way it is. It is possible that Dr. Rickards could be asked to produce another report in reply to the neurology report tendered by the plaintiff. That is something that is certainly up to the defence to do if that is what they so choose, but the defence has not met the heavy onus that is required to make an order for a neurological independent medical examination in this case. Therefore, the application is dismissed.
- [25] The plaintiff will have her costs of this application.

"Master Harper"

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