

CANADA / JUDGMENT

Gennings v. Lum

2020 BCSC 1196

COURT

Supreme Court of British Columbia

DECIDED

11 August 2020

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2020 BCSC 1196 Gennings v. Lum

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gennings v. Lum,

2020 BCSC 1196

Date: 20200811

Docket: M183822

Registry: Vancouver

Between:

Scott Gennings

Plaintiff

And

David Alan Lum and Bo Zhang

Defendants

Corrected Judgment: The front page of the judgment was corrected
on August 20, 2020.

In Chambers

Before: The Honourable Mr. Justice Gomery

Oral Reasons for Judgment

Counsel for the Plaintiff:

M. Cho

Counsel for the Defendant, David Lum:

A. Kalra

Place and Date of Hearing:

Vancouver, B.C.

August 7, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 11, 2020

Introduction

- [1] Mr. Gennings sues for injuries he says he suffered in two motor vehicle accidents. Mr. Lum is the defendant in respect of the first and more serious of these accidents. He brings this application to require Mr. Gennings to attend for a functional capacity evaluation by an occupational therapist. This would be the fifth independent medical examination or "IME" of Mr. Gennings conducted at Mr. Lum's request.
- [2] Mr. Gennings opposes the application. He says that, having regard to the medical examinations and reports already obtained by the defendants, the proposed further examination is unnecessary.

Background

- [3] Mr. Gennings was 29 years old at the time of the first accident. He was injured while riding his bicycle. Prior to the accident, he was employed as a mechanical engineer earning more than \$90,000 annually. He has not returned to that employment and I am told that his wage loss claim exceeds \$2.7 million.
- [4] Mr. Gennings claims that he suffered the following injuries:
- a) Traumatic brain hemorrhage;
 - b) Damage to cranial nerve;
 - c) Left clavicle fracture;
 - d) Injury to neck, shoulders (including fracture of left shoulder), back, knees, ankles, hips, thighs and chest;
 - e) Headaches;
 - f) Dizziness;

- g) Difficulty with short term memory;
 - h) Difficulty with concentration;
 - i) Sleep disruptions; and
 - j) Abrasions and contusions.
- [5] The trial is scheduled to begin on November 16, 2020, for 20 days. It was first scheduled to take place in December 2019, but only 10 days had been set aside and that trial date was adjourned to the current date in November 2020.
- [6] Mr. Gennings attended IMEs requested by the defence as follows: with Dr. Spivak, a psychiatrist, on May 2, 2019; with Dr. Horlick, an orthopedic surgeon, on May 2, 2019; with Dr. Johnston, a neurologist, on May 29, 2019; and with Dr. Magrega, a registered psychologist and vocational counsellor, on June 10, 2019.
- [7] The parties exchanged expert reports in advance of the December 2019 trial date. Mr. Gennings served his reports in early September 2019 after the IMEs requested by the defence had taken place. They included reports from a physiatrist, a neurologist, a psychiatrist, a vocational consultant, and an occupational therapist. The occupational therapist's report included a functional capacity evaluation and also addressed the cost of future care.
- [8] Mr. Lum served reports prepared by Dr. Horlick, Dr. Johnston, and Dr. Magrega in June, September, and October 2019. He did not serve a report prepared by the psychiatrist, Dr. Spivak.

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 :

- [133] 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.

Analysis

- [15] Mr. Lum's counsel, Ms. Kalra, submits that an IME for the purpose of conducting a functional capacity evaluation is necessary in this case to level the playing field between the plaintiff and the defendant. Mr. Gennings maintains that he cannot return to work, although he has resumed strenuous recreational activities such as rock climbing. The nature of his disability - whether it is physical, neurological, psychological or psychiatric - is unclear. She submits that "while medical experts are qualified to provide diagnoses and prognoses within the parameters of their areas of expertise, they are not necessarily in a position to provide a comprehensive, detailed opinion as to how a medical condition may affect a person's physical and/or cognitive ability to function in their work and domestic life".
- [16] It is necessary to consider the expert reports delivered by Mr. Lum.
- [17] Dr. Horlick's report provides his assessment of Mr. Gennings' musculoskeletal injuries. As an orthopedic surgeon, Dr. Horlick expressly declines to address Mr. Gennings' complaints of headache, cognitive difficulty, anxiety, and depression.

- [18] Dr. Johnston addresses Mr. Gennings' cognitive complaints. He finds that it is probable that Mr. Gennings suffered a minor concussion as a result of the first accident, but it is probably not the cause of his current cognitive complaints, which are more likely related to a major depressive episode. Dr. Johnston also attributes Mr. Gennings' complaint of anxiety to his mood disorder. He defers on the diagnosis of the mood disorder and its relationship to the cognitive complaints to a psychiatrist.
- [19] Unfortunately, there is not a report from the independent psychiatrist who conducted an IME, Dr. Spivak. The defence has made available Dr. Spivak's notes from the IME. I infer that Dr. Spivak's assessment is available to the defence; there is no evidence to the contrary.
- [20] Dr. Magrega addresses Mr. Gennings' psychological and psychiatric issues, and his prospects for vocational rehabilitation. He describes the case as "complex". He concludes that Mr. Gennings suffers from significant anxiety and depression which needs continuing treatment and support, and suggests that returning to work should be part of the treatment. He says it is impossible to say whether there will be any permanent disability and that Mr. Gennings "is most likely employable in some capacity".
- [21] I do not accept Ms. Kalra's submission that the defence is not now in a position to address, through its experts, how Mr. Gennings' medical conditions may affect his physical and cognitive abilities to function in his work and domestic life. Dr. Horlick has addressed Mr. Gennings' physical injuries. Dr. Johnston has addressed his cognitive complaints from a neurological perspective. Dr. Spivak has presumably assessed his mood disorder and its contribution to his cognitive complaints. Dr. Magrega has addressed his psychological and psychiatric difficulties and his vocational prospects in that light.
- [22] While the defence may not be happy with the substance of some of the advice and reports it has obtained from its experts, this is not a proper basis for ordering a further IME; that is the point of the rule against ordering a report to bolster a report already obtained. The defence chose these experts. That their advice may not be the advice the defence hoped to obtain does not contribute to placing the defence on an unequal footing with the plaintiff.
- [23] It is true that none of the defence experts is an occupational therapist or has prepared a functional capacity evaluation. Dr. Magrega holds a doctorate in rehabilitation services with an emphasis on vocational evaluation of people with disabilities. He describes his report as a "psycho-vocational assessment". It is not clear to me, on the evidence, that a functional capacity evaluation prepared by an occupational therapist would provide greater insight into Mr. Gennings' condition and prospects. Functional capacity evaluations are hardly uncommon in personal injury litigation, and I think that Ms. Kalra's predecessor quite possibly made a deliberate decision to choose a psycho-vocational assessment instead.
- [24] The involvement of Dr. Horlick and Dr. Magrega distinguish this case from a case relied on by Ms. Kalra, *Calver v. 1020781 BC Ltd. (Harbour Event Centre)*, 2020 BCSC 923. In *Calver*, the defence sought IMEs from a neurologist, a psychiatrist, and, from an occupational therapist, a functional capacity evaluation. The plaintiff agreed to the first two and resisted the

functional capacity evaluation. Justice G.C. Weatherill ordered that the functional capacity evaluation take place, commenting at para. 8 that it would address the question of the extent to which the plaintiff is both emotionally and physically capable of working. He described this question as one "within the area of expertise of an occupational therapist, not a neurologist or a psychiatrist". Whether Mr. Gennings is emotionally and physically capable of working is within the expertise of Dr. Magrega and Dr. Horlick respectively.

- [25] I view the circumstances of this case as quite different from those faced by the court in *Kim v. Lin*. There is no evidence, as there was in *Kim*, that Mr. Gennings is now asserting a marked and significant worsening of his condition. This is not a case, as was *Kim*, in which the defendant can point to a substantive gap in the expert reports that should be filled to put the parties on an equal footing.
- [26] In my view, proportionality is a neutral consideration in this case. It is a substantial case involving many expert witnesses to be heard over the course of a lengthy trial. The size of the claim and complexity of the issues would justify further investigation by the defence if it were necessary to put the parties on an equal footing, but are not a reason to order investigations that are not otherwise justified.
- [27] Taking everything into account, I am not persuaded that the further IME sought by Mr. Lum is necessary to put the parties on an equal footing in this case. In my view, the defence is in a position to fairly defend the case at trial with the opinions and advice already obtained.
- [28] Accordingly, the application is dismissed.

"Gomery J."

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