
CANADA / JUDGMENT

Gray-Verboonen v. Mandurah

2019 BCSC 1697

COURT

Supreme Court of British Columbia

DECIDED

20 September 2019

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2019 BCSC 1697 Gray-Verboonen v. Mandurah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gray-Verboonen v. Mandurah,

2019 BCSC 1697

Date: 20190920

Docket: M173143

Registry: Vancouver

Between:

Denisse Gray-Verboonen

Plaintiff

And

Abdullah Faiz H. Mandurah and Ahmad Faisal M. Mandorah

Defendants

Before: The Honourable Master Muir

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

N. Peterson

Counsel for the Defendants:

B. Harrison

Place and Date of Hearing:

Vancouver, B.C.

September 20, 2019

Place and Date of Judgment:

Vancouver, B.C.

September 20, 2019

- [1] THE COURT: This is an application by the defendants for the plaintiff to submit to a functional capacity evaluation ("FCE") by Mr. Philip Towsley, an occupational therapist, on October 3, 2019.
- [2] The timing is that the matter is set for an eight-day trial commencing March 30, 2020. The 84-day deadline is in January 2020. Mr. Towsley apparently has indicated that he will be able to provide his report to meet the 84-day deadline if such an evaluation is ordered in time.
- [3] The background is that the plaintiff was involved in a motor vehicle accident on August 5, 2015. She was 33 years old at the time. She was working as an executive assistant with Market One Media Group. The plaintiff was off work for one week after the 2015 motor vehicle accident. She then returned to work but had ongoing pain, which apparently was exacerbated by her pregnancy in 2016 and then the birth of the child in 2017.
- [4] The plaintiff apparently had aspirations to become an immigration consultant and got a certificate in that regard.
- [5] I gather the plaintiff was laid off from Market One Media Group and she obtained work with M&P Mercury Sales Limited on March 1, 2016. She continued to have difficulties with pain during that employment and then took maternity leave, I gather, a couple of months' early because of her back pain.
- [6] After her maternity leave, in July 2018, the plaintiff went to work full-time for Vitrum Industries as an executive assistant to the owner.
- [7] Although she has allegedly experienced ongoing pain, it is apparent that she has continued to work on essentially a full-time basis, other than during her maternity leave.
- [8] The defendants point out that, based on the plaintiff's evidence, the plaintiff's goals and aspirations of potentially having her own business as an immigration consultant or perhaps going into the sales end of businesses where she has been employed have been frustrated by the injuries that she alleges stem from the motor vehicle accident.

- [9] The pregnancy and the subsequent motor vehicle accident in January 2019 are also pointed to as being difficulties with respect to investigating causation here. The defendants argue that there are a number of ailments. Some of them are orthopaedic, some of them are not. Some are psychological. The defendants argue that this is a multi-factoral case, requiring a multi-factoral analysis.
- [10] The defendants also point to proportionality--the plaintiff being 37 at the present time and with the potential here of a significant future loss of income earning capacity claim.
- [11] The plaintiff, for her part, points out that the defendants have had her assessed on June 4, 2019 by Dr. Paul Thompson, an orthopedic specialist, and on May 27, 2019, by Dr. Stephen Wiseman, a psychiatrist. Neither of these reports have been produced, despite requests.
- [12] The defendants said they have not received the report of Dr. Thompson. They allege that that is due to Dr. Thompson not having certain films or X-rays, but I gather he does have the X-ray report.
- [13] The defendants do have the report of Dr. Wiseman. However, they did not produce it on this application, saying it was irrelevant. That is interesting, given the fact that the instruction letters for both Dr. Wiseman and Dr. Thompson seek the extent of the plaintiff's recovery from each of the injuries and whether she has any ongoing limitations, impairments, or disabilities. As well, opinions are sought on factors other than the motor vehicle accident that might have caused or contributed to the injuries or any of the plaintiff's limitations, impairments, or disabilities. In addition, the instruction letters seek the prognosis for each of the injuries and whether any further treatment is required.
- [14] The plaintiff points out that both Dr. Thompson and Dr. Wiseman have had their opinions with respect to work capacity considered by the courts and the Workers' Compensation Appeal Tribunal and, in particular, Dr. Thompson has provided opinions for WorkSafeBC for 23 years on workers' work capacity and overall functioning.
- [15] The plaintiff points to the test under the rules of court and submits that the decision in *Tran v. Abbott*, 2018 BCCA 365 did not change the requirement that the defendants must show that this further independent medical examination is necessary. Nor did it change the considerations of overlap and bolstering that were concerns in decisions prior to *Tran*. I agree with that analysis.
- [16] In *Tran*, although the court provided instruction on the question of a higher onus on a second independent medical examination, it did not comment on, for example, the need to show that a previous independent medical examination had not traipsed over the intended field of the proposed independent medical examination. In *Tran*, the court had the report from the previous doctor.

- [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.
- [23] Unless I do not know something about costs, the plaintiff would have her costs in the cause.
- [24] Did you want to make submissions on costs, either of you?
- [25] MR. PETERSON: I have no submissions, Your Honour.
- [26] MR. HARRISON: None, Your Honour.
- [27] THE COURT: Thank you, both.

"Master Muir"

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