

CANADA / JUDGMENT

Guerreiro v. Johnson

2020 BCSC 355

COURT

Supreme Court of British Columbia

DECIDED

5 February 2020

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2020 BCSC 355 Guerreiro v. Johnson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Guerreiro v. Johnson,

2020 BCSC 355

Date: 20200205

Docket: M123394

Registry: Kelowna

Between:

Robyn Tracy Guerreiro

Plaintiff

And

Linda Johnson and Kenneth Johnson

Defendants

Corrected Oral Judgment: The text of the oral judgment
was corrected at paragraph 21 on March 9, 2020.

Before: Master Schwartz

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

L. Turner

Counsel for the Defendants:

M. Prah

Place and Date of Trial/Hearing:

Kelowna, B.C.

February 5, 2020

Place and Date of Judgment:

Kelowna, B.C.

February 5, 2020

[1] THE COURT: This is the defendants' application for the following relief:

1. An order that the Plaintiff, Robyn Tracy Guerreiro, attend at an independent medical examination with Dr. Gabriel Hirsch on February 18, 2020 at 8:00 a.m. which is to take place at Suite #140 - 943 West Broadway, Vancouver, B.C. and there be examined with respect to her injuries and conditions which are the subject of this action.

2. An order for costs for this application payable to the Defendants.

[2] At the outset of this application, defendants' counsel conceded that, having reviewed the plaintiff's application response, the medical examination now sought is indeed to be considered a "second examination", rather than a "first examination" in the tort claim.

Background

[3] The plaintiff was involved in a motor vehicle accident on May 6, 2017. As a result of the accident, she sustained a number of injuries. The plaintiff alleges that those injuries have caused her to experience, among other things, pain and suffering, loss of enjoyment of life, a reduced ability to perform recreational and other activities, loss of earnings or earning capacity, permanent disability or partial disability, and loss of physical, mental, and emotional health.

[4] On March 29, 2018, the plaintiff applied to ICBC for benefits under Part 7 of the Insurance (Vehicle) Regulation (B.C. Reg. 447/83). Thereafter, ICBC requested that the plaintiff be examined by Dr. John Oliver, an orthopedic surgeon. Dr. Oliver's examination took place on November 28, 2018, and he prepared a report with respect to that examination that same day.

[5] The plaintiff then attended before Dr. Arseneau, a specialist in internal medicine, on May 16, 2019. At the request of the plaintiff, Dr. Arseneau prepared a report, dated May 26, 2019, with respect to his examination.

[6] The findings of the two doctors, as well as their recommended treatment plans, differ significantly. Generally, Dr. Oliver suggests that the plaintiff's injuries are much less serious than Dr. Arseneau suggests.

[7] The defendants now wish to have the plaintiff attend before Dr. Hirsch, a specialist in physical medicine and rehabilitation, for further assessment.

Law

[8] The defendants refer me to the decision of *Kenny v. Bateman*, 2017 BCSC 900, at paragraphs 50, 51, 57, and 62 as follows:

[50] For these reasons, I conclude that it is too simplistic to say that there is a much higher standard for a second examination, without more, because the question turns in large part on whether the subsequent examination is in the same field.

[51] To hold otherwise would mean that, in a case involving both an eye injury and a broken foot, in the absence of proof on a higher standard (or, as some cases erroneously suggest, "exceptional circumstances"), a defendant would be limited to one expert and would have to choose between engaging either an ophthalmologist or an orthopedic surgeon. This is most unrealistic and would likely not meet the overall goal of ensuring "reasonable equality between the parties". Such a "one-shot" approach is not supported by the authorities and was specifically rejected by Schultes J. in *Barbosa v. Castillo*, 2010 BCSC 212, at para. 23 [Barbosa].

...

[57] The Court will not exercise its discretion to order subsequent IMEs to simply give the same expert or experts an opportunity to bolster their earlier opinions or to re-explain themselves. There must be something that was not covered previously. There are numerous authorities to that effect.

...

[62] Where experts have overlapping expertise the situation is more difficult and nuanced. In *Samad v. Schisler*, 2007 BCSC 1670, Slade J. found the disciplines of physiatry and neurosurgery to overlap to such a degree that, given the particular circumstances of that case, a further IME was not warranted. That is not to say that a single IME can always respond to a plaintiff's multi-faceted claim based on a "mixed picture" injury, even if the expert who conducted the first IME has a specialty related to that of the proposed expert for a second IME. In *Stene*, Holmes J. found that while the plaintiff had already attended an IME with Dr. Dost, a neurologist, the plaintiff had since served eight reports, all but one of them medical, some of which described injuries in a manner manifestly outside the scope of Dr. Dost's expertise. She found that where:

- [17] . . . the injuries in question are multi-faceted, creating a "mixed picture", the "matter" in issue is more nuanced than this submission assumes. The matter is not simply the fact of the injuries. It also encompasses their medical characterization. This is particularly so in circumstances where, as here, causation is an issue, and where Ms. Stene claims in respect of two separate accidents. . . .
- [9] The plaintiff relies on the following authorities:
- a) Hamilton v. Pavlova, 2010 BCSC 493, at paras. 10 through 14:
- [10] Rule 30(1) provides discretion to the court to order an independent medical examination, and under Rule 30(2), more than one examination may be ordered. Counsel, in their helpful submissions, have thoroughly canvassed the relative authorities on this point. From those authorities, certain principles emerge. The case law is against a background of the rules of court, and in particular, the principle that the rules are designed to secure a just determination of every proceeding on the merits and to ensure full disclosure, so the rules should be given a fair and liberal interpretation to meet those objectives: Wildemann v. Webster, [1990] B.C.J. No. 2304 (B.C.C.A.) at pp. 2-3.
- [11] Rule 30(2) is a discretionary rule, and the discretion must be exercised judicially. An independent examination is granted to ensure a "reasonable equality between the parties in the preparation of a case for trial": Wildemann v. Webster at p. 11 from the separate concurring reasons of Chief Justice McEachern.
- [12] Reasonable equality does not mean that the defendant should be able to match expert for expert or report for report: McKay v. Passmore, 2005 BCSC 570 at para. 17, and Christopherson v. Krahn, 2002 BCSC 1356 at para. 9.
- [13] A second exam will not be allowed for the purpose of attempting to bolster an earlier opinion of another expert. That is, there must be some question or matter that could not have been dealt with at the earlier examination: Trahan v. West Coast Amusements Ltd., 2000 BCSC 691 at para. 48, and Norsworthy v. Greene, 2009 BCSC 173 at para. 18.
- [14] There is a higher standard required where the defendant seeks a second or subsequent medical exam of the plaintiff: McKay v. Passmore, supra, at para. 17 and para. 29.
- b) Tran v. Abbott, 2018 BCCA 365, at paras. 28 and 32:
- [28] The summary in Hamilton has been the foundation for the proposition that a higher standard is required to be met by a party seeking a second or subsequent IME. This supposed requirement, in my view, has no support in the language of the Rules. Simply put, different considerations apply to the assessment of whether a party should be granted a second or subsequent IME.

...

- [32] In my view, it is well-established that the purpose of an IME is to put the parties on an equal footing with respect to the medical evidence, and Rule 7-6 specifically contemplates more than one IME: *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309 at para. 31.
- c) *Goss v. Harder*, 2001 BCSC 1823, at paragraph 11:
- [11] The defendant chose initially to have the plaintiff referred to an orthopaedic surgeon and then subsequently to the thoracic and cardiac surgeon. This is not a situation where their disciplines are as different as those of an orthopaedic surgeon and rheumatologist, on the one hand, and a psychiatrist on the other hand, as in the *Guglielmucci* case. The disciplines of the orthopaedic surgeon, the specialist in thoracic and cardiac surgery and the physiatrist all have considerable overlap in the sense that each will seek to provide a diagnosis of the physical condition and to make recommendations for treatment.
- d) *Robertson v. Grist*, 2006 BCSC 1245, at paragraph 15:
- [15] Should a second independent medical examination be ordered? The test for a second opinion was recently re-stated by Master Hyslop in *Shaw v. Koch* (2004), 4 C.P.C. (6th) 271, 2004 BCSC 634 at para. 25 [Shaw], from the decision in *Jackson v. Miller*, [1999] B.C.J. No. 2751 at para. 12 (S.C.) (QL) [Jackson], to the effect that a second opinion on the same matter cannot be obtained unless something has occurred since the first examination which was not foreseeable or for which could not have been addressed by the examiner on the first occasion. The defendant has conceded that there are no grounds to justify a second examination. In these circumstances, the second independent medical examination by an overlapping specialty doctor should not be ordered.
- e) *Litt v. Guo*, 2014 BCSC 1724, at paragraph 12:
- [12] The second weakness is that passage of time alone is not a basis for ordering a second medical examination of a plaintiff. Dr. Bishop's report is very clear in terms of his diagnosis, prognosis and his description of the pattern of symptoms Ms. Litt will experience into the future. He describes a likely aggravation of symptoms on activity, which it seems is exactly what is reflected in the medical reports which initially led to this application.
- f) *Rong v. Yelland*, 2019 BCSC 2107, at paras. 16 through 19:
- [16] Returning to *Joorawon*, Master Baker notes:

The problem I have, though, is the plaintiff attended on an earlier defence medical examination with Dr. McConkey, an orthopedic surgeon. Much of the argument and discussions today concern *Tran v. Abbott*, 2018 BCCA 365, which the court, if I may say in the vernacular, dialled the issue back a little and said there is no higher bar, no greater obligation than seeking an IME. Fair enough. I do not think that changes the law. With respect, it says, look, if you have a, let us take an extreme example, a psychiatric examination and come back to the court and ask for a second psychiatric examination, you would be hard pressed to get that without some compelling reasons. I do not think the Court of Appeal has changed the law in that respect. As it went out of

its way, I guess, to caution against bolstering earlier reports with subsequent or second IMEs in the same area. The concerns here I think reduce to, how much possible overlap is there? The greater the overlap, I think the greater the obligation to establish a justification for the second IME. The lesser the overlap, then the question moves more and more towards how people see *Tran v. Abbott*, which is to say there is no higher bar.

[17] Master Baker goes on to say:

On the other hand, we have Dr. McConkey, having done his examination but has not yet delivered a report. I am very concerned about that. I am concerned about the potential for overlap, and I think and conclude that it is not a speculative or necessarily unwarranted concern.

And I agree there is a real possibility using that case as a guide that Dr. McConkey's orthopaedic examination and conclusions may well overlap with a functional capacity. I do not know that yet. Notwithstanding my concerns about the swing or potential swing in damages or potential claims, something in the order of \$2 million, I think it is premature to order the functional capacity evaluation, notwithstanding, as I say, the authority of *Tran v. Abbott*. When I say premature, I mean premature. I am not discounting the possibility that it is justified. I just do not think the court is in a position to decide that yet until we see Dr. McConkey's report.

[18] Master Baker dismissed the application with liberty to apply. In doing so he said:

I mean that if Dr. McConkey's report is received and if counsel still feel that the application is justified, they can renew it.

[19] I find I am left in the same position on this application. The evidence does not disclose the instructions that were provided to Dr. Boyle, and the evidence does not provide any indication as to whether Dr. Boyle has advised defence counsel that he is limited in the opinion that he may be able to provide with respect to the plaintiff's functional capacity. It is not possible to determine whether to ensure the parties are on equal footing to prepare for trial that it is necessary to order a functional capacity evaluation until that information is known.

Background

[10] The defendants take the position that the plaintiff's injuries initially presented as being less severe than those she now describes. The defendants say that those injuries were initially described as, effectively, a neck and back injury, and, to the extent the injuries may be more severe, that was not made clear to ICBC at the time of Dr. Oliver's examination. The defendants invite me to conclude that the more severe injuries seem to have been first documented around the time of Dr. Arseneau's report.

- [11] The defendants argue that because ICBC was not made clearly aware of the more significant injuries at the time of Dr. Oliver's examination, they should now have the opportunity to examine the plaintiff on them. Due to what the defendants say is an apparent change in the plaintiff's condition, a second opinion is warranted, as the defendants should not be bound to Dr. Arseneau's findings.
- [12] Conversely, the plaintiff says that these conditions were indeed known to Dr. Oliver at the time he conducted his examination of the plaintiff. In this regard, the plaintiff points to the relatively detailed statement made by her to ICBC with respect to her injuries, and the impact of those injuries, on March 29, 2018. The plaintiff says this was not a statement that reflected a simple neck and back injury but, rather, it articulated something much more significant. The plaintiff says, and her statement appears to support the fact, that she had considerable pain developing over time, and that pain has had a significant impact on her life. She states that she described the severity and intensity of the symptoms to ICBC as best she could, as she had been experiencing the full effects of her injuries at the time of her statement.
- [13] The plaintiff also points to an October 25, 2019 occupational therapy assessment report conducted by Carole Kennedy. In that report, Ms. Kennedy identified that the plaintiff's family physician, Dr. Derek Adam, had diagnosed her with "Central sensitization - fibro type pain" in April 2018. The plaintiff then points to ICBC's own correspondence, dated October 22, 2018, with Dr. Oliver, confirming that all medical records to date had been provided to him. As such, the plaintiff says that Dr. Oliver was certainly made aware (if not through the plaintiff's detailed statement, then certainly through Dr. Adam's records) of the fibromyalgia diagnosis.
- [14] After the lunch break today, when the arguments continued, I was presented with a further affidavit, that being the Affidavit Number 1 of Megan Ozunko, a paralegal at the plaintiff's legal firm. To that affidavit she appends, among other things, Dr. Adam's clinical records. They include an April 24, 2018 entry which mirrors the reference made by Ms. Kennedy, as well as a June 21, 2018 reference to "muscle pains - post MVA myofascial component". It also appears, from the materials in Ms. Ozunko's affidavit, that both Dr. Oliver and Dr. Arseneau had exactly the same material as the other when they were asked to provide their opinions.
- [15] In short, the plaintiff says that ICBC was fully aware of the plaintiff's true condition at the time Dr. Oliver conducted his assessment, and was aware that she was claiming something considerably more serious than a simple soft tissue injury. The plaintiff says that Dr. Oliver is thoroughly qualified to examine a patient with these types of injuries, and opine on the best method for treatment.

- [16] Moreover, the plaintiff takes the position that this is simply a matter of Dr. Oliver and Dr. Arseneau reaching different conclusions with respect to the nature of the injuries, and the recommended treatment plans. The plaintiff says this is not unusual in injury cases, but the fact that they have differing opinions does not allow the defendants to now secure a further report in an attempt to bolster their initial one.
- [17] I agree with the plaintiff's assertion that ICBC knew, or certainly ought to have known, that the injuries claimed by the plaintiff may be more serious than a simple soft-tissue injury.
- [18] I have reviewed the statement of the plaintiff that she executed on March 29, 2018, and she provides considerable detail of her injuries. She spoke about the initial onset of pain in her back, hip, shoulders, left Achilles tendon, as well as her headaches; she spoke about attending her doctor-recommended chiropractor, physiotherapy, massage therapy, and acupuncture sessions; she spoke about how her headaches intensified over time, to the point where they wake her up at night; she spoke about experiencing excruciating pain for approximately one week if she was to spend even an hour cleaning her house; and she spoke about the emotional distress of being unable to play with her four-year-old son.
- [19] In my view, at the time that the statement was made, which predates the Dr. Oliver assessment, the plaintiff indeed claimed that her injury was something considerably more than a simple soft-tissue neck and back injury. Moreover, I am persuaded by the fact that, on the materials before me, Dr. Adam previously diagnosed her with having something more serious than that. This is referenced in the OT's report, as well as Dr. Adam's own clinical records, which are now before me by way of Ms. Ozunko's affidavit.
- [20] On the evidence before me, it seems clear that all relevant records were provided to Dr. Oliver in advance of the medical examination. In fact, it appears that both Dr. Oliver and Dr. Arseneau had exactly the same materials as the other when they were asked to provide their opinions. In my view, Dr. Oliver, as a qualified orthopedic surgeon, was certainly in a position to fully examine the plaintiff on all of the injuries now claimed by her.
- [21] When considering the principles outlined in Hamilton, as qualified by Tran, I make the following observations:
- In the circumstances, given that Dr. Oliver and Dr. Arseneau have already had the opportunity to examine the plaintiff, and each had the same materials, and each should have been fully aware of the extent of the plaintiff's injuries claimed, I believe that reasonable equality between the parties, in preparation of the case for trial, has been achieved.
 - I agree also with the plaintiff's submissions that this is simply a case where the doctors have expressed differing opinions, and have recommended different treatment options. Simply because they have different opinions does not permit the defendants to now match "expert for expert" or "report for report".

- Further, I am concerned that the proposed examination by Dr. Hirsch would simply be used for the purpose of attempting to bolster the opinion of Dr. Oliver.
 - Given that I have already determined that there was no question or matter that could not have been dealt with at the earlier examination by Dr. Oliver, a further report would not be appropriate.
 - And, finally, I note the reference to no higher standard being required when a defendant seeks a second or subsequent medical examination of the plaintiff.
- [22] In the circumstances, the application is dismissed, with costs payable to the plaintiff in any event of the cause.

"Master Schwartz"

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