

CANADA / JUDGMENT

Hamilton v. Pavlova

2010 BCSC 493

COURT

Supreme Court of British Columbia

DECIDED

4 March 2010

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2010 BCSC 493 Hamilton v. Pavlova

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hamilton v. Pavlova,

2010 BCSC 493

Date: 20100304

Docket: 03-1039

Registry: Victoria

Between:

Robyn Mary Hamilton

Plaintiff

And:

Anastasia I. Pavlova and Gerald D'Avino

Defendants

Before: The Honourable Mr. Justice Bracken

Oral Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

M. Selly

Counsel for the Defendants:

G. Deshon

Place and Date of Trial/Hearing:

Victoria, B.C.

March 4, 2010

Place and Date of Judgment:

Victoria, B.C.

March 4, 2010

- [1] THE COURT: This is an application by the defendants for an order that the plaintiff attend for an independent psychiatric examination by Dr. Roy O'Shaughnessy. The examination is currently scheduled for March 8, 2010, in Vancouver, and it is not likely that another appointment could be made with Dr. O'Shaughnessy between now and the time of trial.
- [2] The background of the matter is that the plaintiff alleges that she was injured in a motor vehicle accident on December 14, 2002. The matter is currently scheduled for trial in March of 2011, and the trial is estimated to consume 20 days.
- [3] The plaintiff claims to have suffered extensive and long-lasting injuries, including cognitive difficulties that are consistent, in the opinion of Dr. Barale at least, with a mild traumatic brain injury. Dr. Barale consulted with the plaintiff on January 14, 2008, and released his report shortly afterwards. The plaintiff has seen a number of doctors. By my count, in the chambers material, there were some 14 doctors listed as being involved with the plaintiff in some way after the motor vehicle accident. Included in that number is a psychologist, Dr. Frank Spellacy, as well as a chiropractor and a physiotherapist.
- [4] The plaintiff has already attended for two independent medical exams, the first with Dr. Warren, who is an orthopaedic consultant, and the second was with Dr. Moll, a neurologist. Dr. Moll saw the plaintiff on January 19, 2009, and concluded that there was no evidence to support a diagnosis of brain injury. He did note that the plaintiff suffered from what he referred to as a mild depression.
- [5] Dr. Moll issued a supplementary report on February 4, 2010, to clarify and perhaps expand his earlier report. In that report, he said that psychological and psychiatric conditions can influence neurological functioning. He said that he considers himself competent to assess her psychiatric symptoms and symptoms of anxiety and depression that might impact neurological function, but he pointed out that if a definitive opinion was needed on a psychiatric issue, that it should be obtained from a properly qualified psychiatrist.

- [6] The defendants say that they expect the plaintiff to testify at trial that she has experienced and continues to experience symptoms that may be symptoms of a brain injury. If those symptoms have a psychiatric or psychological origin, then the prognosis is generally thought to be more optimistic than if the symptoms are the result of a brain injury. The defendants want to have an independent medical exam by a psychiatrist to assess that issue.
- [7] The plaintiff opposes the application on the basis that the defendants have already had two independent medical exams and there is no justifiable reason advanced by the defendants for a further assessment. The plaintiff says that Dr. Moll was well aware of the symptoms alleged by the plaintiff for some six years post-accident, and he was aware of all of the material as his examination was two years after the examination by Dr. Spellacy, the psychologist. That report was available to Dr. Moll and considered by Dr. Moll, as was the report of Dr. Barale.
- [8] The plaintiff says that Dr. Moll's examination was extensive and covered every aspect of the plaintiff's health that is in issue in the litigation, including her cognitive complaints. It is also submitted that Dr. Moll commented extensively on the report of Dr. Barale. After noting that one of the more common causes of cognitive complaints is the presence of a mood disorder and administering a basic test for depression to confirm a mild depression, Dr. Moll stated:

In conclusion, neither my examination and assessment, nor the assessment of other physicians who have examined Ms. Hamilton following this accident has shown any evidence to support the diagnosis of brain injury. Sensitive scanning using an MRI scan has also failed to show the presence of any brain injury. The pattern and evolution of Ms. Hamilton's cognitive symptoms is not consistent with the results of brain injury sustained in the accident of December 2002.

Ms. Hamilton's complaints of anxiety and the indications that she has mild depression, as well as the stress related to repeated medical examinations, the stressful nature of her work, and the stress of the medical/legal process are sufficient reasons to account for the difficulties that she describes with cognitive function. I believe that her complaints are not related to any injury and are fully reversible. I do not believe that these complaints would interfere significantly with her ability to perform her job as a realtor, working full-time, either currently or at any time in the future.

- [9] The plaintiff submits that Dr. Moll's conclusions, in that segment of his report and elsewhere in his summary, are clearly that the mild depression, anxiety, and mood disorder are reversible, and not related to a brain injury. The plaintiff takes the position that the defendants have chosen their specialist and already have a report from an independent medical examiner that is on the very issue that the defendants want another opinion from Dr. O'Shaughnessy.
- [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.
- [15] The application must be timely. That is, the proposed examination should be complete and a report available in sufficient time to comply with the rules of admissibility and to allow enough time for the plaintiff to assess and respond if necessary: *Vermeulen-Miller v. Sanders*, 2007 BCSC 1258 at paras. 47-48, relying in part on *Goss v. Harder*, 2001 BCSC 1823.
- [16] Finally, subsequent independent medical examinations should be reserved for cases where there are some exceptional circumstances: *Wildemann v. Webster*, *supra*, at p. 3.
- [17] In this case, the plaintiff submits that there is no new issue, question, or matter that has arisen since Dr. Moll's report in January of 2009. Dr. Moll had Dr. Barale's notes and report of his psychiatric consultation and Dr. Spellacy's psychological report and test results. Mr. Selly points to the various portions of Dr. Moll's report where he reviewed and critiqued the reports of Dr. Barale and Dr. Spellacy. Indeed, some portions of Dr. Moll's report directly challenged the conclusions of Dr. Spellacy. For example, at p. 4 for Dr. Moll's report, he says:

Dr. Barale (Psychiatry) in his report concluded that Ms. Hamilton had sustained a brain injury and attributed her cognitive complaints and mood disorder to brain injury as well as chronic pain. Dr. Barale's report however does not appear to seek to specifically establish the diagnosis of brain injury through history or examination. Rather, Dr. Barale appears to conclude that brain injury is present based on an uncritical acceptance of neuropsychological assessment by Dr. Spellacy.

[18] He goes on to state that Dr. Spellacy's report appeared to contain some contradictions and that he disagreed with the conclusion that Dr. Spellacy reached. In fact, at p. 10, Dr. Spellacy stated that "she showed no significant evidence of anxiety, depression, or unusual emotional distress."

[19] At p. 9 of Dr. Moll's report, he concluded that:

My opinion, as noted above, is that Ms. Hamilton presently has mild mood disorder and no significant anxiety and does not require continuing psychiatric or psychological diagnosis support at this time, family physician monitoring being the most appropriate.

[20] It appears from those passages that there is some consistency in the views of Dr. Spellacy, Dr. Barale, and Dr. Moll that the plaintiff has no significant mood disorder or depression and does not require or at least did not in January of 2009 any further monitoring or treatment by a psychiatrist or a psychologist.

[21] In his supplementary report, Dr. Moll stated, at p. 2:

In the penultimate paragraph on page 9 of my report I indicated that Ms. Hamilton might require some future assessment and management recommendations regarding anxiety and mood disorder and recommended that this be performed by a Psychiatrist, as and when this was felt indicated by her family physician.

My role as a Neurologist providing the court with an Independent Medical Opinion, is not to make specific treatment recommendations since I am not seeing the person in a treating capacity. With regards to psychiatric diagnosis and management, my recommendation was that this be provided by a psychiatrically trained physician, at the discretion of her treating family physician. Should a definitive opinion be required regarding Ms. Hamilton's mood disorder or anxiety for medical/legal purposes, this should be obtained from an appropriately qualified and experienced Psychiatrist.

[22] The difficulty that emerges from the various reports is that at this point in time, none of the physicians either for the plaintiff or for the defence have indicated that there is any need for any psychiatric treatment or assessment. Until that time, it seems to me that there is nothing further that Dr. O'Shaughnessy or any other psychiatrist could add to the picture that has already been painted by Dr. Moll and the other physicians.

[23] The defendants submit that a report of a psychiatrist is necessary as the psychological or psychiatric symptoms may be the root cause of cognitive symptoms of the plaintiff rather than a true brain injury. At p. 6 of Dr. Moll's first report, he clearly gave an opinion that it was his opinion that the symptoms were as a result of stress, anxiety, or mild depression and not a brain injury. The defendants were well aware of all of the symptoms and injuries alleged by the plaintiff, including cognitive difficulties. They chose to seek an opinion of a neurologist, and an opinion on the critical issue of cognitive defects has already been given. In my view, they are not entitled to another at the current moment.

- [24] In my view, there is nothing new, no new question or matter within the material that would require the assessment of a psychiatrist or psychologist. However, I leave open the possibility that if something emerges in addition or further reports that will or may be presented by the plaintiff, then the defence is at liberty to renew its application provided it can establish that it falls within the principles required to succeed on an application of this nature.
- [25] In summary, it is my view that the application is at this point, at least, timely, and given the number of medical experts and the plaintiff's complicated history, it is, in my view, an exceptional case, as that term was used in *Wildemann v. Webster*. However, I cannot find that there is any new question or matter that should be the subject of an inquiry or an independent medical examination. It seems to me that on the material presented, the defence seeks only to bolster the opinion of Dr. Moll by providing a similar opinion from someone with perhaps a more appropriate specialty. At this time, I cannot find a further examination is necessary to ensure reasonable equality of the parties in the preparation for the trial, and the application for an independent medical examination is dismissed.
- [26] Costs, in my view, should remain in the cause.

"J. K. Bracken, J."

The Honourable Mr. Justice Bracken

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Prepared on 27 October 2026 · Esheria