

CANADA / JUDGMENT

Henderson v. Fisher

2020 BCSC 981

COURT

Supreme Court of British Columbia

DECIDED

30 June 2020

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2020 BCSC 981 Henderson v. Fisher IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Henderson v. Fisher, 2020 BCSC 981 Date: 20200630 Docket: M177458 Registry: Vancouver Between: Mikhaila Henderson Plaintiff And Karen Fisher Defendant Before: The Honourable Mr. Justice G.C. Weatherill Decision on Application by way of Written Submissions Counsel for the Plaintiff: M. Klimo Counsel for the Defendant: S.E. Walsh Materials and Written Submissions filed: June 4 and June 19, 2020. Place and Date of Decision: Vancouver, B.C. June 30, 2020

- [1] The plaintiff, a registered nurse, claims to have suffered multiple injuries as a result of a motor vehicle collision on October 15, 2015 ("Accident"). Among her various allegations is that, as a result of both physical and psychological injuries suffered in the Accident, she was and is incapacitated from past and future employment as a nurse. It is apparent that the plaintiff's case, at least in part, is that, but for the Accident, she would have been able to obtain a Master's Degree in Nursing and thereafter work full-time as a nurse practitioner.
- [2] This is an application by the defendant pursuant to Rule 7-6 of the Supreme Court Civil Rules [SCCR] for an order that the plaintiff submit to an independent vocational assessment at the offices of Diana Cameron, a vocational consultant, located at 309-2902 West Broadway, Vancouver, BC on August 13, 2020 at 9 a.m.
- [3] The ten-day trial of this action is scheduled to commence on September 21, 2020. Accordingly, the defendant also seeks an order that the deadline for service of any report prepared by Ms. Cameron be extended to August 27, 2020.
- [4] The defendant's first request that the plaintiff attend an independent vocational assessment by Ms. Cameron was made on March 11, 2019. By letter dated March 18, 2019, plaintiff's counsel objected to the assessment on the basis that it was not warranted. No further steps were taken by the defendant to obtain a vocational assessment of the plaintiff prior to the then scheduled trial date of January 20, 2020.
- [5] The following expert reports were served by the parties prior to the January 20, 2020 trial date: By the Plaintiff
- a) Dr. Stone, orthopaedic surgeon, dated November 22, 2017 and June 26, 2019;

- b) Dr. Ganesan, psychiatrist, dated August 7, 2019;
 - c) Dr. Waseem, physiatrist, dated October 24, 2019 and November 18, 2019;
 - d) Simone Szarkiewicz, occupational therapist, dated October 2, 2019; and
 - e) Sergiy Pivnenko, economist, dated October 23, 2019. By the Defendant
 - a) Dr. Scarth, psychiatrist, dated June 20, 2019 and November 27, 2019;
 - b) Dr. Crossman, physiatrist, dated September 12, 2019; and
 - c) Mark Szekely, economist, dated November 18, 2019.
- [6] On December 20 and 23, 2019, pursuant to an order made at the Trial Management Conference, plaintiff's counsel provided "will say" statements to the defendant in respect of the non-party lay witnesses she intended to call as witnesses at the January 20, 2020 trial. It was apparent from various of those will say statements, particularly those of three registered nurses, that the plaintiff intended to lead evidence at trial about the physically-demanding nature of her employment as a clinical nurse in an acute hospital setting, the pay and other benefits available to such a nurse, her prospects of becoming a nurse practitioner and the employment, and remuneration opportunities in that field.
- [7] The trial did not proceed on January 20, 2020 because there was no judge available to hear it.
- [8] On February 3, 2020, the plaintiff advised the defendant that she intended to reserve new trial dates in September 2020.
- [9] On February 4, 2020, the defendant again requested that the plaintiff attend an independent vocational assessment with Ms. Cameron. On February 13, 2020, plaintiff's counsel again objected to the assessment.
- [10] On February 18, 2020, counsel for the plaintiff received the filed notice of trial but, "through inadvertence", did not provide the notice of trial to counsel for the defendant until May 13, 2020. However, it is clear that counsel for the defendant was aware of the September 21, 2020 trial date prior to May 13, 2020 because she filed an application for an adjournment of the trial on May 8, 2020. That application was heard by Mr. Justice Branch and dismissed on May 29, 2020.
- [11] The plaintiff takes the position on this application that the defendant has waited too long to bring it and has failed to provide a reasonable explanation for the delay. She submits that any difficulties in having this application heard due to the COVID-19 pandemic could have been resolved by video conferencing technology and are not a valid justification for attempting to secure now what should have been secured prior to the first trial date. The plaintiff further submits that the defendant was obviously content to proceed to trial in January 2020 without an independent vocational assessment and ought not to be entitled to the benefit of one now. She submits that the conundrum the defendant now faces is of her own making. Finally, the plaintiff submits that the defendant should not be able to

circumvent the deadlines set out in the Rules to the prejudice of the plaintiff.

- [12] It is apparent that a significant issue at trial will be whether the plaintiff suffered a loss of function and earning capacity as a result of the Accident and, if so, to what extent. That issue necessarily raises the extent to which the plaintiff is both emotionally and physically capable of working and in what capacity or vocation(s).
- [13] The order sought is discretionary. I have reviewed and considered that various cases relied upon by counsel, including *Stocker v. Osei-Appiah*, 2015 BCSC 2312. There is no question that the appropriate order should have been sought when the original request was refused by the plaintiff in March 2019. However, if the order now sought is refused, the trial judge's ability to render a just decision on the merits of the case may be hindered. The views expressed by Mr. Justice N. Smith in *Broumand v. McEdwards*, 2020 BCSC 803 at paras. 13-15 are apt in this case, particularly those at para. 14 where he stated: In the circumstances, the need for the best evidence and a just determination on the merits - along with the fact that access to the court has been restricted during the COVID-19 pandemic - overrides any concern I may have about the timeliness of the first IME or of this application.
- [14] I am unable to conclude that there is any prejudice to the plaintiff (other than what I assume will be some inconvenience in having to attend the assessment itself). If there was any meaningful prejudice claimed by the plaintiff, I am confident that her counsel would have provided the court with some evidentiary basis in support. None was provided.
- [15] In my view, the defendant is entitled to conduct an independent assessment of the plaintiff's vocational capacity even though she did not seek an order prior to the first trial date. The assessment will assist the court in identifying the employment options for which the plaintiff is suited, including the likelihood that she would have obtained a Master's Degree in Nursing and worked as a nurse practitioner but for the Accident. The assessment will even the playing field and will provide the trial judge with a more complete evidentiary foundation for the determination he or she will be asked to make. Such is the very purpose of Rule 7-6: *Stainer v. Plaza*, 2001 BCCA 133 at paras. 13-15; *Hamilton v. Pavlova*, 2010 BCSC 493 at paras. 10-16; *Tran v. Abbott*, 2018 BCCA 365 at para. 32. I do not accept that a vocational assessment will be a duplication of or an attempt to bolster the opinions of the defendant's psychiatrist or physiatrist. Each will bring to bear different qualifications and expertise for the purpose of assisting the court.
- [16] The application is granted. The plaintiff will attend an independent vocational assessment with Diana Cameron on August 13, 2020 at 9 a.m. at Ms. Cameron's offices located at 309-2902 West Broadway Ave., Vancouver, BC. The deadline for service of any report prepared by Ms. Cameron is extended, not to August 27, 2020 as requested, but rather to August 21, 2020 at 4 p.m.
- [17] If a responsive vocational assessment report is considered warranted by plaintiff's counsel, it may be served on defendant's counsel anytime prior to September 18, 2020 at 4 p.m.

[18] Given the defendant's failure to seek an order when attendance at the vocational assessment was refused by the plaintiff in March 2019, there will be no order as to costs. "G.C. Weatherill J."

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Prepared on 28 October 2026 · Esheria