

CANADA / JUDGMENT

Kundan v. Hoogstra

2024 BCSC 57

COURT

Supreme Court of British Columbia

DECIDED

4 January 2024

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2024 BCSC 57 Kundan v. Hoogstra

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kundan v. Hoogstra,

2024 BCSC 57

Date: 20240104

Docket: M202449

Registry: New Westminster

Between:

Mahtab Kaur Kundan by her Litigation Guardian Jarnail Kundan

Plaintiff

And:

Kyle Andrew Hoogstra,

Richard Shimmin and

Yvonne Marie Shimmin

Defendants

Before: Master Krentz

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

R. Sidhu

Counsel for the Defendants, Richard Shimmin and Yvonne Shimmin:

G. Hardy

Place and Date of Hearing:

New Westminster, B.C.

January 4, 2024

Place and Date of Judgment:

New Westminster, B.C.

January 4, 2024

- [1] THE COURT: The following is my decision in this matter. I am providing oral reasons for judgment at the conclusion of the hearing. I do so because this matter has urgency to it, and the parties require a decision now, as opposed to later. In the event that a transcript is requested of my reasons, I reserve the right to make editorial changes. Such editing would not change the outcome of my decision.
- [2] This is an application brought by the plaintiff pursuant to recent regulations that went into effect on November 27, 2023, namely, the Disbursements and Expert Evidence Regulation, B.C. Reg. 31/2021 (the "Regulation") that caps disbursements in these type of personal injury cases at 6 percent of the plaintiff's total damages following a trial or settlement. The Regulation requires a plaintiff to bring applications to have disbursements excluded from the cap before the disbursement is incurred and requires plaintiffs to bring applications for additional experts at the same time as the application is made to exclude the disbursements.
- [3] The plaintiff wants to obtain a report from a psychiatrist, namely Dr. Waisman, and they have scheduled an assessment for this Sunday, three days from now. The plaintiff had retained a physiatrist, Dr. Shergill, and he did an assessment of the plaintiff on November 29, 2023. The report from Dr. Shergill was provided to plaintiff's counsel on December 21, 2023. It is included in the application record but it is heavily redacted. The reason given for the redactions is that there is an Independent Medical Examination ("IME") scheduled with another physiatrist, Dr. Tam, on January 6, 2024, which is two days from now. I was told by the plaintiff's counsel that revealing the contents of the entire report at this time may provide an advantage to Dr. Tam, therefore, the report of Dr. Shergill was heavily redacted.
- [4] In his report, Dr. Shergill indicated that a diagnosis with respect to any psycho-emotional distress related to the plaintiff was outside his area of expertise and therefore he would defer a formal diagnosis, including any recommendations for treatment, to a mental health specialist such as a psychiatrist. That is why the plaintiff has arranged, in a rather hurried manner, the assessment by Dr. Waisman for this Sunday.

- [5] With respect to the history of the litigation, there is a five-day trial scheduled to commence on April 8, 2024. Therefore, the 84-day deadline for service of expert reports will expire on January 12, 2024. This would explain the reason for these assessments occurring, if they both go ahead, this weekend in order to meet that deadline.
- [6] This follows from a motor vehicle accident that occurred in 2016. At that time, the plaintiff was 14 years old and she is now 22 years old. She is a university student and resides with her family. The plaintiff was a passenger in the front seat of a vehicle that was struck by another vehicle.
- [7] The notice of civil claim was filed on May 22, 2018, and the plaintiff alleges the following injuries from the accident: to her neck, back, shoulders, arms, wrist and legs, the effects of which resulted in sciatica, headaches, fatigue, dizziness, sleeplessness and other physiological, psychological and emotional injuries.
- [8] The plaintiff was examined for discovery on March 3, 2021. Medical records have been produced by the plaintiff, that apparently include clinical records from her doctor, a rehabilitation clinic, hospital records, and records from a massage therapy clinic. The plaintiff has also provided her educational records.
- [9] According to the clinical records, the plaintiff has only been treated for symptoms of physiological injuries. She may have seen a counsellor in high school but I understand that may be more in the nature of academic counselling, otherwise, she has not been seeing a counsellor.
- [10] At the examination for discovery of the plaintiff, she indicated at that time that she was, in her words, "doing okay" in her studies at university. Her ongoing complaints at the time of her discovery were headaches, shoulder pain, back pain and pain to her right arm and wrist. However, she had not yet obtained a driver's licence because of anxiety and that sometimes she just has some general anxiety.
- [11] The estimated cost of a report from Dr. Waisman would be approximately \$4,000 and that cost will increase if he is required to attend the trial. In this application, the plaintiff also seeks to exclude a disbursement that may be incurred with respect to obtaining a rebuttal report from Dr. Shergill, in the event that there is a physiatrist report served by the defendants.
- [12] In an affidavit from the plaintiff, she describes her current circumstances, some of which I have already covered. She is pursuing a bachelor's degree at Simon Fraser University and has been a student there since the fall of 2019. She has not been working and had no employment income for the years 2016 and 2017, before she went to university, and also in 2020.

- [13] She deposes that she funds her education through a student foundation, that I take to be from loans and/or grants. She further deposes that she has suffered from headaches, back pain, shoulder pain, arm pain, and leg pain; and she has disturbed sleep, driving anxiety, and symptoms of depression.
- [14] After the accident, the plaintiff received physiotherapy, massage therapy, chiropractic treatment, and she has seen a kinesiologist. She deposes, and I accept, that she is unable to pay for expert reports such as from Dr. Waisman.
- [15] In opposing the application, the defendants submit that the plaintiff has raised in her pleadings what would be predominantly physical injuries. There are no specific pleadings or any amendments to the pleadings related to other mental health or psychological injuries, such as anxiety and depression.
- [16] They submit that her evidence at discovery appeared to be related more to physical injuries, which would be addressed by the psychiatrist, Dr. Shergill. They say there is no evidence that may lead to a conclusion that there are psychological injuries that are affecting her functioning, such as in school or her daily activities.
- [17] They note this is in contrast to the physical complaints which are throughout her records, as the treatment so far received by the plaintiff relates to the symptoms of her physiological injuries. They submit the entirety of the clinical records that have been produced by the plaintiff do not disclose any impairment of the plaintiff's activities of daily living, academic performance or work capacity on account of symptoms related to any psychological injuries, such as depression or anxiety.
- [18] They further note that the report from Dr. Shergill, possibly because it is heavily redacted, does not provide any background or evidence with respect to psychological injuries. The portion of the report that is unredacted merely contains a statement that a diagnosis with respect to psycho-emotional distress is outside the area of Dr. Shergill's clinical expertise. There is nothing in the unredacted portion that suggests the plaintiff has complained of mental health issues.
- [19] The plaintiff has not specifically pled symptoms that amount to a mental illness such that an opinion of a psychiatrist would be required. She has not been diagnosed by any doctor with a mental health condition, and she is not taking any medication or receiving treatment for psychological conditions.
- [20] The defendants submit that to be successful on this application, the plaintiff must satisfy the court that all of the conditions in the Regulation are met, including that she would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding, were the disbursement not excluded. They submit that there is insufficient evidence upon which the court can make findings that the plaintiff may be impaired by psychological injuries.

- [21] These regulations are new, so there is a paucity of caselaw related to this type of application. However, there is a decision of my colleague, Master Nielsen, which is *Nagra v. Prasad*, 2023 BCSC 2297. In it he reviews what is required by the Regulation and found that the disbursement should be excluded from the cap.
- [22] In *Nagra*, the plaintiff was seeking exclusion with respect to obtaining a report from an occupational therapist. The cost would be in area of \$5,000 which would not include attendance for the trial. Master Nielsen noted the cost would be about one-fifth of the \$25,000 annual income of the plaintiff.
- [23] In *Nagra*, the plaintiff was not only seeking to exclude the disbursement for the occupational therapist but also for any rebuttal report that may be required from the physiatrist that had already assessed the plaintiff. The physiatrist provided a prognosis that indicated the plaintiff is experiencing partial disability of his instrumental activities of daily living, recreational and vocational function that is permanent. That was why the plaintiff was seeking the additional report from an occupational therapist.
- [24] Master Nielsen concluded that if the disbursement was not excluded, that the plaintiff would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding. He was satisfied that there would be significant prejudice to the plaintiff if the disbursement was not excluded. There was also a reasonable risk that the total amount of the disbursement would exceed the cap. He was satisfied that the plaintiff would be unable, without undue hardship, to incur the disbursement if it were not excluded. He further noted that the plaintiff had put time and effort into a new career, which was now in jeopardy due to the injuries he allegedly suffered in the accident.
- [25] What this application may turn on is the following, which was referred to by Master Nielsen in his decision. He said at para. 14:
- [14] Also, there has to be evidence that the disbursements that are subject of the application are necessary to justly resolve the proceeding. The plaintiff has the onus of proof with respect to his injuries and their alleged effects. There is the allegation in the notice of civil claim that he suffered a loss of future income and a cost of future care, and in my view, the report of the occupational therapist is necessary in order to prove that - the necessary causation, the causal link between his alleged injuries and his ability to earn income, and medical costs, into the future.
- [26] What Master Nielsen had before him was an opinion from the physiatrist that the plaintiff was experiencing a partial disability of his instrumental activities of daily living, recreational and vocational function that is permanent. However, in the case before me, I do not have that. The report of Dr. Shergill simply states under the heading of "Psycho-Emotional Distress" that it is outside of his clinical experience. There is nothing in his report or in any of the plaintiff's clinical records that have been brought to my attention that indicates there are psychological injuries that need to be investigated and that may be causally linked to the alleged injuries.

- [27] I agree with the defendants that it appears the thrust of the plaintiff's claim based on her pleadings, the clinical records, and from her discovery, are related to her physical injuries. I am prepared to find that there is a reasonable risk that the total amount of the disbursement would exceed the cap and that the plaintiff would be unable, without undue hardship, to incur the disbursement if it were not excluded. However, as I am required to do pursuant to s. 5(8) of the Regulation, in applying the test of proportionality, I do not find that the plaintiff will suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding.
- [28] I do see the potential that if the defendants serve a report from their physiatrist that a rebuttal report from Dr. Shergill may be required. In Nagra, in order to save the additional cost of a further application, Master Nielsen did include in his order that any rebuttal report from the physiatrist would also be excluded.
- [29] Based on the evidence that is before me today, I am denying the application that the disbursement for a psychiatric assessment be excluded, however, I will order that if a rebuttal report is required from Dr. Shergill or any other physiatrist, that will be excluded from the cap.
- [30] Costs?
- (SUBMISSIONS ON COSTS)
- [31] THE COURT: I will just leave it as costs in the cause. Thank you.
- "Master Krentz"

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