

CANADA / JUDGMENT

Larsen v. Karimi

2019 BCSC 1477

COURT

Supreme Court of British Columbia

DECIDED

13 August 2019

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2019 BCSC 1477 Larsen v. Karimi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Larsen v. Karimi,

2019 BCSC 1477

Date: 20190813

Docket: M151535

Registry: Vancouver

Between:

Tara Sue Larsen

Plaintiff

And

Azizallah Karimi and

North Shore Taxi (1966) Ltd.

Defendants

- and -

Docket: M178566

Registry: Vancouver

Between:

Tara Sue Larsen

Plaintiff

And

Nathan James McLennan

Defendant

Before: The Honourable Mr. Justice Mayer

On appeal from: An order of the Master of the Supreme Court of British Columbia, dated June 25, 2019 (Larsen v. Karimi, VA M151535 and VA M178566).

Oral Ruling Re Further Independent Medical Examination

In Chambers

Counsel for the Plaintiff:

B. Baharloo

Counsel for the Defendants:

B. McFadden

Place and Date of Hearing:

Vancouver, B.C.

August 12, 2019

Place and Date of Ruling:

Vancouver, B.C.

August 13, 2019

- [1] THE COURT: These are my reasons on the applications that were before me yesterday.
- [2] By way of background, the plaintiff, Ms. Larsen, was involved in two motor vehicle accidents. The first occurred in March of 2014 and the second in July of 2017.
- [3] The first MVA is the subject of what I will describe as Action No. 1, commenced on March 3, 2015. A response to notice of civil claim was filed in that matter in May 2015.
- [4] The second MVA is the subject of Action No. 2, commenced on November 1, 2017. A response to notice of civil claim was filed in that matter in February 2018.
- [5] The defendants in Actions 1 and 2 are represented by the same counsel as is the plaintiff. A ten-day trial in both actions is to be heard at the same time, commencing November 18, 2019 for ten days. I understand both liability and damages are in issue in both actions. The deadline for service of expert reports is August 26, 2019.

- [6] The plaintiff has obtained and served expert reports from a number of medical practitioners, including a physiatrist, orthopaedic surgeon, psychiatrist, neurosurgeon, a general practitioner and an occupational therapist. The defendant in Action No. 1 obtained a medico-legal report from Dr. Thompson, an orthopaedic surgeon, dated January 14, 2018, following an independent medical examination. I note that this step was completed prior to the defendant in Action No. 2 filing a response to notice of civil claim in that action.
- [7] The defendants have obtained a work capacity evaluation by an occupational therapist after an independent medical examination (IME) of the plaintiff. The plaintiff has consented to a further IME by the same occupational therapist and a vocational assessment. These are effectively update IMEs. Finally, the plaintiff has participated in a defence IME by a psychiatrist although a psychiatric medico-legal report has not been served.
- [8] The plaintiff has undergone a number of surgeries to her back, the first two occurring in 2015 prior to the second accident, and three additional surgeries in March, August and September of 2018. The 2018 surgeries involved, in summary, a disc implantation and subsequent repair and finally, an exploratory surgery. The 2018 surgeries all occurred after Dr. Thompson had completed his medico-legal report in January of 2018.
- [9] A trial date had initially been set for Action No. 1 in April of 2018 but was adjourned by consent.
- [10] On June 25, 2019, the defendants in Action No. 1 applied for an order that the plaintiff attend at a further IME before Dr. Thompson on July 10th. The defendants in Action No. 2 applied for an order that the plaintiff attend at an IME before Dr. Aion, a neurosurgeon, on July 26, 2019. The plaintiff had previously refused the defendants' request to attend at these two further IMEs and instead offered to participate in a further IME with Dr. Thompson or a new IME with Dr. Aion, but not both, on the basis that the expertise and therefore opinions sought from these experts overlapped.
- [11] On June 25, 2019, a Master of this Court denied the application of the defendants to require the plaintiff to attend at two IMEs. During the hearing the Master provided the defendants with a choice - that the plaintiff would attend at either an IME before the orthopaedic surgeon or before the neurosurgeon, but not both. As a result of the defendants' selection, an order was made requiring the plaintiff to attend at an IME by the neurosurgeon, Dr. Aion, which I understand was completed on July 26, 2019. The Master ordered costs in favour of the plaintiff after having been advised by counsel that the plaintiff had previously offered the defendants a "one or the other" option.
- [12] In this appeal the defendants in Action No. 1 appeal the Master's order denying the right to conduct an updated IME by Dr. Thompson, and both defendants appeal the Master's order with respect to costs.

- [13] The defendants argue that the Master erred in applying the test for IME, erred in basing his decision on the fact that the defendants were represented by the same counsel (and therefore could each rely on the reports obtained by the other), erred in finding that the neurosurgeon and orthopaedic surgeon were equally competent to provide an opinion and finally, erred with respect to his determination regarding costs.
- [14] The defendants appeal the Master's decision pursuant to Rule 23-6 of the Rules of Court. As set out in *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309, the standard of review of a master's decision on a purely interlocutory matter is a clearly wrong standard. Where the master's ruling raises questions which are vital to final issues in the case, a rehearing is the appropriate form of appeal. Questions of law are reviewed on the standard of correctness.
- [15] This Court has found that the denial of an independent medical examination can raise questions that are vital to the final issue in a case. Authority for that is set out in the decisions in *Barbosa v. Castillo*, 2010 BCSC 212, and *Stene v. Echols*, 2015 BCSC 1063.
- [16] The defendants say that the relevant vital issues include, in summary: the current condition of the plaintiff after having completed three additional back surgeries in 2018; the plaintiff's current condition given the passage of time since the original IME was carried out by Dr. Thompson in 2017. In addition, the defendants contend that Dr. Thompson, who did not recommend back surgeries after his initial report, may be asked to provide an opinion on the impact of those surgeries on the plaintiff's current condition and her prognosis. I agree that the issues raised may be vital to a final issue in the case, being the current medical condition of the plaintiff and the impact of the 2018 surgeries on both her current condition and prognosis. Accordingly, a rehearing is the appropriate form of appeal in this case.
- [17] The defendants say that the plaintiff's claims are multifaceted and include claims for various injuries, including those to her shoulder, neck, back and arm. As previously stated the main basis for the defendant's application that the plaintiff attend at a further IME with Dr. Thompson includes a requirement for an updated report given the passage of time since the first IME was carried out, coupled with a dearth of knowledge on their part regarding the plaintiff's current condition and prognosis in light of the 2018 back surgeries. The defendants say that the medico-legal opinion sought from Dr. Thompson does not overlap, as is alleged by the plaintiff, with the opinion sought from Dr. Aion.
- [18] As set out in the decision of the BC Court of Appeal in *Tran v. Abbott*, 2018 BCCA 365, the rule allowing the completion of an IME, being Rule 7-6, is a rule of discovery designed to balance the plaintiff's advantage in obtaining expert opinions by providing comparable rights to a defendant. This does not mean that the defendant is automatically entitled to IMEs on an expert-to-expert basis with the plaintiff. The decision in *Tran* establishes that Rule 7-6 does not require that an applicant demonstrate exceptional circumstances in order to obtain the right for a second IME. Where a plaintiff displays multifactorial injuries, attendance at a number of IMEs may be appropriate.

- [19] In this case the plaintiff has attended at a number of IMEs arranged through her counsel. This includes a total of six IMEs, which includes IMEs carried out by an orthopaedic surgeon and a neurosurgeon. The plaintiff has served expert reports from both an orthopaedic surgeon and neurosurgeon and I infer, must consider their individual opinions to be relevant. By comparison, the defendants have obtained only two IMEs - the one completed by Dr. Thompson in 2017 and the more recent IME completed by Dr. Aion in July of 2019. In my view the plaintiff has had a clear advantage in terms of gathering medico-legal evidence necessary to advance her damages claims in the two actions.
- [20] It is inappropriate to seek a second IME simply in an attempt to bolster an earlier opinion, but rather some new question or matter may justify a request for a follow-up examination. Authority for that proposition is *Hamilton v. Pavlova*, 2010 BCSC 493. I am satisfied that the defendants are not seeking a further IME by Dr. Thompson simply to bolster his earlier opinion and that the passage of time and the occurrence of the 2018 back surgeries justifies a further IME by Dr. Thompson as an orthopaedic surgeon. I understand that the defendants are seeking Dr. Thompson's opinion in large part as a result of his particular expertise and the standard of care applicable in the performance of such surgeries.
- [21] The transcript of the Master's reasons on the application before him in June makes it clear that he considered that only one IME was required by either a neurosurgeon or an updated IME by an orthopaedic surgeon on the basis that either would be competent to adequately address the nature of the plaintiff's injuries. With all due respect to the learned Master, I am not satisfied that the expertise of Dr. Thompson and Dr. Aion will completely overlap. The CV of Dr. Thompson indicates that he is an expert in orthopaedic surgery with particular expertise in the areas of degeneration of intervertebral discs. Dr. Aion's expertise is as a neurosurgeon currently focusing on spinal matters.
- [22] In this appeal, I do not have the benefit of having reviewed the initial medical report of Dr. Thompson or the letters of instructions provided to him by counsel or for his follow-up report or a similar letter issued to Dr. Aion. It is therefore not possible for me to determine the extent to which their opinions on the cause of the plaintiff's symptoms will overlap. It seems to me that Dr. Thompson may be in a better position to opine on the impact of the first and second accidents on the plaintiff's lumbar discs and the effectiveness or lack thereof of the 2018 surgeries. Dr. Aion as a neurosurgeon may be in a better position to provide a related specialized opinion on the plaintiff's neurological as opposed to orthopaedic condition and prognosis.
- [23] As was stated by Justice Skolrood in *Irvine v. Bradley*, (22 February 2019) Vancouver, M172655 (BCSC):

A trial judge is in the best position to determine the overlap and redundancy of reports, having been provided with an opportunity to review the reports in their entirety.

- [24] In this case the trial judge will have the opportunity to consider the reports to be filed by Dr. Thompson and Dr. Aion. To the extent that there is inappropriate overlap, the question of relevance can be addressed by the parties at trial when the reports are tendered. I agree with Justice Skolrood's comment in Irvine that it is preferable that the trial judge have the best evidence before them. In the case of Dr. Thompson, having only his 2017 medico-legal report, which I am told only deals with impacts of the first accident, without an update to reflect the impact of the second accident and the 2018 surgeries will likely make the 2017 report of little assistance. As I stated above, a follow-up report is warranted given the passage of time and the supervening surgeries.
- [25] In all of the circumstances, I consider it appropriate and do order that the plaintiff attend at a further IME to be carried out by Dr. Thompson on the first available date. If it turns out that an appointment can only be arranged at a time which prevents the defendants from serving a follow-up medico-legal report after the August 26th deadline for service of expert reports, the defendants will have to make the necessary application for an extension of this deadline either before or at trial.
- [26] I would add this: My order contemplates that Dr. Thompson will be providing a follow-up report on matters arising since he completed his initial independent medical examination. That is, he is not being authorized to complete a further analysis of the cause and extent of the plaintiff's injuries at the time that he completed his initial report in January of 2018.
- [27] With respect to the issue of costs, I have considered the issue, both of costs of the initial application before the Master and this appeal. In my view given the divided success at the hearing before the Master, it would have been appropriate to order costs in the cause. I vary the Master's order in that respect.
- [28] In respect of this appeal, the defendants have been successful and are therefore entitled to their costs in any event of the cause.
- [29] Any questions, Mr. McFadden?
- [30] MR. McFADDEN: No, thank you, My Lord.
- [31] THE COURT: All right. Mr. Baharloo?
- [32] MR. BAHARLOO: I just have a question in terms of clarification, and perhaps I do not quite understand. If the defendants get an IME date with Dr. Thompson let us say in a month, at that point they would have to bring an application to the court again to compel the plaintiffs to come back at that time, or how does that exactly play out?
- [33] THE COURT: I am sorry, if you could just repeat your question, Mr. Baharloo. I missed the beginning.
- [34] MR. BAHARLOO: I am just thinking the assumption that the defendants will eventually get a date from Dr. Thompson.

[35] THE COURT: Yes.

[36] MR. BAHARLOO: And just assume it is in 30 days, and that will bring us 60 days prior to trial. Is your order that the defendants must bring an application at that point? For the plaintiff to come back, or -- because now we are dealing with prejudice and rebutting reports that the plaintiff must obtain in order to respond to that report. And then we are getting closer to trial. And I am not sure if, you know, the experts we have already will be available to give that responsive report in time. So my question is how does that logistically play out if it is -- you know, if it is in 30 days. We need to potentially draw a line somewhere on that.

[37] THE COURT: Well, at this point I am not making a ruling with respect to an extension of the timeline for delivery of expert reports. You know, I appreciate that it is August 13th and there is really only 13 days left for the defendants to obtain the date for a follow-up IME with Dr. Thompson and to prepare a subsequent report and file it within that timeline. If they are able to do so and they comply with the service requirements for expert reports, then no further application is required. If they are unable to do so, then prejudice may arise, and that is why I have indicated that in that case it will be up to the defendants to obtain a necessary order from the Court to file the report.

[38] MR. BAHARLOO: Okay. Thank you, My Lord.

[39] THE COURT: But nothing further is required with respect to the requirement for the plaintiff to attend at the follow-up IME with Dr. Thompson.

[40] MR. BAHARLOO: Thank you very much.

[41] THE COURT: I expect that the parties will act reasonably in making Ms. Larsen available for a follow-up IME with Dr. Thompson, and if they are unable to come to an agreement with respect to date and time and a further application is required, then so be it. We will have to deal with it. But I trust that will not be the case.

[42] MR. BAHARLOO: Okay. Thank you.

[43] THE COURT: Does that help?

[44] MR. BAHARLOO: Yeah.

[45] THE COURT: Thank you.

"Mayer J."

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