

CANADA / JUDGMENT

MacKenzie v. Vanderwal

2024 BCSC 2218

COURT

Supreme Court of British Columbia

DECIDED

21 October 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 2218 MacKenzie v. Vanderwal IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: MacKenzie v. Vanderwal, 2024 BCSC 2218 Date: 20241021 Docket: M-191506 Registry: Victoria Between: Joseph Daniel MacKenzie Plaintiff And: David Mark Vanderwal Defendant

- and - Docket: M-192971 Registry: Victoria Between: Joseph Daniel MacKenzie Plaintiff And: Trevor Watson and Orca Dynamics Defendants
- and - Docket: M-192972 Registry: Victoria Between: Joseph Daniel MacKenzie Plaintiff And: Devlin Ames Defendant Before: The Honourable Mr. Justice A. Saunders Oral Reasons for Judgment on Application for Additional Independent Medical Examination (Functional Capacity Evaluation) In Chambers Counsel for the Plaintiff appearing by videoconference: G.M. Rainforth Counsel for all Defendants: M.J. Smith Place and Date of Hearing: Victoria, B.C. October 17, 2024 Place and Date of Judgment: Victoria, B.C. October 21, 2024

- [1] THE COURT: These reasons are being delivered orally. In the event a transcript is ordered, I am reserving without limitation my right to edit and amend the reasons, not only as to matters of grammar or syntax, but also to elaborate or amplify as I may judge to be necessary for the sake of clarity.
- [2] These three actions in which the plaintiff claims damages for personal injury suffered as a result of three separate motor vehicle accidents in 2017 and 2018 are set to proceed to trial by judge and jury over 15 days commencing Monday, January 6, 2025. Liability is in issue in two of the three actions.
- [3] The defendants have had independent medical examinations of the plaintiff conducted by consent by a neurologist, Dr. Alister Prout, and by a psychiatrist, Dr. Paul Janke, and the expert opinion reports of those two doctors have been served. The defendants now seek an order under Supreme Court Civil Rule 7-6(2), that the plaintiff submit to further examination - a functional capacity examination, or FCE, and a cognitive functional capacity evaluation, or C-FCE - by an occupational therapist, Mr. David Rosen, scheduled for tomorrow and the following day, October 22 and 23, 2024.

- [4] The plaintiff's injuries are complex. The pleadings set out allegations of the plaintiff having suffered, among others, injuries to his arm, back and hip, a head injury and concussion, TMJ dysfunction, migraine headache, fatigue, memory loss, word finding difficulties, and loss of concentration. Under examination for discovery in March 2022, the plaintiff attested to having demonstrated signs of cognitive impairment in the workplace when he has been fatigued. On continuing examination for discovery in July 2024, the plaintiff deposed to his continuing issues with chronic pain, sleep disturbance and fatigue, and the impact on his cognitive functioning and mental health.
- [5] The plaintiff has served expert opinion reports from a physiatrist, Dr. Krassioukov (two reports, one from January 2020 and an addendum dated April 2024); from a psychiatrist, Dr. Lu; from an Armed Forces career consultant (as the plaintiff was a member of the Reserves prior to being medically discharged in or about 2020); and from an economist. The two medical reports are not before me in evidence. The economist's report is before me. It sets out a claim for loss of past and future earning capacity in respect of the plaintiff's career in the civil service in the range of approximately \$1.75 to \$2.8 million. The plaintiff claims generally that the residual effects of his injuries in the workplace have impacted his work performance to the extent that he has not had the career path that would otherwise have been open to him.
- [6] The defendants have served the expert reports of Dr. Prout and Dr. Janke. The defendants further sought the plaintiff's consent to an examination by a physiatrist, and this was refused.
- [7] The defence neurologist, Dr. Prout, was asked to opine on not only the plaintiff's neurological condition but on his physical condition, as well. Among the questions specifically put to Dr. Prout and answered in his report are the following:
1. What are the plaintiff's current subjective complaints in relation to the MVAs, both neurological and physical, the latter within your breadth of your expertise? 2(a) Physical diagnosis?
 3. Causation of any such diagnosis?
 12. Is the plaintiff currently in any manner neurologically, cognitively or physically impaired from his work as he has described it to you?
- [8] Dr. Prout opined that the plaintiff is suffering from ongoing musculoskeletal pain symptoms, probably related to upper back and neck soft tissue injuries, primarily due to the first of the three accidents and to a lesser extent the third accident. He further diagnosed the plaintiff is suffering from mechanical-type low back pain, not related to any of the subject accidents. He opined that the plaintiff's physical diagnoses "overlap with probable mood and psychological issues which have likely exacerbated the degree to which the physical symptoms have affected [his] well-being". He concluded that the plaintiff does not have any cognitive deficits or impairments as a result of any neurologic disorder and in particular not

due to any prior concussion; and, that the plaintiff is "subjectively limited but not objectively impaired or restricted from any particular activities or employment". Dr. Prout stated, unequivocally, that the plaintiff is "not at this time neurologically, cognitively or physically impaired from his work as described to me", and that the subjective limitations and the plaintiff's perceived disability are "not due to any actual neurologic or cognitive impairment". Asked if there was a need for any subspecialty assessments and whether his own clinical expertise extended to assessment of the plaintiff's physical injury complaints, he said: As a neurologist I am very familiar with assessing patients with multiple musculoskeletal type symptoms which often overlap with neurologic type symptoms (in particular headache). I am therefore able to opine on his physical injury complaints, although with respect to more specific details of such complaints and injuries I would defer to experts in the field of physical medicine, particularly as this relates to rehabilitation therapies and prognosis. Dr. Prout stated that he would defer to experts in the field of psychiatry with respect to psychiatric diagnoses, including "their contribution to [the plaintiff's] ongoing subjective symptoms and his perception of functional impairment".

[9] The defence psychiatrist, Dr. Janke, has expressed the following opinions:

- a) that the plaintiff has a significant pre-existing psychiatric condition;
- b) that he did suffer soft tissue injuries and a mild traumatic brain injury in the first of the three accidents;
- c) that he did not develop post-concussion syndrome;
- d) that he developed symptoms of major depression as a result of his discharge from the Armed Forces, and that he in all likelihood continues to experience significant symptoms due to trauma suffered while serving in the Armed Forces and that his mood symptoms have not been adequately treated;
- e) that at the time of the assessment, the plaintiff was experiencing stressors unconnected with either the MVAs or his discharge from the Armed Forces;
- f) that with appropriate interventions the plaintiff will likely experience improvement in sleep and mood.

[10] The scope of the proposed capacity evaluations is described in an October 2, 2024 letter from Mr. Rosen. What is contemplated, as I have said, is both a conventional FCE, and a C-FCE. Generally these will entail evaluation of factors affecting the plaintiff's activities of daily living, including work and social interaction, through standardized testing of his stamina and tolerance in various activities, including testing and measurement of his cognitive functioning.

[11] In *Tran v. Abbott*, 2018 BCCA 365, the Court of Appeal affirmed the longstanding principle that independent medical examinations serve the purpose of putting the parties on an equal footing with respect to medical evidence and that more than one examination may be

required to achieve that purpose. "Multiple examinations may be appropriate and necessary where a variety of injuries are alleged, or the etiology of illness is not straightforward": Tran, paragraph 33. As noted by Master Muir, as she then was, in *Gray-Verboonen v Mandurah*, 2019 BCSC 1697, while Tran did resolve conflicting lines of authority on whether a further medical examination requires there to be exceptional circumstances - holding that it does not - the decision did not change the requirement that the examination be demonstrated to be necessary. A helpful summary of the factors to be considered in the court's exercise of its discretion is found in the decision of Justice Gomery in *Gennings v. Lum*, 2020 BCSC 1196, at paragraphs 9-14.

- [12] The plaintiff says that the capacity evaluations have not been shown to be necessary, and that they would run afoul of the well-established rule against the further examination merely serving to bolster the opinions of others.
- [13] The defendants submit that this is not a case of bolstering. The occupational therapist, Mr. Rosen, has skills distinct from those of Dr. Prout, and the process of his FCE and C-FCE assessments will entail Mr. Rosen administering testing that Dr. Prout did not carry out and, given that Dr. Prout is a neurologist, would not be expected to carry out. It will be, the defendants submit, a standalone report. The defendants further submit that requiring the plaintiff to undergo these assessments is proportional to the size of the plaintiff's claim, and that the plaintiff's complaints are so complex that the evidence of an expert with a different methodology and different perspective can only be of assistance to the jury. The defendants concede that Dr. Prout did opine on the plaintiff's physical symptoms, but they note the limitations he expressed as to his expertise and submit that Dr. Prout's opinion is vulnerable to the criticism that it is not based on testing. The capacity assessments would address that gap in the evidence.
- [14] I find the latter point, however, tantamount to a request that the defence be allowed to bolster the opinion of Dr. Prout with that of another expert. To do so on the basis that Mr. Rosen employs different methodologies would be to commit the same error as that found in *Anderson v. Steffen*, 2021 BCSC 252. In that case, an appeal from the decision of a master, the plaintiff had been ordered to undergo a defence FCE by an occupational therapist, a Mr. Winter, when the plaintiff had already undergone by consent an examination by a defence psychiatrist, a Dr. Waseem. In allowing the plaintiff's appeal against that ruling, Mr. Justice Milman wrote:
- [55] . . . the master recognised that: Dr. Waseem will have assessed Mr. Anderson's physical injury and impairment. Given that he routinely opines on such matters, it is reasonable to infer that Dr. Waseem may also provide an opinion on Mr. Anderson's vocational disability.
- [56] On the other hand, the master reasoned: there is no suggestion that Dr. Waseem performed an FCE with the testing described by Mr. Winter. An FCE would provided the defendants, and in turn the trial judge, with relevant evidence of Mr. Anderson's actual functional abilities, including his capacity, tolerance and productivity.

- [57] In my view, the master thereby underestimated the potential for overlap in the two reports.
- [15] Justice Milman continued,
- [58] In arriving at his conclusion, the master therefore appears to have misdirected himself as to the applicable test. In particular, the outcome should not have turned on the fact that Mr. Winter has "different qualifications" and will apply a "different methodology" from those of Dr. Waseem. Such a test would be far too permissive, having regard to the authorities cited above. Rather, the outcome should turn instead on whether, in light of that fact, the defendants have shown that the proposed FCE can answer a question that Dr. Waseem could not have answered in his report.
- [16] The report of the physiatrist, Dr. Waseem, had not been produced when the initial application was heard before the Master. It was available by the time of the appeal, and Justice Milman admitted it as fresh evidence. Dr. Waseem had made specific findings as to the extent of the plaintiff's disability, opining that the plaintiff's ability to sit for a prolonged period of time was impaired by chronic low back pain; that he retained capacity for sedentary to light employment; and that he should be restricted from moderate to heavy lifting or carrying. Justice Milman noted that Dr. Waseem specifically recommended that the plaintiff undergo an FCE but held that was insufficient to warrant ordering same:
- [65] Although Dr. Waseem included in his list of "recommendations for future treatments," among other things, "a functional capacity evaluation to ascertain Mr. Anderson's capacity for physical labour with comment on physical shortcomings and deficits," I am not persuaded that that recommendation, by itself, suffices to support the relief that the defendants are seeking. Whatever additional need may persist for treatment purposes in that regard, it evidently did not preclude Dr. Waseem from arriving at and conveying his own opinions on the salient questions that were put to him.
- [17] Similarly, in the present case Dr. Prout was asked to opine on the plaintiff's physical condition. The opinion he provided was unequivocal. If anything, the defendants in the present case are on even weaker ground than the applicant in Anderson, as Dr. Prout, unlike Dr. Waseem in that case, did not recommend an FCE.
- [18] I do not have the report of the plaintiff's physiatrist, Dr. Krassioukov, and I am therefore unable to find there is anything in his opinion that makes it necessary to order a further examination in order to level the playing field.
- [19] To grant the application would not put the parties on an even or more even footing; if anything, it is likely to lead to the plaintiff seeking an FCE of his own, thereby causing proliferation of reports. That is not the intention behind the Rule.
- [20] Further, though the defendants have stated they would take no issue with respect to the late filing of a plaintiff's FCE, there must be only a limited number of occupational therapist qualified to perform both FCEs and C-FCEs who, even if they could be located and retained, would have time available to conduct the assessments and write their reports prior to trial,

thereby raising the prospect of the trial, which deals with accidents that occurred more than six years ago, being adjourned and the adjudication of the plaintiff's claim being further delayed. That is not in anyone's interest.

[21] Fundamentally I am not satisfied that the factual issues surrounding the plaintiff's condition cannot be fairly and justly resolved by a jury on the expert evidence as it currently stands, and for those reasons the application is dismissed.

[22] The plaintiff will have his costs as costs in the cause. "A. Saunders J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/24/22/2024BCSC2218.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mackenzie-v-vanderwal-2024>

Prepared on 25 October 2026 · Esheria