

CANADA / JUDGMENT

Marcon v. Lacasse

2021 BCSC 1053

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1053 Marcon v. Lacasse

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marcon v. Lacasse,

2021 BCSC 1053

Date: 20210601

Docket: M20246

Registry: Nelson

Between:

Amy Marcon

Plaintiff

And

Jennifer Lynn Lacasse

Defendant

Before: Master Bilawich

Reasons for Judgment

Counsel for Plaintiff, by videoconference:

R. Sookorukoff

Counsel for Defendant, by videoconference:

G. Hall

Place and Date Hearing:

Kamloops, B.C.

April 27, 2021

Place and Date of Judgment:

Kamloops, B.C.

June 1, 2021

- [1] The defendant seeks an order that the plaintiff attend for a Functional Capacity Evaluation ("FCE") at the office of Sheila Branscombe in Kamloops on June 5 and 6, 2021.
- [2] The plaintiff opposes on the basis that the proposed FCE would unduly overlap with a prior defendant medical examination with an orthopaedic surgeon, Dr. Gharsaa.

Background

- [3] This action arises from a motor vehicle accident which occurred on August 25, 2017 in Castlegar, B.C. The vehicle the plaintiff was driving was struck from the rear. Liability is admitted. The plaintiff claims for injuries to her neck, right shoulder, low back, headaches and psychological injuries. The plaintiff was working full time as a registered nurse in a hospital on a medical floor at the time of the accident and was approximately 5 months pregnant.
- [4] On January 16, 2018, the plaintiff filed her notice of civil claim. On March 29, 2018, the defendant filed her response to civil claim.
- [5] On September 18, 2019, the defendant examined the plaintiff for discovery.
- [6] On September 8, 2020, a notice of trial was filed, returnable March 1, 2021 in Nelson. The parties were prepared to proceed to trial on that date, but unfortunately no judge was available.
- [7] The plaintiff scheduled a case planning conference, which was held on March 10, 2021 before Mr. Justice Groves. An order was made resetting the trial for the November 22, 2021 assize in Nelson, B.C. for 8 days.
- [8] The plaintiff has served the following expert reports on the defendant:
 - a) Dr. MacInnes (pain management specialist and anesthesiologist), report dated November 28, 2020 and second report dated December 30, 2020 responding to report of Dr. Gharsaa;
 - b) Mr. Cole (kinesiologist), FCE dated November 30, 2020;
 - c) Mr. Sheldon (economist), past and future earnings and non-wage benefits report dated November 30, 2020 and cost of future care report dated December 30, 2020; and,

- d) Dr. Trueman (psychiatrist), report dated December 7, 2020.
- [9] The defendant notes that in November 2020, the plaintiff travelled to Vancouver, B.C. for a multi-expert assessment as the first trial date was approaching. This included examinations by Dr. MacInnes, Mr. Cole, and a Dr. Maloon (orthopedic surgeon). The plaintiff did not serve any report from Dr. Maloon.
- [10] The defendant has served the following expert reports on the plaintiff:
- a) Dr. Gharsaa (orthopedic surgeon), report dated November 24, 2020 and second report dated February 18, 2021 responding to the report of Dr. MacInnes;
- b) Ms. Branscombe (occupational therapist), report dated January 13, 2021 responding to the FCE report of Mr. Cole; and,
- c) Mr. Gosling (economist), report dated February 19, 2021 responding to the report of Mr. Sheldon.
- [11] Mr. Sheldon's report opines that the plaintiff's past income loss was about \$181,895 and loss of future earnings of about \$877,500. There is also a loss of pension benefits estimate at \$111,200 to \$119,200. Total income loss found in his report is about \$1,178,595. His cost of future care report concludes that this loss is about \$273,560.
- [12] The defendant says that the magnitude of the damages the plaintiff is claiming took her somewhat by surprise. Defendant's counsel pointed to the relatively mundane description of injuries and damages in the original notice of civil claim and notes that it was not until March 18, 2021, after the parties lost their original trial date, the plaintiff amended her notice of civil claim to refer to these major injuries and damage claims. Paragraph 6 of Part 1, Statement of Facts, was amended as follows (amendments underlined):
- a) Soft tissue injury to neck and right shoulder;
- b) Pain, numbness and decreased range of motion of right shoulder;
- c) Whiplash injury to the back and neck;
- d) Cramping, anxiety and increased pain during pregnancy;
- e) Such other injuries as will be provided by counsel;
- f) Chronic whiplash-associated disorder;
- g) Chronic mechanical spine pain;
- h) Chronic myofascial pain syndrome;
- i) Chronic nociceptive (soft tissue) right shoulder pain;
- j) Mood and anxiety symptoms;
- k) Sleep disruption; and

l) Major Depressive Disorder with Anxious Distress.

[13] In Part 2, Relief Sought, the amendments included the following:

- a) The Plaintiff claims general damages;
- b) The Plaintiff claims loss of earnings and earning capacity past, present and future;
- c) The Plaintiff claims loss of housekeeping capacity;
- d) The Plaintiff claims the cost of future care;
- e) The Plaintiff claims special damages;
- f) The Plaintiff claims interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79; and,
- g) The Plaintiff claims costs.

[14] The defendant framed this application as being an effort to arrange further expert evidence to address gaps relative to the plaintiff's array of expert reports.

[15] In Dr. MacInnes' report responding to that of Dr. Gharsaa, Dr. MacInnes takes issue with Dr. Gharsaa's ability to provide an opinion concerning disability, stating:

In my opinion, Dr. Gharsaa has not undertaken a complete chronic pain assessment of Ms. Marcon. From review of his report, Dr. Gharsaa has completed a history, physical examination, and review of the records. With respect to any psychological or social factors, there was no record that these factors were addressed or discussed. Dr. Gharsaa has not made any inquiry or comment on these essential factors and the role that they may be contributing to Ms. Marcon's pain experience. As any trained pain physician is aware, if psychological factors are not addressed and taken into consideration when formulating an assessment of a patient, then the assessment is incomplete. Without a complete assessment, it is my opinion that one cannot make comments on a patient's disability or limitations. Given the incomplete assessment of Ms. Marcon by Dr. Gharsaa, I am unable to accept his opinion.

[16] Dr. Gharsaa's response to Dr. MacInnes' critique is found in his report of February 18, 2021:

First, I would like to mention that I do agree with Dr. MacInnes that I did not perform a chronic pain assessment as this is not my scope of expertise, and I was asked to address Ms. Marcon from the orthopedic perspective and not from the chronic pain perspective as this is outside the scope of my expertise. I do agree that chronic pain is a multi-factorial condition that involves physiological as well as psychological factors. The psychological factors were not addressed in my report as this is, again, out of my scope of expertise.

- [17] Ms. Branscombe (occupational therapist) responded to Mr. Cole's report by conducting a records review relating to his report. Plaintiff's counsel indicated they intend to object to her report on the basis that she did not assess the plaintiff and her report is argument in guise of opinion. Counsel refers to *L.A.F. v. G.M.F.C. Ltd.*, 2019 BCSC 2252 at paragraph 164, in which Madam Justice Shergill made some critical comments concerning a similar report of Ms. Branscombe in that case:
- [164] The defendants rely on the evidence of Sheila Branscombe, an occupational therapist, to challenge Ms. Szarkiewicz's opinion. Ms. Branscombe authored a Cost of Future Care Analysis - Response Report, dated April 19, 2019. This is essentially a critique report of Ms. Szarkiewicz's methodology. I found Ms. Branscombe's evidence unhelpful and unreliable, and have placed no weight on it. Ms. Branscombe has never met Ms. F. and did not review any of the source documents in preparing her report, which is essentially argument in the guise of opinion. In addition, her testimony lacked objectivity, and exhibited an obvious bias in favour of the defendants.
- [18] On March 25, 2021 defendant's counsel asked that the plaintiff attend for a 6-hour FCE with Ms. Branscombe, to be conducted over two days.
- [19] The plaintiff refused to do so, on the basis that the proposed FCE would not address any question that was not or could not have been addressed by Dr. Gharsaa. She says an FCE would overlap considerably with his opinion and would constitute an impermissible attempt to bolster his opinion. Plaintiff's counsel has also raised a concern that the proposed assessment would aggravate the plaintiff's symptoms. She says that the November 6, 2020 FCE she attended with Mr. Cole aggravated her physical and psychological symptoms for several months afterwards. Dr. Gharsaa refers to this in his report. Plaintiff's counsel says that a further FCE would be invasive, painful, overlap with Dr. Gharsaa's opinion and is unnecessary.
- [20] The defendant says the FCE is necessary to put the parties on an equal footing with respect to medical evidence, and notes that the quantum of damages being claimed by the plaintiff is of such a level as to warrant allowing the defendant's request for a further assessment.

Defendant's Argument

- [21] The defendant organizes her submissions to address the four factors set out in Mr. Justice Blok's reasons in *Kenny v. Bateman*, 2017 BCSC 900, namely:
- a) Fairness and Equality
 - b) New, Unforeseen or Different Matter or Issue
 - c) Proportionality
 - d) Timeliness of the Application

- [22] Under "Fairness and Equality", she refers to paragraph 32 of *Tran v. Abbott*, 2018 BCCA 365 and says the order sought is needed to put the parties on an equal footing. The plaintiff has opinions from a pain specialist and a kinesiologist, with the latter opinion supported by a full day FCE. Contrasted with this, the defendant only has the opinion of an orthopedic surgeon.
- [23] Counsel notes that during the plaintiff's multi-disciplinary assessment in November 2020, there were three evaluations; a pain specialist (Dr. MacInnes), a kinesiologist (Mr. Cole) and an orthopedic surgeon (Dr. Maloon). He also points to Dr. MacInnes' critique and suggests this supports the view that further assessment is appropriate.
- [24] Counsel says there are fundamental differences between orthopedic medicine and occupational therapy. Ms. Branscombe's evidence is that occupational therapists assess demonstrated performance of function/disability while orthopedic surgeons opine on anticipated function/disability.
- [25] Counsel also notes that the plaintiff's income loss claims come to about \$1.2 million. This is predicated on an assumption that the plaintiff is permanently restricted to just 60% of her pre-accident work capacity due to her injuries. Accordingly, both the nature of the disability and extent of the remaining occupational capacity need to be assessed.
- [26] Counsel also points to what he says is an inconsistency in the plaintiff's position, namely objecting to the admissibility of Ms. Branscombe's report based on her not having conducted an examination, but objecting based on overlap when steps are proposed to address that shortcoming.
- [27] The defendant says the focus of the plaintiff's concern is overlap relating to disability, however, in personal injury claims most, if not all, specialists conducting assessments will opine on disability. If one takes this concern to its logical conclusion, it would mean that one specialist opining on disability would preclude any subsequent assessments by others on the basis that the first had already addressed disability.
- [28] Another logical extension of the plaintiff's argument is that defendants will never be permitted functional capacity evaluations of plaintiffs because in all cases the defendant will need some form of medical assessment to diagnose an injury and that opinion will include a statement concerning disability and that would automatically preclude an FCE.
- [29] Counsel for the defendant characterizes the plaintiff's position as effectively suggesting that the defendant should not have any evidence on work capacity at trial. In view of the size of the loss of income claim, fairness requires that the defendant be able to secure evidence addressing not only diagnosis, causation and prognosis, but also evidence measuring the plaintiff's remaining work capacity.
- [30] Under the heading "New, Unforeseen or Different Matter or Issue", the defendant argues that when the plaintiff was examined for discovery in September 2019, there was no opinion evidence available suggesting she would be limited to 60% work capacity permanently. In

October 2019, just weeks after the discovery, the plaintiff went off work entirely. Mr. Sheldon's income loss report dated November 30, 2020 was the defendant's first notice that the plaintiff was claiming about \$1.2 million in loss of income based on her being restricted to 60% work capacity permanently.

- [31] With respect to "Proportionality", the defendant relies on an excerpt in Kenny at paragraphs 64-66:
- [64] In *Stocker v. Osei-Appiah*, 2015 BCSC 2312, Pearlman J. discussed the principle of proportionality:
- [25] Further, proportionality was a relevant consideration under Rule 1-3(2)(a). The court held that where the amount involved was likely to be significant and the issues in dispute were important to both parties, proportionality supported the defence orthopedic examination.
- [65] In that case the plaintiff had a potential claim for four years' past wage loss in the amount of \$200,000 and a claim for loss of future earning capacity for eight years from the trial date to retirement at age 65. Pearlman J. found that, given the significant amounts claimed, proportionality weighed in favour of granting the defendant a further examination (at para. 31).
- [66] Accordingly, if the claimed damages are significant, courts will be more likely to exercise their discretion to order further IMEs: see also Gawlick at para. 25; Wright at para. 10.
- [32] The defendant argues that a permanent 40% disability claim with attendant \$1.2 million dollar income loss claim strongly favours a FCE.
- [33] With respect to the plaintiff's expressed concern regarding that a FCE would aggravate her symptoms, the defendant says that the previous FCE by Mr. Cole occurred on November 6, 2020 and was immediately after assessments by Dr. MacInnes and presumably Dr. Maloon.
- [34] With respect to "Timeliness of the Application", the defendant says the proposed assessment is June 5 and 6, 2021 and the 84 day deadline for service of expert evidence is August 30, 2021. The application is being made in a timely manner.

Plaintiff's Argument

- [35] The plaintiff relies heavily on Mr. Justice Milman's recent decision in *Anderson v. Steffen*, 2021 BCSC 252, which considered an appeal from a Master's order that the plaintiff in that case attend a FCE but not a vocational assessment. The plaintiff had already been assessed by a physiatrist at the defendant's request. The physiatrist's report was not in evidence before the Master, but was admitted as fresh evidence at the hearing of the appeal.
- [36] At paragraph 42 of his reasons, his Lordship stated:

[42] On the other hand, there is other authority holding that the kind of questions answered by an FCE may indeed overlap so much with those that a psychiatrist or an orthopedic surgeon can answer that a second IME by the former may not be appropriate or necessary after the plaintiff has already undergone an IME by the latter.

[underlining added]

[37] After reviewing the authorities, he summarized the applicable test:

[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 [the psychiatrist]. 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.

[underlining added]

[38] His Lordship allowed the appeal and reversed the learned Master's decision, concluding that the plaintiff was not required to attend the FCE but was required to attend a vocational assessment.

[39] The plaintiff says Anderson is consistent with a large body of authorities in which the court has dismissed defence applications for a FCE after the plaintiff attended an independent medical examination with an orthopedic surgeon, including:

- a) *Norsworthy v. Greene*, 2009 BCSC 173 - this case was referred to in *Tran*. The plaintiff attended her own assessor for a FCE and the report was provided to the defendant. The defendant chose to have the plaintiff initially examined by an orthopedic surgeon and later applied to compel her to attend a second examination, a defendant FCE. Master Taylor dismissed the application on the basis (paragraph 18) that the case law establishes that a second examination on the same subject matter will not be allowed, however it would be appropriate if there is some question which could not have been dealt with in the first examination. He compared the plaintiff's FCE with the report of the defendant's orthopedic surgeon's report and (paragraph 22) concluded that despite the fact the two reports were prepared by persons with completely different disciplines and approaches, there was noticeable cross-over in some of the observations made by each of them. He commented (paragraph 26) that despite the different purposes of the reports, that was not sufficient reason for a second report.
- b) *Stocker v. Osei-Appiah*, 2015 BCSC 2312 - the plaintiff had a FCE carried out by a disability insurer and delivered the resulting report to the defendant. The defendant arranged to have the plaintiff examined by a psychiatrist and orthopedic surgeon, and was seeking to compel two more, namely a FCE and vocational assessment. Mr. Justice Pearlman dismissed the request for a FCE but ordered the vocational assessment. He found that proportionality

favoured the further examinations, but second examinations were not permitted to try to bolster an earlier opinion of another expert. The defendant must show that there is some question or matter that could not have been dealt with at the earlier examination. The defendant was also aware at an early stage about the FCE performed by the disability insurer and it put the defendant on notice that the plaintiff's functional capacity, both at home and in the workplace, was in issue. The defendant had also instructed the earlier experts to provide opinions on whether and to what extent the plaintiff is restricted or disabled regarding employment or activities of daily living. Those instructions overlap with the subject matter of the FCE now being sought by the defendant.

- c) *Miller v. Deerenberg*, 2018 BCSC 1872 - the plaintiff had served one report by a physiatrist and had been assessed by an occupational therapist. The defendant arranged to have the plaintiff assessed by an orthopedic surgeon. The defendant then applied to have the plaintiff attend an FCE. Master Bouck dismissed the application on the basis that a FCE was not necessary to put the parties on an equal footing. There was no new opinion or unforeseen event that needed to be addressed in a further FCE. She was concerned that a further FCE could only be intended to bolster existing medical opinions and tip the balance in favour of the defendant.
- d) *Gray-Verboonen v. Mandurah*, 2019 BCSC 1697 - the plaintiff had already attended defence examinations with an orthopedic surgeon and a psychiatrist. The defendant then applied to compel the plaintiff to attend a FCE. Neither of the defence reports had been produced at the time of the applications but the letters of instruction were before the court. Master Muir dismissed the application, saying Tran had addressed the question of there not being a higher onus on a second medical examination, but it had not commented on the need to show that a previous examination had not traipsed over the intended field of the proposed examination. Both defence experts were qualified to provide opinions on work capacity and had the benefit of very recent assessments of the plaintiff but the scope of their opinions was not known. She concluded that the defendants had not established the necessity for an FCE and dismissed the application.
- e) *Rong v. Yelland*, 2019 BCSC 2071 - the plaintiff attended a defendant arranged examination by an orthopedic surgeon but refused to attend a FCE with a kinesiologist. Master Cameron dismissed an application to compel the plaintiff to attend for an FCE based on concern about overlap. The evidence on that application did not include the instructions defence counsel gave to the orthopedic surgeon and whether he had informed defence counsel that he was limited in the opinion he could provide with respect to the plaintiff's functional capacity. It was not possible to determine whether a FCE was necessary to put the parties on an equal footing to prepare for trial.
- f) *Gennings v. Lum*, 2020 BCSC 1196 - the plaintiff attended four defence examinations, including with a psychiatrist, orthopedic surgeon, neurologist and registered psychologist / vocational counsellor. A defendant applied to compel the plaintiff to attend a FCE. Mr. Justice Gomery dismissed the application based on a concern that the FCE would bolster

opinions already obtained. He also commented that while none of the defence experts was an occupational therapist or had prepared an FCE, it was not clear such an evaluation would provide greater insight into the plaintiff's condition and prospects.

- [40] With respect to Ms. Branscombe's description of the substantial differences between occupational therapy and orthopedic medicine, the plaintiff says her evidence is similar to the letter that was before Master Bouck in Miller - see paragraph 9. Ms. Branscombe's focus is on the differences in qualifications and methodology of orthopedic surgeons and occupational therapists. She does not indicate that she can answer a question that Dr. Gharsaa cannot or that he was not qualified to comment on functional capacity. The plaintiff also notes there is no evidence from Dr. Gharsaa indicating he was not qualified to comment on physical capacity. This was a concern for Master Cameron in Rong - see paragraph 19. The plaintiff says the defendant's argument is the same one that was rejected in all of the authorities she relies on. In Anderson, Mr. Justice Milman concluded at paragraph 58:

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 [occupational therapist] has "different qualifications" and will apply a "different methodology" from those of Dr. Waseem [physiatrist]. 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.

[underlining added]

- [41] With regard to the plaintiff's objection to Ms. Branscombe's response report, the plaintiff says that the primary objection is not that she failed to assess the plaintiff, but rather that it is argument in the guise of opinion because it comments on causation and attempts to draw attention to credibility issues.
- [42] With regard to the defendant's argument that the plaintiff's argument leads to the necessary conclusion that defendants are never permitted a FCE, the plaintiff says this misstates the appropriate conclusion, which is that a defendant is entitled as of right to an FCE if they chose it as their initial examination, as opposed to a second examination. One may also be appropriate where it is sought due to passage of time, stale reports or where there is evidence of a gap or limitation in the initial examination.
- [43] With respect to the defendant's suggestion that she was taken by surprise by the extent of the plaintiff's claim, the plaintiff points to evidence she gave at her examination for discovery and the fact that she had listed her Great West Life long term disability file in advance of the discovery. At discovery she was asked what had changed in her ability to work and answered "Almost everything I can't do pretty much any aspect of my job that I owned at the time of the accident." She asked if the questioner wanted specifics and then went on to describe her limitations.

- [44] The Great West Life file was listed on October 7, 2019 but prior counsel for the defendant apparently did not request a copy. It was requested and provided to counsel on November 5, 2020. It contains letters and reports which reference numerous and ongoing functional limitations. On November 27, 2019 and December 13, 2019, plaintiff's counsel advised the adjuster assigned to the case that the plaintiff was off work again and provided her a copy of the Great West Life file. Accordingly, there should not have been any surprise that functional capacity was in issue.
- [45] In spite of the fact all of this had been disclosed prior to the defendant's first medical examination of the plaintiff, the defendant elected to have her examined by an orthopedic surgeon (Dr. Gharsaa) on November 20, 2020 and instructed him to address her functional capacity and work limitations, rather than sending her for a FCE.
- [46] With regard to the defendant's argument that proportionality takes on a greater significance in this case, the plaintiff says that proportionality is just one of several considerations and it is not paramount and is not a basis for ordering unjustified investigations. The plaintiff points to how proportionality was addressed in Gennings, Stocker and Anderson, cases which also involved plaintiffs who had not returned to work and were advancing sizable loss of capacity to earn income claims, yet had FCE requests rejected.
- [47] Finally, the plaintiff points to her evidence, and that from her GP, that she suffered physical and mental hardship following the November 6, 2020 FCE and another is contrary to her doctor's advice.
- [48] The plaintiff suggests that its position would be different had the defendant requested a psychiatric examination or a vocational assessment, as those would likely deal with questions not already put to Dr. Gharsaa and would be less invasive.

Defendant's Reply

- [49] The defendant in reply argued that in Anderson the court erred in its application of the test under Rule 7-6 and failed to mention several factors set out in Kenny, which case was approved by the Court of Appeal in Tran on the central point regarding the standard required for subsequent examinations and which further alludes to the factors in Kenny. In Anderson the court focused on whether there was overlap as between the two specialties and took too narrow of a view of the test. Counsel further argued that the court did not consider proportionality. The court in Tran indicated that the rules should be given a fair and liberal interpretation to meet the objectives of securing a just determination of every proceeding on its merits and to encourage full disclosure. They say the approach taken in Anderson cannot be reconciled with the Court of Appeal's approach in Tran. Alternatively, even if Anderson is correct in law, it can be distinguished on its facts from the present case, including based on the need for proportionality.

Law and Analysis

[50] Court ordered medical examinations are governed by Rule 7-6:

Rule 7-6 -- Physical Examination and Inspection

Order for medical examination

- (1) If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make
 - (a) an order respecting any expenses connected with the examination, and
 - (b) an order that the result of the examination be put in writing and that copies be made available to interested parties of record.

Subsequent examinations

- (2) The court may order a further examination under this rule.
- [51] This rule is intended to help balance a plaintiff's advantage in obtaining expert evidence by providing the defendant a reasonable opportunity to arrange expert assessment and evidence.
- [52] In *Gennings v. Lum*, 2020 BCSC 1196 at paragraphs 9-14, Mr. Justice Gomery summarized the relevant considerations, as follows:
- [9] Supreme Court Civil Rule 7-6(1) authorizes the court to order an independent medical examination of a plaintiff in a personal injury action. The purpose of an IME is to put the parties on an equal footing with respect to the medical evidence; *Tran v. Abbott*, 2018 BCCA 365 at para. 32 [Tran]; *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309 at para. 31. While an assessment of what steps are necessary to achieve the goal of putting the parties on an equal footing is discretionary, the court must consider the effect of refusing an IME on the conduct of the trial; *Tran* at para. 40.
 - [10] The goal of putting the parties on an equal footing does not necessarily require matching expert for expert or report for report; *Hamilton v. Pavlova*, 2010 BCSC 493 [Hamilton] at para. 12, *Gray-Verboonen v. Mandurah*, 2019 BCSC 1697 [Gray-Verboonen] at para. 15.
 - [11] The applicant bears the burden of showing that the IME is necessary; *Stocker v. Osei-Appiah*, 2015 BCSC 2312 [Stocker] at para. 19; *Rong v. Yelland*, 2019 BCSC 2071 [Rong] at paras. 9-12. It is not the law that a second or subsequent IME is only justified in exceptional circumstances; a dictum to this effect in *Hamilton* at para. 16 was repudiated in *Tran* at paras. 27-28. However, it is the case that a further IME is not necessary if it would only serve to bolster an opinion already obtained by the defendant; *Gray-Verboonen* at para. 15. In *Stocker* at para. 33, Justice Pearlman stated :

- [33] A second examination will not be permitted for the purpose of attempting to bolster an earlier opinion of another defence expert. In meeting the higher threshold for a further examination, the defendant must show that there is some question or matter that could not have been dealt with at the earlier examination.
- [12] Where the defendant has already obtained an IME or IMEs and the question is whether a further IME should be ordered, the court must assess the questions already addressed, the differing specialities of the assessors, and the often uncertain path taken in the development of a differential diagnosis in a difficult case; *Kim v. Lin*, 2010 BCSC 1386 [Kim] at paras. 21-27.
- [13] In every case, the court must consider whether the IME sought is proportionate having regard to the magnitude of the plaintiff's claims and complexity of the medical issues; *Kim* at paras. 33-35.
- [14] The court must also consider whether the application is brought in time to permit admissible evidence to be adduced by the defendant at trial without undue prejudice to the plaintiff; *Vermuelen-Miller v. Sanders*, 2007 BCSC 1258 at paras. 47-48; *Hamilton* at para. 15. It is common ground that timeliness is not a concern in this case.
- [53] The key point of contention on this application is whether there is impermissible overlap between the opinion provided by the defendant's orthopedic surgeon, Dr. Gharsaa and the proposed FCE by Ms. Branscombe.
- [54] Dr. Gharsaa examined the plaintiff on November 20, 2020. At the time, she complained that the FCE with Mr. Cole, which she attended two weeks earlier, had caused some discomfort and had "triggered something". She reported that she felt she was 60 percent from a physical perspective, and that her pain level was 4/10 on a good day and 8-9/10 on a bad day. She reported having more good days than bad.
- [55] She reported to Dr. Gharsaa that her pre-accident position had been full time and was a physical one requiring transferring patients and helping with medications. She went on maternity leave following the accident. She returned to work in May 2019 in a part time role doing desk work only and had no dealings with patients. This continued until the end of August 2019. Next she took on a medical surgical educator position which was also a desk job and was a 75% full time position. This lasted for two months, after which she went off work and reported her leg was giving out. She had been off work since November 2019. She did a couple of months work from home doing laboratory bookings. At the time of the exam she was waiting for approval in a charge nurse role on the medical floor. That job would not have any patient care. She was applying for three days a week, eight hours per day as a start.
- [56] There is also a section of Dr. Gharsaa's report which reviews the status of her activities of daily living. She reported doing the same tasks but with pain, and her husband taking on a larger share of chores.
- [57] Dr. Gharsaa describes in some detail his physical examination of the plaintiff.

[58] In his impression and opinion, he indicates, among other things, that a SLAP lesion in her right shoulder may have been present but asymptomatic until the accident, that her reported lower back pain is not related to the motor vehicle accident as scans indicated it was a chronic condition, and that the soft tissue injuries to her neck involve sprain and strain at whiplash-associated disorder (WAD) 1 to 2 at the most. These typically heal within 6 to 12 weeks. She clearly has some evidence of bilateral foraminal stenosis, which in his opinion is chronic in nature and not related to the accident. Based on his file review, it seems like her main issue initially was her neck and shoulder, and it was not until quite some time after the accident where she started to report low back pain, which is not uncommon, especially at the end of a pregnancy and with underlying MRI and CT scan findings as well as possibly some deconditioning.

[59] Under results of his clinical assessment, he states:

My diagnosis at this point as a result of the MVA is sprain and strain of her shoulder and neck with a possible SLAP tear. Examination today identified some slight discomfort with extreme range of motion of her shoulder right side, but she demonstrated full range of motion. She also had some tenderness on palpation of her right trapezius muscle. Examination of the neck was unremarkable.

[60] Under question 6 posed by counsel for the defendant, his opinion is requested about his prognosis as to the duration of the injuries related to the accident and the degree of present and residual disability, if any. His response is:

The prognosis from the injuries sustained in the motor vehicle accident, including her neck strain her right shoulder strain and possible SLAP lesion, is good, especially now after the surgery to repair the issue. Structurally speaking now, no functional limitation or physical restriction would be required. AS for her low back pain, which in my opinion is unlikely the result of the subject motor vehicle accident, her prognosis will depend on how strong her back is, understanding that the stronger her back is the more her pain will be controlled, and her prognosis will be negatively impacted with less core strengthening.

[61] Under question 7, he is asked to include his opinion on how the plaintiff's injuries from the accident have affected her pre-accident potential ability to perform her work or enjoy recreational activities. He is asked to please include his opinion as to the plaintiff's present and future ability to work and his opinion as to how much time off work would be reasonable in light of her injuries and her job duties. His response is:

According to Ms. Macron she is unable to perform her job as an RN due to her right shoulder. At this point structurally speaking and the results of the injuries sustained in the motor vehicle accident, including her right shoulder issues and her neck, no functional limitation or physical restriction would be required. Any restriction at this point would be self-inflicted depending on her own perception of pain. At this point there is no medical contraindication for her to return to her pre-accident activities and occupation. As for the low back pain, again it is my opinion that this is unlikely a result of the subject motor vehicle accident for the reasons mentioned above. As

for time off work, it is hard to determine the exact time given that there was a period of time that she had no diagnosis until she had an MRI done. With soft tissue injuries individuals are usually off work 6 to 12 weeks, but given that she had more than just a soft tissue injury this may take longer. Six months after surgery would be reasonable for her to take time off of work given her occupation, which is a physical job. As for her new job that she applied for, which is a charge nurse without any patient interaction, in my opinion she should be able to return to that job full-time and full duties without any restrictions.

- [62] It is clear from the foregoing that Dr. Gharsaa did carry out a comprehensive functional capacity evaluation of the plaintiff when he assessed her on November 20, 2020 and that he formed the opinion that she has no functional capacity limitations and there is no reason she cannot immediately return to work on a full time and unrestricted basis. There is no "gap" in the defendant's expert medical evidence regarding the plaintiff's functional capacity. Further, the proposed new functional capacity evaluation by Ms. Branscombe would clearly be impermissibly duplicative of the assessment that Dr. Gharsaa carried out and has provided a detailed opinion on.
- [63] My conclusion on this point is likely determinative of the issues in this application, but I will also consider the other factors highlighted in *Kenny v. Bateman*.
- [64] Fairness and Equality - If one were to measure this purely based on number of experts and reports, the defendant has fewer experts and fewer reports than the plaintiff, but that appears to be a function of how the defendant has chosen areas of expertise for its examination and reports. Its sole primary opinion from Dr. Gharsaa concludes the plaintiff's complaints were moderate to minor at best and she has no limitation on her functional capacity that is attributable to injuries caused by the accident which is the subject of this action. If Dr. Gharsaa's opinion were to prevail at trial, that would be a full answer to Mr. Cole's FCE opinion.
- [65] The plaintiff has also indicated they would not likely object to a second examination by a psychiatrist or a vocational assessment.
- [66] In my view, there is no deficit of fairness and equality in these particular circumstances that the relief sought in this application would redress.
- [67] New, Unforeseen or Different Matter or Issue - The plaintiff has tendered evidence indicating that the plaintiff's disability/functional capacity issue should not have been a surprise to the defendant.
- [68] The plaintiff was examined for discovery more than two years post-accident. At that time she was working just 30 hours per week (substantially less than her full time hours pre-accident) and she was pursuing positions with far less physically demanding duties. The reduced hours of work were actually not dissimilar from the permanent loss of functional capacity figure Mr. Cole has indicated.

- [69] Excerpts from the defendant's examination for discovery of the plaintiff indicate that the plaintiff was asked and answered questions regarding her work and other limitations at the time.
- [70] The Great West Life long term disability file likewise contains information regarding the plaintiff's functional limitations. It was listed approximately two weeks prior to the examination for discovery. It was forwarded to the adjuster responsible for the claim in late 2019. Whether that adjuster shared it with defendant's former counsel at the time is not clear. There is also evidence that counsel for the plaintiff informed the adjuster that the plaintiff had stopped working not long after she was examined for discovery.
- [71] By the time the decision was made within the defendant's camp to send the plaintiff for an examination by an orthopedic surgeon, there was substantial information available which clearly indicated that the plaintiff's functional capacity was a significant issue.
- [72] Proportionality - The plaintiff's loss of capacity claim is sizable and as such this factor leans in favour of allowing additional examinations.
- [73] Timeliness of the Application - The defendant brought this application in a timely manner relative to the new trial date.

Conclusion

- [74] I have concluded that the proposed FCE by Ms. Branscombe would be impermissibly duplicative of the examination conducted by Dr. Gharsaa. The other factors I have reviewed overall also favour dismissal of the defendant's application, and I so order.
- [75] The defendant will pay the plaintiff costs of this application in any event of the cause.

"Master Bilawich"

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