
CANADA / JUDGMENT

McAvoy v. Nevison

2021 BCSC 155

COURT

Supreme Court of British Columbia

DECIDED

2 February 2021

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

2021 BCSC 155 McAvoy v. Nevison

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McAvoy v. Nevison,

2021 BCSC 155

Date: 20210202

Docket: M193165

Registry: Vancouver

Between:

Nathan McAvoy

Plaintiff

And

Robert Nevison, WTH Car Rental ULC,

and Andrew Alvarez Brown

Defendants

Before: Master Taylor

(In Chambers)

Reasons for Judgment

Counsel for Plaintiff, appearing via teleconference:

A. Krekovic

Counsel for Defendants, Nevison and WTH Car Rental, appearing via teleconference:

L. Kramchynski

Place and Date of Hearing:

Vancouver, B.C.

January 28, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 2, 2021

Introduction

- [1] The defendants, Robert Nevison and WTH Car Rental ULC, seek orders from the court to require the plaintiff to attend two defence medical examinations.
- [2] The defendants have arranged for the plaintiff to attend upon Dr. Steven Dommann, a neurologist, for examination by him on February 10, 2021 at 1:00 pm in North Vancouver.
- [3] The defendants have also arranged for the plaintiff to attend upon Dr. Eugene Okorie virtually on Saturday, February 6, 2021 at 9:00 a.m. for examination by him. Dr. Okorie is a psychiatrist.
- [4] The plaintiff agrees to attend upon Dr. Dommann, the neurologist on the date and time requested, but opposes the order being sought for the plaintiff to be examined by the psychiatrist.
- [5] As set out in the plaintiff's application response, because the plaintiff has claimed neurological injuries, and it is unknown what the opinion of Dr. Dommann will be with respect to those neurological injuries, the plaintiff is therefore unable to assess the merits of the request that the plaintiff attend a medical examination with a psychiatrist. Thus, the plaintiff opposes the psychiatric examination by Dr. Okorie.
- [6] Further, the plaintiff says that it would be best to postpone the psychiatric examination of the plaintiff until such time as the neurological report by Dr. Dommann has been provided to the plaintiff.
- [7] The defendants/applicants have provided a CV for each of Drs. Dommann and Okorie.
- [8] The application is made pursuant to Rule 7-6 of the Rules of Court.

Supreme Court Civil Rule 7-6 provides:

- (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.

Factual Background

- [9] This action arises from a motor-vehicle accident that occurred on August 11, 2017 in the City of Vancouver at the intersection of 4th Avenue and Yew Street. The vehicle driven by the defendant, Nevison, which was owned by WTH Car Rental ULC, collided with the vehicle driven by the defendant, Brown. The dynamics of this collision caused the Nevison vehicle to then come into contact with the McAvoy vehicle, which, at the time, was stopped for a traffic light.
- [10] The plaintiff, McAvoy, filed a notice of civil claim on March 22, 2019 in which he is seeking damages for sustaining marked disability, loss of enjoyment of life and capacity, special damages, loss of income past and prospective, loss of opportunity to earn income, and loss of housekeeping capacity.
- [11] In his notice of civil claim, the plaintiff alleges having sustained and suffered from headaches, neckaches, backaches, concussion, dizziness and sleep disturbance.
- [12] Examinations for discovery are tentatively scheduled to occur on either August 26 or 27, 2021. A trial has not yet been scheduled in this matter.
- [13] The plaintiff attended the Khatsahlano Medical Clinic on October 11 and November 17, 2017 with reports of headaches and mental foggiess. He was diagnosed with post-concussion syndrome.
- [14] Thereafter, the plaintiff was referred to the G.F. Strong Self-Management Program for persistent post-concussion symptoms. Consultation notes dated May 6, 2019 report ongoing issues with sleep, mood/anxiety, and headaches. Recommendations were made for referrals to a physiatrist or headache specialist regarding the plaintiff's headaches and to a registered psychologist regarding the plaintiff's complaints of mood and anxiety.
- [15] The plaintiff attended psychological counselling at Chuck Jung Associates on four occasions as one of the referrals from the self-management program from G.F. Strong Rehab Centre. All were approximately two years post-accident.

- [16] From the initial counselling report to ICBC from Chuck Jung Associates authored by Angela Leong, R.C.C., a recommendation was made that Mr. McAvoy continue counselling once every two weeks for 12 sessions to help him maintain his psychological coping while he continues to recover from the other physical and cognitive limitations he has acquired as a result of the accident.
- [17] The same report noted that Mr. McAvoy's results from the Beck Anxiety Inventory indicated a potentially concerning level of anxiety, and a level of depression at the extreme level.
- [18] Plaintiff's counsel arranged for Mr. McAvoy to be seen by Dr. Vance Tsai, an Otolaryngologist. Dr. Tsai assessed Mr. McAvoy on October 4, 2018 in regard to injuries received in the accident. Under the heading of "interpretation and prognosis", Dr. Tsai comments that the plaintiff's objective laboratory tests support significant abnormality to a neural pathway important for inner ear balance physiology. Further, he says that vestibular or inner ear injury is implicated as playing a significant role in causation of his imbalance, and his dizziness can be multifactorial given potential head injury and soft-tissue injury, such that these concerns often produce imbalance symptoms that may overlap with vestibular imbalance. He then defers further commentary from these perspectives to experts in these areas.
- [19] Interestingly, included in the clinical records related to the plaintiff was a medical report from Dr. Brian Thiessen, a neurologist, to Dr. Jacqueline Pus, dated September 23, 2013 reporting on an examination of Mr. McAvoy for complaints of mental foggy, lack of clarity as well as mild dizziness. Ultimately, Dr. Thiessen thought Mr. McAvoy's complaints of mental foggy were more related to his underlying anxiety.

Analysis and Decision

- [20] Simply put, the plaintiff suggests that it is premature to make a determination on whether or not it is necessary to order a psychiatric evaluation to ensure the parties are on equal footing to prepare for trial until we have the opinion of Dr. Dommann. In support of this position, the plaintiff cites *Joorawon v. Carchesio*, Vancouver Registry M172930, November 5, 2018, a decision of Master Baker, and cited by Master Cameron in *Rong v. Yelland*, 2019 BCSC 2071.
- [21] The burden is always on the applicant to show why the medical examination is necessary. This question was canvassed in *Williams v. Elvevoll*, 2005 BCSC 1703 where the court said:
- [12] Now, an examination under Rule 30(1) is ordered where required to place the parties on an equal footing with respect to medical evidence and if authority is required for that it is found in the case of *Stainer v. Plaza*, [2001] 4 W.W.R. 638, 87 B.C.L.R. (3d) 182.
- [22] In *Rong*, *Joorawon*, *Tran v. Abbott*, 2018 BCCA 365, and *Stocker v. Osei-Appiah*, 2015 BCSC 2312 the issue was whether or not the defendants in each of those cases had satisfied the court that it was entitled to a functional capacity evaluation of the respective plaintiff.

- [23] In *Stocker*, Mr. Justice Pearlman noted at para 19:
- [19] The plaintiff correctly submits the defendant bears the onus of establishing that the further medical examinations are necessary: *Henri v. Derbyshire*, [1999] B.C.J. No. 1750 (S.C.) at para. 15. Counsel for Mr. Stocker also argues no unforeseen circumstances arise here which would warrant further defence examinations of the plaintiff, particularly where the defendant has requested both the psychiatrist and the orthopedic surgeon to provide opinions on the plaintiff's present level of impairment or disability, and on whether, and to what extent the plaintiff is restricted or disabled for future employment or activities of daily living. The plaintiff contends there would be a substantial overlap between the reports to be provided by Drs. Rasmussen and Masri and the proposed functional capacity and vocational assessments.
- [24] In *Tran v. Abbott*, Mr. Justice Savage said:
- [27] In my view, there is nothing in the language of the Supreme Court Civil Rules, or in logic or reason, that would mandate exceptional circumstances as a requirement for a second IME. As noted by Blok J. in *Kenny*, a plaintiff displaying multifactorial injuries may appropriately be required to attend IMEs by a number of specialists (at para. 62). There is nothing exceptional in that.
- [28] The summary in *Hamilton* has been the foundation for the proposition that a higher standard is required to be met by a party seeking a second or subsequent IME. This supposed requirement, in my view, has no support in the language of the Rules. Simply put, different considerations apply to the assessment of whether a party should be granted a second or subsequent IME.
- [29] In referencing the higher standard requirement, *Hamilton* cites as authority *McKay v. Passmore*, 2005 BCSC 570. In *McKay*, the application was for a second IME by the same physician, an orthopaedic surgeon (at paras. 2-4). The application was granted as new symptoms arose after the first examination, and the court made it clear that a variety of circumstances could support a second examination by the same physician (at paras. 15-30).
- [30] As this Court noted in *Wildemann*, "[t]he rules are designed to secure a just determination of every proceeding on the merits and to encourage full disclosure" (at 246). The rules should be given a fair and liberal interpretation to meet those objectives.
- [31] In this case, the judge relied upon the proposition from *Hamilton* that a second IME would not be allowed for the purpose of attempting to bolster an earlier opinion of another expert (at paras. 11-12). As authority for that proposition, *Hamilton* refers to two cases: *Trahan v. West Coast Amusements Ltd.*, 2000 BCSC 691, and *Norsworthy v. Greene*, 2009 BCSC 173. However, both *Trahan* (at para. 48) and *Norsworthy* (at para. 18) state that a second examination may be appropriate where there is some question that could not have been dealt with on the first examination. Such a question arises where some of the plaintiff's injuries fall outside the first examiner's expertise.

- [32] In my view, it is well-established that the purpose of an IME is to put the parties on an equal footing with respect to the medical evidence, and Rule 7-6 specifically contemplates more than one IME: *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309 at para. 31.
- [40] The primary purpose of Rule 7-6 is to put the parties on an equal footing with respect to medical evidence. Although, in general, what steps are necessary to achieve that end is a matter of discretion for the chambers judge, the ruling in this case would preclude that equality. The judge erred in her application of the Rule.
- [25] The issue for determination in *Rong v. Yelland* was whether the defendant should be entitled to an independent medical examination with Dr. Kim Thompson who is a kinesiologist, and who would provide a functional capacity evaluation in respect of the plaintiff.
- [26] In August of 2019, defendant's counsel sent a letter to plaintiff's counsel advising that an independent medical examination had been arranged with Dr. Mark Boyle, an orthopedic surgeon, on October 29, 2019.
- [27] Two weeks later defence counsel sent another letter to plaintiff's counsel advising that arrangements had been made for the plaintiff to see Dr. Thompson, the kinesiologist, on November 20, 2019.
- [28] As of the date of the hearing, while the plaintiff had attended the requested medical exam with Dr. Boyle, no report from Dr. Boyle had been received or reviewed. In such a case, there arose a serious issue of overlap of the reports if the second IME with the kinesiologist had occurred.
- [29] In making his determination not to permit the second IME with the kinesiologist, Master Cameron said this:
- [19] .The evidence does not disclose the instructions that were provided to Dr. Boyle, and the evidence does not provide any indication as to whether Dr. Boyle has advised defence counsel that he is limited in the opinion that he may be able to provide with respect to the plaintiff's functional capacity. It is not possible to determine whether to ensure the parties are on equal footing to prepare for trial that it is necessary to order a functional capacity evaluation until that information is known.
- [30] A similar issue arose in *Norsworthy v. Greene*, 2009 BCSC 173.
- [31] The plaintiff had been seen by her own assessor to perform a functional capacity evaluation, and the functional capacity evaluation report had been provided to the defendant. Notwithstanding this knowledge, the defendants elected to have the plaintiff seen by Dr. Schweigel, an orthopedic surgeon, to conduct an independent medical examination on the plaintiff.

- [32] At the hearing brought by the defendant to seek an order to compel the plaintiff to attend a functional capacity evaluation for the defence, the plaintiff took the position that Dr. Schweigel had fully opined on the question of the plaintiff's capacity and therefore the defendants were not entitled to another assessment.
- [33] In dismissing the defendant's application, the learned master said this:
- [25] The IME sought by Dr. Schweigel was conducted after the defendants had knowledge of the earlier functional capacity evaluation of the plaintiff by an occupational therapist retained by the plaintiff, yet the defendants chose to have an IME conducted by an orthopedic surgeon. That opinion seems to be firm. Now the defendants seek an opinion of an occupational therapist which may undermine the opinion of Dr. Schweigel, their own expert.
- [26] Respectfully, in my view, although the defendants point to the different purposes of the reports, I do not believe that those differences alone provide a valid reason for a second report pursuant to Rule 30(2).
- [34] As part of their submissions in support of this application, the defendants provided to the court some general information obtained from the Canadian Medical Association which supply some basics about the practice of medicine in neurology and that of psychiatry.
- [35] As set out therein, neurology is the branch of medicine concerned with the study of the nervous system in health and disease. Neurologists diagnose and treat nervous system disorders involving the brain and spinal cord and other nerve and muscular conditions, while psychiatry is the medical specialty that deals with diseases of the mind. Central to the psychiatrist's role is a comprehensive assessment, leading to a diagnosis and a treatment plan for the care and rehabilitation of patients with mental illness, and emotional and behavioural disorders.
- [36] I think it could be fairly said, therefore, that neurologists do not treat depression and anxiety while psychiatrists do not treat physical and cognitive limitations, including significant abnormalities to a neural pathway important for inner ear balance physiology.
- [37] As the Court of Appeal said in *Tran v. Abbott*, supra, at para 17:
- [17] Rule 7-6 is a rule of discovery. It is designed to balance the plaintiff's advantage in obtaining expert opinions, by providing the defendant with access to the plaintiff for such prior to trial.
- [18] The rule is consistent with the "modern philosophy" that procedural rules should work to promote settlement before trial, and to ensure the speedy and inexpensive determination of each dispute on its merits.
- [38] I am of the view that the facts of this case are completely distinguishable from the facts of the cases upon which the plaintiff relies. The defendants have not sought any other medical examinations of the plaintiff, nor does it appear they will. They seek to engage two very

distinct disciplines of the medical profession to examine the plaintiff for two unique concerns the plaintiff has following the motor-vehicle accident. I am not troubled by the fact that neurology and psychiatry appear somewhat similar to some, rather they are very distinct disciplines with very different and exclusive methods by which they treat their patients. Therefore, I see no danger in any overlap of their investigations.

- [39] In the very unlikely possibility that there should be some overlap of the experts' reports, then that is a matter for the trial judge in these particular circumstances. To further alleviate any concern about overlap, each physician should be cognizant that he not engage in any form of opinion not within his acknowledged expertise.
- [40] While a trial date has yet to be set for this matter and examinations for discovery are scheduled to take place some months away, I see no reason why both defence medical exams should not take place on the dates scheduled. More to the point, I exercise my discretion to order that the plaintiff attend upon Dr. Okorie on February 6, 2021 at 9:00 am. There is no need to order the plaintiff to attend upon Dr. Dommann on a particular date and time as the plaintiff has already consented to that medical examination.
- [41] While the defendants have been successful in their application, I see the application as rather uncommon in the circumstances. Accordingly, I order that each party bear its own costs of the application.

Master G. Taylor

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/21/01/2021BCSC0155.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mcavoy-v-nevison-2021>

Prepared on 27 October 2026 · Esheria