

CANADA / JUDGMENT

McNeill v. Saunders

2019 BCSC 520

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 520 McNeill v. Saunders IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: McNeill v. Saunders, 2019 BCSC 520 Date: 20190326 Docket: M54243 Registry: Vernon Between: Jordan McNeill Plaintiff And Aubrey Saunders Defendant Before: Master McDiarmid in Chambers Oral Reasons for Judgment Counsel for the Plaintiff: D. Draht Counsel for the Defendant appearing via teleconference: J. Bullock Place and Date of Trial/Hearing: Vernon, B.C. March 12, 2019 Place and Date of Judgment: Vernon, B.C. March 26, 2019

- [1] THE COURT: This is an application by the defendant to compel the plaintiff to attend a medical examination. They are universally referred to by both plaintiffs and defendants as independent medical examinations ("IME") although they are not what most people would consider "independent". They are supposed to assist the court, but are, of course, put forward by the parties who use them to support that party's position. However, admissible reports comply with the rules and must contain certification that the expert does not advocate in accordance with Rule 11-2(1).
- [2] The defendant seeks to have the plaintiff submit to an IME conducted by Dr. Kevin Solomons, a psychiatrist. The defendant relies on Rule 7-6(1). The defendant submits that the mental condition of the plaintiff is in issue in this action and, thus, examination by a psychiatrist is required to put the parties on an equal footing. The defendant references both the pleadings and the evidence.
- [3] This case results from a motor vehicle accident April 26, 2016. Liability is in issue. The jury trial is set to start September 19, 2019. Expert reports are technically due Sunday, June 16, but, practically speaking, Friday, June 14. Response reports, practically speaking, are due Friday, July 28.
- [4] The Notice of Civil Claim, in paragraph 5, alleges injuries, including mild traumatic brain injury; and then, irritability, poor mood, and depression, and sleep disturbance in the context of the plaintiff's suffering "injuries in the accident which have had an effect on her health and lifestyle since". It includes a number of other particularizations which are set out and can be reproduced fully if a transcript is ordered:
- (a) neck injury, pain and stiffness;

- (b) shoulder injury, pain and stiffness;
 - (c) left sided facial injury, pain, redness and swelling;
 - (d) soft tissue injury and pain;
 - (e) myofascial pain;
 - (f) left side hearing loss;
 - (g) chronic and severe headaches, with nausea, vomiting and sensitivity to light;
 - (h) concussion;
 - (i) mild traumatic brain injury;
 - (j) irritability, poor mood and depression;
 - (k) sleep disturbance;
 - (l) such other injuries as counsel for the Plaintiff may advise prior to trial; all of which injuries have caused and continue to cause the Plaintiff pain, suffering, discomfort, loss of enjoyment of life, permanent physical disability, and loss of earnings, both past and prospective.
- [5] In her examination for discovery, the plaintiff gave the following evidence, at Question and Answer 107: Q. And did you suffer any psychological effects from that trauma? In other words did you get depressed or get anxious or seek any counselling or psychiatric or psychological help? A. Yeah. I started getting bad panic attacks, and I was going to counselling a lot
- [6] That trauma refers to an accident in which one of the participants died around 2011. She was then questioned at length about what I will characterize as psychological or psychiatric difficulties, including panic attacks, going back seven years before the examination for discovery, which was on August 30, 2018. At Question 293 to 300, the following took place: Q. And what were you feeling at this time right after the accident? Did you have any pain? A. I did. I was very panicky as well, though, almost like a panic attack. Q. All right. Had you had any panic attacks in the year before this accident? A. No. I was good with my . . . Q. How about in the two years before this accident? Did you have any panic attacks or anxiety attacks? A. I don't remember two years. I don't think so, though. I was good with my -- I had my panic attacks under control. Q. Were you taking any medication for depression or panic attacks when this accident occurred? A. Yes. Q. What were you taking? A. Not Effexor. Sert . . . Q. Sertraline? A. Sertraline or Effexor. I think it was sertraline. It was a low dose. We were coming off of it. Q. So are you sure you weren't having panic attacks or hadn't had any panic attacks in the year before this accident? A. Am I sure? Q. Yeah. A. I don't know. I can't tell you for sure. I just know I had them kind of under control, I thought. I don't think I did.

- [7] Dr. Solomons is a psychiatrist. He has been a Fellow of the Royal College of Physicians and Surgeons of Canada since 1993. He has extensive qualifications. His testimony has been accepted by this court.
- [8] Two relatively recent decisions were cited to me: *Scott v. Hoey*, 2015 BCSC 2037, a decision of Mr. Justice Bowden, and *Layes v. Stevens*, 2017 BCSC 895, a decision of Madam Justice Hyslop.
- [9] The plaintiff has consented to being examined by Dr. Dost, a neurologist chosen by the defendant. The plaintiff has provided the defendant with expert reports from a psychiatrist, an anesthetist, and a neurologist. The plaintiff has set out, in its Response to this application, that it has no intention of leading evidence from a psychologist or a neurologist. That is strongly suggestive of the conclusion that the psychiatric components of the plaintiff's claim are of less significance to her than the physical and neurological components.
- [10] The legal test for a second medical examination has recently been confirmed by the Court of Appeal in *Tran v. Abbott*, 2018 BCCA 365, where Mr. Justice Savage, for the court, writes, at paras. 31 - 33:
- [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 (CanLII), and *Norsworthy v. Greene*, 2009 BCSC 173 (CanLII). 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 (CanLII) at para. 31.
- [33] Multiple examinations may be appropriate and necessary where a variety of injuries are alleged, or the etiology of illness is not straightforward. In exercising its discretion on an application pursuant to Rule 7-6, the court must consider the effect of refusing the order sought on the conduct of the trial.
- [11] The plaintiff objects to the IME by Dr. Solomons. She raises several objections. She submits that Dr. Solomons is not independent and has been shown to fail to conform to the requirements of Rule 11-2.

- [12] In *Drodge v. Kozak*, 2011 BCSC 1316, Madam Justice Dardi writes, at para. 53: In my view, Dr. Solomons was not an impartial expert providing a balanced discussion on Mr. Drodge's condition. Overall, I found his evidence lacking the sufficient degree of objectivity to be of any real assistance. In the result I have accorded his opinion little weight.
- [13] In *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155, Mr. Justice Davies writes, at para. 464: The fact that Dr. Solomons was prepared to advance an unrecognized theory, entirely at odds with the evidence of other well-qualified experts, along with my concerns with respect to Dr. Solomons' lack of impartiality as an expert witness, convinces me that I should give no weight to his opinions.
- [14] In *Prasad v. Sedivy*, 2008 BCSC 443, Mr. Justice Williams, at para. 18, confirms that he does not accept Dr. Solomons' opinion, and then he deals with his reasons elsewhere in the judgment, in particular, in para. 145 and following.
- [15] In *Jokhadar v. Dehkhodaei*, 2010 BCSC 1643, Mr. Justice Willcock, as he then was, now Willcock J.A., writes, at para. 135: Further, there is no reason, in my view, to regard stressors other than the car accident as more compelling or predominant. Dr. Solomons, in reaching that conclusion, ignored clear evidence of the significance of the accident. He erroneously concluded that Ms. Jokhadar had not described the traumatic effect of the accident and its emotional consequences to her physicians, or sought psychiatric help. In cross-examination Dr. Solomons acknowledged deficiencies in his review of the records and misunderstanding of Ms. Jokhadar's history and treatment. While he expressly describes pregnancy as a factor contributing to the increase in symptoms of bipolar illness he does not consider the fact that Ms. Jokhadar's one specific worry during the pregnancy was the possibility of a miscarriage or birth defect due to the motor vehicle accident. Justice Willcock then goes on to, essentially, not accept Dr. Solomons' evidence.
- [16] In *Bellaisac v. Mara*, 2015 BCSC 1247, in para. 57, Mr. Justice Funt adopts a rebuttal report which contains significant criticism of Dr. Solomons.
- [57] The Court adopts Dr. O'Shaughnessy's observations from his July 15, 2014 rebuttal report:
7. Having reviewed the report of Dr. Solomons, I note that there are two major differences in our opinions. These include:
 1. Dr. Solomons describes fewer and less intense symptoms of Clinical Depression than I noted in my examinations in 2012 and earlier in 2014. Likewise, he reports fewer symptoms of depression than are seen in Dr. Mallavarapu's report in 2013 and in the records of his family doctor. When one looks at chronic illnesses such as Major Depressive Disorder (Clinical Depression), one never only looks on a cross-sectional interview but rather at the longitudinal evolution and change of symptoms I over time. Dr. Solomons based his opinion in large measure on the cross-sectional examination he conducted in which he did not think Mr. Bellaisac was showing significant symptoms of depression during his interview. If one looks at the longitudinal picture from 2011 onward, it is clear that this man has had

fluctuating symptoms of depression over time that have been altered through a combination of medications when he is able to afford them as well as ongoing psychosocial stresses, chronic pain, and interference with physiological functioning such as sleep, exercise, etc. In my view, Dr. Solomons has minimized the extent of symptoms to conclude that this man has only mild depression. I agree that at times his depression has been mild but at other times it has been more serious and certainly causing significant interference. I do not think Dr. Solomons' opinion that there is no disability associated with the depression is an accurate reflection of the clinical data over time and I disagree with his conclusion.

2. Issues of Causation: Dr. Solomons has opined that the accident did not directly cause the depression and I agree. As noted in my earlier report, however, it has been a "material cause" leading to his depression insofar as the accident caused significant physical injuries that in turn led to chronic pain as well as restriction in his abilities to work and earn income that in turn were the critical factors triggering his depression. While Dr. Solomons acknowledges that since the accident he has not been able to earn money, he fails to appreciate the role of chronic pain in the genesis of this man's depression. In addition, from my review of his report he appears to understate the significant psychosocial disruption that has occurred and in particular the distress associated with not being able to support his girlfriend and son to immigrate to the country that in turn led to the breakdown in his relationship with his ex-girlfriend and the inability for this man to see his son. Likewise, he has failed to address the issues related to his pain that has limited Mr. Bellaisac's social activities; i.e. he is no longer able to play sports or engage in demanding physical activities that he previously enjoyed with the result that it has altered his social functioning. He has also failed to account for the disrupted sleep patterns related to the pain that also have a significant impact on genesis and perpetuation of Clinical Depression symptoms.

[17] However, it is not for me to consider the issue of bias or admissibility at this point. I can consider the bias issue in the context of my discretion, but, in so doing, I need to be cautious. It is most often up to the trial judge, following cross-examination, to deal with those issues. They would get dealt with initially in the absence of the jury initially.

[18] The plaintiff is also concerned about overlap with the consensually-agreed-to neurological IME. The plaintiff suggests adjourning. However, adjourning, in my view, would potentially prejudice the plaintiff's position, in that she may well seek a psychiatrist's report, either for rebuttal or first instance.

[19] The plaintiff also points out that, in exercising my discretion, I need to consider what Mr. Justice Pearlman said in *Wocknitz v. Donaldson*, 2010 BCSC 1991, where, in para. 20, he writes: With respect to the application of the defendants for an order for an independent medical examination by a psychiatrist, again this is not a case where such an examination is required in order to level the playing field. This is not a case where the plaintiff has obtained or intends to obtain a psychiatric report. An independent medical examination by a psychiatrist is a particularly invasive form of examination and, in the circumstances of this case, it is not one . . . I would be prepared to order.

- [20] That comment about an IME by a psychiatrist being particularly invasive has been cited in subsequent cases dealing with this sort of application. Pearlman J.'s observation about invasiveness is not, in my view, affected by the ratio of Tran. It is a factor I must consider. However, the actual decision in that case is somewhat at odds with the subsequent decision of our Court of Appeal in Tran.
- [21] The plaintiffs also submit, in paragraph 5 of their Response: Liability in this case is contested. Allowing multiple [it says DMEs, but I think it means IMEs] will increase the defendant's disbursements, with a corresponding increase in the plaintiff's cost exposure should liability be apportioned or found in favour of the defendant. Similarly, the defendant's total disbursements will have a direct impact on any risk assessment that the plaintiff will be required to undertake should the defendant serve a formal offer to settle.
- [22] No authority is provided for that being a reason to refuse this application. I often sit as registrar in cost assessments. If there was a liability split found at trial, it remains open to the plaintiff to seek directions respecting any disbursement, especially if, at trial, a report was ruled inadmissible or largely inadmissible, and, as well, a registrar can always consider whether it was proper to have such a report ordered.
- [23] I am concerned about the potential for overlap with the neurologist's opinion and for the bolstering of that opinion by the psychiatrist. I also accept that a psychiatric assessment is invasive. I also consider proportionality. The fact that the plaintiff is not at this time retaining a psychiatrist or psychologist expert strongly suggests that these injuries are not her main concern. However, the pleadings and the discovery evidence tip the balance here.
- [24] I order that the plaintiff attend the IME as sought in paragraph 1 of the Notice of Application. It is a discretionary order. Rule 11-5(7)(b), where the court is appointing an expert, specifically sets out that the expert can be given appropriate directions. I use that as a guide to my discretion here.
- [25] I direct that the IME must be limited to considering the psychiatric issues in the plaintiff's pleaded claims of irritability, poor mood and depression, together with any psychiatric component to the sleep disorder, and together with any other evidence respecting psychiatric matters taken at the examination for discovery.
- [26] I order that the IME be limited to considering the psychiatric issues in the plaintiff's pleaded claims of irritability, poor mood and depression, and any psychiatric component to the sleep disorder claim.
- [27] I order that all notes and any other primary evidence taken at the IME must be promptly provided to the plaintiff, within seven days of completion of the IME.

- [28] I have concerns that this IME will not be of much assistance. It flies in the face of the insurer's stated public opposition to too many expensive medical reports. It is odd that the defendant, through its insurers, focuses on what would appear to be a relatively minor component of the plaintiff's claim. However, that is the defendant's choice.
- [29] I am adjourning the application for costs. That is to be dealt with by the trial judge after the conclusion of the trial.
- [30] Mr. Draht, I am concerned about the invasive nature. Are there any other terms you think ought to be ordered with respect to the IME? I have ordered that it be limited and I have ordered that all primary documentation of any kind taken at the IME, including notes and anything else, be promptly provided.
- [31] MR. DRAHT: Your Honour, with respect to the instruction letter to Dr. Solomons, would the order under 1 require the -- an alteration of any instruction letter that would've already gone out?
- [32] THE COURT: I do not know whether one has, but the short answer is that the instruction letter must include my limiting provisions. So you can deal with that, Mr. Bullock?
- [33] MR. BULLOCK: Yes, absolutely, Your Honour.
- [34] MR. DRAHT: Your Honour, I'm just wondering if it may be appropriate, in the circumstances, to have that done in dialogue between plaintiff and defendant?
- [35] THE COURT: I cannot order that, but the order -- the way to do it is to attach the order.
- [36] MR. DRAHT: Thank you, Your Honour.
- [37] THE COURT: All right. Anything else, Mr. Bullock?
- [38] MR. BULLOCK: No, Your Honour.
- [39] THE COURT: All right. Thank you. I am going to hand the binders back to -- Mr. Draht, can you get some of these back to Mr. Bullock?
- [40] MR. DRAHT: Yes, Your Honour.
- [41] THE COURT: All right. Thank you.
- [42] MR. BULLOCK: Thank you, Your Honour.
- [43] MR. DRAHT: Thank you, Your Honour. "Master R.W. McDiarmid" MASTER McDIARMID

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