

CANADA / JUDGMENT

Mendoza v. Hadley

2024 BCSC 492

COURT

Supreme Court of British Columbia

DECIDED

27 February 2024

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2024 BCSC 492 Mendoza v. Hadley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mendoza v. Hadley,

2024 BCSC 492

Date: 20240227

Docket: M2010039

Registry: Vancouver

Between:

John Christian Mendoza

Plaintiff

And

Glen William Hadley

Defendant

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

T. Dennis

Counsel for the Defendant:

S. Karim

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 27, 2024

Place and Date of Judgment:

Vancouver, B.C.

February 27, 2024

- [1] THE COURT: The application before the court is for the plaintiff to attend an independent medical examinations ("IME") with three different specialists: one with a physiatrist; one with an otolaryngologist ("ENT"); and the third with a neurologist.
- [2] The plaintiff does not oppose, in theory, the physiatry IME, although it has become somewhat complicated because he had agreed specifically to attending with Dr. de Ciutiis, which was the physiatrist which had been proposed. However, given that the parties were unable to get this matter heard when the application was originally scheduled, that appointment was cancelled to avoid cancellation fees, and a new appointment has not yet been set. The plaintiff has not agreed to a carte blanche order for a physiatrist IME without knowing who the physiatrist will be, but, as I said, in theory, is not opposed to a physiatry IME and is not opposed specifically to one being conducted by Dr. de Ciutiis.
- [3] Similarly, there is no opposition with respect to the ENT IME. The issue really comes down to whether or not an IME with a neurologist is necessary. The plaintiff argues that there is insufficient evidence before the court, to date, to support such an examination.

Background

- [4] The plaintiff was involved in a motor vehicle accident on December 23, 2018. He was 22 years old at the time. Liability has been disputed.
- [5] Trial is scheduled to commence on September 5, 2024, meaning that the 84-day deadline falls on June 14, 2024. Thus, the attempt is to seek these various IME appointments well in advance of that 84-day deadline, which I thank defence counsel for; we often see these applications on the eve of the 84-day deadline.

Legal Framework

- [6] The parties do not disagree as to the test on cases such as these. They both rely on *Tran v. Abbott*, 2018 BCCA 365, with respect to the overall purpose and intent of examinations under R. 7-6, namely, to put the parties on an equal footing.

- [7] Neither party disputes that those principles do not include a right to match expert for expert. This is not something that the defendant is entitled to do by virtue of the IME. In addition, there doesn't seem to be any dispute that the applicant bears the onus to show that the IME, whichever IME it is, is necessary, as noted in *Stocker v. Osei-Appiah*, 2015 BCSC 2312, at para. 19.
- [8] The issue when we have subsequent IMEs is made more difficult when the application is made in a block with three IMEs being sought at one time, given the inevitable lack of evidence that arises as a result. Obviously, we will not have the benefit of any findings of any of the IME authors when the applications are brought in this way, nor will we have, for example, evidence that one of the experts was unable to opine on any particular issue which may necessitate one of the others.
- [9] I do not fault defence counsel for approaching it in this manner. It is more efficient from a court perspective and a legal-cost perspective to bring one application. However, it does not derogate from the obligation of the defendant to ensure that they can establish that each of the IMEs is, on their own, necessary. There must be evidence before the court in order to do so.
- [10] As noted in *Gray-Verboonen v. Mandurah*, 2019 BCSC 1697, at paras. 15 to 17:
- [15] The plaintiff points to the test under the rules of court and submits that the decision in *Tran v. Abbott*, 2018 BCCA 365 did not change the requirement that the defendants must show that this further independent medical examination is necessary. Nor did it change the considerations of overlap and bolstering that were concerns in decisions prior to *Tran*. I agree with that analysis.
- [16] In *Tran*, although the court provided instruction on the question of a higher onus on a second independent medical examination, it did not comment on, for example, the need to show that a previous independent medical examination had not traipsed over the intended field of the proposed independent medical examination. In *Tran*, the court had the report from the previous doctor.
- [17] Many courts have considered the difficulty of ascertaining the need for a subsequent opinion when there is overlapping expertise and the scope of the earlier opinion is unknown.
- [11] In this respect, this court has grappled from time to time with respect to what evidence is necessary in order to meet the onus upon them to establish that an examination is necessary. As I indicated, the issue here is not so much that the psychiatry or ENT opinion is necessary but whether or not a neurologist is an improper bolstering of opinion which has not been proven to be necessary.

Summary of Evidence in Support of Application

[12] The evidence that the defendant does rely upon in this respect is largely based on the examination for discovery transcripts of the plaintiff, the complaints of injuries as set out in the notice of civil claim, and the curriculum vitas of the various doctors.

[13] The examination for discovery evidence shows clearly that there are various injuries that the plaintiff suffered, immediately following the accident and continuing to date. With respect to the ear, or ENT issues, those were fully canvassed at the examination for discovery and included symptomology continuing to date, which includes a blockage of the inner ear, resulting in numerous infections that causes the ear to continue draining. It has resulted in what the plaintiff claims to be hearing loss, requiring the use of a hearing aid.

[14] With respect to issues or symptomology that are generally more associated with concussion or cognitive difficulties, the evidence in that respect was more confined to the period of time immediately after the accident. In particular, the plaintiff deposed on discovery that there was some sensitivity to light that interfered with his ability to play video games and do various activities. It interfered with his ability to focus. He tried to play his guitar and piano but was unable to do so. Noise was a trigger. And then, as noted, he experienced issues with his ear.

[15] However, what is not in the discovery evidence before the court is when these injuries seemed to have resolved, other than the evidence by the plaintiff himself in answer to the question "How are your concussion symptoms now?" Answer: "I don't think it is bothering me."

[16] In response to further questioning about whether he was still experiencing noise, light sensitivity, and vomiting, he deposed "vomiting is because of my ear infection. But other than that, my sensitivity to light may be from time to time, not too sure, and of course the noise tinnitus just became a habit for me."

[17] And further:

Q: How do your current, I guess, symptoms or issues with concussion limit you today?

A: At this point I don't even know how to mainly tell you. I've just grown accustomed to it.

Q: You feel it's -- like it's more that you've adapted rather than these issues have improved?

A: Yes.

[18] With respect to the cognitive deficit, the plaintiff deposed that shortly after the accident it became an issue with respect to decision making during work. He testified that he was at that time slower when it came to make decisions, which also created some conflict with his girlfriend in that he was more indecisive and slower when it came to processing what she said. It was not clear on the discovery evidence as to how long those issues continued.

- [19] A further piece of evidence that is before the court is an emergency-room doctor's report, which is described as a brain scan in 2019 at which time the emergency-room physician did comment on the fact that a recommendation for a neurologist or a person dealing with multidisciplinary analysis of concussion symptoms would be recommended.
- [20] All of this is to say, and I do not think that the plaintiff disagrees, that when it comes to concussion and ear issues there are overlapping symptoms. In fact, the plaintiff argues that the fact of that overlap means that it is at this early stage, and without more evidence, that the defendant has not been able to establish that it is necessary that a neurologist opine as to the symptoms at this time and that such an opinion would not be anything other than a bolstering of what may be determined by the ENT physician.

Analysis and Conclusion

- [21] The defendant relies on various decisions, including *Baxter v. Shelton*, 2017 BCSC 953 at para. 17, and *Hunter v. Martell*, 2021 BCSC 1962, a decision of Master Harper, as she then was, where she commented upon the type of evidence that ought to be before the court to support these examinations, noting at para. 5 and 6:
- [5] I also agree that Master Keighley's decision in *Khan v. Cabrera*, [unreported, New Westminster Registry Action M201147], is similar to the case before me. At para. 15, Master Keighley said:

The Court has to be satisfied, however, that there is evidence to suggest that the preparation of a further report is necessary to achieve that equality. There are a number of ways in which that evidence might be adduced.

- [6] It could be a medical report, which obviously was not commissioned in this case. It could be an affidavit of the prior defence IME doctors to say that it is outside their scope of expertise to opine on functional capacity or vocation. That evidence might theoretically exist, but, as I say, is not before the court today. I cannot assume that the psychiatrist and physiatrist were incapable of opining on the issues that would be opined on by the functional capacity evaluator or vocational assessor.
- [22] I did note during submissions that obtaining an affidavit of a doctor as suggested may increase costs which, given the new 6% disbursement cap, would likely be prohibitive. However, such evidence does not necessarily have to be a medical report or affidavit, given that hearsay evidence is admissible on applications such as this, but something more simple as a brief letter from the proposed expert saying what their scope of expertise is in addition to what is in their CV and what they will be specifically able to opine on that other experts may not. Of course, that too, would come with an increase to disbursements.
- [23] All of this is to say that I agree with the plaintiff that at this early stage and without further evidence I would not be able to say that the neurology IME is necessary.

- [24] I expect that there will be overlap between a neurologist and an ENT; however, the degree of that overlap is not something I can determine at this stage of the matter in terms of whether or not it is the type of overlap that would be permissible without having to find that the subsequent examination is a bolstering of evidence instead.
- [25] It may be that, ultimately, a neurologist will be required to provide evidence that an ENT or physiatrist simply cannot. As such, I am going to adjourn that portion of the application, rather than dismiss it.
- [26] In summary, I make the orders as sought in paras. 1 and 2, with para. 1 being that it will be a psychiatry medical examination with Dr. de Ciutiis on a date to be agreed upon by the parties or with such other physiatrist as the parties may agree, and, if they are unable to agree, they are at liberty to seek further directions before me to determine an appropriate physiatrist.
- [27] Paragraph 3 is adjourned generally. I would expect that it would be brought with further evidence, including potentially instruction letters and/or letters from whatever physiatrist is ultimately retained, or the ENT, as to what areas they are unable to opine on once they have had an opportunity to examine the plaintiff.
- [28] As to costs, it was not entirely clear to the defendant that the plaintiff was not opposing because there was an issue as to conditions which created some confusion. Sorry. Do you want to address that?
- [29] CNSL S. KARIM: I was just going to make submissions that liability is denied. Costs in the cause.
- [30] THE COURT: Given that liability is denied, I think it is appropriate to order costs in the cause.

"Associate Judge Robertson"

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