

CANADA / JUDGMENT

Miolla v. Schouten

2025 BCSC 356

COURT

Supreme Court of British Columbia

DECIDED

13 February 2025

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2025 BCSC 356 Miolla v. Schouten

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Miolla v. Schouten,

2025 BCSC 356

Date: 20250213

Docket: M1910592

Registry: Vancouver

Between:

Justin William Miolla

Plaintiff

And

Douglas William Schouten

Defendant

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

K. Stewart

Counsel for the Defendant:

B. Turner

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 13, 2025

Place and Date of Judgment:

Vancouver, B.C.

February 13, 2025

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The defendant brings this application to compel the plaintiff's attendance at an independent medical examination ("IME"), specifically a functional capacity evaluation ("FCE"), on February 18, 2025.

Background

- [3] This action concerns a motor vehicle accident that occurred on November 9, 2017. Liability has been denied.
- [4] The matter is scheduled for a 14-day trial commencing June 30, 2025, meaning that the 84-day deadline is April 4, 2025. As such this application is being brought in a timely way with no issue in that respect.
- [5] At the time of the motor vehicle accident, the plaintiff was a student at the University of British Columbia, taking political science courses. He graduated with a Bachelor's degree in arts in 2022. Subsequently, he took the LSAT and commenced law school at the University of Alberta in 2023.
- [6] Between his graduation and starting law school he worked as a longshoreman, generally as a summer job. One of the concerns he now expresses is, given the injuries alleged to have occurred and impact upon him, whether or not he will be capable of, or suited to, a career in law. As such, it may be that he is unable to pursue law, and will be compelled to pursue a career as a longshoreman.
- [7] The plaintiff has attended a previous IME on July 23, 2024 with Dr. Ho, physiatrist, at the request of the defendant. Dr. Ho's August 24, 2024 report following that examination is before the court today, forming part of the evidence that the defendant relies upon.

[8] In his report, Dr. Ho outlines what he describes as a usual physical examination that he conducted which included a review of the plaintiff's gait and range of motion as well as a general inspection, palpation exams, neurologic exams, and other tests with respect to cervical radicular pains, occipital nerves, tripod test, facet loading, and sacroiliac joint tests. Dr. Ho's conclusion and opinion, based on that examination and his interview of the plaintiff, includes the following:

That being said, he tells me he has continued to achieve nearly all A-grades this past year, even in law school. He continues to receive academic accommodations which may include having some notetaking done for him, having notes sent to him, or being given extra time for exams.

[The plaintiff] reports having missed a few lectures due to his pain issues although this is rare. At this time, [the plaintiff] tells me he is contemplating whether he would stay in law school. He is concerned that he would not tolerate the long hours he anticipates working in the future. His plan if he does not continue with law school is to continue longshoreman work.

As a longshoreman, he can tolerate lighter physical tasks in general; however, with heavier tasks such as driving or lifting repetitively, he anticipates he may not be able to work consecutive shifts. He tells me has tried training to be a multi-truck driver however this was not tolerated due to the repeated head turning, and jolting vibrations of the vehicle.

Overall, [the plaintiff] has been mildly affected with respect to his academic studies, and pursuit of a career in law, due to his MVA-related issues. With academic accommodations, he has done reasonably well up to this point, continuing to achieve A-grades in his postsecondary studies even now in law school.

He does report increased sensation of pain with prolonged studying, desk work, and sitting, which I anticipate will persist to an extent. As such, he may require some accommodative flexibilities with sedentary type work in the future, which could include potential increased breaks at work, flexibility to change positions throughout the day, ergonomic equipment such as standing desk, or periodic therapy attendance to help maintain his overall work function.

From a physical standpoint, I do not find any contraindication to a career in law; however, his pain symptoms limit his overall endurance for static positions and tolerance for prolonged work.

As a longshoreman, there is more physical work involved. I do not find any frank contraindications to such a career, however, given his chronic pain problems, I anticipate that he could have some issues tolerating more strenuous physical tasks consistently. That being said, as a longshoreman, he would have full control over his work schedule and which shifts he would bid on, with no consequence to spacing out shifts if needed to accommodate his pain symptoms, or a symptom flare.

[9] The defendant also relies on a February 7, 2025 letter from the proposed occupational therapist who would be conducting the FCE, Mr. Lloyd, in which he advises as to the differences in his assessment and that of a physiatrist or a treating physician generally. In particular he writes as follows:

I will first address the purpose and scope of a physician IME. A physician (e.g., a physiatrist or another medical specialist) conducts an IME primarily to evaluate and diagnose medical conditions, assess causation, and provide a prognosis. The emphasis is on clinical and medical findings--identifying the nature of the injury or condition, discussing potential treatments, and estimating recovery timelines.

Physicians apply their specialized clinical knowledge to determine diagnoses, recommend medical interventions, and comment on the efficacy of treatments. Their reports often form the basis for understanding the medical aspects of a personal injury claim, including causation and the necessity for ongoing medical management.

And further:

As to the purpose and scope of an occupational therapy FCE, these focus on how an individual's injury or condition impacts their ability to perform functional activities related to work, self-care, and daily living. The goal is to provide objective measures of physical tolerance, strength, flexibility, and endurance in tasks that simulate real-world and workplace demands.

Occupational therapists consider not only the physical components of function but also cognitive, psychosocial, and environmental factors that may impact performance. This includes assessing the examinee's capacity to safely and consistently meet the essential demands of daily and work-related tasks.

FCE reports typically include recommendations for work accommodations, adaptive equipment, or specific rehabilitation strategies. The OT may outline strategies to optimize independence and guide return-to-work or daily living plan.

I will now turn to the methodological difference between IMEs and FCEs. A physician IME typically includes clinical interviews, physical examinations, diagnostic test reviews, and possibly imaging or lab results. The primary product is a medical opinion. IMEs are conducted by a medically licensed doctor with a specialization (e.g., physiatry, orthopedics).

In contrast, an occupational therapy FCE involves standardized and non-standardized functional testing protocols, observation, task simulations, and validated assessment tools to evaluate performance in relevant functional areas (e.g., lifting, carrying, standing, or reaching). FCEs are conducted by a licensed Occupational Therapist with specialized training in functional capacity evaluations.

The practical implications of these differences for a medical-legal file are as follows:

If the objective is to gain a clear medical diagnosis, prognosis, and causation opinion, a psychiatry or physician IME is most appropriate. If the objective is to ascertain the claimant's current functional abilities, limitations, and practical strategies for accommodation or return to work, an occupational therapy FCE provides specific, task-oriented data.

By having both a comprehensive physician IME and an occupational therapy FCE, legal counsel can present a more complete picture of the claimant's overall condition -- both medically and functionally.

Legal Framework and Analysis

- [10] The parties do not fundamentally disagree as to the factors for consideration with respect to applications under R. 7-6 for an IME, as is being sought today. The considerations for a court in making such an order have been clearly articulated and cited in various decisions since *Tran v. Abbott*, 2018 BCCA 365, the leading decision on this issue.
- [11] Since most of these principles are not in dispute, I will generalize, and paraphrase, the ones relevant to today's application as follows:
- a) The purpose of R. 7-6 is to put the parties on an equal footing to ensure a fair trial on the merits.
 - b) The onus is on the party seeking the IME to show that the report itself is necessary.
 - c) An IME will not be necessary if its purpose or effect will be to:
 - i. match expert for expert as against the plaintiff's reports, or anticipated reports, or
 - ii. bolster other opinions that the defendant will be relying upon.
 - d) Although there is no higher onus of proof on an application for a subsequent IME, given that they are not intended to bolster other reports or opinions in evidence, there must be a question that was not able to be answered by the prior attending or examining practitioner. Here, the plaintiff largely relies on the findings of Dr. Ho and his report as to the functional limitations and his opinion that the plaintiff is not functionally limited from either a career in law or the career as a longshoreman. The plaintiff argues that that is, essentially, a full answer to the defence being raised such that any opinion that could be tendered through an FCE would do nothing more than a bolstering of that opinion, relying on *Gray-Verboonen v Mandurah*, 2019 BCSC 1697 at para. 19 ("*Gray-Verboonen*") where the court noted:

Counsel for the plaintiff points out that the onus is on the plaintiff to show that there has been impairment of the plaintiff's functional capacity. If both Dr. Thompson and Dr. Wiseman conclude that there is no such impairment, then that is the answer for the defendants. That is the defence. There is no necessity for a FCE. If they have assessed the amount of any functional impairment of the plaintiff, then a FCE would be bolstering those opinions.

- e) The potential size of a plaintiff's claim does not alter the defendant's obligation to establish the necessity of assessment, as noted in *Hunter v. Martell*, 2021 BCSC 1962 at para. 7. I specifically reference this consideration as the counsel for the defendant raised the issue of proportionality. Notwithstanding that the obligation remains on the defendant to establish that the assessment being sought is necessary, and by that I mean necessary to put the parties on an equal footing, the issue of proportionality is always a consideration of the court, given the existence of R. 1-3(2) of the Supreme Court Civil Rules, BC Reg 168/2009. I do not read *Hunter* to suggest that proportionality is not a factor, but rather that the value of the claim is not a determinative factor.
- [12] Counsel for the plaintiff's position on this application is that the defendant has not met the onus upon it to establish necessity, given the likelihood of any opinion merely bolstering that of Dr. Ho, arguing that this application is on all fours with that before the court in *Gray-Verboonen*. In addition, counsel for the plaintiff relies on various cases where FCEs have not been ordered, for example, in *Anderson v Steffen*, 2021 BCSC 252 ("*Anderson*") which referred to *Norsworthy v. Greene*, 2009 BCSC 173 as well as other decisions.
- [13] In support of the application, the defendants rely primarily on *Johal v. Singh*, 2017 BCSC 2431 ("*Johal*") where an FCE was ordered. In refusing to make such an order in *Anderson*, the court did distinguish itself from *Johal*, but did deal specifically with an FCE where the plaintiff had already been assessed by a neurosurgeon who had commented on the plaintiff's ability to do his job. The defendant here says that the case is very similar in that respect. In particular, the opinion of the doctor there had been:

In his line of work as a home care nurse I do not see how any of his areas of injury would preclude him from continuing in the usual capacity, particularly since he does a supervisory role. I would expect him to work in a full-time capacity. As his low back improves I would expect overall functional improvements.

- [14] In *Johal*, the court had evidence before it as to the expected differences between the two assessments, which is referenced at para. 14:
- [14] The defendants submit that the functional capacity evaluation they seek would consider different matters than those addressed by Dr. Heran. A letter from the expert proposed for the examination, Timothy Winter, is annexed as Exhibit "Q" to the affidavit filed in support of the defendant's application. In the third, fourth and fifth paragraphs of that letter Mr. Winter states:

A physician such as a neurosurgeon will perform an assessment of an individual in order to determine diagnosis, prognosis and causation while a functional capacity evaluation aims at determining capacity to perform activity, tolerance related to such activity and level of productivity...

It is the role of the occupational therapist performing a functional capacity evaluation to determine an individual's level of disability, or how their impairment, determined by a physician impacts upon their function

although having a thorough understanding of a person's impairment or health condition is of great importance, it does not allow for a complete understanding of how such impairment impacts upon their function and therefore their ability to work and perform their activities of daily living. The missing element of tolerance and productivity can only be determined through observation of an individual over a longer period. As the functional capacity evaluation occurs over a full work day and utilizes both standardized testing instruments and work/activity simulation, it allows for the determination of capacity as well as tolerance and productivity.

- [15] The argument advanced in Johal was that the FCE would assist in the preparation of the case for trial because it would provide opinion evidence on the functional abilities as well as the employment capacity and recommended treatment with respect to a return to full-time employment. This was significant given that the plaintiff was only 39 years with a loss of earning capacity claim being potentially significant. As such, the application was allowed and the order to compel the FCE was granted.
- [16] Each party sought to distinguish the cases relied upon the other. While the decisions are helpful as to the general principles applicable to IME applications, each case must ultimately be determined on its own facts, based on the evidence before the court.
- [17] Under that backdrop, I do however agree with the plaintiff that all of the cases support that there must be something more in that evidence than merely a difference in modalities or testing that will be undertaken by the two proposed experts before the court will make an order for a subsequent IME.
- [18] Rather, in order to establish that the report is necessary and that it will not merely bolster the opinions that have been or could be given by other experts, there must be a question being answered that was not and could not be answered by the previous treating or examining practitioner.

Conclusion and Order

- [19] Here, having regard to the summary that has been provided by Mr. Lloyd as the proposed examiner, as compared to the findings of Dr. Ho, I am satisfied that there is enough of a difference that it can be said that specific questions will be answered by him that were not, and could not, be answered by Dr. Ho.
- [20] Specifically, based on Mr. Lloyd's letter, he will go further, and is uniquely qualified to fill a number of gaps in what Dr. Ho has opined upon in terms of how the functional limitations will specifically translate to the plaintiff's ability to do the two different potential careers or jobs that he is considering. Specifically, he can comment on not only whether or not there is an impairment, which Dr. Ho comments upon, but his ability to specifically do the tasks

required in each of those roles, and whether there are accommodations that could be taken to overcome those limitations, in particular, given that he will go further and discuss "practical strategies for accommodation".

[21] In addition, although not determinative but part of the overall analysis, there is a potential for a significant wage loss claim when one has regard to the difference between a potential 40-year career as a longshoreman and a 40-year career as a lawyer if the plaintiff establishes that his injuries have made him unsuitable for a career in law.

[22] The application is granted as sought.

[DISCUSSION RE COSTS]

[23] THE COURT: Given that liability is denied, I order costs in the cause.

"Associate Judge Robertson"

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