

CANADA / JUDGMENT

Ostrowka v. Coles

2021 BCSC 733

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Supreme Court of British Columbia

DECIDED

21 April 2021

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2021 BCSC 733 Ostrowka v. Coles

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ostrowka v. Coles,

2021 BCSC 733

Date: 20210421

Docket: M203748

Registry: New Westminster

Between:

Adrian Ostrowka

Plaintiff

And

Wendy Leanne Coles and

Honda Canada Finance Inc.

Defendants

Before: Master Robertson

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A. Urquhart

Counsel for the Defendants:

L.P. Samuel

Place and Date of Hearing:

New Westminster, B.C.

March 23, 2021

Place and Date of Judgment:

New Westminster, B.C.

April 21, 2021

- [1] This is an application by the defendants to compel the plaintiff's attendance at an Independent Medical Examination ("IME") scheduled for May 7, 2021, with Dr. David Lipson, Physiatrist.
- [2] There is no dispute as to attendance at the IME itself, to which the plaintiff has consented.
- [3] Rather, the issue before the court on this application is whether or not it should be a condition of the plaintiff's attendance that if the defendants obtain a written report from Dr. Lipson, it must be provided to the plaintiff upon receipt whether being relied upon at trial or not, in exchange for which, the plaintiff will deliver up all of its medical reports, whether the plaintiff intends to rely upon them or not.
- [4] The plaintiff refers to this condition as a Stainer condition, in accordance with the order made in *Stainer v. Plaza*, 2001 BCCA 133 ("Stainer") and one that, the plaintiff submits, is now settled law and standard practice to include as a matter of course when ordering attendance at any IME. The plaintiff says that there is no obligation on the defendants to actually get a report as they can speak with Dr. Lipson and get his views without reducing that to writing. However, if they do it ought to be produced "promptly".
- [5] The defendants dispute that this condition is standard and submit that the plaintiff's interpretation of the law is not only wrong, it has an absurd consequence of making solicitor's privilege contingent on its communications with its agents being oral effectively defeating solicitor's brief privilege over a solicitor's file materials and work product, in this case expert reports.
- [6] The defendants say that the written report, even if not being relied upon at trial, serves a valuable purpose to assist counsel in developing its strategy, providing information to form its case, and instructing and seeking advice from its client, all of which will be impaired if they must restrict themselves to oral communications in order to preserve privilege.
- [7] Ultimately, the arguments of counsel came down to whether the starting point when an IME is ordered is that:

- a) If a report is ordered it must be produced, with the onus being upon the defendants to establish that special circumstances justify it not being produced; or
- b) No conditions are assumed, such that the onus is on the plaintiff to establish that special circumstances justify a condition requiring production of any report obtained.

Background

- [8] This action involves claims for damages arising from a motor vehicle accident that occurred on July 31, 2016. Liability is denied. Discoveries have been held. Trial is scheduled for January 17, 2022. There have been no prior IME's.
- [9] In his Notice of Civil Claim, the plaintiff alleges that he sustained physical injuries and other loss and damage, including injuries to the neck, shoulders, back, hips, tailbone, buttocks, knees and legs, and contusions.
- [10] On February 7, 2020 the plaintiff produced medical reports from Dr. Hugh Anton, a physiatrist, dated June 27, 2017 and October 16, 2017.
- [11] The defendants gave notice to the plaintiff of the subject IME by letter on December 14, 2020, which resulted in back and forth communications regarding the conditions for the plaintiff's attendance.
- [12] While various conditions were demanded by the plaintiff most have now been resolved and agreed to between the parties either through a consent to the condition or agreement that the issue is more properly one to be determined at a later date or trial itself. That includes a condition, for example, that Dr. Lipson not testify by video deposition. While this condition was raised in the defendants' Notice of Application, and the defendants addressed it briefly at the hearing, the plaintiff agreed that if the defendants ultimately sought to have Dr. Lipson testify by video the defendants could make a later application for that.
- [13] As such, the only issue that this court is addressing is that pertaining to the condition that if a report is obtained it must be produced.

The Law

- [14] Stainer involved an appeal by ICBC as a third party of the conditions that had been ordered by the court below in respect of an IME as follows:

This court further orders that the Third Party may request reports from one or more of the doctors conducting the said independent medical examinations. If such reports are requested and received by the Third Party, they may be requested by the Plaintiff. If requested by the Plaintiff copies will be forwarded to the Plaintiff by the Third Party and the Plaintiff will forward to the Third Party all medical reports which she has received regardless of whether those reports will be relied upon at trial.

AND THIS COURT FURTHER ORDERS THAT if the Third Party does not request a report from a doctor conducting such independent medical examination, the Third Party shall within 45 days from such medical examination, obtain from that doctor a copy of all documents generated by, or on behalf of that doctor, relating to that defence medical examination and shall forthwith deliver a true copy to counsel for the Plaintiff. Should the Third Party call an independent medical examination doctor for rebuttal evidence at trial, the Third Party shall obtain a report containing the doctor's opinion and the facts or assumptions on which his opinion is based and shall produce this report to Counsel for the Plaintiff at least 90 days before trial.

[15] Although set out in two paragraphs, there were, in essence, four conditions:

- a) That if ICBC requests a report, ICBC is to provide it to the plaintiff upon request;
- b) The plaintiff should then also have to deliver all reports received the plaintiff, whether being relied upon or not;
- c) If no report ordered, ICBC should deliver up the doctor's complete file materials; and
- d) That if ICBC were to obtain rebuttal evidence, it was to obtain a report and produce it 90 days prior to trial.

[16] However, only the final 3 conditions were in issue on appeal. Notably, the Court was not asked to consider the first, that being that if a report is obtained, it must be produced, that being the issue here.

[17] In any event, the plaintiff specifically relies upon para. 9 of Stainer where, after noting that the purpose of the prior rule, Rule 30, was to put the parties on equal footing as to medical evidence, and that the means to do that was within the discretion of the chambers judge, Finch, J.A found as follows:

[9] I am unable to see any error in principle in the imposition of the first condition. It would appear, from the cases to which we were referred, to be a condition frequently imposed by judges making orders under Rule 30. To expand that condition, as the third party would have the Court do, to require the plaintiff to deliver up medical reports not only in her possession at the time of the order, but in addition all medical reports she may receive in future, is not necessary to achieve equality between the parties. A defendant can choose the time at which it seeks independent medical examinations. Depending upon the nature of the case and the course of the litigation, a defendant may be entitled to a medical examination on more than one occasion. A judge may impose whatever conditions are necessary to achieve equality on any application that may be made. It is possible that a judge might, in particular circumstances, think it necessary to require the plaintiff to deliver up medical reports not yet in her possession.

[emphasis added]

- [18] The Court's later comments, however, narrowed the obligation for production of the IME expert's file materials if a report is not ordered. In that context, the Court specifically noted that it would not be fair to require a defendant or third party to disclose the confidential opinions of the doctor:
- [13] It therefore appears to me to be within the proper exercise of the discretion afforded under Rule 30 to impose, as a condition of ordering an independent medical examination, delivery up to a plaintiff of the examining doctor's notes that record any history given to him by the plaintiff on the examination, and any notes that record the doctor's observations or findings on physical examination. It would not usually, however, be fair to go further, and to require the defendant or third party to disclose any documents prepared by the doctor which contain his confidential opinions or advice to the lawyer who requested the examination, whether for the purposes of trial preparation, cross-examination at trial, or otherwise.
- [emphasis added]
- [19] That raises somewhat of an inconsistency, which is likely explained by the fact that the first condition of the four made was not squarely in issue, as it was agreed by the parties that if report was ordered it would be produced.
- [20] Stainer has been subsequently considered various times. However, insofar as the obligation to deliver a report has been concerned the subsequent treatment has generally involved an agreement by counsel for the defendant that it will produce a report if ordered, with the question in issue being whether there is an obligation to compel the defendant to obtain the report, with there being two different results, one in *Inhoff v. Irwin*, 2005 BCSC 280 ("Inhoff"), and the other in *Edgar v. Moore*, 2005 BCSC 1877 ("Edgar").
- [21] In *Inhoff*, Madam Justice Beames pointed out that Stainer did not directly address the issue of whether the defendant was obliged to obtain and provide a report:
- [16] The Court of Appeal was concerned with only three matters on the appeal in *Stainer v. Plaza*:
1. Whether the plaintiff should also have to deliver all reports she may receive in the future;
 2. Whether the third party should be compelled to obtain and produce all of the doctors' notes; and
 3. The issue of rebuttal evidence.
- [17] No appeal was taken by the plaintiff, and the court was not asked to consider squarely, or really at all, the issue which is before me on this case, namely, whether the third party should be compelled to have the doctor put the results of the examination in writing in the form of a report and produce it to the plaintiff. Indeed, it is not clear that that point was even in issue on the initial application to the chambers judge.
- [18] As I have said to counsel and as counsel have confirmed to me, no case has been found by either counsel, by me, or by my law clerk that has considered this issue squarely.

- [22] At para. 26, Madam Justice Beames noted that the appropriateness of the order depends ultimately upon the circumstances of the case, concluding as follows:
- [27] The policy rationale, which guides the exercise of this discretion, is to put both parties on an equal footing with respect to the medical evidence in a given case and avoid trial by ambush in the interest of ensuring a just determination on the merits.
- [28] In exercising its discretion under Rule 30(1), the court must have due regard to the solicitor's brief privilege and not order disclosure of documents prepared by the doctor, which would contain his confidential (and I stress the word "confidential") opinions or advice to the lawyer who requested the examination whether for the purposes of trial preparation, cross-examination at trial, or otherwise.
- [29] Rule 1(12) provides that, when making an order, the court may impose terms and conditions and give directions that it thinks are just. Rule 1(5) reminds all litigants and the court that the purpose of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
- [23] The Court in *Inhoff* found that in the circumstances of that case the Master had erred in refusing to order that a report be prepared and produced, noting that there may be circumstances where a plaintiff has not been forthcoming with respect to their expert's clinical records and reports, a factor that would be relevant to the exercise of the discretion, concluding:
- [36] However, where the plaintiff has made full disclosure and agrees to submit to an examination in exchange only for a copy of the result of the examination in writing, that order should, in my view, be made unless there exists some exceptional circumstances which weigh against it.
- [24] In *Edgar*, Madam Justice Stromberg-Stein refused to follow *Inhoff*, finding that what was done there was exactly what was suggested as being a step too far in *Stainer* at para. 13, as referenced above.
- [25] *Edgar* was then followed in *Idzior v. Stephens*, 2006 BCSC 401 and *Ames v. The Maritime Life Assurance Company*, 2006 BCSC 621.
- [26] That particular issue was then resolved by the Court of Appeal in *Morey v. Lemon*; *Kelln v. Stevens*, 2006 BCCA 278 ("*Morey*"), after the Court considered *Inhoff* and *Edgar*. The order being appealed in *Morey* was that the defendant was both obligated to obtain a report and disclose it.
- [27] *Morey* involved a joinder of two appeals where in one Master Bishop made the order, but specifically noted his reluctance, but that he was compelled to follow *Inhoff*, his reasons being cited at para. 10:

- [5] The condition with respect to the medical report is one that I have not, I can say, unless it has been consented to, ever ordered in an independent medical examination. As I understand it, what usually happens is counsel normally requests the I.M.E., the doctor examines the party and then consults with counsel, and a report is ordered or not. It seems to me that the court is now, as a result of Madam Justice Beames' decision, in the position of instructing counsel as to how to conduct their cases and taking away some discretion that they may have. Be that as it may, that is the present state of the law.
- [28] Notably, Master Bishop observed that he had never made an order compelling the delivery of the report unless already consented to.
- [29] The decisions of the Masters were upheld by Supreme Court Judges, and then further appealed with the Court of Appeal finding that the order made in *Inhoff* failed to put the parties on equal footing as was the objective. Given that the plaintiff knows what is in his brief before he asks for disclosure he will not ask for that term if he has unfavourable evidence, whereas the defendant cannot predict what the IME opinion will be. Instead, the Court of Appeal noted, such an order would give the plaintiff an unfair advantage and impinge too much on the defendant's right to know the IME doctor's opinion informally before being required to elect whether to request a formal medical opinion and disclose it.
- [30] The Court of Appeal in *Morley* specifically overruled *Inhoff*, but with the caveat acknowledging that there may be special circumstances in any particular case that would justify the exercise of discretion to order more disclosure than that in *Stainer*, but not as a term of general application in the absence of special circumstances.
- [31] The Court of Appeal then disposed of the matter by saying that the order would be made to "conform with the *Stainer* terms" without specifying which disclosure obligations in *Stainer* it was comfortable imposing in the absence of special circumstances.
- [32] Having determined that a party obtaining an IME could not be compelled to order a report absent special circumstances, there has been little judicial discussion since *Morey*.
- [33] In *Curak v. Brown*, 2010 BCSC 1821 ("*Curak*") the parties had agreed to the condition that if a report was obtained it would be produced, with the contentious issue being whether or not the plaintiff's expert's "history and observations" were to be delivered if produced by the defendant. Master Scarth noted as follows:

Ordinarily, on an application pursuant to Rule 7-6, the order that the plaintiff attend for independent medical examinations is sufficient to put the parties on equal footing. They are left to their usual obligations regarding the disclosure of reports and underlying documents. Here the defendants having sought the terms confirmed by the court in *Stainer*, and the plaintiff having accepted those terms, it is appropriate to include them in the order. However, the defendants have not established that there are special circumstances here which warrant more disclosure than contemplated in *Stainer*: *Morey v. Lemon*, 2006 BCCA 278, at para. 14. Accordingly the order will go without the additional term set out in paragraph 4 of the notice of application.

- [34] As Master Bishop did, Master Scarth's observation suggests that the courts are not asked to impose these conditions as a matter of course, but rather only when they are already agreed to.
- [35] In *Eastman v. Eastman*, 2013 BCSC 1019, the defendant and third party sought production from the plaintiff testing results and raw data from neuropsychological examinations conducted by the plaintiff's experts. Master Taylor concluded as follows:
- [34] There certainly was no compelling reason or proper circumstance in *Lanteigne* to breach the plaintiff's brief privilege, and I especially find in the case at bar the rationale "to be of the most assistance to the court" is not a compelling reason to breach the solicitor's brief privilege. Nor is there a special circumstance as suggested in *Morey v. Lemon*.
- [35] In my view, the cases cited by the plaintiff stand for the proposition that solicitor's brief privilege is inviolate unless or until the Applicant can show special or compelling circumstances that would allow the court to breach the sanctity of the privilege. No circumstances were provided in this case.
- [36] Thus, in the two cases that have considered *Morey* they both involved the issue of which documents were to be produced from the expert's files, while recognizing the court's interest in preserving the solicitor's brief privilege, absent overriding special circumstances.

Analysis

- [37] Counsel for the parties both argue that the lack of recent case law on whether an IME report, if ordered by the defendant must be delivered whether being relied upon or not supports their position. On the one hand, the defendants argue that this is not done as a matter of course as a first IME is generally agreed to easily with no conditions at all such that court orders are rarely needed. On the other hand, the plaintiff argues that it is such a standard and accepted condition that it is never refused and an application is never necessary.
- [38] As the above shows, however, the courts have grappled with balancing the preservation of what former Chief Justice McEachren described in *Hodgkinson v. Simms*, 1988 CanLII 181 (BC CA), [1988] B.C.J. No. 2535 as the "sanctity of the solicitor's brief" and ensuring that parties are on an equal footing with respect to medical evidence to ensure a fair trial on the merits, the court's paramount consideration in ordering an IME and exercising its discretion by imposing disclosure obligations as a condition.
- [39] To that end, it has been noted that Rule 7-6 is a rule of discovery, 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. 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: *Tran v. Abbott*, 2018 BCCA 365, at para. 17 and 18.

- [40] To achieve these objectives, there is no dispute that when ordering an IME the court may make an order that the result of the examination be put in writing and that copies be made available to interested parties of record: Rule 7-6(1)(b).
- [41] The issue here, however, is whether Stainer terms in the exact and full wording of that decision including that any report ordered should be disclosed should be imposed as a matter of course or, as the defendants submit, only when special circumstances exist to support such an order.
- [42] The defendants submit that where Stainer terms have been imposed including that term the cases are distinguishable or there are special circumstances to support the terms. The defendants specifically point to the fact that in the cases brought to the Court's attention there were multiple IMEs. In contrast, in the case at bar, this is the first IME.
- [43] Further, in many of these decisions the plaintiffs were taking issue with their reciprocal disclosure obligations. Here, the plaintiff's case has been conducted with a strategy that involved disclosure of the reports nearly two and a half years after they were obtained. The plaintiff's case is known, including what the medical evidence is, if it is the best evidence that is likely to be obtained and, determining that to be the case and that it will be relied upon at trial, has now been voluntarily disclosed.
- [44] In short, the defendants say that the plaintiff is not using the reciprocal disclosure conditions to ensure the parties are on equal footing, but rather to get an advantage such that the offer of reciprocal disclosure in exchange for the IME report is really an empty one.
- [45] That argument mirrors the concern raised by the Court of Appeal at para. 13 of *Morey* that a plaintiff will not request this term if it has unfavourable medical reports that it does not wish to produce.
- [46] This is relevant in that implicit in the need for equal footing and promotion of settlement is the expectation that the IME report will be ordered and tendered at trial. That is the point of the defence seeking the IME in the first place. Does that lead to the conclusion that the report should be produced as a matter of course? I do not believe it does.
- [47] In a personal injury action the plaintiff is able to secure its evidence on its own terms and timeline, decide when best to begin settlement discussions and to decide strategically when to produce its expert opinions, subject only to the deadline for delivery under the Rules. The plaintiff may well have consulted with various medical doctors whose opinions were unfavourable to its case, and may even settle, without the defendant knowing that such unfavourable evidence existed.
- [48] That is not the case with an IME.

- [49] The plaintiff is well aware that the IME occurred. If no report is provided the plaintiff will be able to factor that into its settlement strategy or even demand it as part of settlement negotiations and, if trial does proceed, will presumably seek to have an adverse inference drawn by virtue of its absence.
- [50] Accordingly, as a practical matter, by virtue of the inherent differences in how, when, and with what transparency each party is able to obtain their medical evidence there is no obvious extra unfairness to a plaintiff if an IME report is ordered but not ultimately produced, as opposed to not ordered at all.
- [51] The defendants also argue that consideration must be had to the change in the Supreme Court Civil Rules since both *Stainer* and *Morey* were decided. Now expert reports must be delivered 84 days prior to trial under Rule 11-6, with the specific requirement that responding reports be delivered at least 42 days before trial. Under Rule 40A the time for service was 60 days for expert reports generally and no specific deadline for responding reports, the result being that IME's were often sought after the plaintiff served their reports at the 60-day deadline resulting in the response reports being delivered quite close to trial.
- [52] The defendants argue the amendments to the rules have already levelled the playing field to put the parties on equal footing to promote earlier settlement and better avoid a trial by ambush as was the risk in *Stainer* and *Morey*, because there is less risk in having multiple defence reports delivered on the eve of trial.
- [53] In contrast, as noted, the plaintiff's position rests solely on an interpretation of the above case law which the plaintiff says supports that a requirement to produce a report if obtained is the standard condition and that special circumstances must exist to justify excluding it. That position is identical to what the Court said at para. 36 of *Inhoff*, which the Court of Appeal in *Morey* overturned as being contrary to the reasoning at para. 13 of *Stainer*.
- [54] Based upon the above, I summarize as follows:
- a) Rule 7-6 is a rule of discovery, 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, in a way that should work to promote settlement before trial.
 - b) Since *Morey* and the amendment to the Rules including in an order to compel attendance at an IME a term that the defendant is to produce its medical opinion upon receipt has not been specifically in issue or considered by the Court;
 - c) A term that an IME report be disclosed if ordered, while it may often be included in an order compelling attendance at an IME, is often by agreement. It is not a standard one that the plaintiff is entitled, at their option, to insist upon as of right; and
 - d) As a general rule, solicitor's brief privilege is inviolate unless or until an applicant can show special or compelling circumstances that would allow the court to breach the sanctity of the privilege.

- [55] The effect and objective of the Stainer terms is still achieved if the first condition of the four is removed, by amending the terms so that the right to have the IME expert's file materials produced is triggered on the non-delivery of the report whether prepared or not.
- [56] There is no inherent difference to a plaintiff's case if a defendant gets an oral report from its IME doctor, or one in writing. Rather, the Stainer terms as subsequently considered in Morey are concerned with and address the objectives of Rule 7-6 by providing that if a report is not served, the plaintiff shall be entitled to the experts file materials, excluding opinions, in order to ensure that the parties are on a equal footing.
- [57] Under those considerations, and having regard to the court's discretion under Rule 7-6(1)(b) to order that a report be prepared and produced, I conclude that the party seeking to have the court impose conditions on the IME must establish that circumstances warrant those conditions, including the one in issue here.

Conclusion

- [58] The plaintiff has not shown that there are any circumstances to support that if a report is ordered by the defendants that it must be delivered "promptly". This is a first IME, being obtained after delivery of the plaintiff's expert reports some 2 1/2 years after they were obtained. There are no special circumstances to deprive the defendants of their rights to use the report for such purposes as they may wish according to their own strategy and, if they choose to do so, deliver it in accordance with the deadlines in the Rules so it may be relied upon at trial.
- [59] As such, and having regard to the agreements already made by counsel with respect to the remainder of the Stainer terms, I make the following orders:
- a) On May 7, 2021 the plaintiff shall attend an IME with Dr. David Lipson at 601 - 1281 West Georgia Street, Vancouver, B.C.
 - b) If the defendants do not deliver a medical report from Dr. Lipson with respect to the IME within the time requirements as set out in Rule 11-6, the defendants are to obtain from Dr. Lipson a copy of all documents which record the plaintiff's history and any observations or finding made by the doctor on the physical examination and shall forthwith thereafter deliver a true copy to counsel for the plaintiff.
- [60] Due to a lack of time, the parties were unable to make submissions on costs. As such, I will accept submission on costs in writing, with the defendants providing their written submissions within 14 days of today order, and the plaintiff 14 days thereafter. Alternatively, if the parties are able to agree to the costs order, they may advise accordingly in writing within 14 days.

"Master Robertson"

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