
CANADA / JUDGMENT

Pearson v. Deol

2021 BCSC 1419

COURT

Supreme Court of British Columbia

DECIDED

28 June 2021

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2021 BCSC 1419 Pearson v. Deol

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pearson v. Deol,

2021 BCSC 1419

Date: 20210628

Docket: M189098

Registry: Vancouver

Between:

Jay Elizabeth Pearson

Plaintiff

And

Dilraj Deol and 0950825 BC Ltd.

Defendants

Before: Master Muir

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff, appearing by teleconference:

P. Venegas

Counsel for the Defendants, appearing by teleconference:

J.H. Law

Place and Date of Hearing:

Vancouver, B.C.

June 28, 2021

Place and Date of Judgment:

Vancouver, B.C.

June 28, 2021

[1] THE COURT: This is an application by the defendants for the following:

- a) an order that the plaintiff attend at a vocational assessment with a vocational rehabilitation consultant, Ms. Samantha Gallagher, on July 6, 2021 at 9:30 a.m.;
- b) an order that the plaintiff attend at a functional capacity evaluation ("FCE") with an occupational therapist, Mr. Gary Worthington-White, on July 15, 2021 at 9 a.m.; and
- c) costs.

Background

- [2] This action arises out of a motor vehicle accident that allegedly occurred September 6, 2016. In the notice of civil claim, the plaintiff alleges a head, neck, back, and arm pain, post-concussive symptoms, headaches, and so forth.
- [3] The evidence indicates that the plaintiff has not worked since the accident. At the time of the accident, she was a very high-income earner, working for the Royal Bank of Canada ("RBC") with an income in the range of \$250,000 per annum.
- [4] Discovery of the plaintiff was conducted March 26 and May 4, 2021. The trial is scheduled to commence on November 15, 2021 for 15 days, therefore, the 84-day deadline for expert opinion is August 20, 2021.
- [5] The plaintiff has consented to independent medical examinations by Dr. Lysak, a neuropsychologist, Dr. Spivak, a psychiatrist, Dr. Dommann, a neurologist, and Dr. Khan, a physiatrist. Those examinations, I gather, have now been conducted, although the latter three apparently were conducted quite recently, all in June 2021.
- [6] Dr. Lysak did her examination quite some time ago, however, no report has been commissioned from her.
- [7] At this point, no reports have been produced from any of these experts and that is one of the problems that the plaintiff alleges with this application. However, we do have the instruction letter that counsel for the defendants provided to Dr. Lysak. From that letter, it is clear that she was not asked to comment on the plaintiff's employability or potential vocations.

- [8] There have been numerous other opinions about the plaintiff's condition. On October 3, 2016, Dr. Fasihy, the plaintiff's family physician, completed a Manulife Insurance application indicating that the primary diagnosis was whiplash injury and concussion syndrome, that the plaintiff's symptoms included daily headache, dizziness, poor sleep, lack of concentration, and inability to finish tasks and to plan ahead. Limitations included an inability to drive for any long period of time.
- [9] Dr. Fasihy concluded that the plaintiff had moderate impairment of occupational dysfunction with performing complex and varied tasks and with performing tasks requiring short and/or long-term memory.
- [10] There was also an ICBC-funded activation program under the care of Kiley Kwak, an occupational therapist. Ms. Kwak dealt with the plaintiff for a long period of time--from May 2017 to January of 2019--and saw the plaintiff again in June 2019. There is an initial report from Ms. Kwak of May 31, 2017 as well as a discharge report of October 28, 2019.
- [11] Although the defendants point to some wording in Ms. Kwak's report, particularly her initial report, which they submit suggests the plaintiff was expected to be able to return to work, in my view, that is a bit of a "tortured reading". I agree with the plaintiff that Ms. Kwak was not of the view that she would be able to return to work.
- [12] The plaintiff also saw Dr. Cameron, a neurologist, in 2017 for a medical-legal assessment. He diagnosed the plaintiff suffering from a mild traumatic brain injury and concluded that she had developed psychological problems, along with chronic pain. Dr. Cameron also opined that the plaintiff was completely disabled and would be unable to work in a competitive fashion at her previous job or any job. I note that Dr. Cameron's 2017 report was served on the defendants on December 14, 2018.
- [13] On May 14, 2017, the plaintiff was approved for long-term disability benefits by RBC Insurance.
- [14] On June 5, 2018, the plaintiff was approved by Manulife Insurance for continued long-term disability benefits on the basis of her being unable to perform the duties of any occupation.
- [15] On September 8, 2018, the plaintiff was approved for Canadian Pension Plan disability benefits.

Law

- [16] There was some dispute on the law and, in my view, the defendants are quite correct that the Court of Appeal decision in *Tran v. Abbott*, 2018 BCCA 365 has clarified the law regarding independent medical examinations.
- [17] Where there are multifactorial injuries, the defendant will normally be entitled to medical examinations in different specialties to allow the defendant to fully investigate the plaintiff's condition. No special circumstances need to be shown.

[18] The caveat is that the independent medical examinations sought must be necessary to the conduct of the defence. As it is often said, they must be necessary to level the playing field. In addition, they must not be for the purpose of bolstering the opinion of other experts.

Analysis

[19] Here, the plaintiff objects to the examinations sought on the basis that they are potentially bolstering the opinion of the other experts. She points out that Dr. Lysak has experience in disability and rehabilitation and has experience working with WorksafeBC. The instruction letter from defence counsel to Dr. Lysak not covering employment capacity or vocation abilities is a factor, but it may not be the complete answer.

[20] The plaintiff also points out that Dr. Spivak was asked to assess the following:

- a) the plaintiff's present level of impairment and/or disability, if any;
- b) whether any improvement of the plaintiff's conditions can be expected; and
- c) whether the plaintiff's employment or income-earning capacity has been compromised as a result of injuries or conditions caused by the subject accident, and, if so, whether they will continue to be compromised into the future.

Again, the plaintiff noted here that Dr. Spivak has WorksafeBC experience and has provided work-capacity opinions in the past.

[21] Thus, the plaintiff submits that there is a significant risk that these additional examinations would work to bolster the opinions of these prior examiners. In support of that, the plaintiff pointed out that some of the questions asked of Mr. Worthington-White, the occupational therapist, were duplicative of some of the questions asked of the other examiners, and that these questions did not appear to be focused specifically on functional capacity.

[22] However, even leaving aside this issue of bolstering of previous opinions, what the defendants do not show, in my view, is that these extensive examinations are necessary. No expert has opined that a vocational assessment or FCE is necessary. There have been no recent changes in the plaintiff's condition. Of all the doctors that the plaintiff has seen, at least in the reports produced in evidence before the court, not one has concluded that the plaintiff has any residual employability. She has been approved three times for long-term disability insurance, including on the basis of being unable to perform the duties of any occupation.

[23] As plaintiff's counsel submitted, where everyone has concluded that a plaintiff is blind, why would you order them to see an optometrist? The reality is that it is for the defendants to prove that these examinations are necessary.

- [24] They are also prejudicial. The plaintiff points out that these examinations would involve extensive six- to seven-and-a-half-hour examinations, with lengthy driving time. Although the defendants argue that the commute time put forward by the plaintiff is perhaps miscalculated and is longer than one would expect it to be, it is still a significant amount of time when you look at the injuries this plaintiff is suffering under.
- [25] The plaintiff's evidence is that she is already concerned with the amount of testing and driving that she has consented to, and she objects to these additional tests on the basis that they would aggravate her symptoms and be dangerous to her, in terms of the driving required.
- [26] The plaintiff's condition is such that when she attended an FCE for her counsel, the occupational therapist, Ms. Szarkiewicz, cut the examination short due to her observations of fatigue and concerns about the plaintiff. First, she noted that it was her opinion that the plaintiff "is not competitively or durably employable in any vocation . . . nor would I expect her situation to improve or change in the future due to her residual deficits". Ms. Szarkiewicz further says:

Based on the Plaintiff's significant cognitive dysfunctions and fatigue that were observed throughout the course of the functional capacity evaluation, it is not advisable or safe in my opinion for the Plaintiff to participate in this amount of assessment and driving. I ended my evaluation early due to concerning observations of fatigue and concerns that she would be at risk driving home. Post-evaluation follow up from the Plaintiff indicated that she experienced blurred vision, a pounding headache, decreased attention and processing, and neck and back pain. It is my understanding that the Plaintiff cancelled her plans over the next few days to rest. Based on the Plaintiff's tolerance for testing, it is highly likely that she will experience significant symptom aggravation to include but not limited to fatigue, increased anxiety, headaches, vision changes, and neck and back pain. The Plaintiff's memory is likely to be affected also.

- [27] Although the plaintiff herself does not go into the detail of Ms. Szarkiewicz, she does say that the attendance at that examination significantly aggravated her injuries. The plaintiff also says that her experience with Dr. Lysak significantly flared up her symptoms and she regretted the decision to drive herself to Dr. Lysak's appointment.
- [28] The defendants point out that the plaintiff is quite able to take a taxi to these appointments, but that does not really solve the problem that the long days are going to be aggravating to the plaintiff's symptoms.
- [29] Although the reports can undoubtedly be produced in time for the 84-day deadline, the scheduling of these examinations at the last minute has resulted in the plaintiff being asked to attend many examinations within a short period. That, combined with the travel time from her home in Abbotsford, has obvious impacts on her health.

[30] I should add that it is no answer to the plaintiff's objections to say that she has had an FCE conducted with Ms. Szarkiewicz. That, in and of itself, does not entitle the defendants to an FCE.

Conclusion

[31] In conclusion, I do not see how these extensive examinations are warranted. There is no point in doing a vocational assessment and an FCE on a plaintiff when there is no evidence that she has any residual employability. Their potential probative value is questionable and the evidence establishes that the examinations themselves will have serious detrimental effects on the plaintiff's health.

[32] Despite the potential for a significant damage award here, I am not convinced these examinations are in the interests of justice and the application is denied.

[33] I will hear you on costs, but, in my view, the plaintiff is entitled to her costs in the cause.

[SUBMISSIONS ON COSTS]

[34] THE COURT: The plaintiff will have her costs of this application in the cause. Thank you both.

"Master Muir"

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