

CANADA / JUDGMENT

Pepper v. MacDonald Estate

2023 BCSC 1741

COURT

Supreme Court of British Columbia

DECIDED

11 September 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 1741 Pepper v. MacDonald Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pepper v. MacDonald Estate,

2023 BCSC 1741

Date: 20230911

Docket: M207219

Registry: Vancouver

Between:

Daniel Pepper

Plaintiff

And

The Estate of Garrett Michael MacDonald, Deceased

Defendant

Before: Master Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A. Estey

Counsel for the Defendant:

D. Machat

Place and Date of Hearing:

Vancouver, B.C.

September 5, 2023

Place and Date of Judgment:

Vancouver, B.C.

September 11, 2023

Introduction

[1] The defendant applies for an order that the plaintiff attend a vocational assessment by Dr. Colleen Quee Newell on September 27, 2023. The plaintiff opposes the relief sought.

Background

[2] The plaintiff was injured in a motor vehicle accident which occurred on September 8, 2018. The defendant regrettably died at the scene of the accident, and the action has been brought against his estate.

[3] The plaintiff alleges he suffered the following injuries:

- a) traumatic brain injury;
- b) concussion;
- c) contusions and abrasions to the interior chest wall;
- d) right pneumothorax;
- e) fractured ribs;
- f) external fracture;
- g) pulmonary contusions;
- h) extensive pelvic fracture bilaterally;
- i) fracture to right femoral neck, right humerus;
- j) open fracture of the tibial plateau;
- k) fracture to right proximal fibular head;
- l) fracture to right ankle;
- m) multiple right foot fractures;

- n) avulsion fracture;
 - o) intra-articular injury to left patella;
 - p) fracture to the left calcaneus;
 - q) right midshaft ulnar fracture;
 - r) bilateral hand abrasions;
 - s) abrasion to groin and pelvic areas;
 - t) erectile dysfunction; and
 - u) injury to neck, back, shoulders, arms, hips, and legs.
- [4] The plaintiff says his injuries have caused and continue to cause permanent physical disability and loss of income, impairment of income earning capacity, both past and prospective, and loss of or diminished vocational opportunities.
- [5] The plaintiff has stated on discovery that he was bedridden in hospital for approximately six weeks post-accident. He underwent multiple surgeries and various other treatments. He alleges he was totally disabled between the date of the accident and August 22, 2023, when he embarked on a gradual return-to-work program. There was no information available regarding how that return to work has been progressing.

Litigation History

- [6] On July 9, 2020, the plaintiff filed his notice of civil claim.
- [7] On June 12, 2022, the defendant filed its response to civil claim.
- [8] On September 7, 2022, the plaintiff was examined for discovery.
- [9] Trial has been scheduled for February 5, 2024, for 14 days.
- [10] The 84-day deadline for delivery of expert reports is November 10, 2023.
- [11] As of the hearing of this application, the plaintiff had not yet served any medical-legal reports, nor has he disclosed who his experts will be.

Plaintiff's Work History and Training

- [12] At the time of the accident, the plaintiff was employed as an Electronic Technician with Coast Mountain Bus Company ("Coast Mountain"). He was earning about \$81,600 per year.
- [13] After high school, the plaintiff obtained a certificate in common core electronics. This qualifies him to work as an electronics technician. He has also obtained a diploma in aircraft maintenance.

- [14] At the examination of the plaintiff held on September 7, 2022, he indicated he had not yet returned to work. He was walking without aids about half the time, but walking was painful. He was riding a bicycle for about 30 minutes to one hour at a time and had resumed participating in karate.

Plaintiff's Evidence

- [15] The plaintiff tendered an affidavit in response to this application in which he states he was 36 years old at the time of the accident and is currently 41. Pre-accident, he had been employed as an Electronics Technician with Coast Mountain since July 2018. The company is unionized and he is a union member.
- [16] He says he was disabled from work as a result of injuries suffered in the accident. He immediately went on short-term disability, followed by long-term disability. He had multiple surgeries and attended many treatments with medical professionals, with the goal of regaining his overall function and returning to his pre-accident activities and full-time work. Returning to his former job has been his primary goal.
- [17] On June 23, 2023, he attended upon Dr. Jamal Al-Awsi at Surrey Family Medical to discuss his gradual return to work. He was given a note stating that in order for him to return to work, he would require steel-toed shoes with a lift to account for a discrepancy in the length of one of his legs due to the accident. On August 10, 2023, his occupational therapist, Lorraine Phan, prepared a gradual return-to-work (GRTW) plan to allow him to begin working in his previous position on a limited basis. He and a representative of Coast Mountain were involved in the creation of that plan. On August 22, 2023, he began his gradual return to work in accordance with the plan.

Defendant IMEs To Date

- [18] On May 29, 2023, at the defendant's request, the plaintiff was assessed by Dr. Muhlstock, a physiatrist. Counsel says Dr. Muhlstock has not yet prepared a report.
- [19] The plaintiff has also agreed to the defendant's request that he attend a Functional Capacity Evaluation and Future Care Assessment ("FCE/FCA"), to be conducted by Ms. Shannon Smith, occupational therapist, on September 11, 2023.
- [20] Defendant's counsel had also requested the plaintiff attend two other examinations:
- a) Dr. Colleen Quee Newell, vocational expert. This was originally proposed for September 7, 2023, but has since been reset for September 27, 2023;
 - b) Dr. Paul Thompson, orthopedic surgeon. This was originally proposed for September 13, 2023.
- [21] Plaintiff refused both of these latter two requests. As noted, the current application only seeks to compel the plaintiff's attendance upon Dr. Quee Newell.

Dr. Quee Newell

[22] Included in the material is a curriculum vitae for Dr. Quee Newell. She indicates she is a PhD in Counselling Psychology, a Master of Arts in Counselling Psychology, and a Bachelor of Physical Education. Her work experience includes providing services as a vocational consultant/clinical counsellor through Vocational Pacific Ltd. since June 1993. She has been accepted as an expert in vocational rehabilitation by this court.

[23] Also included is a letter from Dr. Quee Newell to defendant's counsel dated January 25, 2022. The name of the patient and date of the appointment have been redacted. It appears this was prepared for a different case and has been "recycled" in support of this application to help explain the type of assessment Dr. Quee Newell conducts. The letter states in part:

A vocational assessment is intended to determine the client's potential for employment and focuses on an analysis of the client's education, training, and employment experience, as well as results of vocational testing.

The specific test administered during a vocational assessment will vary according to the specific clients; therefore, it is not possible to preselect specific tests I will use in my assessment of [name redacted]. Tests typically administered during a vocational assessment include measures of general intellectual capacity, occupational aptitudes, academic achievement (e.g. reading comprehension, math computation, etc.), and occupational interest. This information, along with an in-depth interview and a transferable skills analysis, is used as a basis for opinions related to the client's suitability for employment within specific occupations, and/or eligibility for specific education or training programs.

A vocational assessment integrates medical, psychological, functional capacity and other vocationally relevant information. Physical testing is not administered during a vocational assessment. While the results of a physical evaluation are generally vocationally relevant, a client's physical abilities and limitations are not the sole determinants of their employment and educational potential.

Defendant's Position

[24] Defendant's counsel argued that an opinion from Dr. Quee Newell is necessary to allow the defence to properly prepare for trial.

[25] The plaintiff alleges he has been unable to work and claims damages for both past and future loss of earning capacity and loss of vocational opportunities. He worked in a well-paid career and is expected to advance a very large claim for past and future loss of earning capacity.

[26] The testing administered by a vocational expert differs significantly from that done by a physiatrist and on an FCE/FCA. A vocational expert will focus on assessing employability in various careers and capacities, based on education, training, certification, interests and aptitude, presently and with further education and training.

- [27] The plaintiff says he has not been able to return to work, initially alleging full disability and more recently only returning on a limited basis. It is appropriate to consider other employment options available to him when addressing the claim for past wage loss and future loss of earning capacity.

Plaintiff's Position

- [28] The plaintiff argues that he has previously attended an IME with the defendant's physiatrist, Dr. Muhlstock. The report is not in evidence, but the instruction letter is. It requests that he provide an opinion on whether the plaintiff is or has been totally or partially disabled from his own employment, or any other reasonable occupation as a result of injuries sustained in the motor vehicle accident.
- [29] Counsel notes that the letter of instruction to Ms. Smith, the occupational therapist, is not in evidence, nor are her qualifications. Likewise, the proposed letter of instruction to Dr. Quee Newell has not been provided.
- [30] Counsel argues there is potential overlap between the reports of Dr. Quee Newell and Ms. Smith, as there are significant similarities between the specialties of vocational expert and occupational therapist. They have varying areas of expertise and different methods, but both are concerned with assessing the plaintiff's vocational or occupational ability and what their disability permits them to do in a vocational setting.
- [31] If Dr. Quee Newell is being asked to evaluate whether the plaintiff is totally or partially disabled from his own employment or any other occupation, there may be a significant overlap between the reports of Dr. Muhlstock, Ms. Smith, and Dr. Quee Newell. Counsel says the defendant bears the onus of establishing via evidence such as affidavits of experts or instruction letters, that there will not be impermissible duplication or bolstering of opinions.
- [32] The proposed vocational report would not put the parties on an equal footing and is not necessary to level the playing field, because the plaintiff does not intend to retain a vocational expert for trial.
- [33] Further, a vocational expert is not necessary because the plaintiff remains employed by and intends to continue working at Coast Mountain. As an employee in a unionized workplace, he has significant job, wage and benefits security. Leaving that position to work for a different employer would result in loss of those advantages. It would also lose him support and security provided by this employer and his union. Remaining in his current position with his current employer while continuing to recover is his best opportunity to maximize his future income-earning capacity. His employer has been very accommodating throughout his recovery.

- [34] His employer has fully supported his goal of returning to his previous position when ready. This is demonstrated by Coast Mountain's approval of the GRTW program, which has the plaintiff initially working four hours per week and moving up to six hours per week over the course of six weeks.
- [35] The plaintiff argues the evidence the defendant has tendered is not sufficient to establish that the opinion of a vocational consultant is necessary.

Applicable Law

- [36] The application is made pursuant to Rule 7-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009:

Order for medical examination

- (1) If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make
- (a) an order respecting any expenses connected with the examination, and
- (b) an order that the result of the examination be put in writing and that copies be made available to interested parties of record.

Subsequent examinations

- (2) The court may order a further examination under this rule.
- [37] Justice Gomery summarizes how the rule has been interpreted in *Gennings v. Lum*, 2020 BCSC 1196 at paras. 9-14:
- [9] Supreme Court Civil Rule 7-6(1) authorizes the court to order an independent medical examination of a plaintiff in a personal injury action. The purpose of an IME is to put the parties on an equal footing with respect to the medical evidence; *Tran v. Abbott*, at para. [Tran]; *Wright v. Sun Life Assurance Company of Canada*, at para. While an assessment of what steps are necessary to achieve the goal of putting the parties on an equal footing is discretionary, the court must consider the effect of refusing an IME on the conduct of the trial; *Tran* at para.
- [10] The goal of putting the parties on an equal footing does not necessarily require matching expert for expert or report for report; *Hamilton v. Pavlova* [Hamilton] at para., *Gray-Verboonen v. Mandurah*, [Gray-Verboonen] at para.

- [11] The applicant bears the burden of showing that the IME is necessary; *Stocker v. Osei-Appiah* [Stocker] at para. ; *Rong v. Yelland*, [Rong] at paras. It is not the law that a second or subsequent IME is only justified in exceptional circumstances; a dictum to this effect in *Hamilton* at para. was repudiated in *Tran* at paras. However, it is the case that a further IME is not necessary if it would only serve to bolster an opinion already obtained by the defendant; *Gray-Verboonen* at para. In *Stocker* at para., Justice Pearlman stated:
- [33] A second examination will not be permitted for the purpose of attempting to bolster an earlier opinion of another defence expert. In meeting the higher threshold for a further examination, the defendant must show that there is some question or matter that could not have been dealt with at the earlier examination.
- [12] Where the defendant has already obtained an IME or IMEs and the question is whether a further IME should be ordered, the court must assess the questions already addressed, the differing specialities of the assessors, and the often uncertain path taken in the development of a differential diagnosis in a difficult case; *Kim v. Lin*, [Kim] at paras.
- [13] In every case, the court must consider whether the IME sought is proportionate having regard to the magnitude of the plaintiff's claims and complexity of the medical issues; *Kim* at paras.
- [14] The court must also consider whether the application is brought in time to permit admissible evidence to be adduced by the defendant at trial without undue prejudice to the plaintiff; *Vermuelen-Miller v. Sanders*, at paras.; *Hamilton* at para. It is common ground that timeliness is not a concern in this case.

Analysis

- [38] The plaintiff's primary opposition is based on alleged overlap or bolstering with the anticipated report from the defendant's physiatrist, Dr. Muhlstock, and/or the occupational therapist, Ms. Smith. There is also a general complaint that the evidence tendered by the defendant is inadequate, including no affidavit evidence from Dr. Quee Newell or proposed instruction letter to her specifically addressing the proposed examination of the plaintiff in this case.
- [39] I agree the evidence tendered is relatively thin. The requirement for some evidence is addressed in two decisions, including *Gray-Verboonen v. Mandurah*, 2019 BCSC 1697, at paras. 15 -17 and *Hunter v. Martell*, 2021 BCSC 1962, at paras. 5-6.
- [40] It would have been preferable to have sworn evidence from Dr. Quee Newell regarding the proposed assessment for this specific case. Alternatively, an instruction letter might have also been of some assistance. What has been provided is a general explanation of the type of assessment that Dr. Quee Newell carries out, which she prepared for another case. This does offer some insight. There is no report from Dr. Muhlstock, but his letter of instruction was provided. There was also no evidence regarding the FCE/FCA by Ms. Smith. Typically, these

involve testing to assess physical capacity and limitations in both a work and home setting.

- [41] In the present case, the plaintiff's evidence is that he has been completely disabled from working since the date of the accident (September 8, 2018) to August 22, 2023. He has testified about the commencement of a gradual return-to-work program, which has been put in place with the apparent support and cooperation of his union and his employer. It is notable that this initially involves only four hours of work per week, gradually increasing to six hours per week. It is fair to characterize this as a very preliminary reintroduction to the workplace. There is also no evidence indicating how the plaintiff has been managing thus far. It is not at all clear at this point whether the plaintiff will eventually be able to return to his former duties and, if so, whether that will involve any ongoing limitations in terms of duties, hours and prospects for advancement.
- [42] The proposed vocational assessment will focus on assessing the plaintiff's employability in various careers and capacities based on education, training, certification, interests, and aptitude presently and with further education and training. I accept that this is substantially different than the type of examination typically carried out by a physiatrist or on an FCE/FCA. There are several previous authorities which have found vocational assessments to be appropriate in cases where the plaintiff has previously had physiatrist and occupational therapist examinations.
- [43] In *Parent v. Krystal*, 2021 BCSC 988, Master Keighley granted an application for a vocational assessment by Dr. Quee Newell for a plaintiff who had already attended for medical examinations requested by defence counsel, including with a neurosurgeon, a physiatrist, an occupational therapist and a psychiatrist. He emphasized the significance of proportionality as a consideration. See paras. 12-13 and 22:
- [12] As far as the proposed assessment by Dr. Quee Newell is concerned, there are a couple of issues for me to look at which I will get into in more detail in a moment, but they would be, well, the man is 61 years of age. One might ask how many years he has left in his working career whether as an ironworker or not and how likely is it that whatever the results of the vocational assessment, he is likely to be retrained or retrainable given the limited number of working years he has left.
- [13] On the other hand, there is the significant issue of proportionality in this case. As I started to say before I was distracted by my thoughts concerning the vocational assessment itself, the trial is set for three weeks. There is an indication in the materials, I gather, that the wage loss claim alone is going to be in the order of perhaps \$1.1 million if proved to the plaintiff's satisfaction.
- [22] I am satisfied after reviewing all the circumstances of this case that the plaintiff's condition, his age, the apparent nature of his disability, the value of his claim, justify an order for the assessment by Dr. Quee Newell.

- [44] In *Henderson v. Fisher*, 2020 BCSC 981, Justice G.C. Weatherill granted an application for a vocational assessment, commenting that he did not accept that such an assessment would be a duplication of or an attempt to bolster opinions of a physiatrist or a psychiatrist at paras. 12-13 and 15:
- [12] It is apparent that a significant issue at trial will be whether the plaintiff suffered a loss of function and earning capacity as a result of the Accident and, if so, to what extent. That issue necessarily raises the extent to which the plaintiff is both emotionally and physically capable of working and in what capacity or vocation(s).
- [13] The order sought is discretionary. I have reviewed and considered that various cases relied upon by counsel, including *Stocker v. Osei-Appiah*. There is no question that the appropriate order should have been sought when the original request was refused by the plaintiff in March 2019. However, if the order now sought is refused, the trial judge's ability to render a just decision on the merits of the case may be hindered. The views expressed by Mr. Justice N. Smith in *Broumand v. McEdwards*, at paras. are apt in this case, particularly those at para. 14 where he stated:

In the circumstances, the need for the best evidence and a just determination on the merits - along with the fact that access to the court has been restricted during the COVID-19 pandemic - overrides any concern I may have about the timeliness of the first IME or of this application.

- [15] In my view, the defendant is entitled to conduct an independent assessment of the plaintiff's vocational capacity even though she did not seek an order prior to the first trial date. The assessment will assist the court in identifying the employment options for which the plaintiff is suited, including the likelihood that she would have obtained a Master's Degree in Nursing and worked as a nurse practitioner but for the Accident. The assessment will even the playing field and will provide the trial judge with a more complete evidentiary foundation for the determination he or she will be asked to make. Such is the very purpose of Rule 7-6: *Stainer v. Plaza*, at paras.; *Hamilton v. Pavlova*, at paras.; *Tran v. Abbott*, at para. I do not accept that a vocational assessment will be a duplication of or an attempt to bolster the opinions of the defendant's psychiatrist or physiatrist. Each will bring to bear different qualifications and expertise for the purpose of assisting the court.
- [45] In *Evangelista v. Chohan*, 2021 BCSC 476, Master Cameron granted an application that the plaintiff attend an IME with Dr. Quee Newell. The learned master indicated he found *Henderson* to be instructive. At paras. 10-12:
- [10] Prior to this accident the Plaintiff was a nurse working in a surgical setting. Following the accident, due to her injuries and limitations, she has been able to continue her career as a nurse but in community nursing. A claim for past and future income loss or loss of capacity is being made by the Plaintiff, albeit she has remained in nursing following the accident.

- [11] In evaluating what loss the Plaintiff has suffered as a result of the accident, it will be of assistance to the parties and the court to have the benefit of an experienced vocational assessor to examine the Plaintiff's qualifications and what her opportunities may be while remaining in the nursing field to either replace, entirely or in part, any pecuniary loss she may have suffered as a result of her having to move from one nursing setting to another.
- [12] In making that evaluation it was conceded by Plaintiff's counsel that one would not expect either of the two medical experts who have already examined the Plaintiff, being a neurologist and a physiatrist, to be able to express an expert opinion on that discrete question. Accordingly, I find the defendant has met the onus of showing that it is necessary to level the playing field for this examination to take place and the order sought is granted.
- [46] The plaintiff argues that the court should take into consideration that it is his intention to focus all of his efforts on returning to his former position with Coast Mountain and his union. While this is understandable, it is merely an expression of his desire and intention. It is not at all clear whether it is a realistic or practical goal, or achievable within a reasonable time frame. It is possible he may not be able to return to work. Even if he is able to return on a part-time or modified basis, some other potential vocational path might arguably have advantages which the plaintiff may wish to consider as an alternative, or which the defendant may wish to raise in the context of a mitigation defence.
- [47] The defendant has satisfied me that the proposed examination by Dr. Quee Newell is necessary and proportionate in the circumstances of this case. I order the plaintiff to attend the office of Dr. Colleen Quee Newell at 309 - 2902 West Broadway, Vancouver, BC, on September 27, 2023, at 9:00 a.m.
- [48] Defendant has been successful in this application and is entitled to costs in any event of the cause.

"Master Bilawich"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/17/2023BCSC1741.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/pepper-v-macdonald-estate-2023>

Prepared on 29 October 2026 · Esheria