

CANADA / JUDGMENT

Peters v. Morrison

2021 BCSC 1086

COURT

Supreme Court of British Columbia

DECIDED

10 February 2021

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2021 BCSC 1086 Peters v. Morrison IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Peters v. Morrison, 2021 BCSC 1086 Date: 20210210 Docket: M199665 Registry: New Westminster Between: James Roy Peters Plaintiff And Kaelen Morrison Defendant Before: Master Keighley Oral Reasons for Judgment In Chambers Counsel for Plaintiff: D.J. Brown Counsel for Defendant: R. Bacha Place and Date of Hearing: New Westminster, B.C. February 10, 2021 Place and Date of Judgment: New Westminster, B.C. February 10, 2021

- [1] THE COURT: In this action Mr. Peters, the plaintiff, brings suit for compensation relating to injuries he allegedly suffered in a motor vehicle/motorcycle accident on or about July 8, 2017.
- [2] Liability is denied by the defendant, Ms. Morrison, but it will be the evidence of the plaintiff that the Morrison vehicle turned left in front of him, resulting in a T- bone type of collision.
- [3] The application before me today is brought by the defendant and is for orders requiring the plaintiff to attend two medical examinations, one with Dr. Andrew Woolfenden, a neurologist, and the other with Dr. Derryck Smith, a psychiatrist. The notice of application sets out the date, time and proposed location of those examinations. The defence also seeks the costs of this application in any event of the cause from the plaintiff.
- [4] I am not sure of the plaintiff's age. I am assuming the accident occurred at a time when the plaintiff was in his early to mid 40s. He alleges numerous injuries as a result of the accident. The ones relevant to this application, it seems to me, would be head injury, concussion, sensitivity to light and noise, ringing in ears, difficulty with speech, confusion, nausea, insomnia. He goes on to allege certain other physical injuries perhaps more orthopedic in nature.
- [5] A nine-day trial of this matter is scheduled to begin on June 28, 2021. As a result, the date for the exchange of expert reports is April 2, 2021.

- [6] The examinations sought on this application would be, if granted, the third and fourth examinations attended by the plaintiff at the behest of the defence. The plaintiff has already attended, at the request of the defendant, an independent medical examination with Dr. Sexton, a neuro-ophthalmologist, and Dr. Horlick, an orthopedic surgeon. Neither of those reports has been served in accordance with the Rules. At this point, the plaintiff has not served any reports.
- [7] Now, in general terms, Supreme Court Civil Rule 7-6(1) grants jurisdiction to order the independent medical examination of a plaintiff in a personal injury action, and in general terms, the purpose of an independent medical examination is to put or attempt to put the parties on an equal footing with respect to medical evidence.
- [8] A case to which the court is often referred, understandably, on applications of this nature is the decision of the British Columbia Court of Appeal in *Tran v. Abbott*. It is reported at 2018 BCCA 365. That case, to my mind, stands for two important considerations in dealing with applications of this nature. One is that it emphasized the primary duty of the court being to place the parties on as equal as possible a footing with respect to medical evidence, and the other was in clarifying the decision in *Hamilton v. Pavlova* to establish that no higher standard was required of a party seeking a second or subsequent medical examination.
- [9] Both prior to the *Tran* case and since, it has been clear that the applicant for an order of this nature has the burden of proving that an independent medical examination is necessary. The court must also consider proportionality. I suppose the suggestion being that as the case becomes more complicated or more likely that more money is in play, that the court might be more inclined to order additional reports than it might be had the matter been in a relatively simple matter, perhaps a Rule 15-1 type of case.
- [10] Here it appears as though the claim may be a fairly substantial one. The plaintiff suffered this injury, as I indicated, perhaps in his early 40s. He has been unable to work since the accident. Prior to the accident he earned something in the order of 65 to \$70,000 a year. A calculation for the amount owing for wage loss alone since the date of the accident, given those numbers and projecting that should he remain unable to work for what one might anticipate would be his working life, would amount to a sum well in excess of a million dollars.
- [11] Now, I am going to deal first of all with the application to have the medical examination conducted by Dr. Derryck Smith, who is a psychiatrist. As I said a few moments ago, the applicant bears the burden of proving that an IME is necessary.
- [12] I note first off that in the pleadings which commenced this action, the plaintiff makes no claim for a psychiatric or psychological issue arising as a result of the accident. That is not determinative of itself, but as Mr. Brown did, I cast an eye over the responses that this plaintiff gave to questions concerning emotional issues.

- [13] He was examined for discovery on two separate occasions, and I will not take the time to try and resolve which of the examinations gave rise to these answers, but in the transcript of his examinations, I am going to be referring to page 157. Commencing at question 903, he was asked: What sort of emotional symptoms have you experienced? And he answered: It's been kind of all over the map. I mean, after the accident, I was kind of - felt sort of numb for a while, like I didn't - I wasn't really happy. Sad. I was just sort of, you know, like, nothing really - nothing really affected me, and then sort of things slowly started to creep back in. Like, I remember driving in traffic, and then somebody cut me off, and I - I just started yelling like a crazy person. I was, like, where did that come from. Like, I've never done that before in my life so - Question 904: And when was that approximately? Do you remember the year or the month? Answer: It was probably - it probably was like a year and a half ago now or so. Question 905: A year and a half from now? Answer: Yeah, ago, yeah. Question 906: So 2019, late 2018, something like that? Answer: Something like that, yeah. Question 907: And you said you were numb following the accident? Answer: Yes. Question 908: What are we talking about after that time period? Answer: Probably eight to 12 months after the accident. Question 909: And so in the past couple of years, say past two years, other than that one angry outburst, have you had any other issues controlling anger? Answer: Not that I can recall. I've really tried to just keep it under check, not to let myself get to that level, talk myself down, so to speak. And then it was just sort of, you know, frustration. Also some sadness. Probably - well, definitely some depression. Just sort of being stuck where I am, you know. Question 910: And when did that - when did you say definitely some depression? Why do you say definitely some depression? Answer: Just because it feels like what it is, and I probably started like - it probably started after my shoulder, neck got really because I wasn't really able to do anything. Question 911: And, sorry, when was that? Answer: That was - would have been, like, August, September of last year, so - Question 912: And you mentioned some sadness once? Answer: Yes. Question 913: What sort of sadness are we talking about? What is the sadness associated with? Answer: Just from the fact that I can't do anything that I really used to enjoy doing, so it's, like, totally different person from what I used to be, so - Question 914: Is that being associated with any crying or any sort of outward emotional responses? Answer: I've had my moments, yeah. So - Question 915: And when did that sadness start to kick in, do you recall? Answer: Probably later on last year. Question 916: Around the same time as the shoulder and neck or later than that? Answer: Later on, yeah. Later on. Question 917: And other than what we've talked about, any other depressive symptoms that you've experienced. Answer: No, not that I can recall. Question 918: Have you noticed any increase in the severity or intensity of your symptoms in conjunction with any of these emotional issues? Answer: No.
- [14] Now, it will be for the trial judge to determine whether the plaintiff's evidence at trial in the context of those questions and answers discloses an injury which you might characterize as a psychological one or one requiring a psychiatric diagnosis. It seems to me that what the plaintiff is essentially expressing is low mood as a consequence of being obliged to deal with his injuries. There is nothing in the material before me in addition to the plaintiff's

responses to suggest to me that there is a psychiatric or a psychological issue that needs to be addressed by an independent medical examination.

- [15] The defendant's application for an order that Mr. Peters attend the examination with Dr. Smith is, as a result, dismissed.
- [16] Now, with respect to the application for an order that the plaintiff attend for the examination with Dr. Woolfenden, the neurologist, I indicated earlier on in these reasons for judgment that the plaintiff had already attended, at the request of the defendant, an examination with Dr. Sexton, a neuro-ophthalmologist. Now, a lay person might assume that there is some connection in the nature of the work performed or services provided by a neurologist and a neuro-ophthalmologist. What Dr. Sexton who conducted the earlier examination said in a letter dated January 26, 2021, is:
- [12] While there is some overlap between my area of expertise and that of a neurologist, I have been asked specifically to opine on the virtual issues and any related issues that the plaintiff has complained of since the accident, and I will do so.
- [17] Dr. Sexton is not saying, to my mind, that she does not have the expertise to consider a neurological injury, and particularly in this case a concussion. She is saying that she has not been asked to.
- [18] With respect to the issue from the neurologist's perspective, I also have in the material before me a letter from Dr. Woolfenden, and it is dated January 21, 2021, in which he says at para. 11:
- [11] While there may be some overlap between a neuro-ophthalmologist and a neurologist with respect to visual issues which could potentially result from a concussion, treatment and diagnosis of the full spectrum of concussion symptoms is most appropriately handled by a neurologist.
- [19] Now, Dr. Woolfenden is not saying that a neuro-ophthalmologist cannot or should not make an opinion with respect to a neurological issue generally or specifically with respect to concussion, and I am not satisfied from the material before me that Dr. Sexton, if asked, might not be able to provide an opinion with respect to concussive symptoms other than ones which have a visual component. For this reason I am also dismissing the application for a medical examination by Dr. Woolfenden.
- [20] What about costs? Mr. Brown? Liability is an issue, is it not?
- [21] MR. BROWN: Yes, Your Honour. Liability is denied. Perhaps for that reason only, I would ask the plaintiff have their costs in any event.
- [22] THE COURT: Okay. Thank you. Mr. Bacha?
- [23] MR. BACHA: My submission, Your Honour, would be that costs in the cause is the usual order and it should be made in this application as well.

[24] THE COURT: I am going to make an order that costs be to the plaintiff in the cause. And I should admonish both of you gentlemen for going well over your time estimate, but I will commend you for very well-prepared submissions on the application. Thank you. "Master Keighley"

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