

CANADA / JUDGMENT

Schiel v. Pearson

2020 BCSC 2045

COURT

Supreme Court of British Columbia

DECIDED

3 November 2020

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2020 BCSC 2045 Schiel v. Pearson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Schiel v. Pearson, 2020 BCSC 2045 Date: 20201103 Docket: M180106 Registry: Vancouver Between: Hildegard Schiel Plaintiff And Danielle Nicole Pearson and Maury Pearson Defendants Before: Master Cameron Oral Ruling for an Order that the Plaintiff Attend for an Independent Medical Examination with a Neurologist Counsel for the Plaintiff: R.A. Holness Counsel for the Defendants: D. Machat Place and Date of Hearing: Vancouver, B.C. November 3, 2020 Place and Date of Ruling: Vancouver, B.C. November 3, 2020

INTRODUCTION

- [1] This application is brought by the defendants for an order that the plaintiff attend an Independent Medical Examination (IME) with a neurologist, Dr. Frank Kemble, on December 3, 2020.

BACKGROUND

- [2] The plaintiff was involved in a motor vehicle accident on January 5, 2016 (the "Accident"), in which she was struck as a pedestrian crossing in a crosswalk by a motor vehicle owned and operated by the defendants.
- [3] In the Notice of Civil Claim filed on January 3, 2018, the following injuries are alleged:
- a) Subdural hematoma;
 - b) C7 laminar fracture;
 - c) Fractured left clavicle;
 - d) Fractured pelvic and sacrum;
 - e) Fractured right scapula;
 - f) Fractured ribs;
 - g) Fractured left olecranon;

- h) Multiple contusions;
 - i) Abrasions;
 - j) Soft tissue injury;
 - k) Chronic pain;
 - l) Headaches;
 - m) Loss of earnings;
 - n) Loss of capacity to earn income;
 - o) Loss of housekeeping capacity; and
 - p) Loss of pension income.
- [4] The plaintiff is currently 80 years of age and at the request of the defence has already attended an IME with Dr. Richard Kendall, an orthopaedic surgeon.
- [5] The trial of this action is set for ten days commencing on May 3, 2021.
- [6] It is apparent from the evidence filed on this application that the plaintiff suffered serious orthopedic and neurological injuries as a result of the Accident. Counsel for the defendants referred to notes from the emergency care provided at Royal Columbian Hospital that indicated that as a result of the Accident, the plaintiff was confused at the scene and amnesic for the event.
- [7] Medical imaging on the day of the Accident confirmed that the plaintiff suffered a significant subdural hematoma. The plaintiff has continued to suffer the effects and limitations of her injuries and has been unable to resume her employment as a price checker for a data marketing firm. DISCUSSION
- [8] The defence submitted in support of this application that Dr. Kendall is not qualified to provide expert opinion evidence in respect of brain injuries, including the impact and ongoing limitations that the plaintiff may suffer as a result of her subdural hematoma. To properly prepare for trial, the defence argued that they must have an opinion from a qualified neurologist.
- [9] Plaintiff's counsel opposed the application and submitted that there was likely to be overlap between the opinion provided by Dr. Kendall and any opinion that might be provided by Dr. Kemble.

- [10] On the record there is correspondence from Dr. Kemble that in my view is of assistance in resolving this application. In a letter dated October 19, 2020, to counsel for the defendant, Dr. Kemble writes the following: A neurologist diagnoses disorders of the nervous system, including traumatic brain injuries, nerve and nerve root entrapment, dizziness, headaches and disorders of balance. An orthopaedic surgeon typically diagnoses and treats joint disorders and does not have specific training in any of the above neurological disorders.
- [11] There was no evidence contrary to what was said by Dr. Kemble as to the respective degrees of specialty involving orthopedic and neurological injuries and their diagnosis and treatment.
- [12] The leading authority on applications such as this one is the decision of the Court of Appeal in *Tran v. Abbott*, 2018 BCCA 365. Defence counsel referred to para. 33 of the decision that reads as follows: Multiple examinations may be appropriate and necessary where a variety of injuries are alleged, or the etiology of illness is not straightforward. In exercising its discretion on an application pursuant to Rule 7-6, the court must consider the effect of refusing the order sought on the conduct of the trial.
- [13] At para. 37 the court said: In this case, the judge concluded that parts of the neurologist's report went beyond his expertise, and thus a report from an expert with appropriate and different expertise would "bolster" the first report (at para. 26). Without opining on whether that view is correct, the practical effect of the ruling is to preclude the defendant from obtaining a report from an expert with appropriate qualifications on a live issue, the etiology of the plaintiff's complaints.
- [14] While Dr. Kendall has not yet provided his report, plaintiff's counsel advised that at least a cursory neurological examination was done by him during the course of his examination of the plaintiff while assessing her other injuries within his expertise.
- [15] While Dr. Kendall may make some comment in his report about the plaintiff's neurological injuries it is not to be anticipated that he would offer a diagnosis or an opinion in respect of the significant brain injury suffered by the plaintiff.
- [16] In this case it will be necessary for the defendant to properly prepare to defend the claim arising from the brain injury and to have an opinion from an appropriately qualified expert and, on the record before me, that opinion evidence would not be provided by an orthopedic surgeon.
- [17] In my view, this is not a case where one would anticipate that even before the examinations are conducted, there is likely to be significant overlap between the opinions and that one might be expected to "bolster" the other. In fact, just the opposite is likely to be the case, bearing in mind the limitations on an orthopedic surgeon when it comes to opining on neurological injuries.

[18] Accordingly, I am satisfied that the defence has met the threshold required for an order for an IME with a neurologist, and the order sought is granted. [SUBMISSIONS]

[19] The costs of the application are in the cause. "Master Cameron"

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