
CANADA / JUDGMENT

Shannon v. Cook

2019 BCSC 1139

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1139 Shannon v. Cook

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shannon v. Cook,

2019 BCSC 1139

Date: 20190604

Docket: M180648

Registry: Vancouver

Between:

Cynthia Rose Shannon

Plaintiff

And

Michael Cook

Defendant

Before: Master Elwood

Oral Ruling Re Application for Attendance at an IME

In Chambers

Counsel for the Plaintiff:

C.L. Linegar

Counsel for the Defendant:

B.M. McFadden

Place and Date of Hearing:

Vancouver, B.C.

May 30, 2019

Place and Date of Ruling:

Vancouver, B.C.

June 4, 2019

- [1] THE COURT: This is an application by the defendant in a motor vehicle action for an order requiring the plaintiff to attend an independent medical examination by a neurologist.
- [2] The plaintiff Cynthia Shannon and the defendant Michael Cook were involved in a motor vehicle accident on February 11, 2016. Ms. Shannon was also involved in two previous accidents.
- [3] In a notice of civil claim filed January 12, 2018, Ms. Shannon alleges physical, neurological and psychological injuries resulting from the collision with Mr. Cook. She has not returned to her job as a cook since the accident. As she is relatively young, her future wage loss claim is potentially significant.
- [4] Mr. Cook denies liability for Ms. Shannon's injuries. Causation and damages are also in issue. The trial is set for January 20, 2020, for ten days. The normal 84-day deadline for delivery of expert reports is October 28, 2019.
- [5] Ms. Shannon has agreed to attend three medical examinations by professionals selected by Mr. Cook: Colleen Quee Newell, an occupational therapist; Dr. Maryana Apel, a physiatrist; and Dr. Susan Lazar, a psychiatrist. Of these examinations, only the assessment by the psychiatrist, Dr. Lazar, has taken place. Dr. Lazar has not yet provided a report.
- [6] Mr. Cook has also asked Ms. Shannon to attend a medical examination by Dr. Dean Johnston, a neurologist, on June 19, 2019. Ms. Shannon has not consented to this examination.
- [7] Mr. Cook's position is that a further independent medical examination should be ordered because Ms. Shannon alleges a variety of injuries, some of which are within the area of expertise of a neurologist, as distinct from that of a physiatrist or a psychiatrist. Mr. Cook submits that the consequence of being denied an independent neurological examination is that the defendant will not have a qualified expert opinion on a potential brain injury claim at trial.

- [8] Ms. Shannon opposes a further examination on the basis Mr. Cook has failed to establish that any of her injuries cannot be addressed adequately in the assessments and reports by the physiatrist and the psychiatrist. She says there is overlap between the expertise of Drs. Apel and Lazar, on the one hand, and that of a neurologist, on the other, and that no new matters have arisen that would justify a further examination by a neurologist at this time. A report by a neurologist, she submits, would serve only to bolster the opinions of the existing examiners or, alternatively, provide the defendant with an unwarranted second opinion.
- [9] Ms. Shannon further submits that the recent introduction of Rule 11-8, which limits expert evidence at trial in a motor vehicle action on the issue of damages to that of three experts, should be a factor in the court's exercise of discretion whether to allow a further independent medical examination, so as to discourage defendants from "expert shopping."

Background

- [10] Ms. Shannon's symptoms following the accident included headaches, dizziness, light sensitivity, nausea, neck and back pain, and what she described as a blockage in her right arm. Ms. Shannon also testified on her examination for discovery that she believes she struck her head and that, in addition to severe headaches, she has experienced memory loss and difficulty concentrating.
- [11] Ms. Shannon was referred by her family doctor to a neurologist who reported in May of 2018 that her neurological exam was normal and that the pain in her right arm was likely tendonitis unrelated to the motor vehicle accident.
- [12] In a letter provided to defendant's counsel, Dr. Johnston confirms that Ms. Shannon's reported symptoms are commonly assessed by neurologists in clinical practice and are within the purview of a neurology practice generally and his area of practice specifically.
- [13] As stated, Ms. Shannon has been or will be examined by a physiatrist and a psychiatrist. Dr. Apel's web site describes a physiatrist as a rehabilitation specialist with expertise in the treatment of nerve, muscle and bone injuries and illnesses that affect physical movement and comfort. In *Harry v. Powar*, 2018 BCSC 845, and *Mariano v. Campbell*, 2009 BCSC 98, trial judges of this court accepted Dr. Apel's expert evidence on chronic soft tissue pain and headaches suffered by the plaintiffs, including her prognosis for their recoveries.
- [14] In *Hale v. Pratt & Whitney Canada Corp.*, 2014 BCSC 2048, the psychiatrist, Dr. Lazar, described her proposed independent medical examination in that case as focusing on the diagnosis of any psychiatric disorders, in particular any secondary psychiatric disorders related to the plaintiff's brain injury, including cognitive disorders and mood or anxiety disorders.
- [15] In the letter to defendant's counsel in this case, Dr. Johnston described neurology, and distinguished it from psychiatry and psychology, as follows:

Neurology is primarily a diagnostic specialty focused on disorders of the nervous system, including brain, spinal cord, nerves and muscles. We address patients with symptoms including but not limited to impaired cognition, spinal cord injury, head injury, nerve injury, weakness, numbness, pain, visual and other perceptual disturbances, including hearing, balance difficulties and headache. A neurologist is specifically trained to diagnose problems with the nervous system and typically does not address emotional, psychiatric or rehabilitation treatment issues as these are addressed by physiatrists and psychiatrists. Neurologists are uniquely qualified to opine on injuries to the nervous system as outlined above. The symptomology that you have described in your letter is highly suggestive of injury involving the nervous system. Of note psychiatrists and physiatrists typically refer patients with the above symptoms to a neurologist for opinion in general clinical practice. (emphasis added)

Analysis

[16] The Court of Appeal considered the test for ordering an independent medical examination under Rule 7-6 in *Tran v. Abbott*, 2018 BCCA 365. The Court described Rule 7-6 as a rule of discovery which is designed to balance the plaintiff's advantage in obtaining expert opinions by providing the defendant with access to the plaintiff for such before trial. The Court rejected the suggestion in some previous decisions that exceptional circumstances are required for a second or subsequent independent medical examination. As to the correct considerations, the Court said this at paragraph 33:

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.

[17] In *Tran*, the chambers judge concluded that parts of a neurologist's report went beyond his expertise, and thus a report from an expert with appropriate and different expertise would only bolster the first report. Reversing this decision, the Court of Appeal held that the practical effect of the ruling was 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.

[18] The parties in this case are agreed that, following *Tran*, the primary questions on an application for a second or subsequent examination under Rule 7-6 are: whether it is required to put the plaintiff and the defendant on the same footing with respect to medical evidence; and, what would be the consequences of denying such an examination at trial.

[19] Ms. Shannon submits that a further examination by a neurologist is not required because there is no evidence from the existing independent medical examiners that the plaintiff's symptoms are outside their expertise. The defendant has not disclosed counsel's instruction letters to Dr. Apel or Dr. Lazar; however, it is reasonable to assume he asked them to consider the same basic questions he would ask Dr. Johnston. In the absence of the reports

from Drs. Apel and Dr. Lazar, Ms. Shannon argues, it is premature to conclude they cannot provide adequate and admissible answers.

[20] In *Irvine v. Bradley*, (22 February 2019) Vancouver, M172655 (BCSC), the defendant sought an additional examination by a neurologist after the plaintiff had already been seen by a psychiatrist and an orthopedic surgeon. Similar to this case, the plaintiff objected on the basis that the existing assessments, particularly by the psychiatrist, were likely to assess the brain injury. The plaintiff asserted a concern with overlap and argued that a neurological report would simply be used to bolster the existing report.

[21] Mr. Justice Skolrood rejected this argument as follows, at paragraph 4 and 5:

I am going to order the additional IME. I am alive to the plaintiff's concern. I think it is a fair one. I am also alive to the concern that this may be premature because we do not know what is in the psychiatrist's report. However, it seems to me that there are distinct specialties here. While it is true that a psychiatrist can diagnose a brain injury, I am not satisfied that a psychiatrist is qualified to deal with all of the neurological implications of it. Certainly that is true of an orthopedic surgeon.

I also approach this from the perspective of a trial judge who will prefer to have the best evidence available before him or her as to the nature of the injuries and the consequences of those injuries. To my mind this additional report is likely to help in that respect. If indeed it turns out there is overlap or there is redundancy or one or more of the doctors has gone beyond his or her sphere of expertise that is something from the trial judge. For the present purposes I am satisfied on the evidence that a neurological examination is in order, and I will allow the application. (emphasis added)

[22] On the other hand, in *Samad v. Schisler*, 2007 BCSC 1670, Mr. Justice Slade found, at paragraph 20:

As for the conduct of the trial, I am not satisfied that a further examination by a neurosurgeon would in circumstances in which all records of treatment by the family physician, physiatrist and neurosurgeon have been made available prior to the initial independent medical examination be required to put the defendant in a position of equality for the purposes of the conduct of the trial. I say this because the disciplines of physiatrists and neurosurgeons to some extent overlap, and in the present case the full disclosure provided by the plaintiff afforded to the defendant an opportunity for the first independent medical examiner, here a physiatrist, to conduct an examination that would be comparable to that of a neurosurgeon. I note in this connection that Dr. Reebye is an extremely experienced physician with a broad background, including a background in orthopaedics. (emphasis added)

- [23] In *Hein v. Linge*, 2018 BCSC 1203, the reports from two previous independent medical examinations were placed before the court. Master McDiarmid found that the reports showed the particular neurological issue, in that case traumatic brain injury, had been canvassed in these assessments and a further examination by a neurologist was not necessary to level the playing field between the parties.
- [24] In *Koulechov v. Dunstan*, 2015 BCSC 393, the defendant applied for an independent medical examination of the plaintiff's shoulder by a neurosurgeon sometime after the plaintiff had submitted to an examination by an orthopedic surgeon. Mr. Justice Baird found no evidence that the orthopedic surgeon did not examine the shoulder or that he lacked the expertise to opine on that injury. Accordingly, Mr. Justice Baird agreed with the plaintiff that the second examination would simply amount to an opportunity for the defendant to obtain a second opinion on the same injury.
- [25] *Samad*, *Hein* and *Koulechov* were all decided prior to the Court of Appeal's decision in *Tran*. It is no longer accurate following *Tran* to say that a court will only order multi-practitioner assessments in exceptional circumstances. To this extent at least, prior decisions must be treated with some caution. However, the objective - or limiting consideration - of reasonable equality between the parties at trial, seen for example in paragraph 20 of *Samad* quoted above, remains a relevant consideration following *Tran*.
- [26] *Joorawon v. Carchesio* (5 November 2018), Vancouver, M172930 (BCSC), was decided by Master Baker with the benefit of the Court of Appeal's decision in *Tran*. The defence in that case sought an order requiring the plaintiff to attend a functional capacity evaluation. The plaintiff had already submitted to an examination by Dr. McConkey, an orthopedic surgeon. Master Baker referred to the size of the potential damages claim, which he found justified more effort than might be typical, and then said, at paragraph 7:

On the other hand, we have Dr. McConkey, having done his examination but has not yet delivered a report. I am very concerned about that. I am concerned about the potential for overlap, and I think and conclude that it is not a speculative or necessarily unwarranted concern.

- [27] After referring to a WCAT case in which Dr. McConkey gave evidence, Master Baker continued:

And I agree there is a real possibility using that case as a guide that Dr. McConkey's orthopaedic examination and conclusions may well overlap with a functional capacity. I do not know that yet. Notwithstanding my concerns about the swing or potential swing in damages or potential claims, something in the order of \$2 million, I think it is premature to order the functional capacity evaluation, notwithstanding, as I say, the authority of *Tran v. Abbott*. When I say premature, I mean premature. I am not discontinuing the possibility that it is justified. I just do not think the court is in a position to decide that yet until we see Dr. McConkey's report.

- [28] This case would be easier to decide if the existing independent examiners had indicated that some aspect of Ms. Shannon's condition was outside their expertise. However, such evidence is not in my view a requirement of the case law. Nor does the case law require in every case that the defendants submit the reports of the agreed upon experts, first, to demonstrate that a further examination is justified.
- [29] In *White v. Fan*, 2019 BCSC 785, Madam Justice Iyer rejected a submission by the plaintiff in that case that a party seeking a subsequent examination must tender medical evidence demonstrating that there are issues that require an examination with that expertise. While there must be a real basis for the request, Madam Justice Iyer held, it may be grounded in the pleadings and other evidence without the need for medical evidence.
- [30] In *Palmer v. Elliot*, (31 January 2019) Vancouver, M178337 (BCSC), Master Caldwell ordered an examination by a neurologist before the reports by an orthopedic surgeon and a functional capacity evaluation, also requested by the defence, were available. Although he acknowledged an overlap between neurology and orthopedic surgery, Master Caldwell concluded at paragraph 16:

Certain of the multifaceted injuries that are alleged do range into the area of neurological assessment as opposed to strictly bones and joints that orthopods deal with. I do not think in light of the *Tran* decision I have much option but to order that the neurological examination proceed as scheduled.

- [31] Each case must be decided on its own merits and whether a further examination is justified to put the parties on an equal footing without requiring the plaintiff to submit to unnecessary or unduly overlapping examinations. Here, there is some overlap in the expertise and assessments by the physiatrist and the psychiatrist, and the expertise and potential assessment by a neurologist. Physiatrists, in particular, have broad expertise, and it appears that experts with training and expertise in this field are frequently retained by the parties in motor vehicle actions.
- [32] However, I am satisfied that there are also distinct areas of focus of these three medical specialties. The focus of a neurologist is on diagnosis of problems with the nervous system, whereas the focus of a physiatrist is on physical injuries, rehabilitation and the prognosis of recovery, and the focus of a psychiatrist is on diagnosing and treating secondary psychiatric disorders.
- [33] Ms. Shannon's condition, as she has alleged it and described it to her treating physicians and on her discovery, is multi-factorial. While her neurological examination in 2018 was normal, the causes and consequences of her injuries, including her inability to return to work, are unclear and may be neurological. On the pleadings and Ms. Shannon's evidence, this case may concern a traumatic brain injury and a significant claim to future wage loss. Ms. Shannon is not bound by the results of the 2018 neurological examination. She may well obtain an expert report by a neurologist. If so, the defendant and the trial judge may be left without an adequate independent medical assessment within this area of expertise.

- [34] I do not think it is necessary or consistent with the purpose of Rule 7-6 to require the defendant to wait until this risk becomes a reality. So long as there is a real basis for the current request grounded in the pleadings and the evidence, the rule favours early rather than later discovery, so as to put the parties on the same footing with respect to this potentially very important issue.
- [35] It is notable that Mr. Cook requested the assessment by the neurologist at or about the same time he requested the assessments by the physiatrist and the psychiatrist, and before he received the report of either. This makes it less likely, in my view, that he is shopping for a second or third opinion, as opposed to seeking three opinions from experts in three distinct fields of study. In these circumstances, it is unnecessary, in my view, for Mr. Cook to demonstrate that something new has come along after the plaintiff consented to the first two examinations that could not have been foreseen. Mr. Cook saw from the outset in this case the need for an independent neurological assessment.
- [36] I do not think Rule 11-8 is relevant to this analysis. Rule 11-8 limits the number of expert reports the parties may tender at trial. It does not limit the number of assessments or reports they may obtain before trial. It certainly has no bearing on the plaintiff's ability to consult with and obtain reports from multiple experts on damages. Using Rule 11-8 to limit a defendant's discovery under Rule 7-6 would run contrary to the objective of levelling the playing field with respect to medical evidence. It would also run contrary to the modern philosophy expounded in *Tran* that procedural rules should promote settlement and narrow the issues before trial and therefore reduce the overall cost of litigation, which is presumably the underlying intent of Rule 11-8 in motor vehicle cases.
- [37] For these reasons, I order that Ms. Shannon appear on June 19, 2019, at 9:00 a.m. at the offices of Dr. Johnston at the Specialist Referral Clinic, and submit to an independent medical examination by Dr. Johnston.
- [38] Costs of this application are in the cause.

"Master Elwood"

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