

CANADA / JUDGMENT

Shea v. Melnyk

2014 BCSC 1655

COURT

Supreme Court of British Columbia

DECIDED

5 August 2014

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2014 BCSC 1655 Shea v. Melnyk IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Shea v. Melnyk, 2014 BCSC 1655 Date: 20140805 Docket: 13-1499 Registry: Victoria Between: Alisha Shea Plaintiff And Daniel Melnyk Defendant Before: The Honourable Mr. Justice G. R. J. Gaul Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: A. Wrona Counsel for the Defendant: D. Ryneveld Place and Date of Trial/Hearing: Victoria, B.C. August 5, 2014 Place and Date of Judgment: Victoria, B.C. August 5, 2014

- [1] THE COURT: Given that time is of the essence, I will give you my decision now. I note parenthetically that my reasons may be inarticulate and therefore I reserve the right to make editorial revisions to them before they are reproduced in final form.
- [2] On this application filed 18 July 2014, the defendant seeks an order, pursuant to Rule 7-6 of the Rules of Court, requiring the plaintiff to attend for an additional independent medical examination. The plaintiff has already undergone one IME at the request of the defendant, conducted by a medical specialist in neurology and electromyography. She has also consented to being examined on 23 September 2014, by an orthopaedic surgeon retained by the defendant.
- [3] If permitted, the proposed new IME will focus upon and examine issues surrounding the plaintiff's mental health and it will be conducted by Dr. Alexander Levin, a medical doctor with a specialty in psychiatry. There have been no previous examinations that have scrutinized this area of the plaintiff's health or condition, although Dr. D. Vincent, a medical specialist in anesthesiology and pain management who examined the plaintiff at the request of her counsel, did conclude in his expert report that: Based on the history, clinical examination and review of supporting documentation, it is my impression that Ms. Shea presents with the following clinical features:

4. Long-standing history of anxiety and depression with various anti-depressants and anti-anxiety medications. The more recent motor vehicle collision of June 27, 2011 has likely exacerbated the symptoms resulting in a further progression of her psychiatric symptoms of depression and anxiety.
- [4] The jurisprudence is clear that the threshold is high for an applicant who seeks an order directing a second or additional IME [See: Trahan v. West Coast Amusements Ltd., 2000 BCSC 691; and, McKay v. Passmore and Lavis, 2005 BCSC 570].
- [5] In this personal injury case, the plaintiff seeks an award of damages for the pain, suffering, and reduced ability to enjoy life she says the motor vehicle accident has caused her. She also alleges she has suffered a loss of income earning capacity and therefore seeks an award for lost wages, both past and future.
- [6] The plaintiff has recently applied to the provincial government to be designated as a person with a disability under the Employment and Assistance for Persons with Disabilities Act, S.B.C., c. 41. The documents prepared by the plaintiff and her family physician that were submitted in support of the application indicate that part of the reason for pursuing such a designation is the emotional and mental trauma the plaintiff has suffered as a result of the accident. One of the documents, a letter dated 18 February 2014 from the plaintiff's doctor, indicates that the plaintiff suffers from a medical illness, including a Major Depressive Disorder and a Generalized Anxiety Disorder, which "prohibits her ability to seek gainful employment".
- [7] Counsel for the plaintiff argues there is no need for a further costly and time consuming IME, and in particular no need for a specific examination of the plaintiff's mental or emotional health. In making that submission, counsel maintains there has been no clinical change in the plaintiff's psychiatric or psychological condition as a result of the accident. Moreover, counsel points out that the plaintiff's pleadings do not include a claim that the accident has caused her to suffer from depression, anxiety or any other psychological or psychiatric ailment. Finally, counsel submits that the defendant's application is premature, given that the second IME is scheduled for later next month. In this regard, counsel for the plaintiff says the expert evidence that will result from the two IMEs the plaintiff has consented to will likely address all aspect of her health.
- [8] With respect, I do not agree with the plaintiff's position on this application. First of all, the evidence of Dr. Vincent, a witness for the plaintiff, suggests that the plaintiff's pre-existing mental health issues have likely been adversely affected by the accident. Second, while plaintiff's counsel is correct when she submits that the notice of civil claim does not specifically allege the accident caused the plaintiff any compensable mental distress or harm, it does include the general assertion that the accident caused the plaintiff to suffer injuries that have "yet to be determined". Finally, the doctor who conducted the first IME does not have a speciality in mental health, nor is it expected that he would opine on the

plaintiff's psychiatric or psychological condition. The same can be said of the doctor who will be conducting the second IME later next month. Dr. Levin, however, is a mental health specialist and his proposed examination of the plaintiff will focus on an area of the plaintiff's health that has yet to be examined.

- [9] In my respectful opinion, the plaintiff's mental and emotional condition will likely be an issue at trial, given the nature of her claims. The trier of fact will likely have to address, amongst other things, whether the accident caused emotional or mental trauma to the plaintiff and if so how much of an impact that trauma has had on her life. Given there is presently no expert evidence that directly addresses these questions, I find the defendant's application is well founded.
- [10] Mr. Ryneveld, your application proposes a specific time and date. Ms. Wrona, are you aware whether your client is available on that date or is that something that needs to be addressed at a later date?
- [11] MS. WRONA: My Lord, I think it needs to be addressed, but it's likely that she will be available. The only other term I would request is that reasonable conduct money be provided before the plaintiff attends. I don't know if that will be an issue.
- [12] THE COURT: Is that not sous-entendu? Is that not--
- [13] MR. RYNEVELD: It's automatic.
- [14] THE COURT: Thank you for raising that, but I -
- [15] MS. WRONA: It typically is automatic, but lately with ICBC, there have sometimes been issues. So I would prefer to have it in the order. I expect it won't be a problem for my friend.
- [16] THE COURT: Any issue with having that included in the order, Mr. Ryneveld?
- [17] MR. RYNEVELD: I don't think it's necessary, but I don't object to that, which means we'll have to draft a new order.
- [18] THE COURT: Yes. Now, the question being, your order has a date specific, September 3, 4:00 p.m.
- [19] MR. RYNEVELD: That is the date that was suggested. That is the date when the doctor is available.
- [20] THE COURT: Do you have any sense whether your client is going to be available on that date? Also, Dr. Levin is a local doctor, is he?
- [21] MR. RYNEVELD: No. He's a Vancouver doctor.
- [22] THE COURT: So the plaintiff is going to have to travel to attend the examination?
- [23] MR. RYNEVELD: And they're heavily booked that's why I said timing is of the essence.

- [24] MS. WRONA: My Lord, I think my office has been trying to contact the plaintiff to confirm her availability. If she is available on that date, I don't need to see a copy of an entered order prior to her actually attending. It's not -- the Court has made the order, so I will explain to my client -
- [25] MR. RYNEVELD: Might I -
- [26] MS. WRONA: -- that is it binding.
- [27] MR. RYNEVELD: -- suggest this: Since I've got to redraft the order in any event, should we perhaps provide an order for Your Lordship once it's confirmed that that is a convenient date for Ms. Wrona's client? We want the order, but - I'm just trying to be helpful here in the sense that if her client says, yeah, I reluctantly - but I'll show that day, then we can use that date that's in the order and I just won't enter it now. In the event she says she's not available, now I've got a problem. I don't know about the - do we have to come back?
- [28] THE COURT: If she says for whatever reason - I am not saying she will - "I'm not available until December." What if she says that?
- [29] MR. RYNEVELD: Yes. Well, then we have a problem.
- [30] THE COURT: How about that she attend on September 3 at 4:00 p.m., or on a date agreeable to both sides?
- [31] MR. RYNEVELD: Okay.
- [32] MS. WRONA: Yes. That would be fine with me.
- [33] THE COURT: Okay, if there isn't an agreement on another date, the plaintiff will have to attend on September 3. If she does not attend, then she will have to explain why.
- [34] So, Madam Registrar for your purposes, paragraph 1 of the notice of application is granted. There is an amendment to that paragraph to reflect the fact that the examination is to occur on September 3, 2014, at 4:00 p.m. or on such other date as the parties agree. The order will also have a second term. The defendant is to provide the necessary conduct money to the plaintiff in advance of the scheduled examination.
- [35] THE COURT: All right. Anything further?
- [36] MR. RYNEVELD: Nothing. Thank you.
- [37] THE COURT: Ms. Wrona?
- [38] MS. WRONA: Nothing further.
- [39] THE COURT: Thank you counsel. "G. R. J. Gaul, J."

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