

CANADA / JUDGMENT

Zhang v. Srott

2021 BCSC 2532

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 2532 Zhang v. Srott

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhang v. Srott,

2021 BCSC 2532

Date: 20211203

Docket: M1911201

Registry: Vancouver

Between:

Ruo Peng Zhang

Appellant (Plaintiff)

And

Jan Srott and Coquitlam Taxi (1977) Ltd.

Respondents (Defendants)

Before: The Honourable Mr. Justice Riley

(appearing by teleconference)

On appeal from: An order of the Supreme Court of British Columbia,
dated October 8, 2021 (Zhang v. Srott, 2021 BCSC 1971,

Vancouver Registry, M1911201)

Oral Reasons for Judgment

In Chambers

Counsel for the Appellant appearing by teleconference:

M.J. Bauer

Counsel for the Respondents appearing by teleconference:

C.J. Hope

Place and Date of Hearing:

Vancouver, B.C.

November 22, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 3, 2021

Introduction

[1] THE COURT: This is an appeal from the decision of a Master granting an application for an order requiring the plaintiff to attend an independent medical examination ("IME") with a psychiatrist under Rule 7-6(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. Before the Master, the plaintiff acknowledged that the defendants would be entitled to the order sought based on the jurisprudence delineating the scope and proper exercise of the court's discretion to order an IME. However, the plaintiff argued that the proposed IME was unjust based on the implications of the recently enacted Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020 (the "Disbursements Regulation") which, under s. 5(1), limits the disbursements that can be recovered from an unsuccessful party in a motor vehicle injury proceeding to six percent of the judgment or settlement. The Master did not accept that argument. The plaintiff now appeals, contending that the Master committed reviewable errors in failing to accede to his submission that the IME was unjust due to the implications of the Disbursements Regulation.

Facts

[2] The factual background is as follows:

- a) The plaintiff, a 40-year-old driver for a commercial courier company, alleges that he suffered serious personal injuries in a motor vehicle collision while on his way home from work on 5 June 2018.
- b) On 5 November 2019, the plaintiff commenced an action against the personal defendant who was the operator of the other vehicle in the collision, and the corporate defendant who was the owner of that vehicle.

- c) The plaintiff alleges that as a result of the negligence of the defendants, he suffered injuries to his neck, back, and shoulders, as well as headaches, psychological injuries, anxiety, shock, and other injuries as diagnosed by his treating physicians.
- d) The defendants deny liability, causation, and the nature and extent of the plaintiff's injuries and losses.
- e) The action is presently set for trial in October 2023 for 10 days. Based on those dates, the time limit for filing expert reports under the Rules is 6 July 2023.
- f) The plaintiff has indicated an intention to proffer an expert report from Dr. Ancill, a psychiatrist, in support of his damages claim.
- g) On 5 July 2021, the defendants brought an application for an order under Rule 7-6(1) requiring the plaintiff to attend an IME with Dr. Morgan, a psychiatrist.

The Ruling under Appeal

- [3] At the hearing before the Master, the plaintiff acknowledged that the defendants would be entitled to the order sought on a proper application of the authorities interpreting and applying Rule 7-6(1), but argued against the order based on the implications of the Disbursements Regulation. Plaintiff's counsel said that if his client were required to attend an IME and the defendants subsequently tendered an expert report from Dr. Morgan, the plaintiff would be obliged to obtain a responding report. On counsel's estimate of the total disbursement expenditures, the six-percent limit would preclude the plaintiff from recovering the cost of the responding report, even if successful at trial. Plaintiff's counsel then set out a number of specific arguments in support of his overall contention that this was unfair and unjust.
- [4] In reasons indexed as *Zhang v. Srott*, 2021 BCSC 1971, the Master granted the application for an order under Rule 7-6 requiring the plaintiff to attend an IME with Dr. Morgan. The Master did not accede to any of the plaintiff's arguments. He concluded that giving effect to the plaintiff's position would fundamentally alter the nature of the court's exercise of discretion under Rule 7-6 in a manner that could only be properly achieved by an amendment to the Rules themselves.

Standard of Review

- [5] In an appeal from a Master's decision on a "purely interlocutory matter", the Court will only intervene where the appellant shows that the Master was "clearly wrong": *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.) [*Abermin Corp.*] at p. 193. This standard is met where the Master is shown to have erred in principle, erred in law, or committed a reviewable error in respect of a finding of fact: *Stephen v. McGillivray*, 2008 BCCA 472 at para. 17, and *M. Dhaliwal Holdings Inc. v. Pacific Blue Farms Ltd.*, 2014 BCSC 1482 at paras. 23 and 26. There is a broader scope of review where the Master's decision

relates to a matter that is vital to a final issue in the case or falls into the narrow category of final orders within the jurisdiction of a Master. In such cases, the appeal is in the nature of a "rehearing" and the court is free to substitute its view for that of the Master even on discretionary matters: *Abermin Corp.* at p. 193.

- [6] I agree with the defendants that the order under appeal in this case, namely an order under Rule 7-6 requiring the plaintiff to attend for an IME, was purely interlocutory. The order in question related to a pre-trial step in the litigation process to obtain an IME for the defendants to gather evidence relevant to causation and damages in connection with psychological injuries, being a particular head of damages claimed by the plaintiff. The order under appeal is clearly interlocutory rather than final, and it does not pertain to a matter that is vital to a final issue in the case. It follows that the deferential standard of review discussed above applies. In order to succeed, it must be shown that the Master was clearly wrong in ordering the plaintiff to attend an IME with Dr. Morgan.

Analysis

- [7] To set the context for the arguments advanced on appeal, it is important to note the plaintiff's concession before the Master and on appeal that an order requiring the plaintiff to attend an IME was supportable under settled case law delineating the scope of discretion to make such orders under Rule 7-6. In this regard, I can do no better than to quote from the reasons of the Master describing what he referred to as the basic law on IMEs as follows:
- [19] Rule 7-6(1) of the Supreme Court Civil Rules provides:

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.
- [20] Rule 7-6 is a rule of discovery. It is designed to balance a plaintiff's advantage in obtaining expert opinions, by providing the defendant with access to the plaintiff for such prior to trial: *Tran v. Abbott* [citation omitted].
- [21] Rule 7-6 is aimed at securing a just determination of each proceeding on the merits and to encourage full disclosure, and should be given a fair and liberal interpretation to meet those objectives: *Tran* [and the citations are omitted here].

- [22] The Court's discretion to order a plaintiff to attend an examination is to be exercised in light of the purpose of an IME, which is to put the parties on an equal footing with respect to medical evidence: *Kenny v. Bateman* [again citation omitted].
- [23] The objective is to ensure "reasonable equality" between the parties in the preparation of their cases for trial. This does not mean a one-to-one matching of reports; nor does it restrict the defendant to the sorts of experts the plaintiff has chosen: *Hamilton v. Pavlova* [again citation omitted].
- [24] Relevant factors on an application under Rule 7-6 include: fairness and equality between the parties; the presence of new, unforeseen or difficult matters or issues; proportionality; and the timeliness of the request: *Fox v. Merricks* [again citation omitted].
- [8] The Master went on to apply those principles to the facts of the case, concluding as follows:
- [25] In this case, the psychological condition of the plaintiff is clearly an issue. The plaintiff intends to tender an expert report by a psychiatrist as part of his case. An examination by a psychiatrist retained by the defendants would tend to put the parties on an equal footing with respect to the medical evidence on this issue. There is no suggestion that an examination by Dr. Morgan would be redundant, overlapping or intended to bolster any other opinion by a defence expert. The intrusion on the plaintiff's time and privacy is proportionate to what may be a significant lost income claim. The defendants' request is timely given there is plenty of time remaining prior to the deadline for expert reports.
- [9] It is significant that the plaintiff does not suggest any error on the part of the Master in reaching this conclusion. On the basis of the authorities he reviewed, the Master concluded at para. 25 of his reasons that it was appropriate to order the plaintiff to attend an IME to "put the parties on an equal footing with respect to the medical evidence" on a particular aspect of the plaintiff's claim for damages.
- [10] With that backdrop in mind, I turn to the plaintiff's arguments on appeal. Plaintiff's counsel put forward three specific arguments, namely: (i) that the Master misapprehended the facts as to the expert evidence the plaintiff intended to rely upon at trial; (ii) that the Master erred in principle in his approach to the plaintiff's evidence as to the value of the claim and the effect of the Disbursements Regulation; and (iii) that the Master erred in holding that the plaintiff's argument would effectively do away with the court's discretion under Rule 7-6. I will deal with each of those points in turn.
- (i) Alleged Misapprehension of the Evidence

- [11] The plaintiff says the Master misapprehended the evidence in stating at para. 46 that the plaintiff "had the benefit of examinations by Dr. Young, Dr. Ancill and possibly others." In fact, there was no evidence in the record that the plaintiff had yet been examined by Dr. Ancill, and Dr. Young was not an expert, but rather a treating physician. The plaintiff points out that when the case law discusses fairness and equality between the parties, the concept of equality refers to the medical experts only, not treaters.
- [12] I accept that the Master misapprehended the evidence in stating that the plaintiff had been examined by Dr. Ancill when there was no evidence in the record to that effect. Counsel for the plaintiff merely indicated an intention to proffer a report from Dr. Ancill at trial. However, the plaintiff volunteered during the hearing of the appeal that this was a minor point that did not materially affect the Master's decision. The Master clearly focused his analysis on the fact that the plaintiff intended to rely on an expert report from Dr. Ancill who was a psychiatrist in the same field as the proposed defence expert, Dr. Morgan. It was in this context that the Master had to consider whether the IME was appropriate to put the parties on an equal footing with respect to medical evidence.
- [13] The plaintiff's contention that the concept of equality or a level playing field, as contemplated by the jurisprudence interpreting and applying Rule 7-6, "refers to medical experts only, not to treaters" is, with respect, debatable and probably semantic. The Master noted at para. 22 that the purpose of an IME is to "put the parties on an equal footing with respect to the medical evidence". [underlining added] To me, this would include both the ability to marshal primary facts about the plaintiff's medical conditions and the ability to present opinion evidence from medical experts. The arguments in the case law are invariably about IMEs to be conducted by experts for the purposes of proffering expert reports, but at least part of the underlying rationale is that a defendant does not have the same ability to marshal the primary facts necessary to ground such an opinion; hence the need for an actual medical examination by the defence medical expert, as opposed to a report from an expert who has never seen or personally examined the plaintiff.
- [14] In any event, nothing turns on this aspect of the Master's decision in view of the plaintiff's position, both before the Master and on appeal, that on the existing jurisprudence under Rule 7-6, there was a basis in the record for ordering an IME in this case. The real focus of the plaintiff's argument is whether the introduction of the Disbursements Regulation materially alters the legal landscape or the required analysis for IMEs under Rule 7-6(1).

(ii) Alleged Error in the Master's Approach to the Plaintiff's Evidence

- [15] In support of his application response, the plaintiff tendered an affidavit from a legal assistant stating that she was informed by counsel that: (i) in his opinion, the total disbursements in this action, excluding reports commissioned in reply to defence expert reports, will exceed six percent of damages; and (ii) in 16 of counsel's last 21 cases, the total disbursements were greater than six percent of the damages obtained. The Master did not find that evidence to be helpful, reasoning at para. 44 that, "[i]t is simply not possible on this

evidence to engage in any meaningful weighing of the effect of the Disbursement Regulation on reasonable equality between the parties". The Master stated at para. 42 of the reasons that the record on this application does not provide an adequate evidentiary foundation for the plaintiff's argument about fairness and equality because there was "no evidence of the value of the plaintiff's claim".

- [16] The plaintiff says the Master was in error in rejecting the evidence on this point. The plaintiff says it was unreasonable and inappropriate for the Master to require evidence as to the value of the claim on an interlocutory application because it would have turned the application into a "mini trial" with evidence and argument to determine quantum. The Master would, in effect, be predetermining damages.
- [17] I see no error by the Master in rejecting the evidence from the plaintiff's counsel that the costs of disbursements would exceed six percent of the damages. Indeed, I think the Master had no choice but to do so. The legal assistant's affidavit gave a hearsay account of the plaintiff's legal opinion on his own case. This was inadmissible opinion evidence and the manner of presenting it was tantamount to, if not worse than, counsel speaking to his own affidavit in a contested chambers application. Further, the reference to outcomes in prior cases is essentially anecdotal information. Without any detail as to the nature of those cases, it is impossible to make any real assessment of whether they bear any similarity to the case at bar. Moreover, as the Master noted at para. 39, "the cost of reasonable disbursements in any given case is not necessarily a function of the value of the claim." It cannot be said that the Master committed any reviewable error in declining to act on this evidence.
- [18] With respect to the Master's indication at para. 42 that there was "no evidence as to the value of the plaintiff's claim", that is a correct statement of fact. The plaintiff complains that under the Master's reasoning, the only way to effectively present his argument concerning the effect of the Disbursements Regulation on fairness of the IME process would be to conduct a mini trial on the issue of damages in an interlocutory application before a Master. I tend to agree with counsel that it would be inappropriate to embark upon a lengthy and contentious hearing as to the value of the plaintiff's claim in a pretrial application.
- [19] In my view, the most that could be done in an application of this sort would be for the presiding judicial officer to take into account, in a very rough sense, the nature and magnitude of the claim in assessing the proportionality of the request for an IME, proportionality being one of the factors to consider when determining whether or not to grant the order. That kind of approach is commonly taken in assessing issues of proportionality. All that can realistically be considered in the pretrial context is the amount in issue or the amount that is claimed by the plaintiff, not what amount the plaintiff will ultimately receive by way of a judgment at the end of the case. In *Kenny v. Bateman*, 2017 BCSC 900 [Kenny], for example, the Court referred at para. 55 to the "potential claim" and at para. 66, to "the claimed damages". On this approach, the amount in issue can be considered as an aspect of proportionality as one factor among many that is relevant to the court's exercise of discretion to order an IME.

- [20] The approach advocated by the plaintiff, on the other hand, would make the value of the claim, the likelihood of the plaintiff's need to commission a responding report, and the corresponding effect of causing the plaintiff's overall disbursements to exceed six percent of damages virtually, if not entirely, dispositive. Indeed, counsel's argument was a generic one that had very little to do with the particular facts and details of the plaintiff's case or the overall magnitude of his claim in proportion to the steps taken by the opposing party to defend the case.
- [21] The plaintiff's argument was basically an attack on the operation and effect of the Disbursements Regulation itself. The Master properly rejected this argument, reasoning as follows at paras. 48 to 49 of his judgment:
- [48] The effect of the plaintiff's argument would be that, wherever a plaintiff states that they intend to obtain an expert report on an issue on which the plaintiff has the burden of proof, that statement of intention would foreclose on any IME by the defence in the same or similar area of expertise. The trial judge in these circumstances would be left only with a report by the plaintiff's expert, if any.
- [49] I am invited by the plaintiff to conclude that no defence IME can be justified in light of the legislated limit on his recoverable disbursements. The plaintiff's argument would eliminate the court's discretion under Rule 7-6 in all but the simplest motor vehicle cases. Such a radical departure from the governing law would, in my view, require an amendment to the Rules.
- [22] I find no reviewable error in this reasoning and I agree with it. Under the plaintiff's approach, the downstream effect of the IME on the plaintiff's disbursements and the limitation on those disbursements to six percent of damages would supplant the entire analysis of whether an IME is appropriate in light of the purposes of the Rule. As noted, Rule 7-6 is intended to allow for a just and speedy determination of the issues by placing the parties on an equal playing field with regard to medical evidence about the plaintiff's condition.
- (iii) Refusal to Depart from Governing Law as to the Discretion under Rule 7-6
- [23] The plaintiff contends that the Master erred by rejecting his new approach on the basis that it would "eliminate" the court's discretion under Rule 7-6. Counsel submits that the effect of his position would not eliminate the court's discretion, but rather would require that it be exercised differently.
- [24] The point the Master was making would be the same whether one said the effect would be to "eliminate" the court's discretion or to "drastically alter" it. Under settled jurisprudence, the focus of the court's analysis in Rule 7-6 is to determine whether an IME is appropriate in order to place the defendant on an equal footing with the plaintiff, insofar as medical evidence is concerned. This is a case-specific analysis. The court can consider a number of factors in deciding when to exercise that discretion, including fairness and equality between

the parties, the presence of new, unforeseen, or different matters or issues, proportionality, and time limits: see Kenny at paras. 52 to 67, and Fox v. Merricks, 2020 BCSC 1178 at para. 26.

- [25] If accepted, the plaintiff's argument would drastically alter the exercise by making one factor - consideration of whether the plaintiff is at risk of being unable to recover the costs of a potential responding report as a disbursement at the end of the case - dispositive or virtually dispositive. The Master committed no error in rejecting the plaintiff's position on the basis that it would represent such a "radical departure from the governing law" that it can only be achieved by an amendment to the Rules themselves.
- [26] On the existing jurisprudence, the court may consider issues of proportionality as one of many factors in deciding whether an IME is appropriate in any particular case: see, for example, Stocker v. Osei-Appiah, 2015 BCSC 2312, where Mr. Justice Pearlman explained at para. 25 that where the amount involved is likely significant and "the issues in dispute were important to both parties," then "proportionality" might support the defence request for an IME. There may well be cases on the opposite side of the spectrum where the amount in issue is not likely significant and the proposed IME relates to an issue that is not an important aspect of the claim, such that proportionality would weigh against the granting of an order. On this reasoning, a plaintiff would be free to argue that the potential limitation on his or her ability to recover disbursements in respect of any potential responding reports is a factor for the court to consider in the exercise of its discretion under Rule 7-6. By contrast, the effect of the plaintiff's position would be to make that single factor the controlling consideration in the vast majority of cases. The Master committed no error in rejecting this approach.

Conclusion

- [27] The Master committed no reviewable error in granting an order under Rule 7-6 requiring the plaintiff to attend an IME with Dr. Morgan. The appeal is therefore dismissed.
- [28] So that concludes my ruling. I should ask counsel if there is anything arising from it?
- [submissions of counsel on costs]
- [29] THE COURT: All right. Having considered that the point raised by plaintiff's counsel relates to what he refers to as a new issue where he wished to pursue a right of appeal, I accept that submission and I order that costs of the appeal should be to the defendants in the cause.

"Riley J."

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