IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bowden v. Lund,*
2023 BCSC 869

Date: 20230523
Docket: M230155
Registry: Vancouver

Between:

Ashley Bowden

Plaintiff

And

Veronica Wynne Lund, 0732288 B.C. Ltd and Leonard Michael Silbernagel

Defendants

Before: Master Robertson

Reasons for Judgment

Counsel for the Plaintiff:	Collins, S
Counsel for the Defendants	Keri, C.
Place and Date of Hearing:	Vancouver, B.C. May 2, 2023
Place and Date of Judgment:	Vancouver, B.C. May 23, 2023

[1] This is an application to compel the plaintiff to attend an independent medical examination ("IME") on May 31, 2023, with Crystal Wong, Vocational Consultant (the "Vocational Consultant"), and ancillary terms related to that attendance.

Background

[2] By way of a brief background, the plaintiff claims injuries as a result of four motor vehicle accidents which occurred on January 15, 2015 (the "First MVA"), July 2, 2017, July 3, 2018 and September 27, 2019 (collectively, the "MVAs"). The subject action involves the First MVA, in which a notice of discontinuance was filed against all defendants but one. Consent orders have been entered to have the trial of all of the actions heard together. Trial is scheduled for 15 days commencing September 11, 2023, meaning that the 84-day deadline for expert reports is June 19, 2023.

[3] The defendant initially arranged two IMEs, one with the Vocational Consultant on May 3, 2023 and a second a physiatrist on May 12, 2023, notice for both of which was given in March, 2023. The plaintiff agreed to attend the IME with the physiatrist, but not the Vocational Consultant. After being advised as to the plaintiff's position, and coordinating schedules for the necessary application, the defendant was able to secure the later day of May 31, 2023, and brought this application, which was then filed on April 18, 2023.

[4] There is no issue that the application being brought was not brought in a timely manner. Rather, the issue is whether or not the defendant has established that the IME with the Vocational Consultant is necessary.

Legal Framework

[5] In this respect, the parties do not disagree as to the law, which is well settled with respect to IME's since *Tran v. Abbott,* 2018 BCCA 365 ("*Tran*"), which I

summarize briefly, and in a way that is by no means meant to be exhaustive, as follows:

a) Rule 7-6 is a rule of discovery, designed to balance the plaintiff's advantage in obtaining expert opinions, by providing the defendant with access to the plaintiff for such prior to trial, consistent with the "modern philosophy" that such rules should work to promote settlement before trial, and ensure the speedy and inexpensive determination of each dispute on its merits: *Tran* at para 17 to 19.

b) Rule 7-6 specifically contemplates that there can be more than one IME.

c) A second examination may be necessary where the plaintiff's injuries fall outside the first examiner's expertise: *Tran* at para. 31.

d) Multiple examinations may be appropriate and necessary where a variety of injuries are alleged, the etiology of illness is not straightforward, or there are a wide range of injuries: *Tran,* at para. 33*,*

e) In exercising its discretion, the court must consider the effect of refusing the order sought on the conduct of the trial: *Tran* at para. 33*.*

f) Subject to questions of timeliness and proportionality, even if one examination concluded that a potential source of the plaintiff's symptoms can be eliminated, that should not necessary preclude a subsequent IME to consider other alternatives, even if they were commented upon by the author: *Tran,* at para. 35;

g) However, the applicant must still establish that the subsequent examination is necessary, having regard to where there is overlap or an attempt at "bolstering" evidence: *Gray-Verboonen v. Mandurah,* 2019 BCSC 1697*,* at para. 15 to 17 ("*Gray-Verboonen*")*; and Larsen v. Karimi*, 2019 BCSC 1477, at para 20. The greater the overlap, the greater the obligation to establish justification for the subsequent examination:

Joorawon v. Carchesio Unreported: (November 5, 2018) Vancouver M172930 (BCSC); and

h) Different opinions of experts do not entitle a defendant to an examination under this rule to merely match "expert for expert": *Hamilton v. Pavolva,* 2010 BCSC 493, at para. 12 and *Guerreiro v. Johnson,* 2020 BCSC 355

i) Ultimately, every case is to be determined on its own facts.

Analysis

[6] The application materials referred to the following evidence in support of the application to compel attendance at the IME with the Vocational Consultant:

a) In her CL-22 insurance claim applicant, the plaintiff noted that she worked for the company, Barclay Restoration, but was on maternity leave at the time of the first MVA;

b) In the notice of civil claim filed in respect of the First MVA, the plaintiff claims:

> As a further result of the negligence of the Defendant, the plaintiff has been rendered less capable overall form earning income from all types of employment, is less marketable to potential employers, has lost the ability to take advantage of all job opportunities that would otherwise have been available, if not injured, and is less valuable as a person in a competitive labour market, to an extent which is not yet determined.

c) In an initial report to ICBC prepared on October 30, 2019, Dr. Kamal, the plaintiff's general practitioner, described the plaintiff's condition as follows:

> Lower back, existing chronic low back since previous MVA 2015 and two further MVAs after that. Has been unable to work as a result. On disability benefits.

d) In a clinical note from “Kenaz Training Facility”, which is not further particularized in terms of modality of that particular treatment, it is noted:

> Car accident almost 8 years ago. Was 8 months pregnant with son. Stopped at traffic light and got rear-ended. Been to pain clinics, massage therapy, physio, needling. Only thing that has ever helped was getting super fit (2x/day, 2 hr, 405 days/week). Light exercise at physio did not work before. More intense core work is where she has noticed a big change. On disability from work since 2015.

e) At her examination for discovery conducted on December 20, 2022, the plaintiff was questioned as to her work history, and deposed that her only income since the First MVA has been from an attempt to work on a film/movie set, as a hair stylist, which she did for 3 weeks, working 4 days per week and 14 hours per day. She was able to perform the 3-week contract, but was not asked to return. On discovery she admitted that she had some opportunities to work after that, but did not know if she would be able to physically perform the job as it was “hard”. As to her future plans, her evidence was: “the things I want to do, I honestly don’t know if I can, and trying to figure that out”. She indicated that she wanted to work on hair and makeup, which is why she sought schooling for that, but is unsure if she can because, on this job, her back bothered her and she had to take Advil.

[7] The plaintiff argues that the defendant has not met the onus that is upon them to establish that the IME with the Vocational Consultant is in fact necessary. In this respect, the plaintiff argues:

a) it is entirely possible that the physiatrist may find that the plaintiff is not disabled in any respect, meaning that what she can and cannot do from a vocational perspective will be moot; and

b) the defendant has neglected to tender any evidence to establish that the Vocational Consultant will opine on anything that the physiatrist will or cannot opine upon. There must be some evidence, such as the *curriculum*

> *vitaes*, retainer letters, or information from the other treating and proposed IME practitioners as to the expected scope of their examinations so as to establish that both are in fact necessary.

[8] With respect to the former argument, it is concerningly similar to arguing that the defendant must tender its expert reports before a subsequent IME will be ordered, which is not the case: See for example, *Baxter v. Shelton,* 2017 BCSC 953 at para. 13, and my comment in *Walsh v. Riley,* 2023 BCSC 135 at para. 18 ("*Walsh*"). The plaintiff acknowledged that there is no such requirement.

[9] As to the latter argument, the plaintiff submits that the application before the court today simply suffers from the same failings of lack of evidence to establish necessity as has been commented upon in other decisions of this court. For example, in *Hunter v. Martell,* 2021 BCSC 1962 at paras. 5-7, the court noted as follows:

> [5] I also agree that Master Keighley's decision in *Khan v. Cabrera*, [unreported, New Westminster Registry Action M201147], is similar to the case before me. At para. 15, Master Keighley said:
>
> > The Court has to be satisfied, however, that there is evidence to suggest that the preparation of a further report is necessary to achieve that equality. There are a number of ways in which that evidence might be adduced. …
>
> [6] It could be a medical report, which obviously was not commissioned in this case. It could be an affidavit of the prior defence IME doctors to say that it is outside their scope of expertise to opine on functional capacity or vocation. That evidence might theoretically exist, but, as I say, is not before the court today. I cannot assume that the psychiatrist and physiatrist were incapable of opining on the issues that would be opined on by the functional capacity evaluator or vocational assessor.
>
> [7] The fact that this might be a significant claim does not, in and of itself, establish grounds for the two IMEs that are sought. It is simply an evidentiary issue today, and I agree with counsel for the plaintiff, who says that the court is in an evidentiary vacuum in this case.

[10] Similarly, in *Baxter v. Shelton,* 2017 BCSC 953, Master Keighly concluded as follows:

> [16] Now, here we do not know specifically what issues Dr. Axler dealt with during the examination. We know what he was asked to do. We do not have

> a report. There is nothing in the material to suggest to me that there is some issue which has arisen since the time that referral was made which could not have been dealt with at the time of that examination.
>
> [17] It is difficult in circumstances where a report of an expert with an overlapping expertise has not been produced to make a determination as to whether that subsequent examination is required for the purpose of levelling the playing field or addressing some issue which could not have been raised at the time of the original examination. The onus is on the defendant to establish those issues. I am not satisfied on this application that the defendant has done so.

[11] The defendant argues that the medical evidence establishes the necessity of this report on its own, and that the court may take judicial notice of the specific purpose, scope and expertise that is brought by a Vocational Consultant, as I noted in *Walsh.*

[12] In *Walsh,* I was able to make those findings based on the evidence before the court.

[13] Specifically, not only were the instruction letters to the various examiners in evidence, but also letters from both the proposed vocational consultant and the occupational therapist proposed to undertake the functional capacity evaluation where each author set out the purpose of their proposed examinations, the types of test that would be undertaken, and their training and expertise. The examiner also provided an overview as to why the other experts likely engaged in that particular matter would not necessarily have the training and experience for the tests to be undertaken, concluding that the importance of having objective vocational test data regarding capacity, as well as a personal meeting, were important to gauge how a patient may present in a similar setting to a job interview, which is necessary to form an opinion as to future and current potential and retraining options.

[14] The letters were specific to that matter. Evidence in other cases, even if reproduced in reasons for judgment, does not necessarily make it admissible as evidence in this case.

Conclusion

[15] While I accept that the plaintiff's medical and discovery evidence establishes that whether or not she is disabled from working as a result of the MVAs is in issue, as was the case in *Gray-Verboonen,* at para. 20, there is no evidence to establish that the opinion of a vocational consultant is necessary, or, whether the vocational assessment will provide vital evidence, or rather the bolstering of the opinion of the physiatrist. As was noted in *Hunter* above, the fact that there may be significant claim in this regard is not a sufficient basis on which to make an order.

[16] Here it would have been a simple enough exercise for the defendant to have tendered some evidence to establish the differences between the physiatrists and vocational consultants to meet the onus upon them to satisfy the court that *this* examination is necessary. While some of those differences may, on their face, appear obvious, the court cannot decide matters on assumptions, there must be evidence.

[17] As the defendant has failed to meet the onus upon them, the application is dismissed.

[18] As the plaintiff was successful, costs should be to the plaintiff in the cause, unless the parties wish to make submissions as to a matter. If that is the case, then they are free to do so in writing within 30 days of these reasons.

"Master Robertson"