IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20161115
Docket: M108741
Registry: Kelowna

Between:

Jacqueline Dippel

Plaintiff

And

Lorna Florence Kraus

Defendant

Before: Master Wilson

Oral Reasons for Judgment re Application for Independent Medication Examination of the Plaintiff

In Chambers

Counsel for Plaintiff:	L.C. Turner
Counsel for Defendant:	D. Graves
Place and Date of Trial/Hearing:	Kelowna, B.C. November 15, 2016
Place and Date of Judgment:	Kelowna, B.C. November 15, 2016

[1] **THE COURT:** This is an application by the defendant for the plaintiff to attend at the defendant's medical examination with Dr. Gabriel Hirsch, a physiatrist, on Monday next week.

[2] The background of the matter is that this motor vehicle accident occurred on October 3, 2013. The notice of civil claim was filed on October 1, 2015. The defendant is represented by ICBC, who is also responsible for administering the plaintiff's Part 7 benefits.

[3] In April 2014, the adjuster who was handling both files required that the plaintiff attend at a medical examination with Dr. Richardson, who is an orthopedic specialist. That report was ordered under Part 7. The plaintiff agreed to attend but took the position that this would constitute the defendant's first medical examination in the tort claim as well. While that was not necessarily agreed to at the time, the defendant now concedes at this application that Dr. Richardson's examination and report was the first IME.

[4] Dr. Richardson's report is very thorough. This matter was originally set yesterday and I had an opportunity overnight to read both the report and the parties' authorities. Dr. Richardson's report contains a neurological examination and considers various possible contingencies and says that a neurosurgeon should be seen as soon as possible. He also went on to provide his opinion as to the duration of the plaintiff's disability, both with and without surgery.

[5] The surgery was performed by Dr. Govender. I am advised that the plaintiff is still largely confined to a wheelchair, although not wheelchair bound, and I assume from that that her recovery was neither as quick nor as complete as was hoped. The defendant now seeks to have the plaintiff attend with Dr. Hirsch, a physiatrist.

[6] The plaintiff does not consent to that appointment and instead says that she will consent to attending for a subsequent examination by Dr. Richardson.

[7] The legal test for a second independent medical examination has been discussed in many cases including what is often referred to as the leading authority, being the case of *Hamilton v. Pavlova*, 2010 BCSC 493. In that case, Bracken J. said the following starting at paragraph 11:

> [11] Rule 30(2) is a discretionary rule, and the discretion must be exercised judicially. An independent examination is granted to ensure a "reasonable equality between the parties in the preparation of a case for trial": *Wildemann v. Webster* at p. 11 from the separate concurring reasons of Chief Justice McEachern.
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> [12] Reasonable equality does not mean that the defendant should be able to match expert for expert or report for report: *McKay v. Passmore*, 2005 BCSC 570 at para. 17, and *Christopherson v. Krahn*, 2002 BCSC 1356 at para. 9.
>
> [13] A second exam will not be allowed for the purpose of attempting to bolster an earlier opinion of another expert. That is, there must be some question or matter that could not have been dealt with at the earlier examination: *Trahan v. West Coast Amusements Ltd.*, 2000 BCSC 691 at para. 48, and *Norsworthy v. Greene*, 2009 BCSC 173 at para. 18.
>
> [14] There is a higher standard required where the defendant seeks a second or subsequent medical exam of the plaintiff: *McKay v. Passmore*, *supra*, at para. 17 and para. 29.
>
> [15] The application must be timely. That is, the proposed examination should be complete and a report available in sufficient time to comply with the rules of admissibility and to allow enough time for the plaintiff to assess and respond if necessary: *Vermeulen-Miller v. Sanders*, 2007 BCSC 1258 at paras. 47-48, relying in part on *Goss v. Harder*, 2001 BCSC 1823.

That factor was not raised before me today.

> [16] Finally, subsequent independent medical examinations should be reserved for cases where there are some exceptional circumstances: *Wildemann v. Webster*, *supra*, at p. 3.

[8] The test for a second medical examination has been described as a high hurdle. In *Rowe v. Kim*, 2008 BCSC 1710, a decision of Master Keighley, he stated the following at paragraph 14:

> [14] A party seeking to have a second examination performed by a practitioner practicing in the same speciality or discipline as a practitioner who has already examined a person faces an uphill battle: *Hothi v Grewal*, [1993] 45 B.C.L.R. (3d) 394 (SC); *Hamada v. Semple*, [1983] B.C.J. No. 1307 (SC). Successful applicants are those who are able to demonstrate that something has happened since the first examination which could not have been foreseen or which could not, for some other reasons, have been

> addressed by the first examiner. It also seems to me that material filed in support of the application should indicate why a further examination by the doctor who performed the original assessment is not appropriate.

[9] Dr. Richardson, as an orthopedic surgeon, is a different speciality from Dr. Hirsch, who is a physiatrist; however, it is established by case law and not disputed that there is significant overlap between these two specialties.

[10] The defendant says it is obvious from Dr. Richardson's report that he felt that he was not qualified to comment about the spinal cord injury and that was why he recommended a neurosurgeon. The defendant refers to Dr. Hirsch's qualifications as to rehabilitation regarding patients with spinal cord injuries. The issue from what I can see, however, is not whether surgery is recommended or not because the surgery has already taken place. The defendant does not seek an examination by a neurosurgeon.

[11] The issue at this point is the prognosis and ongoing treatment for the plaintiff. There is no doubt that physiatry is an appropriate speciality for this kind of opinion; however, that is not the test. As Master Keighley said in *Rowe v. Kim*, the defendant must show that an updated opinion from the initial defence medical examination doctor would not be appropriate.

[12] In the *Gawlick v. Lim* decision of Master Muir, 2016 BCSC 526, the plaintiff had already seen an orthopedic surgeon and the defendant sought an order that the plaintiff see a physiatrist. In that case, the further examination was granted. However, there are two significant distinguishing features in that case in my view. Firstly and most importantly, there was significant evidence in the application before Master Muir from the doctor proposed for the subsequent medical examination as to what he would be able to add to the analysis beyond what the orthopedic expert had already opined on. There is no such evidence here. The second distinguishing feature is that in *Gawlick* there had been a new diagnosis, one of thoracic outlet syndrome. In this case there is no evidence of a new diagnosis or any injury of a different nature or character to when Dr. Richardson saw the plaintiff, simply a greater magnitude of the continuing and ongoing symptoms.

[13] In the absence of any evidence that Dr. Richardson would not be able to provide the evidence as to the plaintiff's rehabilitation, or alternatively any evidence from Dr. Hirsch as to what he could bring to the analysis, or that he could opine on something that Dr. Richardson could not, I am unable to conclude that the defendant has established on the evidence that a second medical examination with Dr. Hirsch is required in these circumstances.

[14] As such, the application to attend the appointment with Dr. Hirsch is dismissed.

[15] MR. TURNER: Your Honour, with respect to costs, my friend has suggested in his materials an appropriate award with costs if he were successful would be costs on the application in any event of the cause, and I will ask for those costs based --

[16] THE COURT: Has liability been admitted?

[17] MR. GRAVES: I think it has.

[18] MR TURNER: I think it has, yes.

[19] THE COURT: Costs --

[20] MR. TURNER: Costs in the cause?

[21] THE COURT: Costs in the cause.

"Master Wilson"