IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20160920
Docket: 15-2795
Registry: Victoria

Between:

Eduardo Pinheiro Marques

Plaintiff

And:

Lyubomir Stefanov and Jagrup Singh Johal

Defendants

Before: The Honourable Madam Justice Dorgan

Oral Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:	S. Sidhu
Counsel for the Defendants appearing by teleconference:	C. P. Collins
Place and Date of Trial/Hearing:	Victoria, B.C. September 6, 2016
Place and Date of Judgment:	Victoria, B.C. September 20, 2016

[1] **THE COURT:** The application in this motor vehicle accident case concerns an independent medical examination of the plaintiff sought by the defendant.

[2] Are you able to hear me, Mr. Collins?

[3] MR. COLLINS: Yes.

[4] THE COURT: The parties agree that the defendant is entitled to have a named orthopedic surgeon examine the plaintiff on September 29, 2016, in Abbotsford. I am assuming the plaintiff lives here in Victoria.

[5] They have also agreed on a number of conditions in respect of the examination and the ensuing report. This medical examination is the first sought by the defendant. The trial is set to commence March 6, 2017.

[6] The condition the plaintiff seeks to impose as a condition of attendance, which is not agreed to, concerns surveillance. The plaintiff asserts that it would be appropriate for the court to order that the defendant not be entitled or not be able to surveil the plaintiff as he travels to and from the independent medical examination appointment. It is agreed between the parties that there will be no surveillance of the plaintiff during the course of the medical examination.

[7] In support of this argument, the plaintiff cites two cases, each of which is a decision of a master: *Carta v. Browne*, 2012 BCSC 2219, and *Ng v. Eng*, [2014] B.C.J. No. 3498.

[8] Pursuant to Rule 7-6(1), where, as here, the physical or mental condition of a party, the plaintiff in this case, is in issue, the court in its discretion may order that party be examined by a medical practitioner. Rule 7-6(1) to (3) provides the basis on which such a medical examination will be ordered. For example, the court may impose conditions regarding delivery of the ensuing medical reports (see *Stainer v. ICBC*, 2001 BCCA 133) or in respect of audio or video recording during a medical examination (see *Wong v. Wong*, 2006 BCCA 540).

[9] The discretion of the court is to be exercised judicially, and in that exercise, any condition imposed must be reasonable and fair to all parties in the circumstances of the case. What is reasonable must be analyzed in the context of what is necessary in order to achieve parity or equality of footing between or among, as the case may be, the parties.

[10] In this case, the following findings pertain:

1) the defendant is entitled to the medical examination sought;

2) there is no evidence the defendant intends or does not intend to surveil the plaintiff as he travels to and from the medical appointment;

3) surveillance in these cases, subject to reasonable limits prohibiting such things as harassment or trespass, is a legal tool of discovery, one which could be used from the moment the notice of civil claim is filed;

4) the plaintiff presents no evidence that his abilities to get to and from the medical appointment would be impaired unless the condition sought is imposed;

5) no suggestion was raised that surveillance of the plaintiff travelling to and from the medical examination, if undertaken, would in any way impair the orthopedic surgeon's ability to undertake and complete the court-ordered medical examination to which the defendant is entitled.

[11] How then would the imposition of the condition the plaintiff seeks be reasonable in this case? In the *Carta v. Browne* decision, the application that master was dealing with was the plaintiff's objection to the independent medical examination proposed by the defendant based on three reasons. Those reasons are cited by the learned master. They are:

1) credentials;

2) inconvenience in respect of the date proposed; and

3) the inconvenience of travel between Abbotsford, the place that the doctor was located, and Kelowna where the plaintiff lived.

[12] The learned master dealt with each of the objections in depth and then, in one paragraph, deals with the matter of surveillance, and in para. 15, the master writes:

> With respect to item (i) of the response of the plaintiff here, the plaintiff is seeking that there be no surveillance of him during any part of the defence medical examination or during his arrival or departure there from. In my view this is in the nature of being required to attend at court, and it is my view that any such surveillance would be unseemly, and I therefore grant the order.

[13] There is no description in para. 15 or anywhere else in the decision to the arguments raised on this issue referred to. There is no note of what, if any, evidence this aspect of the application was argued on, nor is there any differentiation in the decision between the issue of surveillance during the medical examination itself as distinct from the plaintiff's arrival or departure therefrom.

[14] In my view, different considerations may well pertain, depending on the scenarios; that is, surveillance during the examination itself or surveillance of a plaintiff travelling to and from the court-ordered examination.

[15] In *Ng v. Eng*, a master ordered the defence IME sought and, with respect to the issue of surveillance raised by the plaintiff, the master said at para. 60:

> With respect to the surveillance, I'm inclined to agree with Mr. -- the submissions Mr. Naylor. I think it is inappropriate for party who is compelled by court order to attend examination to be under the potential of surveillance, and despite there being no evidence in that regard, I don't think it's appropriate, I'm prepared to grant that order as well.

[16] In the *Ng* case, as well as in the *Carta* case, there is no analysis of surveillance in the context of the evidentiary record before the court. Indeed, in *Ng,* the master notes there is no evidence in regard to the issue of surveillance.

[17] I was given no case authorities where these two decisions were followed.

[18] Without more, and with all due respect, I do not consider myself bound by these statements in respect of surveillance. To impose the general conditions

sought by the plaintiff would, in my view, unduly restrict the defendants' right of discovery without compelling evidence of why it would be reasonable to do so and why it would be required and necessary to do so in order to achieve parity between the parties.

[19] Such a general “rule”, if imposed, would, in a motor vehicle case, limit a defendant's ability to surveil a plaintiff where, for example, the plaintiff is compelled by a subpoena to attend court. It could be in an unrelated case, but compelled nonetheless to attend court in order to provide evidence.

[20] That, in my view, is a restriction which ought to be avoided unless the evidence and the arguments convince a court in the exercise of its discretion that such a restriction is necessary to achieve parity between the parties. I know that Mr. Collins, during argument, suggested that a plaintiff could be surveilled at the courthouse and indeed Mr. Collins points out that within the courthouse itself there are signs to indicate that surveillance is in place. That, in my view, is different than having a defendant in a case like this conduct surveillance. A defendant would not be able to surveil a party inside the courthouse. The surveillance signs Mr. Collins refers to are signs to indicate security surveillance is in place.

[21] In my view, the imposition of a broad, all-encompassing restriction, as is sought here, of an otherwise legal discovery tool should be avoided. Such restriction, if any, should be imposed by a court exercising discretion judicially, on evidence, which would lead the court to conclude that the restriction was necessary in order to achieve parity between the parties, and is therefore a reasonable restriction of an otherwise legal discovery tool.

[22] Those are the reasons. Counsel, does anything else arise? Mr. Collins?

[23] MR. COLLINS: Only the issue of costs of the application, My Lady.

[24] THE COURT: Yes. Mr. Sidhu?

[25] MR. SIDHU: No, My Lady.

[26] THE COURT: All right, and the order you seek, Mr. Collins?

[27] MR. COLLINS: Just for costs of the application in the ordinary course.

[28] THE COURT: I order the costs of the application in the ordinary course to the defendant. Thank you, counsel.

[29] MR. SIDHU: Thank you, My Lady.

[30] MR. COLLINS: Thank you, My Lady.

"J. L. Dorgan, J."
The Honourable Madam Justice Dorgan