SUPREME COURT OF YUKON

Citation: *van Veen v. Emblau*, 2017 YKSC 47

Date: 20170919
S.C. No. 14-A0127
Registry: Whitehorse

BETWEEN:

LANA VAN VEEN, MALLORY COLLINS AND SCOTT MCDOUGALD

PLAINTIFFS

AND

MICHAEL ROBERT EMBLAU, CALMONT GROUP CARRYING ON BUSINESS AS CALMONT LEASING LTD., AND COMPANY B

DEFENDANTS

AND

LORNE ESSERY, THE DRIVING FORCE INC. AND NORTH AMERICAN TUNGSTEN CORPORATION INC.

THIRD PARTIES

Before Mr. Justice L.F. Gower

Appearances:
Adrian Wright (by telephone) — Counsel for the Plaintiffs
Lindsey Galvin (by telephone) — Counsel for the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the defendants, Michael Emblau and Calmont Group, carrying on business as Calmont Leasing Ltd., for an order directing the plaintiffs, Lana

van Veen and Scott McDougald to attend for various independent professional examinations relating to their alleged damages from a motor vehicle accident. The application is only opposed by Ms. van Veen.

[2] The accident occurred on January 23, 2013, at approximately 11 o'clock in the morning on the Alaska Highway just east of the Highway 37 Junction, in the Yukon. The plaintiffs were passengers in a van which collided with the rear of a semi-trailer vehicle being driven by the defendant, Emblau, with the consent of the defendant, Calmont. The defendants deny liability for the accident.

[3] Ms. van Veen alleges that she suffered various injuries from the accident, including psychological trauma and related post-traumatic stress disorder ("PTSD"). At the time of the accident, Ms. van Veen was employed as an environmental officer at the North American Tungsten mine in the southwest Northwest Territories. She has been unable to return to that employment since the accident.

[4] The defendants seek to have Ms. van Veen attend for a vocational assessment with Ms. Diana Cameron in Vancouver, British Columbia, on September 20, 2017, or in the alternative, to attend for such an assessment by Ms. Cameron in Whitehorse on that date at a time and location to be determined (the "Cameron appointment"). The defendants are prepared to initially cover Ms. Cameron's reasonable costs in that regard for travel, accommodation and carrying out the assessment.

[5] The defendants also seek to have Ms. van Veen attend for a psychiatric assessment with Dr. Auby Axler in Vancouver on October 10, 2017. Dr. Axler is unwilling or unable to come to Whitehorse to perform the assessment.

ISSUE

[6] The issue is whether Ms. van Veen should be required to travel to Vancouver for the examinations. She alleges that, as a result of her PTSD, she finds travelling by automobile and airplane extremely upsetting, both psychologically and physically. Accordingly, she says that she is willing to undergo the examinations, but that the defendants should nominate professionals who are willing to travel to Whitehorse for that purpose. As noted, Ms. Cameron is prepared to come to Whitehorse to perform the vocational assessment, although her preference would be to have Ms. van Veen come to her office in Vancouver.

FACTS

[7] Ms. van Veen resides on a rural property at Marsh Lake, Yukon, which is about a 30 to 45 minute drive from Whitehorse. Since the accident, she finds driving stressful.

[8] The statement of claim in this personal injury action was filed in December 2014. Ms. van Veen was examined for discovery in Vancouver in August 2016. The trial is set to commence in Whitehorse on January 29, 2018. On February 14, 2017, Ms. van Veen's counsel provided the defendants with a psychological report by Dr. Mel Kaushansky, relating to Ms. van Veen's alleged psychological damages and PTSD. In this report, Dr. Kaushansky noted that Ms. van Veen's employment as an environmental officer is "typically confrontational and often acrimonious". Accordingly, he recommends that she pursue another less stressful line of work with the assistance of a job coach or vocational psychologist.

[9] A mediation to resolve the issues in this action was held in Vancouver on May 1 and 2, 2017, however it was not successful.

[10] On June 22, 2017, Justice Veale of this Court made a case management conference order that all reports on liability and damages must be provided to the other parties by October 31, 2017.

[11] On June 27, 2017, the paralegal for the defendants' counsel gave notice to Ms. van Veen's counsel that she had arranged for a vocational assessment with Ms. Diana Cameron on September 29, 2017, and a psychiatric assessment with Dr. Axler on October 10, 2017, with both appointments to take place in Vancouver.

[12] On July 5, 2017, Ms. van Veen's counsel replied to the paralegal for the defendants' counsel inquiring whether it would be possible to schedule the appointments during the same week, ideally the week of September 18 - 22, 2017. Alternatively, Ms. van Veen's counsel indicated that his client would prefer to make only one trip to Vancouver to attend both appointments, as opposed to two trips. No particular reasons were given by Ms. van Veen's counsel for this request.

[13] On July 6, 2017, the paralegal for the defendants' counsel replied that she had been able to reschedule the Cameron appointment to September 18, 2017, but that she had yet to hear from Dr. Axler.

[14] On July 10, 2017, the paralegal for Ms. van Veen's counsel asked the paralegal for the defendants' counsel whether the appointment with Dr. Axler could be moved into the same week as the Cameron appointment. On the same day, the paralegal assisting the defendants' counsel replied to the paralegal for Ms. van Veen's counsel that her request regarding Dr. Axler had been forwarded and she was waiting to hear back.

[15] On July 28, 2017, the paralegal for the defendants' counsel wrote to the paralegal for Ms. van Veen's counsel indicating that Dr. Axler would be available on

September 18, 2017, at 3 PM. Later the same day, the paralegal wrote again to the paralegal for Ms. van Veen's counsel indicating that, because the Cameron assessment was scheduled for 5 to 6 hours, commencing at 9 AM, the appointment with Dr. Axler had been moved to 3:30 PM.

[16] On July 31, 2017, Ms. van Veen's counsel wrote to the paralegal for the defendants' counsel indicating that his client was not comfortable attending two appointments on the same day. Rather, she would prefer to attend one on one day and the other on the next, or have a day in between.

[17] On August 2, 2017, the paralegal for the defendants' counsel wrote to Ms. van Veen's counsel indicating that Dr. Axler did not have any other available time the week commencing September 18. Accordingly, she suggested that they return to the notion of Ms. van Veen seeing Dr. Axler on October 10, 2017.

[18] On August 3, 2017, Lucy Austin, assisting Ms. van Veen's counsel, wrote to the paralegal for the defendants' counsel indicating, apparently for the first time, that Ms. van Veen had reached a point where she simply could not handle the stress of further travel to attend for treatment, assessments and steps in the litigation. Accordingly, Ms. Austin suggested that the vocational assessor travel to Whitehorse to see Ms. van Veen and that Dr. Axler consider performing his assessment by Skype or another video method.

[19] Later on August 3, 2017, the paralegal for the defendants' counsel learned from Dr. Axler's office that he would not do an assessment via Skype or any other electronic method and that he will not see any patients in that fashion because "he believes the courts will not look kindly" on assessments done in that manner.

[20] On August 8, 2017, the paralegal for the defendants' counsel learned from Ms. Cameron's office that Ms. Cameron would not be able to do the assessment via Skype. However, she could travel to the Yukon to do the assessment on September 20, 2017, but her preference would be that Ms. van Veen come to her office for the assessment. The offer to travel to the Yukon was also contingent on Ms. Cameron's costs for travel and travel time being covered.

[21] Also on August 8, 2017, the paralegal for the defendants' counsel learned that Dr. Axler would not travel to the Yukon for his assessment. No reasons were provided for that by Dr. Axler.

[22] On August 14, 2017, the paralegal for the defendants' counsel contacted another agency in an attempt to locate a psychiatrist who was available to conduct an assessment in the Yukon.

[23] The affidavits in support of the defendants' application regarding these assessments were sworn August 15, 2017. As of that date, the defendants had not yet determined whether there was an alternative psychiatrist available to attend Whitehorse for an assessment.

[24] The hearing of this application was held on August 30, 2017. In the evidence before me, I do not have confirmation about when or how the updated information regarding Ms. Cameron's ostensible willingness to travel to the Yukon to perform her assessment, if necessary, or the updated information regarding Dr. Axler was communicated to Ms. van Veen's counsel. However, given that none of this information seemed to take Ms. van Veen's counsel by surprise at the hearing, I can only assume that the information was passed along in a timely fashion.

[25] On August 22, 2017, Ms. van Veen affirmed an affidavit in which she detailed how one of the effects of her PTSD is that she finds travelling by automobile and by airplane exhausting and that it causes her significant anxiety and stress. She deposed that she had none of these reactions prior to the motor vehicle accident, and in fact used to enjoy driving and flying. She also deposed that she has physical reactions to the stress of travel, stating:

> Since the accident I clench many muscles in my body when I drive in a motor vehicle [or] travel by air. This causes headaches, my hands or feet to "fall asleep" or I experience a ball of heat between my shoulder blades. Sometimes I feel as though I want to curl up in a ball. I also feel physically ill to the extent I cannot eat, my stomach feels upset, I have nausea and headaches. I cannot sleep the night before I have to fly.

[26] Notwithstanding these difficulties, Ms. van Veen travelled to Vancouver during 2013 and 2014 to attend a total of 25 sessions with a psychologist for the treatment of her PTSD. She also travelled to Ontario on May 20, 2015 to attend six sessions of treatment during May and June 2015, at the Homewood Health Centre. Further, Ms. van Veen travelled from Whitehorse to Vancouver to attend for her examination for discovery on August 23, 2016, as well as for the mediation on May 1 and 2, 2017.

LAW

[27] The legal principles regarding independent medical examinations ("IME"s) and other independent professional examinations of the physical or mental condition of a party to the personal injury action are not contentious.

[28] Rule 30 of the Yukon *Rules of Court* ("Physical Examination and Inspection") governs such examinations. Sub-rules (1) through (3) provide:

> **Order for medical examination**
>
> (1) Where the physical or mental condition of a person is in issue in a proceeding, the court may order that the person submit to examination by a medical practitioner, a psychologist, physio-therapist, occupational therapist or other similarly qualified person, and if the court makes an order, it may make
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> (a) an order respecting any expenses connected with the examination, and
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> (b) an order that the result of the examination be put in writing and that copies be made available to interested parties.
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> **Multi-disciplinary examinations**
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> (2) In exceptional circumstances, or on consent, the court may order an examination of a person by more than one qualified person.
>
> **Subsequent examinations**
>
> (3) The court may order more than one examination under this rule.

[29] One of the often-quoted cases which neatly summarizes the applicable principles is *Parsons v. Mears*, 2011 BCSC 397, ("*Parsons*") a decision of Master Bouck. The case also has some factual similarities to the one at bar. It was a personal injury action in which liability was denied. The plaintiff, Mr. Parsons, resided in Victoria. The defendants had scheduled an IME and a work capacity evaluation in Vancouver and Burnaby, British Columbia. In subsequent communications, the plaintiff's counsel took the position that Mr. Parsons should not be required to travel to Vancouver for the appointments, but that similar evaluations should be arranged with practitioners in or near Victoria. One of the reasons given for not wanting to attend the assessments in Vancouver is that Mr. Parsons was only able to fly comfortably when provided with

handicapped seating, and that such seating was not available on harbour to harbour flights from Victoria to Vancouver. The narrow issue was the role that convenience plays when considering an order under the British Columbia equivalent of our Rule 30. Master Bouck determined that Mr. Parsons would have to travel to Vancouver for the assessments.

[30] At paras. 19 through 22 and para. 24, Master Bouck set out the principles and added some helpful comments, which I will emphasize:

> 19 The following principles are applicable to this discussion:
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> a. The purpose of an independent medical examination is to put the parties on a basis of equality. It is not for the plaintiff to decide which doctor can examine him or her on behalf of the defendant: *Sinclair v. Underwood,* 2002 BCSC 354 at para. 5;
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> b. Nonetheless, an independent medical examination is an examination conducted by a person appointed by the court. The convenience of the plaintiff is to be considered in appointing such a person: *Willis v. Voetmann*, [1997] B.C.J. No. 2492 (S.C.) at para. 5;
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> c. Convenience to the plaintiff is but one of several factors for the court to consider in exercising its discretion under Rule 7-6: *Adelson v. Clint* (1993), 16 C.P.C. (3d) 209 (B.C.S.C.) at para. 17; and
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> d. It may be appropriate for the court to consider appointing a specialist other than the proposed examiner but only where the plaintiff demonstrates, on a preponderance of evidence, sufficient grounds to justify the court in concluding that its discretion should not be exercised in favour of the appointment of the defendant's nominee: *Sinclair v. Underwood* and *Adelson v. Clint, supra.*
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> 20 In terms of convenience to the plaintiff, I do not understand the authorities to say that an independent medical examination should, or even might preferably, take

> place at the examinee's town or city of residence. Nor do I understand those authorities to say that all things being equal, the defence should be required to schedule an examination with a specialist practicing near the examinee's residence. For example, the court in *Willis v. Voetmann*, *supra*, deemed it reasonable for a resident of Port McNeil to travel to Victoria or Vancouver for an examination.
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> 21 It is almost always an inconvenience to a plaintiff to attend an independent medical examination. An employed person might miss a day's pay; a homemaker with young children might be required to pay for childcare. However, that inconvenience can be remedied at trial by an award of damages for this suggested loss.
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> 22 On a very rare occasion, the court may order that the defendant's nominee travel to the plaintiff's town or city of residence to conduct the independent examination or assessment. Such an order might be appropriate where the examination or assessment is requested so late in the day that travel time would unduly interfere with the plaintiff's trial preparation. The alternative to such an order would be to deny the defendant's entitlement to an examination altogether: *White v. Gait,* 2003 BCSC 2023.
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> ...
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> 24 In short, convenience to the plaintiff is one of several factors for the court's consideration on this application. It is not the predominant factor and in itself does not provide justification for denying the defendant's entitlement to the order sought. (emphasis added)

[31] The reference to “equality” in para. 19 is in the context of allowing defendants an opportunity to obtain their own independent professional assessment to counter those put forward as part of the plaintiff’s case. Other courts have noted that medical reports, in particular, are critical to the resolution of personal injury disputes, and allowing defendants this opportunity is necessary as a matter of trial fairness in order to level the playing field and better equip them to meet the plaintiff’s case: see also *Federico v. Hassan*, 2017 ONSC 4474, at paras. 13, 14, 16 and 17.

ANALYSIS

[32] I conclude that Ms. van Veen will be examined by Ms. Cameron in Whitehorse and by Dr. Axler in Vancouver. I do so for the following reasons.

[33] I do not wish to appear insensitive to Ms. van Veen's anxiety about automobile and airplane travel. Nevertheless, her difficulties in that regard still do not amount to anything more than a matter of her convenience or preference. Thus, her convenience is not the predominant factor here, but is but one of several factors for the court to consider. Further, as noted in *Parsons*, it is almost always an inconvenience to a plaintiff to attend for an independent professional assessment.

[34] Secondly, the defendants have given due regard to Ms. van Veen's convenience by making appropriate inquiries with the professionals they nominated to perform the independent assessments. Indeed, they were successful in obtaining accommodation for Ms. van Veen by securing Ms. Cameron's agreement to attend for the assessment in Whitehorse, if necessary.

[35] Thirdly, Ms. van Veen has demonstrated an ability to utilize both auto and air travel in the recent past. Although it might well be something which is becoming increasingly difficult for her over time, she has not provided any objective medical evidence that she is unable to undertake such travel.

[36] Fourthly, Ms. van Veen did not inform the defendants about her unwillingness to travel to Vancouver for the assessments until the email from Lucy Austin on August 3, 2017. This was relatively late in the day given that the defendants initiated the process of arranging for the independent assessments on June 27, 2017. Ms. van Veen's counsel suggested that this should have been done sooner, however given that the

unsuccessful mediation did not occur until May 1 and 2, 2017, I do not find that it was unreasonable for the defendants to have waited until after that time to arrange for the independent assessments.

[37] Fifthly, the law does not require defendants to schedule such independent examinations with professionals practising near the plaintiff examinee's residence.

[38] Lastly, Ms. van Veen herself has offered, as recently as July 5, 2017, to make one trip to Vancouver to attend both assessments, providing that they could be appropriately scheduled. The result of my decision is that she will only have to make a single trip to Vancouver to see Dr. Axler. Thus, in this respect also she has been accommodated.

[39] Before moving on, I simply note that Ms. van Veen had also deposed in her affidavit that if the assessments were done in Whitehorse, she would prefer to have them done in her home, rather than having to drive into Whitehorse. Counsel for the defendants submitted that this was inappropriate, as neither examination was to be a functional assessment of Ms. van Veen's ability to cope in her own home. Rather, she submitted that any assessment done in Whitehorse should take place in a neutral and professional location, such as a hotel meeting room or the like. I agree.

CONCLUSION

[40] Ms. van Veen is directed to attend the vocational assessment with Ms. Diana Cameron on September 20, 2017, at a time and place to be agreed between counsel, but not at Ms. van Veen's home. The defendants will initially cover Ms. Cameron's reasonable costs for travel, accommodation, travel time and undertaking the assessment, subject to any costs order made following the completion of the trial.

[41] Ms. van Veen is further directed to attend the psychiatric assessment with Dr. Axler on October 10, 2017, at 4:20 PM, at 201 – 1118 Homer Street, Vancouver, British Columbia, V6B 6L5. Again, the defendants will initially cover Ms. van Veen's reasonable costs for travel and accommodation to attend that assessment.

[42] I noted at the outset that only Ms. van Veen was opposed to this application. The other plaintiff, Scott McDougald has filed a Response indicating that he does not oppose the relief sought in paragraphs 5 and 6 of the defendants Notice of Application filed August 16, 2017. Accordingly, I further direct Mr. McDougald attend the continuation of the neuropsychology assessment with Dr. Rosemary Vernon-Wilkinson, on September 19, 2017 at 10 AM, at 1103 Fairmont Medical Building, 750 W. Broadway, Vancouver, British Columbia,V5Z 1J1. Mr. McDougald's costs for travel and accommodation will be borne by him.[1]

[43] The defendants will have their costs for this application respecting Ms. van Veen, but those costs will be in the cause.

[44] There are no costs awarded with respect to any portion of the defendants' Application, or preparation for the hearing, regarding Mr. McDougald.

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GOWER J.

[1] This is as a result of a previously missed appointment with Dr. Vernon-Wilkinson on August 1, 2017.