IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation:
Hammer v. *Dolhan and Cusick,* 2005 YKSC 66

Date: 20051214
Docket No.: S.C. No. 03–A0035
Registry: Whitehorse

Between:

MYRA CLARE HAMMER

Plaintiff

And

KIMBERLY DARLING DOLHAN and
RICHARD CUSICK

Defendants

Before: Mr. Justice L.F. Gower

Appearances:

Daniel S. Shier — Counsel for the Plaintiff
James R. Tucker — Counsel for the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the defendants for a multi-disciplinary independent medical examination of the plaintiff pursuant to Rule 30 of the *Rules of Court*. The issue is whether there are exceptional circumstances to justify such an Order.

[2] I gave my oral decision on the application in chambers, but indicated that these written reasons would follow.

FACTS

[3] The plaintiff claims to have been injured in a motor vehicle accident on October 30, 2002. She was initially assessed by Dr. Buchanan, a locum for her usual physician, Dr. Phillips. She was diagnosed with a strain-sprain injury to her neck, prescribed an anti-inflammatory, a muscle relaxant, local heat and stretching and was referred to physiotherapy. Her x-rays were completely normal. Dr. Buchanan's report indicated that the plaintiff had good health prior to the accident, with no neck problems. Dr. Buchanan felt her prognosis was excellent.

[4] In August 2003, Dr. Phillips noted that the plaintiff's neck was doing generally well. She showed a full range of movement and had 95% of her pre-accident status. Dr. Phillips concluded that the plaintiff would likely have full improvement over time.

[5] However, the plaintiff continued to experience headaches and pain. She sought out Dr. Robinson, a neurologist, in March 2004. He concluded that she had a soft tissue injury to her neck, mid-back and shoulders, but no damage to her nervous system. He indicated that she needed no further investigation and suggested a self-directed exercise program. He thought she might have pain for years to come, but would be able to continue working full-time.

[6] Dr. Stewart, a specialist in physical medicine and rehabilitation also examined the plaintiff in March 2004. He found her to be angry and emotional about the persistence of her symptoms, as well as scared, worried and a little depressed. Like Dr. Robinson, Dr. Stewart concluded that she had a soft tissue injury and that her symptoms were aggravated by physical activities and increased muscle tension. He noted that she had a "driving perfectionist personality" and was finding it difficult to cope with her limitations.

[7] The plaintiff then consented to an independent medical exam by Dr. Clarke, a consultant in pain medicine chosen by the defendants. That examination took place on May 2, 2005. Dr. Clarke reviewed the various medical assessments to that date, as well as reports from two physiotherapists and a massage therapist. He noted that Dr. Buchanan described the motor vehicle accident as a "relatively mild rear-end collision" and that by December 2002, the plaintiff's symptoms were not interfering with her ability to work. Dr. Clarke continued that by July 2003, the plaintiff had a full range of movement in her neck and by August she was doing most of the things that she had done before the accident. He concluded that it was likely that the plaintiff had suffered a mild whiplash injury at the time of the accident and was functionally back to her pre-accident condition by no later than August 2003. However, by then she had developed a variety of other symptoms which Dr. Clarke could not link to anything that could have happened in the accident. He expressed his opinion that the plaintiff "is a chronically anxious somewhat obsessional lady who in the past has expressed this in terms of physical symptoms". He felt that her current symptoms were those of increased muscle tension, which was stress-induced. He strongly recommended a formal psychiatric/psychological assessment.

[8] The plaintiff's counsel has indicated that he intends to call a number of expert witnesses at the trial, including:

a. Dr. Phillips, the plaintiff's family physician;

b. Mandy McClung, the plaintiff's physiotherapist;

c. David Bruce, an economist;

d. Dr. Robinson, the neurologist;

e. Dr. Stewart, the specialist in physical medicine and rehabilitation; and

f. a psychiatrist.

ANALYSIS

[9] The law in this area generally begins with the case of *Wildemann* v. *Webster*, [1990] B.C.J. No. 2304. In that case, Hollinrake J.A. decided that Rules 30(1) and (2), when read together, allow for more than one medical examiner, thus giving rise to the concept of a multi-disciplinary independent medical examination. However, he also said that Rule 30 was discretionary and such an examination should be reserved for cases where there are "exceptional circumstances". MacEachern C.J.B.C., added that an independent medical examination by more than one examiner may also be done where it is necessary to ensure "reasonable equality between the parties" in the preparation of the case for trial. *Wildemann* was more recently affirmed by the subsequent decision of the British Columbia Court of Appeal in *Guglielmucci* v. *Makowichuk,* [1996] B.C.J. No. 448.

[10] The plaintiff's counsel opposes the application on the basis of Master Grove's decision in *Dewetter* v. *Robertshaw,* 2000 BCSC 1518. There, the 17 year old plaintiff had also been injured in a motor vehicle accident. The defendant sought to have her attend before what Master Groves described as a "battery of physicians" for an independent medical assessment. The plaintiff was prepared to consent to a single assessment by an appropriate specialist, but opposed attending for multiple examinations by different doctors. Master Groves found that it would be sufficient for the plaintiff to be examined by one expert of the defendant's choosing in order to place the parties on an even footing with respect to the medical opinion evidence to be led at trial. The defendant had not yet sought the traditional medical assessment of one physician

and there were no exceptional circumstances to justify subjecting the plaintiff to a battery of examinations at that stage. At para. 17, Master Groves said as follows:

> "Multi-disciplinary assessments are clearly reserved for cases and fact patterns which create unique circumstances, the rare case where an independent medical exam cannot place the parties on an even footing. Further, the rare case where perhaps the medical evidence is contradictory, ***where the injuries alleged by the plaintiff are such that they cannot in the usual circumstances be reasonably drawn back to what, on the face of the facts, suggested would be the likely injuries resulting from the accident***. Further, it would be a rare case indeed where a multi-disciplinary assessment would be ordered prior to a request for an independent medical assessment."
>
> (emphasis added)

[11] In the case at bar, the plaintiff's neurologist, Dr. Robinson, seemed unable to discern the current cause of her continuing physical pain and symptoms, such as her headaches, and whether they are causally connected with the alleged accident. Dr. Clarke seems to have thoroughly canvassed the issue and noted that by the summer of 2003, most of the plaintiff's physical symptoms initially related to the accident had been resolved, but the plaintiff's complaints continued. Therefore, in his view, it would be helpful at this stage to have a further assessment done to see whether there is a psychological factor in these current complaints. I do not understand Dr. Clarke to suggest in any way that the plaintiff is a malingerer, but rather that she may be suffering from emotional, psychological or psychiatric stressors, which have translated into muscle tension and physical symptoms, and which in turn are continuing to cause the plaintiff genuine pain.

[12] Also relevant is the fact that the plaintiff has already undergone several rounds of treatment and assessments by various medical professionals, including her family

physician, a locum, two physiotherapists, a massage therapist, an ophthalmologist, a neurologist and a specialist in physical and rehabilitation medicine. Yet, it still seems to be unclear, at least according to the evidence of Dr. Robinson, as to what the source of her continuing current complaints is and what would be the best course of treatment.

[13] In this regard, I find the following passage in the case of *Bargery* v. *Boltz*, 2000 BCSC 1522, another decision of Master Groves, to be applicable (at para. 5):

> "The law in this area seems clear. The test in *Wildemann* v. *Webster* is that exceptional circumstances must be established to support an order for a multi-disciplinary assessment. However, a multi-disciplinary assessment can be ordered where it is necessary to put the plaintiff and the defendant on an even "playing field" in terms of preparation for trial. In the *Wildemann* decision, the plaintiff had already seen eight specialists including four neurologists and it seemed clear that ***despite the abundance of medical assessments that the plaintiff's conditions were still at best undiagnosed and at worse unexplained. It appears from the reading of the facts that there was a real psychological component present in the plaintiff's injury***, other than the usual frustration and depression resulting from the injuries suffered in the motor vehicle accident or perhaps the delayed recovery from those injuries."
>
> (emphasis added)

[14] In the case at bar, it similarly appears, at least from Dr. Clarke's report, that there may be a "real psychological component present in the plaintiff's injury." Further, despite a number of assessments to date, it remains unclear whether the plaintiff's current complaints are causally connected to the accident. Therefore, I am satisfied that there are sufficient "exceptional circumstances" to justify granting the order sought. I also find that doing so will likely put the defendants on a more even footing with the plaintiff with respect to the medical evidence to be led at trial.

[15] The details of the order were previously discussed with counsel at the chambers hearing.

[16] The defendants are entitled to costs in the cause.

GOWER J.