

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20160426
Docket: M131020
Registry: Vancouver

Between:

Bradley Gaebel

Plaintiff

And

Gordon Lipka and Stacy Gaebel

Defendants

Before: Master Dick

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

C.J. Trueman

Counsel for Defendants:

J.J.L. Brun

Place and Date of Hearing:

Vancouver, B.C.
April 26, 2016

Place and Date of Judgment:

Vancouver, B.C.
April 26, 2016

[1] **THE COURT:** As indicated at the outset understanding the urgency of this matter as the subject appointment is set for tomorrow morning, I will give reasons now. I reserve the right to edit liberally if written reasons are required in the future but the edits will not affect my decision in this matter.

[2] This is the defendants' application that the plaintiff, Bradley Gaebel, attend the offices of Dr. Douglas Coleman on Wednesday, April 27, 2016 at 10:00 a.m. and submit to an independent medical examination by Dr. Coleman pursuant to Rule 7-6(1) for Dr. Coleman to prepare a responsive report pursuant to Rule 11-6(4) . Dr. Coleman is an addiction specialist located in New Westminster, British Columbia.

[3] This action arises from a motor vehicle accident that occurred March 11, 2011 in Powell River, B.C. Liability has been denied.

[4] The matter is set for trial for 13 days commencing June 6, 2016 and is to be heard by judge and jury.

[5] The Notice of Civil Claim filed in this matter alleges the plaintiff sustained the following injuries:

- a) a blow to the head with scalp contusion;
- b) concussion and headaches;
- c) injury to the neck, clavicle, chest, ribs, right shoulder and right arm, right hand, back sacroiliac, and
- d) chronic pain.

[6] Prior to the collision, the plaintiff had a history of prescription drug use and participated in a methadone program under the supervision of Dr. A. Maguire in Powell River, B.C.

[7] The defendant acknowledges receipt of various medical and employment documents in 2012 and 2013, which records include pre and post-accident records

of Dr. White, the Powell River Hospital and Dr. Maguire. The plaintiff's list of documents and medical records disclosed include a PharmaNet printout, and an MSP printout. The documents listed the plaintiff's pre and post-accident prescriptions including Oxycodone, Zopiclone and Methadone as well as involvement with Dr. Maguire.

[8] The plaintiff was examined for discovery by the defendants on December 3, 2013. Counsel for the defendants questioned the plaintiff at length about his PharmaNet printout, oxycodone use and methadone treatment.

[9] In 2014 Dr. Maguire's records for April 2012 to November 27, 2013 were sent to the defendants as were the pre and post-accident dental records of Dr. Smillie.

[10] In April and June 2015 further records of Dr. White for the period of October 18, 2013 to April 29, 2015 and the PharmaNet printout for September 4, 2013 to March 9, 2015 were sent to the defendants.

[11] The defendants served a copy of Dr. Sohmer's medical legal report on the plaintiff in September 2015. Dr. Sohmer had reviewed the records of Dr. White, Dr. Maguire and the PharmaNet printouts. He provided an opinion about the plaintiff's narcotic dependence and chronic pain.

[12] On March 15, 2016 one day following the 84 day deadline for service of expert reports in this matter, the plaintiff served on the defendants the report of Dr. John Armstrong, dated March 9, 2016. Dr. Armstrong is a complex chronic pain physician. Dr. Armstrong's report indicated the plaintiff has a substance use disorder. Dr. Armstrong states the plaintiff had experienced a substance use disorder involving dependence on prescription opioids and Zopiclone and that his use and misuse of drugs had led him to enter the methadone maintenance program. He further noted that the plaintiff continues to battle his substance use disorder and that it is an ongoing stressor in his life. He notes that the plaintiff had been using illicit substances and as a result he was no longer eligible to participate in the methadone maintenance program. Dr. Armstrong's opinion was that it was difficult

to reliably evaluate his pain condition in light of his substance use disorder and that the initial goal should be to stabilize his substance use disorder.

[13] The defendants wrote to the plaintiff on March 16, 2016 acknowledging service of the report and seeking the attendance of Dr. Armstrong at trial for cross-examination. Further, the defendants objected to the report on the grounds that it was delivered a day late pursuant to the *Rules*.

[14] On April 12, 2016 the applicant created an instruction letter and sent it together with relevant documentation to Dr. Coleman requesting a written responding opinion. Dr. Coleman, is a fully qualified medical practitioner, licensed to practice in the area of addiction in British Columbia. The applicant also requested that if Dr. Coleman required further information or documentation to fully form his opinion, or if he required an IME of the plaintiff, to advise the writer at their earliest convenience

[15] By letter sent via fax on April 14, 2016 the applicants advised the plaintiff that an independent medical exam had been scheduled for the plaintiff with Dr. Douglas Coleman for April 20, 2016 at 10:00 A.M.

[16] On April 14, 2016 a letter was received by the defendants that plaintiff's counsel was away from the office until April 20, 2016 and the letter would be brought to his attention upon his return.

[17] By letter dated April 18, 2016, Dr. Coleman wrote to counsel for the defendants and advised of his necessity to conduct an independent medical examination of the plaintiff as part of his task of providing a responsive report. Dr. Coleman, in his letter dated April 18, 2016 advised that since there is a live issue respecting the plaintiff's addiction illness, he noted that in order for him to provide a meaningful responding report, he will need to perform a comprehensive interview followed by physical examination and laboratory testing of the plaintiff. Dr. Coleman noted that addiction is a chronic and progressive multifactorial illness and that a proper assessment consists of a comprehensive interview followed by physical

examination and laboratory testing. The physical examination and laboratory testing could provide objective support for the disclosures made by the plaintiff. He also indicated he will need to examine the plaintiff to contextualize the documentation provided in a meaningful manner. Dr. Coleman noted that the prescription for high doses of Zopiclone both before and after the accident raises concerns about an ongoing substance dependence disorder causing or contributing to compromises in the plaintiff's clinical condition and possibly being responsible for causing or exacerbating the symptoms of concern to the plaintiff. He was also unable to determine what documents were considered by Dr. Armstrong to be relevant in preparing his report or whether Dr. Armstrong reviewed the plaintiff's PharmaNet reports that documents the plaintiff's receipt of Zopiclone, as well as other opioids.

[18] Plaintiff's counsel did not agree, on his return to the office, that an IME was necessary, or that his client would attend.

[19] The defendants seek an order to compel a further IME after the expiry of the 84 day deadline for expert opinion evidence. Both counsel have recognized that the evidentiary threshold is more difficult to meet where an IME is sought for a responsive report after the expiry of the 84 day deadline than if the application is made at an earlier date. As set out in *Jackson v. Yusishen*, 2013 BCSC 1522 at paragraphs 17, 18.

[17] . . . An order under Rule 7-6(1) is discretionary. While there are a host of factors that should be considered when exercising the discretion conferred by that rule, one of the factors might broadly be taken to be whether the examination sought will advance the litigation, in the sense of potentially yielding relevant evidence touching on a material issue.

[18] In the context of a personal injury action, meeting that evidentiary threshold where the object of the examination is the eventual production of a fresh or new expert report will not usually be difficult. On the other hand, where the time limited for serving fresh or new expert reports has passed, and thus the only purpose of an independent medical examination is in furtherance of the production of a responsive expert report, the evidentiary burden will generally be more difficult to meet.

[20] It is recognized that Rule 11-6(4) establishes a notice requirement for responsive evidence but does not exempt any party from the basic notice

requirement under Rule 11-6(3). In the case of *Timar v Barson* 2015 BCSC 340 at paragraphs 19 and 20 Mr. Justice N. Smith noted:

[19] . . . Where each party has properly prepared its case and used the rights given by the *Rules* to discover the other party's, responsive reports under R. 11-6(4) should rarely be necessary and IME's for the purpose of preparing such reports should be rarer still.

[20] A party seeking an IME after expiry of the deadline in R. 11-6(3) must, as stated in *Luedecke*, satisfy the court that the examination is necessary to properly respond to an expert report served by the other party and not simply to respond to the subject matter of the plaintiff's case.

[21] However, other factors beyond the meeting of that evidentiary threshold must be considered. The principle one that emerges from virtually all the cases is the extent to which the party seeking the examination can claim to be truly surprised by the expert evidence served by the other party: *Jackson* at para. 27; *Compton v. Vale* (4 June 2014), Kelowna M95787 at para. 11 (B.C.S.C.). . . .

[21] In this case there is evidence from Dr. Coleman outlining his reasoning behind requiring an examination of the plaintiff in order to provide a meaningful responsive assessment.

[22] The plaintiff had indicated at his examination for discovery that his addictions were not affected by the accident.

[23] I further understand the first opinion that the plaintiff suffers from a substance use disorder was in the report of Dr. Armstrong received March 15, 2016. This was also the first time there was evidence that the plaintiff was no longer participating in the Methadone maintenance program.

[24] I am satisfied here on the basis of the evidence before me, Dr. Armstrong's report, Dr. Coleman's letter, and the recent turn that this matter has taken with respect to the psychiatric illnesses alleged to have arisen from the accident or been exacerbated by the accident that the defendant has been taken by surprise by these matters. These conditions were not been previously plead, nor was there evidence the plaintiff was diagnosed with these conditions prior to receipt of Dr. Armstrong's report.

[25] The delivery of Dr. Armstrong's report at the 84 day deadline has altered the situation to the extent that the defendant will need a responsive report to level the playing field with respect to the expert evidence available for the trial judge. I do find that defendants have been taken by surprise by the recent opinion of Dr. Armstrong that came at the eleventh hour as to the substance abuse disorder of the plaintiff and the impact the disorder has had on the injuries sustained by the plaintiff in this accident. I therefore find that the examination by Dr. Coleman to provide a responsive report is necessary and will, therefore, exercise my discretion to order that Mr. Gaebel attend tomorrow at Dr. Coleman's office for the purposes of the examination to allow him to complete a responsive report.

[26] I am cognizant of the prejudice that arises with respect to this order to both parties. I find it necessary to exercise my discretion to order this independent examination to provide a responsive report to put the parties on an equal footing with respect to the medical evidence available for the trial judge on the issue of the addiction disorder and the effect on this on the plaintiff's recovery. I find that the examination and report is justified and necessary and that the balance of prejudice weighs in favour of the defendants. I find that there is more prejudice to the defendants by proceeding in the absence of a responding report in the circumstances than on the plaintiff if I order this examination. I am aware that there is argument from the plaintiff that based on the tone of Dr. Coleman's letter that the report that is expected is not truly responsive. I do find that that is something that will need to be dealt with potentially by the trial judge as to the admissibility and the propriety of any report that is tendered.

[27] I have reviewed all of the authorities and I thank counsel for their able submissions with respect to this matter

[28] I recognize these reasons are not as thorough as I would otherwise have liked them to be, but based on the authorities in this matter, Dr. Armstrong's report and Dr. Coleman's letter, as well as the evidence before me, I do find that the evidentiary threshold has been met to allow me to exercise my discretion to order

the independent medical examination of the plaintiff by Dr. Cameron to allow him to tender a responsive report to Dr. Armstrong's report.

[Submissions]

[29] Costs in the cause.

[Submissions]

“Master S. Dick”