IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Soczynski v. Cai,*
2011 BCSC 1299

Date: 20110930
Docket: M101488
Registry: Vancouver

Between:

Ada Theresa Soczynski

Plaintiff

And

Yi Juan Cai, Sik H. Cheung and Highland Produce Ltd.

Defendants

Before: Master McDiarmid

Reasons for Judgment

Counsel for the Applicant (Defendant):	G. M. Hagel
Counsel for the Respondent (Plaintiff):	E. Goodman
Place and Date of Hearing:	Vancouver, B.C. September 19, 2011
Place and Date of Judgment:	Vancouver, B.C. September 30, 2011

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[1] On September 21, 2011, I issued my decision in this matter, cited at 2011 BCSC 1258, dismissing the defendant Cai's application to compel the plaintiff to attend at the offices of Dr. Simon Horlick and submit to a medical examination. The medical examination was scheduled to take place on September 29, 2011; to prevent the imposition of a cancellation fee, I issued brief written reasons dismissing the application, with more detailed reasons to follow.

[2] In this tort action, the plaintiff claims damages for injuries she sustained in a motor vehicle accident ("MVA") on April 9, 2008. The plaintiff also accessed "no fault" accident benefits following the MVA, pursuant to Part 7 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 ("Part 7 benefits").

[3] On August 9, 2011, defendants' counsel wrote to plaintiff's counsel as follows:

> We write to advise we have arranged an appointment for a medical examination of your client with Dr. Simon Horlick, Orthopaedic Surgeon.

[4] In response, plaintiff's counsel succinctly set out the plaintiff's position by a letter written the next day, in which counsel wrote:

> The IME you have arranged for September 29, 2011 with Dr. Simon Horlick is a duplication as the Plaintiff has already attended an IME with Dr. Paul Bishop.

[5] This was in reference to a medical examination carried out by Dr. Paul Bishop on January 23 2009. Following that examination, Dr. Bishop wrote an eleven-page report dated that day which set out his qualifications, a detailed history of the plaintiff, physical examination of the plaintiff, and a review of clinical records with comments about some of what was written in those records by the plaintiff's family physician. Dr. Bishop's report concluded with sections entitled "Impression" and "Discussion". In this latter section, Dr. Bishop responded to questions put to him by Wendy Mulligan, a claims representative with the Insurance Corporation of British Columbia ("ICBC") who was responsible for handling the plaintiff's claims arising from the April 9, 2008 MVA. His report is, in my view, more comprehensive than what would be needed to deal solely with Part 7 issues. In my view, it is a report

which could assist the trier of fact in this (tort) action. The report sets out the author's qualifications and facts, and assumptions on which the opinion was based. The way the report is written makes it obvious that Dr. Bishop was personally (i.e. "primarily") responsible for its content. The report was, therefore, in compliance with the requirements of Rule 40A, predecessor to Rule 11-6(1).

[6] If Dr. Bishop's report was solely for the purpose of an examination pursuant to s. 99, there would be no need to request the expert's qualifications and experience. Ms. Mulligan understood, as at December 9, 2008, that Dr. Bishop was an orthopaedic surgeon. The need for a statement containing qualifications and experience is to ensure compliance with the requirements for admissibility in accordance with Rule 40A.

[7] I recognize that no actions had been started as of January 2009. It is conceivable that an action for Part 7 benefits could have been initiated, but ICBC was paying Part 7 benefits. The probable reason for compliance with Rule 40A was to enable the report to be admissible in the anticipated tort action.

[8] The defendant argues that the examination scheduled by Ms. Mulligan and resulting in the examination of the plaintiff by Dr. Bishop was not a first examination under Rule 7-6(1), but rather was an examination which the plaintiff was statutorily required to attend if she wanted to continue to access Part 7 benefits. Section 99 of the *Insurance (Vehicle) Regulation* states:

> 99 (1) An insured who makes a claim under this Part shall allow a medical practitioner, dentist, physiotherapist or chiropractor selected by the corporation, at the expense of the corporation, to examine the insured as often as it requires.
>
> (2) The corporation is not liable to an insured who, to the prejudice of the corporation, fails to comply with this section.

[9] At times there is a separation between a department of ICBC which is handling Part 7 benefits, and a different department and other claims representatives (adjusters) dealing with ICBC as the insurer of the defendant in tort claims.

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[10] In *Vorasarn v. Manning,* 30 B.C.L.R. (3d) 63, referred to by Master Bolton in *Longva v. Phan*, 2007 BCSC 690, paras. 19-22, the Court of Appeal based its decision on the fact that the ICBC rehabilitation representatives were independent of the adjuster and counsel defending the tort claim, to the point that there was an exclusive agreement that the rehabilitation representative would not disclose the Part 7 report to the ICBC representatives in the tort claim.

[11] This can be contrasted with the decision of the Supreme Court in *Robertson v. Grist*, 2006 BCSC 1245. In *Robertson*, the adjuster who requested the report was dealing with both Part 7 benefits and tort claims.

[12] The key guiding principle in the cases is set out by Mr. Justice Barrow in *Teichroab v. Poyner*, 2008 BCSC 1130, where at para. 24, his Lordship states:

> Generally, the more closely an examination performed under a contractual obligation or for purposes of a claim for Part VII (now Part 7) benefits resembles an independent medical examination under Rule 30(1) (now Rule 7-6(1)), the more relevant it will be to the exercise of the discretion conferred by the Rule, and the less likely it may be that an order under that Rule (referring to 7-1(2)) will be made. That is so because the purpose of Rule 30 is, in part, to put the parties on an equal footing in terms of their ability to explore the issues in the case ... To the extent an assessment prepared under a contract of insurance or in relation to a claim for Part VII benefits puts a defendant on an equal footing, the need for an assessment under Rule 30(1) will be mitigated.

[13] Some of the cases to which I was referred suggest that it is appropriate to explore whether the examiner is asked to deal with issues that are confined to a Part 7 claim or whether the issues relate to an actual or potential tort claim. I do not find such an analysis useful. Many issues relate to both Part 7 and tort claims and cannot be easily separated out. For example, taking a history of the accident is often necessary to enable the examiner to have some idea of the magnitude and direction collision forces which resulted in the claimed injury; this is so irrespective of whether the medical examiner is dealing with a Part 7 claim or a tort claim. Similarly, a prognosis is often needed by the claims examiner with respect to assessing Part 7 accident benefits (see for example s. 88(8) of the *Insurance (Vehicle) Regulation*). This will necessarily overlap with what will be needed to properly assess a plaintiff's claim for pain and suffering in a tort action.

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[14] In this case, Ms. Mulligan has deposed that on July 31, 2008, the claim file regarding the plaintiff's **claims** [emphasis added] arising from the MVA was transferred to her for handling. This obviously referenced both the Part 7 and the tort claims. By the fall of 2008, Ms. Mulligan was aware that the plaintiff had retained counsel with respect to both her tort claim and her claim for benefits under Part 7.

[15] On December 9, 2008, Ms. Mulligan wrote to plaintiff's counsel confirming the appointment for the medical examination by Dr. Paul Bishop set for January 27, 2009. The letter states:

> This medical examination is pursuant to Section 99 of the *Insurance (Vehicle) Regulation*...to assess your client's continuing entitlement to:
>
> - temporary total disability benefits under Section 80 of the *Regulation* and/or,
> - homemaker benefits under Section 84 of the *Regulation* and/or,
> - medical or rehabilitation benefits under Section 88 of the *Regulation*.

[16] In response, plaintiff's counsel sent Ms. Mulligan an email on December 10, 2008, which contained the following:

> I have your letter of December 9, 2008... The letter suggests that the assessment is for Part VII issues only.
>
> I take the view that the assessment is for the tort claim so you are using your opportunity for a tort IME at this stage.
>
> The client will attend on the condition that you provide us with a copy of report if you order one from this doctor. She will also require $35 conduct money. Ms. Mulligan did not respond to this letter. She did not provide conduct money, but plaintiff's counsel did receive a copy of Dr. Bishop's report.

[17] Ms. Mulligan deposed that she understood Dr. Bishop to be an orthopaedic surgeon. It is deposed that she sought the Part 7 examination to determine whether ICBC had an ongoing obligation to fund physiotherapy treatments for the plaintiff. She deposed:

> At no time did I consent to Mr. Mussio's position that the Part 7 medical examination was also a tort medical examination, nor was any conduct money paid.

[18] Ms. Mulligan did not respond at all to the December 10, 2008 email.

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[19] Jenny Chan, a paralegal working for counsel for the plaintiff, filed an affidavit in which she has deposed that the plaintiff intends to rely on at trial the expert opinions of Dr. Christopher Hunt, the plaintiff's family physician and Dr. John le Nobel, a specialist in physical medicine and rehabilitation. Appended to an affidavit filed by the defendant, is what is referred to as a "Medical Report" in her affidavit from Dr. Christopher Hunt dated February 25, 2009, and a photocopy of a twelve-page fax comprising three related letters from John le Nobel M.D., which set out his qualifications, opinion, history, current symptoms, current treatments, post-accident activities, physical examination, imaging review and record review.

[20] Plaintiff's counsel has advised that the plaintiff will not be relying on any orthopaedic specialists.

[21] In reviewing the facts in this case, and keeping in mind the main principle to be looked at here, the principle of keeping the parties on an equal footing, I find that in the circumstances of this case, and in particular, the fact that the ICBC adjuster was handling both the Part 7 and tort claims, and did not respond when she knew that the plaintiff's position was that the examination in front of Dr. Bishop was to deal with both those claims, I find that the examination which took place at the behest of ICBC on January 27, 2009 by Dr. Paul Bishop constituted the first medical examination as contemplated by Rule 7-6(1). The defendants want a further examination by another medical practitioner who practices in the area of orthopaedics. The plaintiff is not relying on any orthopaedic specialists. Keeping in mind the "level playing field" principle, it is not appropriate to order a further examination of the plaintiff by a medical practitioner having expertise in the area of orthopaedics.

"Master R.W. McDiarmid"

MASTER McDIARMID

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