IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20131209
Docket: M123846
Registry: Vancouver

Between:

Changhee Lee

Plaintiff

And

Josephine Ching

Defendant

Before: Master Baker

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:	T.C. Schapiro
Counsel for Defendant:	D.J. Sinnott
Place and Date of Hearing:	Vancouver, B.C. December 9, 2013
Place and Date of Judgment:	Vancouver, B.C. December 9, 2013

[1] **THE COURT:** This is an application by the defense for an order compelling the attendance of the plaintiff with Dr. Sovio, an orthopedic surgeon, at an examination scheduled for January 6, 2014. This arises as a consequence of two motor vehicle accidents involving the plaintiff; one in July of 2010 and one in April of 2011. I have no doubt whatsoever, and there has been no dispute taken with Mr. Sinnott's argument, that clearly the injuries are orthopedic or are of an orthopedic nature, a soft-tissue injury. There is no dispute about that.

[2] The entire dispute today turns on whether or not this is a so-called first IME or a second IME, the obvious issue being that if it is in the view of the court a second IME then the standard is significantly higher under Rule 7-6.

[3] The plaintiff attended voluntarily, it must be said, an IME for Dr. Yu, an orthopedic surgeon, on December 14, 2011. The defense argues emphatically that this IME was for the sole and exclusive purpose of determining the plaintiff's rights under Part 7, and as a consequence that report does not count as so-called first IME.

[4] Moreover, and this is not disputed, the plaintiff attended before Dr. Yu voluntarily and no notice of civil claim had been issued although the plaintiff was represented by counsel, Mr. Wiseman, at the time that is referred in the letter of instruction by the adjuster to Dr. Yu. Generally speaking I would agree that the letter of instruction of the adjuster that is appended to the materials addresses those Part 7 issues. There are, of course, problems with that. Master Bolton's decision -- the name eludes me right now -- but in his decision he parsed down the very similar letter of instruction and addressed each point in turn, demonstrating at various points how much overlap there is between the issues focused upon and addressed in the letter, the issues of Part 7 on the one hand, and a tort claim on the other, and concluded ultimately that there was sufficient overlap that the letter of instruction did not exclude the possibility of a so-called tort orthopedic report.

[5] Master Keighley has taken another view of this and I find his reasons in *Rathgeber* to be very helpful and instructive in fact, they being quite recent, I think. I

agree with his perception, or take, that earlier decisions take, as he calls it an "atomistic view" of the issue, whereas he says in his view a more holistic view is necessary. I think that is the approach.

[6] The arguments for the order are that, as I say, firstly the earlier report was a Part 7 report; secondly that it was voluntary and, thirdly, that it pre-dated the notice of civil claim, therefore, as Mr. Sinnott argued, the adjuster, he said, could not consult with counsel. Well, I do not accept those submissions. I cannot see that the date of the notice of civil claim is so determinative and I do not think Mr. Sinnott meant it that way. It is evident to me, and I do accept, that practically from the get go, as it were, there was a tort claim out there and that the adjuster was reasonably aware of this. So I cannot exclude the purposes and conclude that these were exclusively Part 7, and I do not draw that conclusion.

[7] I also do not place the same weight on voluntariness. Nobody has addressed or spoken of one of the corollaries to that argument which is that voluntariness automatically permits a second IME. I can see the plaintiff's counsel routinely and arbitrarily refusing any IMEs on any terms if voluntariness implied a second IME.

[8] It is worth noting Madam Justice Gerow's comments in *Houghland v. Egilsson* --I do not have a cite for it because they are oral reasons -- at paragraphs 16 onward, and particularly paragraph 18 where she discusses the voluntariness and comments that she does not have the reasons of the master as it was an appeal so she cannot really comment on it. She does reference the voluntariness but she says at paragraph 18:

> The overriding question is whether the independent medical examination being sought by the defendant is necessary to ensure reasonable equality between the parties and their preparation of the case for trial.

[9] Citing *McKay v. Passmore* 2005 BCSC 570. That is the “holistic approach”, I think, if I can adopt Master Keighley's description.

[10] It is my view that the IME is not necessary to put the parties on an equal, reasonable equality. Whatever the purpose, whatever in mind the adjuster had

when he or she sent their letter of instruction, and I can acknowledge that it does clearly address points referencing rehabilitation and further treatment. For whatever purpose it is my view that Dr. Yu's report so reads like a tort IME that it can be taken as such. I think the comments that Master Keighley in *Rathgerber* takes from *Rowe* [phonetic] and I paraphrase, are apposite. The closer that the first report looks like a usual IME the more it bears on the court's discretion as to whether or not a second IME, or a further IME let us call it, should be ordered.

[11] Dr. Yu's report looks very, very much to me like a report that might have been the result of an ordinary request for an IME in a tort claim. By no means does Dr. Yu restrict himself to the issues in the letter of instruction. I think that he has concluded that the accident -- for example, one he says is more severe than the other -- was the cause of the injuries, et cetera. I do not think it is very distinct from a typical report.

[12] I agree with Ms. Schapiro's submission that it is essentially a belt and suspenders approach.

[13] On that basis the application is dismissed.

[14] (Submissions re costs)

[15] THE COURT: The plaintiff was successful. The plaintiff is entitled to his/her costs. So costs to the plaintiff.

"D. C. Baker, M."