

Date: 19980305
Docket: B936815
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Master Barber
Pronounced in Chambers
March 5, 1998

BETWEEN:

BARRY LEA GOOD

PLAINTIFF

AND:

DEAN JOHN GILLALES

DEFENDANT

Counsel for the Plaintiff: M. Kozlowski

Counsel for the Defendant: T. Pettit

[1] THE COURT: This is an application by the defendant for an order pursuant to Rule 30 that the plaintiff attend before Doctor Bonnie Hayes for examination.

[2] The order itself is not opposed except as to who the plaintiff will attend before. The plaintiff is prepared to attend before any psychologist who has a practice somewhat similar to that of Dr. Hayes, but is quite opposed to appearing before her. A multi-disciplinary assessment is under way and two aspects of it have been completed. The psychological examination is yet to be done.

[3] The plaintiff says in his affidavit at tab 5 in paragraph 6 that:

As a result of reviewing the above mentioned Judgments and extract of the "Statements and Schedules of Financial Information" of the Insurance Corporation of British Columbia there is, in my mind, a distrust of Dr. Bonnie J. Hayes and that, accordingly, I ask the Court to exercise its discretion in my favour by ordering that another expert be appointed to conduct a psychological examination of myself.

[4] He appears to be saying that because he has read 18 judgments and found that Dr. Hayes rendered an opinion which was adverse to the plaintiff in those judgments, usually by, he says, asserting that the plaintiff was malingering or exaggerating his or her symptoms as a means to promote financial gain that he "distrusts Dr. Hayes". Further, he appears to have come to that conclusion because he has reviewed financial statements and it appears that Dr. Hayes received \$144,878 from ICBC in the year ending December 31, 1996.

[5] In a further affidavit, he says that he has read the affidavit of Dr. Hayes and that did not give him any comfort. He said nothing in those documents lessens his distrust of Dr. Bonnie Hayes.

[6] Lastly, in an affidavit filed, he speaks about the time that he will be required to spend and he says because of that information, it compounds the distrust and apprehension he feels about attending a psychological examination with Dr. Hayes.

[7] The law on this matter, in my view, is set forth in *Wheeler v. White* (1984) 7 D.L.R. (4th) 767, which ultimately went to the Court of Appeal wherein Mr. Justice Nemetz, who was the Chief Justice at that time, adopted the words of the learned master in the first instance as being an entirely sensible application of a Rule 30(1) application, especially in cases of psychiatric examinations. Thus, the appeal was dismissed. The words he adopted were as follows:

Whereas in this proceeding there is a willingness on the part of the person to be examined to accept any expert other than the one chosen by the applicant, coupled with material which supports a reasonable belief that there exists in the mind of that person a distress or fear of a nominated specialist, it is my opinion the court should exercise its discretion in favour of the person to be examined.

[8] There are other psychologists who can complete this examination. In fact, the plaintiff would accept Dr. Solemon (phonetic).

[9] The issue before me is whether or not the evidence is sufficient to indicate that the test as set forth in Wheeler v. White (supra) has been met, such that I should order the examination by another doctor other than Dr. Hayes. The plaintiff says that it has been, and that I need do no more than look to the language used by the plaintiff and determine that in fact the examination will be thwarted in some way.

[10] There is no need for me to make any determination as to whether or not Dr. Hayes has a bias or not, and I decline to do so.

[11] For the defence, it is argued that in fact the distrust is a manufactured distrust or at least it has the aura of being a manufactured distrust, in that, first of all, virtually the language of Wheeler v. White has been used and secondly, the defendant pointed to earlier correspondence which indicated a concern about Dr. Hayes by the solicitor for the plaintiff and that it was only after that was not accepted, that the plaintiff swore these affidavits.

[12] There is no question but that when the examination is a psychological examination that, in appropriate cases, the wishes of the plaintiff should be given consideration. Here, though, it seems to me that the bare words "distrust and apprehension" are insufficient.

[13] In my view, what the plaintiff is doing is attempting to, in very colloquial terms, get in through the back door what he cannot get in through the front door. If the plaintiff were to have a distrust such that it would be given consideration, I think there must be more evidence to indicate what that distrust is and how it may affect the plaintiff. The fact that the plaintiff merely uses such words is an indication that he may have a distrust, but I cannot determine how that in fact may affect the examination, nor can I determine the extent of his distrust or apprehension. Therefore, it is extremely difficult for me to determine the reasonableness of it.

[14] As a result, the application for the medical examination to be with Dr. Hayes is approved.

(SUBMISSIONS BY COUNSEL)

[15] THE COURT: Costs in the cause.

"R. Barber"
Master Barber