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DEFENCE APPLICATION TO PROHIBIT THE TENDERING OF MORE THAN THREE EXPERT REPORTS AT TRIAL

LV V. KYL AND DB – 2021 BCSC 1224

On August 10, 2020 Section 12 of the Evidence Act was revised to restrict the number of expert reports that may be tendered in what is defined in the Act as a "vehicle injury proceeding". Specifically, Section 12.1(2)(a) restricts expert evidence on the issue of vehicle injury damages to no more than 3 experts and no more than one report from each of those experts. Section 12.1(5) gives the court authority, upon application by any party, to allow additional expert reports to be tendered, and/or more than one report from a single expert, provided the conditions of Section 12.1(6) are met; the subject matter of the additional evidence is not already addressed by another expert; or, "without the additional expert evidence, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding.

On November 11, 2017 the plaintiff, LV, was travelling as a passenger in a vehicle driven by the defendant DB, when it collided head-on with a vehicle driven by the defendant KYL. The plaintiff brought this action against the defendants for damages for injuries sustained as a result of the collision. The defendant DB brings this application seeking to prohibit the plaintiff from tendering more than three expert reports at trial.

The plaintiff is 26 years old. She claims to have suffered various injuries as a result of the accident, including mild traumatic brain injury, neck and back injuries, trauma and stress-related disorders, adjustment disorder with mixed anxiety and depressed mood, among other injuries. She claims that as a result of these injuries she faces occupational challenges, including the likely inability to work full time and potential impacts on her ability to advance to more senior positions in her career as an urban planner. Claims include damages for cost of current and future care, loss of future income, general and special damages, among others.

The plaintiff has served medical reports as follows: one report from a neurologist, three reports from a physiatrist and one report from a psychologist. Further, she has served a vocational assessment report, an occupational therapy report and two reports from an economist – for a total of nine reports. In her submissions, counsel for the plaintiff, Ms. Hayman, referred to the first three sets of reports, the neurologist, physiatrist and psychologist reports, as "first-tier reports" that relate to the different types of injuries that the plaintiff is alleged to have suffered. She referred to the second three sets of reports, vocational, occupational therapy and economist reports, as second- and third-tier reports describing how the alleged injuries are likely to affect the plaintiff's physical and mental wellbeing, employment and advancement opportunities, as well as her cost of future care and future income. Ms. Hayman submitted that, if reports must be sacrificed it would have to be the second- and third-tier reports. She emphasized, though, that sacrificing these reports would prevent her from making proof of essential elements of the damages claim. After taking the court through the expert reports served in this case, Ms. Hayman remarked that "this is a classic structure of all PI claims since time immemorial". The court agreed that the authorities cited and summarized in the application response would seem to support the general point that Ms. Hayman seems to make.

The defendant KYL, has served four responding reports and takes no position on this application. The defendant DB, who has brought this application, has served no reports. The issues are whether the plaintiff should be permitted to file more than three reports; and, whether the plaintiff should be granted leave to file more than one report from a single expert. The applicant's central argument is that there is nothing extraordinary about this case that would justify a departure from the limitations imposed by the Evidence Act. He notes that the limitations are mandatory in that they state that a court "must" not allow a party to tender expert evidence that exceeds the limits set out in the Act. This, of course, is qualified by subsections (5) and (6). The court notes "I do not read the conditions set out in s.12.1(6) to require that a case be of an extraordinary or unusual nature before a court can make an order under s. 12.1(5)" but rather, (1) whether the subject matter of the additional reports is already addressed – or as it has been described in other cases, "piling on" of expert evidence; and (2) the applicant would suffer prejudice disproportionate to the benefit of increasing the complexity and cost of the proceeding.

With respect to duplication, the court was "satisfied that this condition is met for all the reports at issue in this application".

With respect to "prejudice to the plaintiff disproportionate to the benefit of not increasing the complexity and cost", the court states, "I am satisfied that denying [the plaintiff] the ability to tender all the expert reports at issue in this application would prejudice her ability to prove essential elements of the claim… limiting her to only three of the reports would prevent or at least seriously impede proof of essential

elements of her damages claim." After review of the various reports, particularly that of the economist, Mr. Justice Kirchner commented, "Obviously, this is a significant claim." He goes on to say, "Without weighing the merits of the claims but using these values as an indicator of what is at stake, I find they are supportive of a conclusion that the prejudice to [the plaintiff] in not being able to rely on the second- and third-tier reports would be disproportional to any increased cost or complexity of allowing the reports to be tendered… I do not see that omitting these reports at this stage will significantly reduce the cost and complexity of this case. Indeed, doing so may make the case more costly and complex… Without these reports the plaintiff is put in the position of trying to prove as many of the matters covered in the reports as possible through lay witnesses or documentary evidence. Assuming that this could even be done, it would very well add to the length or complexity of the trial and preparation time."

With respect to multiple reports from one expert, the court found in each case that the additional reports were not repetitive and did not constitute "piling on" of evidence, and to require that one of those reports be excluded would prejudice the plaintiff in a manner that is disproportionate to any benefit of not increasing the complexity or cost of the trial. The court allowed, without exception, the multiple reports from the physiatrist and economist.

CONCLUSION

For the foregoing reasons, I find that [the plaintiff] has met the conditions of s.12.1(6) of the Evidence Act in this case, and I grant leave under s. 12.1(5) for her to tender all the reports that are the subject of this application… The application of [DB] is therefore dismissed"

The full Oral Ruling of this Application by Mr. Justice Kirchner, April 26, 2021, CAN BE FOUND HERE

WRITTEN BY STELLA GOWANS, PARALEGAL

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