

SUPERIOR COURT OF JUSTICE

5 B E T W E E N :

CRYSTAL WESLEY

Plaintiff

10 - and -

ROYAL AND SUN ALLIANCE INSURANCE COMPANY OF CANADA

15 Defendant

R U L I N G S

20 BEFORE THE HONOURABLE JUSTICE K. CARPENTER-GUNN  
on December 20, 2016, at HAMILTON, Ontario

25 APPEARANCES :

30 J. Waxman

Counsel for Plaintiff

H. Saeed

Counsel for the Defendant

(i)  
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<u>WITNESS:</u>	Exam. <u>in-Ch.</u>	Cr- <u>exam.</u>	Re- <u>exam.</u>
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<b>LEGEND</b>
<b>[sic]</b> - Indicates preceding word has been reproduced verbatim and is not a transcription error.
<b>(ph)</b> - Indicates preceding word has been spelled phonetically.

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E X H I B I T S

<u>EXHIBIT NUMBER</u>	<u>ENTERED ON PAGE</u>
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Transcript Ordered: .....	December 21, 2016
Transcript Completed: .....	January 12, 2017
Ordering Party Notified: .....	January 12, 2017

TUESDAY, DECEMBER 20, 2016

R U L I N G

5 Carpenter-Gunn, J. (Orally):

10 Today I heard a motion brought by the defendant,  
Royal and Sun Alliance Insurance Company of Canada  
for the plaintiff to attend two defence medical  
appointments. One an appointment with a  
psychologist, and one an appointment with a  
physiatrist.

15 These appointments were originally scheduled, one  
for November, one for December of this year and  
were cancelled once the moving party found out from  
the responding party that he would not produce his  
client at such examinations.

20 Obviously, cases of this type are determined  
specifically on the facts of the case at bar. And  
there is no case that falls on all on fours with  
the case at bar. There is no issue before the Court  
that the defendant can ask for examinations under  
25 S. 105 and under the rules. Indeed, the responding  
party concedes that fact.

30 One has to look at the history of this particular  
matter in order to discern what is an appropriate  
outcome of this motion.

Here there is a motor vehicle/pedestrian accident

that took place on September 30, 2010. Originally, some housekeeping benefits were paid and some non-earner benefits were paid.

On the facts of this specific case the AB carrier deemed that the plaintiff was in the minor injury guidelines with access to only \$3,500 of medical and rehabilitation benefits.

In the past this particular insurer, the moving party has spent \$12,254.57 on various examinations. To date there have been seven such examinations which includes a multidisciplinary assessment that was done in 2011.

As well, on the specific facts of this case what is really in dispute on this action are the following:

One, housekeeping and home maintenance benefits which were restricted to a two year period from the accident. In this case, the precise period of time that they have not been paid and they are being sought is July 8, 2011 to September 30, 2012 at the rate, a maximum of \$100 per week.

The second item that is in dispute is non-earner benefits, which the responding party concedes would be restricted from the time they were not paid July 7, 2011 to March 31, 2015. The March 31, 2015, date is because Dr. Kumbhare opined in a report at that time that the plaintiff would not be suffering a complete inability to carry on a normal life.

5 There is a recent occupational therapist report, but that obviously is not for this Court to deal with, but rather on the new regime before the Licensing Appeals Tribunal.

10 Both counsel provided the Court with various cases, and as I said previously, the cases are very fact specific. The court needs to look at the whole issue of proportionality on this particular case. And here I harken back to what the two issues are, the housekeeping for a very finite period of time that ends in 2012. And a period for non-earner benefits that is for a finite period of time which ends March 31, 2015.

15 Unlike some motions that I have heard with respect to these types of issues, there is no affidavit evidence before the Court dealing with why each of these two specific doctors feel that such an examination that is being requested would be of assistance to answer the historical issues that are in play on this motion.

20 I am not suggesting that that is a mandatory requirement on a motion of this type, but on the specific facts of this case it would be helpful to the Court.

25 There is no doubt, as I said previously, that the defence theoretically can ask for these examinations, but the precise issue on this motion

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is whether it is reasonable on the specific facts of this case. One has to look at the history, and I detailed some of that already in these reasons.

5 As well, there is a tort action on this case that involves the same insurer, and I understand there has been some defence medicals on that tort action. I agree with the moving party that the fact that there are defence medicals for the same insurer on the tort/companion action is not a bar to obtain additional medicals on the accident benefits claim.

10 The plaintiff submits to the Court that you have to look at whether it is reasonable in all of the circumstances to order these two defence medicals given the contextual history of this matter.

15 The responding party submits that the court has to look for the potential of abuse here, and have to factor in proportionality which obviously is a major issue on our so called new rules that are not so new anymore. The court has to look at the prior examinations that I have already referenced, which in this case are seven in number.

20 Mr. Waxman submits on behalf of the responding party, that the court must determine whether the assessments are reasonable and are they appropriate. He feels that there is no legitimate reason for these examinations as we are dealing with a precise finite frozen in time period of time. He questions whether these examinations

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would be of assistance in that regard.

5 The Court also has concerns in that respect, in that it is not clear on the record before the Court that having this particular plaintiff seen by the two defence doctors will, in fact, assist the Court.

10 The moving party submitted to the court is her initial submissions, that she on behalf of her client requires these examinations to determine the plaintiff's "present needs". The Court had somewhat of a disconnect when that submission was made and identified that to counsel, in that what we are dealing with on this specific case is not so much "present needs", but is very much past needs in terms of finite periods of time.

15 In the Court's view, one has to balance the interests of both sides in deciding whether or not these two further examinations are appropriate.

20 The Court agrees that this is not a situation where the moving party is seeking updates from two predecessor physicians to bring their opinions up to date. But rather in this case, we are dealing with a request to have the plaintiff examined by two different doctors then had previously seen the plaintiff.

25 That makes it different then some of the cases such as *LaForme* wherein it was the same physician that

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was being requested the second time around.

5 The responding party's position is that, and this is mentioned in the material, that there is emotional toil on the plaintiff having to go for these additional examinations. The moving party is critical of that submission. Her view is that what we have here is simply the plaintiff's counsel saying that and no further evidence of the toil on the plaintiff.

10 The Court has looked at the various cases that are before the court and as I said before, there is no case that is on all fours. I have to look at the context of this case. I have to look at what is at issue on this case. The dollar value, the period of time and whether or not these additional medicals will be of assistance.

15 The Court has carefully reviewed both factums provided by both parties and feels that what is submitted in the responding party's factum in terms of what should be the outcome here is more appropriate. The Court feels that on this specific case, both the Court and the insurer are not going to be further enlightened by doing medicals at this time as to what the scenario was in the past.

20 During the no-fault period, the moving party has had multiple examinations that deal precisely with the issues that are in play here. The Court does not see when one weighs proportionality with the

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history of this file why it would be appropriate to send this particular plaintiff for these two further examinations. So the motion is dismissed.

5 ...SUBMISSIONS BY MR. WAXMAN

...SUBMISSIONS BY MS. SAEED

R U L I N G

10 Carpenter-Gunn, J. (Orally):

15 So I put Ms. Saeed for the moving party, the defendant. Mr. Waxman for the responding party, the plaintiff. For oral reasons, given the defendant's motion is dismissed. With respect to costs each counsel has given me their Bill of Costs. The figure the plaintiff's counsel is suggesting is a compromised number and is less than the fees on the defendant's bill of costs. Accordingly, the Court awards costs of \$2,500 all in for fees to the plaintiff, plus \$558.90 all in for disbursements. The defendant shall pay these fees and disbursements within 30 days.

25 ...THIS MATTER WAS CONCLUDED

**FORM 2**

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***Evidence Act, Subsection 5(2)***

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I, Vera Simachowskyi, certify that this document is a true and  
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15 \_\_\_\_\_  
**(Date)**

\_\_\_\_\_  
**(Signature of authorized person)**

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