CITATION: Babcock v. Destefano, 2016 ONSC 5352
COURT FILE NO.: CV-12-0133-00
DATE: 2016-08-24

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
REGGIE BABCOCK	)	
Plaintiff	)	D. Gilbert, Counsel for the Plaintiff/Responding Party
– and –	)	
ANGELO DESTEFANO and WAWANESA MUTUAL INSURANCE COMPANY	)	B. Marta, Counsel for the Defendant/Moving Party, Wawanesa Mutual Insurance Company
Defendants	)	
	)	**HEARD:** August 22, 2016

RAY, J

[1] The defendant Wawanesa seeks orders requiring the plaintiff to be examined by several medical specialties.[1] The plaintiff opposes the orders on various grounds including that Wawanesa requires leave to bring the motion, the request is in violation of the rules of civil procedure, and the motion is brought after the pretrials took place.

[2] This action is for damages arising out of an automobile accident on February 1, 2011, and is now an assessment of damages. The defendant Destefano collided with the rear of the plaintiff's vehicle. Wawanesa was added January 29, 2013 in order to permit the plaintiff to claim against his OPCF-44R Endorsement for the excess over the $200,000 policy limits the defendant Destefano's insurer settled with and paid to the plaintiff. Wawanesa's exposure is the excess over what has been

[1] *Courts of Justice Act,* R.S.O. 1990, c. C43, Section 105,

paid to the plaintiff, up to the policy limits of $1,000,000, assuming the plaintiff's claim is found to exceed $200,000. The action is scheduled to be tried March 27, 2017 in Belleville for 5 weeks with a jury.

[3] A brief chronology is as follows:

a. February 26, 2014, the plaintiff was examined for discovery;

b. December 1, 2014, Destefano settled with the plaintiff;

c. March 14, 2015, the plaintiff served the trial record and set the action down for trial;

d. March 26, 2015, Wawanesa agreed to a pretrial to take place October 28, 2015;

e. October 15, 2015, pretrial conference with Scott, J, plaintiff filed list of witnesses, Wawanesa did not. Plaintiff confirmed ready for trial in January or February, 2016. Wawanesa stated not ready for trial until fall of 2016.

f. June 8, 2015, the plaintiff was examined for discovery;

g. September 28, 2015, Wawanesa was "considering a defence medical examination";

h. January 13, February 2, 2016, Wawanesa cancels a neurological assessment and confirms it will not require one providing the plaintiff confirms he will not be serving a neurological report. He does. No such report is part of the plaintiff's case;

i. January 18, 2016, the Court confirms the trial scheduled for March 27, 2017 for 5 weeks with a jury;

j. January 27, 2016, by this date, plaintiff has served all medical reports, and income loss report; and future care report;

k. February 26, 2016, notice of pretrial conference for June 28, 2016;

l. March 30, 2016, by this date, plaintiff has served future care cost report, further physiatrist report;

m. April 15, - May 3, 2016, Wawanesa advises plaintiff it requires an orthopedic (scheduled for June 22, 2016) and a neurological assessment (September 8, 2016). Plaintiff replies that he will agree to one but not both;

n. June 28, 2016, second pretrial, this motion was confirmed and a timetable ordered for the motion materials; and a timetable for preparation for trial. A

trial management conference was ordered for February, 2016, but that did not materialize;

o. June 29, 2016, Wawanesa requested an in person meeting with its future care expert;

p. July 13, 2016, Wawanesa requested an in person assessment with Dr Zielinsky, psychiatrist for October 7, 2016.

[4] Wawanesa has abandoned its request for an order for an orthopedic examination and for an order for productions. The remaining orders being sought are for:

a. An examination by Dr Peter Watson, neurologist on September 8, 2016;

b. An examination by Angela Fleming, an OT future care specialist on September 9, 2016;

c. An examination by Dr Fenton, otolaryngologist, on September 14, 2016; and

d. An examination by Dr Ariel Zeilinski, a psychiatrist, on October 7, 2016.

[5] Wawanesa's position is that it is entitled as of right to an order for these examinations under the Courts of Justice Act, since these are the first orders it has sought, and that it requires the information and the evidence from these examinations as a matter of fairness in order to permit it to defend the action. It says the timing of this motion is irrelevant. The plaintiff's position is firstly that because of the delay in bringing this motion, it requires leave pursuant to rule 48.04, which should not be available since it has not shown a material change to have taken place since a trial date was assigned. In addition he argues that he will likely be prejudiced by a potential delay in the trial, either because it will not be ready; or that the additional trial time required by the defendants additional experts, undisclosed until now, will require a re-scheduling of the trial.

[6] I am satisfied that Wawanesa does not require leave to bring this motion in accordance with the language of rule 48.04. Wawanesa neither set the action down for trial nor consented to have the action placed on the trial list. The 'consent' contemplated by rule 48.04 is found in rule 48.06: *A defended action shall be placed on the appropriate trial list by the registrar sixty days after the action is set down for trial or, if the consent in writing of every party other than the party who set the action down is filed earlier, on the date of filing.* (Emphasis added). I do not agree with the reasoning by Master Haberman in *Lue v. TD Bank Financial Group*.[2] I take the use of *consent* in rule 48.04 to intend to incorporate the use of *consent* in 48.06 as a matter of statutory interpretation, as

[2] *Lue v. TD Bank Financial Group*, [2015] O.J. No. 5263 (Master Haberman).

opposed to looking outside the language of the rule to describe an agreement in the nature of consent. In addition, since limits would be placed on the party seeking to bring the motion, a strict interpretation is required. Quite frankly, it seems to me to amount to a form of waiver and estoppel. The party setting the action down is presumed to be ready for trial. Similarly the party consenting, as it appears in rule 48.06, to an earlier trial date is also presumed to be ready for trial, a threshold must be met and rule 48.04 has application.

[7] Notwithstanding that Wawanesa does not require leave, its failure to take any steps prior to the first pretrial regarding an independent examination puts it in breach of the rules requiring that at a minimum it list all witnesses including expert witnesses in its pretrial brief. Its response that the case was not ready for trial begs the question. According to the judge's pretrial report, the plaintiff listed its witnesses for trial. Wawanesa did not.

[8] A second pretrial took place before a different judge, and again Wawanesa failed to take any steps, other than writing to the plaintiff, to obtain independent medicals, the scheduled dates for which meant that no report would be available for the second pretrial. As a consequence, the second pretrial resulted only in a timetable.

[9] The rules for pretrials make it clear that the case is to be ready for trial with all reports available to the trial judge. They must be filed 60 days before the pretrial not 90 days before the trial which was the previous practice. This change in 2008 was prompted in part by the crisis created by the shortage of judicial resources combined with lengthy trials that settled at the last minute thereby wasting the scheduled time for a trial that could not be reassigned to something else at the last minute. It was thought that if all reports and all evidence was ready at the time of the pretrial that it would create the proper environment for settlement at an earlier time, and only the cases that needed to be tried would go ahead - with accurate estimates of needed trial time. This change required the cooperation of the bar as well as the intervention of the judiciary to use the new powers contained in rule 50.07.

[10] Since earlier trial dates were made available, then all counsel needed to take their preparation seriously. Wawanesa's motion has not been triggered by anything the plaintiff did or failed to do. It was caused solely by its own failure to take these obligations seriously. An additional problem created by Wawanesa is that the trial time was estimated at the time of the pretrial without the benefit of knowing what if any defence experts were necessary. That in and of itself raises the spectre of additional trial time being necessary; and at a time of tight judicial scheduling, it may not be available and may have to be re-scheduled. Counsel's position in its factum ignores all of the foregoing, makes no apologies, and says the only relevant factor is whether the trial date will be delayed. Wawanesa requires an order for an independent medical assessment, which in turn requires a judge to exercise his discretion.

[11] The independent medical examinations contemplated by the *Courts of Justice Act* are part of the discovery process, and are explicitly dealt with because of the intrusive nature of a personal interview and assessment which may require the party to be subjected to testing without the benefit of counsel present, which would not otherwise be available at an examination for discovery. In an action for damages for personal injuries, an independent examination is common and routine. Correspondence between Wawanesa and the plaintiff is typical, and shows negotiations and justifications as part of the exchanges.

[12] The right of Wawanesa to have an independent examination is not seriously challenged. It is the timing of the requested examinations that is in issue.

[13] I do not accept Wawanesa's position that it has an unfettered right to a defence medical; and I do not accept its argument that the timing of this motion is irrelevant. The failure of Wawanesa to seek its defence examinations prior to the pretrials requires that the court scrutinize the requested orders more closely. The onus on the moving party is a heavy one.

[14] The requested order for a defence medical by Dr Watson, neurologist, (September 8, 2016) is granted. This had been agreed to by the plaintiff previously providing the orthopedic examination did not go ahead. Wawanesa withdrew its request for the orthopedic examination and for an order that the plaintiff pay a cancellation fee, at the opening of submissions. In order to minimize any prospect of delay of the trial, Dr Watson's report must be served on the plaintiff by October 8, 2016, otherwise, subject to the trial judge's order, Dr Watson's evidence will not be permitted to be introduced at trial. The plaintiff will be entitled to deliver any responding report by January 30, 2017.

[15] The requested order for an examination by Angela Fleming is dismissed. There was no evidence and no apparent reason advanced as to why a personal interview and assessment was necessary in order for the proposed defence expert to assess the plaintiff's future care assessment and report.

[16] The requested orders for examinations by Dr Zeilinski, (psychiatrist), and Dr Fenton (ENT) are dismissed. There was no evidence from the proposed medical practitioners (or on the basis of information and belief) that in person assessments would be necessary for them to give an opinion. No mention was even made of the areas of speciality, leave alone the named experts when discussed at the second pretrial.

[17] In Dr Zeilinski's case, no reason was advanced as to why a psychiatric assessment was necessary as the plaintiff does not rely on any psychiatric evidence; and until July 13, 2016 Wawanesa had neither raised the issue nor specifically requested a defence psychiatric examination. Madam Justice MacLeod-Beliveau's reasoning in *Daggitt* is instructive, and I adopt her principled approach concerning the onus on the party seeking a psychiatric defence

medical although as noted above I differ on the question of the timing of the motion.[3]

[18] If the parties cannot agree on costs, they may make written submissions within 14 days, 2 pages or less, and with reply within a further 5 days.

Honourable Justice Timothy Ray

Released: August 24, 2016

[3] *Daggitt v. Campbell*, [2016] O.J. No. 2226, 2016 ONSC 2742

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REGGIE BABCOCK

Plaintiff

– and –

ANGELO DESTEFANO and WAWANESA MUTUAL INSURANCE COMPANY

Defendants

REASONS FOR DECISION

Honourable Justice Timothy Ray

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