CITATION: Babcock v. Destefano 2017 ONSC 276
COURT FILE NO.: CV-12-458641
DATE: 20170113

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
REGGIE BABCOCK Respondent/Plaintiff/	*Deanna S. Gilbert*, for the Respondent/Plaintiff
– and –	
ANGELO DESTEFANO and WAWANESA MUTUAL INSURANCE COMPANY Applicant/Defendant	*Barry G. Marta* for the Applicant/Defendant, Wawanesa Mutual Insurance Company
	HEARD in writing

REASONS FOR DECISION
(Motion for Leave to Appeal)

MEW J.

[1] Wawanesa Mutual Insurance Company seeks leave to appeal from an order of Mr. Justice Ray dated 24 August 2016 dismissing a motion for orders requiring the plaintiff to attend medical examinations by Dr. Ariel Zielinsky (psychiatrist), Dr. Ronald Fenton (otolaryngologist) and by a future care expert, Angela Fleming. Ray J.'s reasons are reported at 2016 ONSC 5352 (CanLII).

[2] The applicants argue that the motion judge:

a. Erroneously found that Wawanesa was in breach of the requirement that, at a minimum, it lists all witnesses including expert witnesses in its pre-trial brief;

b. Failed to apply the proper test for the determination of the entitlement of the defendant to medical examinations pursuant to section 105 of the *Courts of Justice Act.*

[3] The test for granting leave to the Divisional Court from an interlocutory order of a judge of the Superior Court of Justice is set out in Rule 62.02(4) of the *Rules of Civil Procedure.* Leave to appeal shall not be granted unless:

a. There is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

b. There appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[4] The applicants argue that both of these branches of the test are made out by the proposed appeal.

Background

[5] This is a personal injury action brought by Mr. Babcock as a result of an automobile accident that occurred on 1 February 2011. A five week jury trial is scheduled to commence on 27 March 2017 in Belleville.

[6] The plaintiff served the trial record and set the action down for trial on 14 March 2015.

[7] A pre-trial conference was scheduled for 28 October 2015.

[8] On 28 September 2015, the solicitors for Wawanesa set an email to the plaintiff's solicitors noting that since many of the plaintiff's discovery undertakings remained outstanding, a number of which were for medical information required for a defence medical examination, there should be an adjournment of the pre-trial conference until the spring.

[9] On 6 October 2015, the plaintiff served Wawanesa with a psycho-vocational assessment report.

[10] Notwithstanding the developments noted above, a pre-trial conference, conducted by Scott J., went ahead on 28 October 2015. At that juncture, Wawanesa had yet to formally request a defence medical examination. However, Wawanesa's pre-trial conference memorandum indicated that "4-5" experts would be called.

[11] The pre-trial conference report completed by Scott J. indicated that the plaintiff was ready for trial in January or February of 2016, but that the defendant would not be ready until the

fall of 2016. The report also indicated the requirement for a further pre-trial in January or February of 2016.

[12] On 13 January 2016, Wawanesa's solicitors advised that a tentative date had been scheduled for a defence medical examination of the plaintiff by a neurologist, Dr. Gordon Sawa.

[13] There was then an exchange of correspondence culminating with a letter from Wawanesa's solicitors, the effect of which was that unless they were advised by 22 January 2016, that the plaintiff would be serving a neurologist's report, it was be assumed that the plaintiff would not be doing so. Having heard nothing further in that regard, Wawanesa's solicitors cancelled the tentative appointment with Dr. Sawa.

[14] In the meantime, the parties received confirmation from the trial coordinator on 18 January 2016 that the trial of this action had been scheduled for 27 March 2017. That date was agreed to by the parties.

[15] On 26 February 2016, the parties were notified by the trial coordinator that a second pre-trial had been scheduled for 28 June 2016. This date was agreed to by the parties.

[16] On 17 March 2016, the plaintiff served Wawanesa with a "physiatry neuromusculoskeletal report" from Dr. Milan Unarket, a physiatrist.

[17] On 30 March 2016, the plaintiff served Wawanesa with a future care cost report dated 24 March 2016 from Tanya Beatty, R.N.

[18] On 18 April 2016 and 25 April 2016 respectively, Wawanesa requested that the plaintiff attend medical legal examinations with Dr. Joel Finkelstein (orthopaedic surgeon) and Dr. Peter Watson (neurologist). The scheduled dates for those examinations were 22 June 2016 and 8 September 2016 respectively.

[19] The plaintiff's solicitor took the position that Mr. Babcock would attend one, but not both of these medical examinations. Because agreement could not be reached, the proposed examination by Dr. Finkelstein did not take place.

[20] The second pre-trial was conducted by Kershman J. on 28 June 2016.

[21] A motion to deal with the defence medical issue was originally scheduled for 26 July 2016. However, the pre-trial conference endorsement of Kershman J. dated 4 July 2016 notes that, on consent, that motion date was vacated and a new motion date of 23 August 2016 set.

[22] On 29 June 2016, Wawanesa's solicitors advised the plaintiff's solicitors that they were retaining Ms. Fleming as a future care expert and would like to schedule a convenient time for her to meet with Mr. Babcock at his home in order to prepare her responding assessment report.

The Decision of Ray J.

[23] Wawanesa identifies paragraphs 7-17 of the Reasons for Decision of Ray J. as pertinent to this motion for leave to appeal.

[24] Ray J. had before him a request by Wawanesa to permit three defence medical examinations and an examination by Ms. Fleming. He ordered that an examination by Dr. Peter Watson (neurologist) should be allowed to proceed, as scheduled, on 8 September 2016. However, he declined to order that medical examinations by Dr. Fenton and Dr. Zielinsky, or the future care examination by Ms. Fleming, should take place.

[25] Ray J. noted that at the first pre-trial, Wawanesa had failed "to take any steps prior to the first pre-trial regarding an independent examination… in breach of the rules requiring that at a minimum, it lists all witnesses including expert witnesses in its pre-trial brief…" (para.7).

[26] With respect to the second pre-trial, Ray J. observed that the scheduled dates for the proposed defence medical examinations on 22 June 2016 and 8 September 2016 meant that those reports would not have been available at the second pre-trial and that, as a consequence, the second pre-trial had resulted only in a timetable.

[27] Ray J. stated that Wawanesa's motion was caused solely by its own failure to take its obligations under the *Rules of Civil Procedure* seriously, and in particular, the rules for pre-trials and expert reports providing that expert reports must be filed 90 days before the pre-trial conference (60 days in the case of responding reports).

[28] Ray J. rejected the position that Wawanesa had an unfettered right to a defence medical examination, holding, instead, that the determination of whether the court should exercise its jurisdiction under section 105 of the *Courts of Justice Act* to order a physical or mental examination involves the exercise of judicial discretion.

[29] Ray J. granted the requested order for a defence medical examination by Dr. Watson, the neurologist, because it had been previously agreed to by the plaintiff, provided that the orthopaedic examination did not go ahead as well.

[30] The requested order for an examination by Ms. Fleming was dismissed because Ray J. found that 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.

[31] The requested orders for examinations by Dr. Zielinsky (psychiatrist) and Dr. Fenton (otolaryngologist) were dismissed because 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 and, further, because no mention was even made of the areas of speciality, let alone naming the experts, when expert evidence was discussed at the second pre-trial. Nor, in the case of Dr. Zielinsky, was a reason advanced as to why a psychiatric assessment was necessary as the plaintiff was not relying on any psychiatric evidence.

Issues

[32] As already alluded to, a motion for leave to appeal such as this raises the following issues:

a. Are there conflicting decisions by another judge or court in Ontario or elsewhere on the matters involved in the proposed appeal and is it desirable that leave to appeal be granted; and

b. Is there good reason to doubt the correctness of the order in question and does the proposed appeal involve matters of such importance that leave to appeal should be granted?

Analysis

[33] Section 105(2) of the *Courts of Justice Act* provides:

> Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

[34] Although in practice only very special circumstances would disentitle a moving party to an order for a medical examination, it is nevertheless clear that the court retains a discretion whether or not to order a medical examination and, if so, whether to make ancillary orders to ensure the medical examination is effective.

Are there conflicting decisions?

[35] In order to satisfy the conflicting decision requirement, it is not sufficient to show that there are different judicial applications of the same legal principle. Rather, it is necessary to demonstrate a difference in the principle chosen as a guide to the exercise of a judge's discretion: *Brownhall v. Canada (Ministry of National Defence)* (2006), 80 O.R. (3d) 91 (ON SC) at para. 27.

[36] Wawanesa offers the following distillation of the principles to be considered in determining whether to order a plaintiff to attend on defence medical examinations:

a. The purpose of defence medical examinations is to put the parties on an equal footing by allowing the defendant to meet the case advanced by the plaintiff;

b. It is an important condition of increased and reasonable settlements and more effective and fairer trials;

c. Without effective medical evaluation, the chances of a pre-trial settlement and a fair and effective trial must suffer;

d. Medical examinations are crucial expert evidence on which a court relies to do justice between the parties at trial;

e. Defence medical evidence is necessary to uphold the adversarial process at trial and finally defence medical evidence is necessary for fairness and in order to level the playing field.

[37] These principles were advanced in the hearing before the motion judge and, as I will discuss in connection with the second issue, he was alert to them. The fact that he chose to exercise his discretion by not allowing three of the four requested defence medical examinations to proceed does not meet the "conflicting decision" requirement.

Is there good reason to doubt the correctness of the order in question?

[38] A judge hearing an application for leave to appeal must have good reason to doubt the correctness of the decision and must also be satisfied that the matters involved are of "such importance" that, in the judge's opinion, leave should be granted. Those words refer to matters of general importance, not matters of particular importance relevant only to the litigants: see *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Ont. Div. Ct.).

[39] Wawanesa complains that the plaintiff was also non-compliant with the rules relating to the delivery of expert reports in advance of the pre-trial conferences in this matter. Yet only Wawanesa has, effectively, been penalised for its non-compliance.

[40] An examination of the record indicates that on 15 June 2015, the plaintiff's solicitors had written to the defendant's solicitors confirming that Wawanesa did not require strict compliance with the rules regarding the date by which expert reports were to be served. This letter was written in anticipation of the approaching 28 October 2015 pre-trial date and trial thereafter. The rationale was to avoid increasing the cost of resolving the litigation.

[41] At that point in time, no trial date had been set. Circumstances then changed in that, by January 2016, the parties knew that there would be a five week jury trial commences in March 2017.

[42] It was not until the second half of April that Wawanesa (having cancelled the appointment with Dr. Sawa) proposed further defence medical appointments which, regardless of whether the plaintiffs would agree to them, would not have yielded reports in time for the second pre-trial.

[43] As a result, the second pre-trial focused on trial management issues. A valuable opportunity to explore resolution of the dispute with judicial input was thereby wasted.

[44] This history was part of the factual and procedural matrix considered by the motion judge.

[45] The threshold to be met for the first branch of Rule 62.02(4)(b) is whether there is a good reason to doubt whether the impugned order is correct or is at least open to serious debate, such that it warrants the intervention of the appellate court. It is not necessary to conclude that the order is wrong or probably wrong.

[46] In a case involving a review of the exercise of judicial discretion, it is the result of the exercise of the judge's discretion that must be correct, not the reasoning process used in coming to the decision: *Hancock v. Hancock*, 2014 ONSC 6702 (Div. Ct.) at para. 8.

[47] As already alluded to, medical examinations are generally granted by the court almost as a matter of right: see Archibald, Killeen, Morton, *Ontario Superior Court Practice 2017*, (Toronto: LexisNexis, 2016) at p. 1359. To put the motion judge's decision in context, however, it must be borne in mind that the civil litigation landscape is changing. The "culture shift" advocated by the Supreme Court of Canada in *Hryniak v. Mauldin,* 2014 S.C.C. 7, has infused not only the principles applicable to summary judgment motions but to the broader conduct of civil disputes. The general principles in Rules 1.4(1) and (1.1) of the *Rules of Civil Procedure* form part of the foundation for this culture shift, providing that the rules should be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits and to make orders and give directions that serve those objectives.

[48] Parties who fail to comply with the rules regarding the delivery of expert reports and preparedness for trials and pre-trials run the risk that, as a consequence, they may not be permitted to adduce all of the evidence at trial that they would have been able to if compliant, suffering adverse costs consequences, or both.

[49] On this motion for leave to appeal, the thrust of the submissions made by the applicant on this appear to include a regurgitation of the arguments which were made on the motion before Ray J., and which he largely rejected.

[50] I find no error of principle on his part on the part of the motion judge. He correctly recited the applicable provisions of the *Rules of Civil Procedure* and the *Courts of Justice Act.* He recounted, in some detail, the procedural history of the matter.

[51] In applying those principles to the case before him, Ray J. clearly formed a negative view of the way in which Wawanesa had conducted certain aspects of the litigation. However, there was ample material contained in the record before him to support the conclusions he came to. The exercise of his discretion to partially deny the relief requested on the motion logically flowed from those conclusions.

[52] The defendant argues that it will now be forced to proceed to trial on an unlevel playing field. Even if that were so, it is a situation which could have been mitigated, if not avoided had Wawanesa not left it so late to obtain defence medical evidence. But, to extend the analogy, this playing field, like any other, is one where there are rules of the game. If, during the course of a match or game, a player is lost through injury or dismissal by the referee, that does not make the

playing field unlevel. A playing field where the rules are not correctly applied is an uneven playing field. This is not such a case.

[53] By reason of the foregoing, I find no good reason to doubt the correctness of result of Ray J.'s exercise of the discretion given to him by s. 105(2) of the *Courts of Justice Act*.

Does the proposed appeal involves matters of such importance that leave to appeal should be granted?

[54] While the answer to this question is academic, given my conclusion on the issue of correctness, having regard to the second part of the test in Rule 62.02(4), I would not, in any event, find that the proposed appeal involves matters of general importance sufficient to warrant the granting of leave to appeal.

Disposition

[55] The application for leave to appeal is dismissed.

[56] If the parties are unable to agree on the issue of costs of the motion for leave to appeal, I will receive written submissions from the parties, limited to three pages in length plus bills of costs, as follows:

a. From the plaintiff within fourteen days of the release of these reasons; and

b. From Wawanesa within fourteen days of receipt of the costs submissions of the plaintiff.

These costs submissions should be sent or delivered to me at the Court House, 5 Court Street, Kingston, K7L 2N4.

Graeme Mew J.

Released: 13 January 2017

CITATION: Babcock v. Destefano 2017 ONSC 276
COURT FILE NO.: CV-12-458641
DATE: 20170113

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

REGGIE BABCOCK

Respondent/Plaintiff/

– and –

ANGELO DESTEFANO and
WAWANESA MUTUAL INSURANCE COMPANY

Applicant/Defendant

REASONS FOR DECISION

(Motion for Leave to Appeal)

Mew J.

Released: 13 January 2017