ATTENTION

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FROM: Justice B.T. Granger

PAGES: 12 (including cover page)

DATE: November 22, 2010

RE: **52326/06 – Vanderidder et al. v. Aviva Canada Inc. et al.**

MESSAGE:

Please find attached the Reasons for Judgment of Mr. Justice B.T. Granger as released November 22, 2010.

Thank you.

ORIGINAL TO FOLLOW: Yes ( ) No (X)

If you have any questions regarding this transmission, please call Jenna at (519) 660-3027.

CITATION: Vanderidder v. Aviva Canada Inc., 2010 ONSC 6222
COURT FILE NO.: 52326/06
DATE: 2010-11-22

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
VANESSA ZITA VANDERIDDER and PAULA ZITA VANDERIDDER and MATTHEW GERARDUS VANDERIDDER Plaintiffs (Responding Party)	M. Dale, for the Plaintiffs (Responding Party)
– and –	
AVIVA CANADA INC., LAFARGE PAVING & CONSTRUCTION LIMITED AND C.H. EXCAVATING (LONDON) LTD., H. PRANGER TRUCKING LTD., CURRAN CONTRACTORS LTD., DAVE LILLEY & SON EXCAVATING and PAUL HUNTER and 291 CONSTRUCTION LTD. Defendants	M. Gobran, for the H. Pranger Trucking Ltd., Defendants (Moving Party) M. Mathew, for Lafarge Paving & Construction Limited, Defendants (Responding Party)
	HEARD: October 12, 2010

GRANGER J.

[1] The moving party seeks an order compelling the plaintiff Vanessa Zita Vanderidder to participate in a life care plan assessment by Joanne Hommik, a certified life care planner at Taran Rucas & Associates.

[2] This action arises from an accident which occurred on June 7, 2006 on Fanshawe Park Road at Wonderland Road in London, Ontario. The plaintiff Vanessa Zita Vanderidder sustained an injury when a rock fragment that fell from a truck deflected from the road surface, went through her open car window and struck her in the head.

[3] The Statement of Claim alleges that Vanessa Zita Vanderidder sustained serious injuries, which have caused permanent and serious disfigurement; serious impairments of important physical, mental and psychological functions.

[4] The Statement of Claim states that the plaintiff, Vanessa Zita Vanderidder "continues to suffer and require treatment and, to date, the full extent of her injuries, disabilities and future treatment as yet have not been fully determined. She will continue to suffer from the effects of her injuries for an indefinite period of time."

[5] Vanessa Vanderidder claims damages for future health care costs, "as a result of the effects of the injuries on the activity of the plaintiff, Vanessa Vanderidder, daily living, the plaintiff will be put to considerable future costs for medical care, house and home care, assistance and vocational expense."

[6] In support of Vanessa Vanderidder's claim for future health care costs, counsel has served a future care cost report authored by Keith C. Hayes, Ph.D. The future care costs report was analysed by James Jeffrey, an actuary, and places a present value on Vanessa Vanderidder's future health care needs at $719,901.00.

[7] Faced with this substantial monetary claim, the moving party wishes to have Vanessa Vanderidder participate in a life care assessment/future care cost assessment by Joanna Hommik who has a Bachelor of Science in Occupational Therapy degree and is defined as a "practitioner" pursuant to s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23.

[8] The sole basis upon which the moving party bases its motion for the life care assessment/future care cost assessment is prejudice.

[9] The position of the responding party Vanessa Vanderidder is that the moving party has not deduced any evidence that the requested assessment is necessary to aid a health practitioner as a diagnostic tool.

[10] Prior to the commencement of argument on the substance of the motion, Mr. M. Dale asked me to recuse myself from hearing this motion on the grounds that in *Kozhani v. Gelbart* [2010] O.J. No. 1384 I ordered the plaintiff to submit to a life care assessment/future care cost

assessment by an occupational therapist without a health practitioner requiring the assessment as a diagnostic tool. In *Kozhani v. Gelbart*, *supra*, I stated:

> Although Dr. Ozersky has not stated directly that he requires such an assessment, I am convinced on all of the evidence that the defence has established that such an assessment is necessary and in the interest of fairness should be granted.

[11] Mr. M. Dale suggests that based on my earlier decision in *Kozhani v. Gelbart*, *supra*, there is a reasonable apprehension of bias and as such I should recuse myself from hearing this motion.

[12] The test for reasonable apprehension of bias, which is applicable to judges and administrative decision-makers, is found in *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, and has been summarized by Jones and de Villars in *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009), p.402:

> In the wake of *National Energy Board*, the easiest part of the rule against bias has been stating the test. It is whether "an informed person, viewing the matter realistically and practically – and having thought the matter through," would have "a reasonable apprehension of bias."

[13] There are five situations where a reasonable apprehension of bias can arise; when the decision-maker:

1) Has a personal financial interest in the outcome of the matter being decided;

2) Has a personal relationship with one or more parties in the case;

3) Has acquired knowledge or had involvement in the case in some other capacity;

4) Has, through actions or words, provided a basis to challenge his or her impartiality;

5) Exists as part of an institutional structure that gives rise to an apprehension of bias.

[14] Although judges are subject to the same test of bias as other decision-makers, there is a strong presumption of impartiality, as discussed by the Supreme Court of Canada in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484:

> Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances": *United States v. Morgan*, 313 U.S. 409 (U.S. S.C.) 1941), at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England III*, cited at footnote 49 in Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Radicalized Perspective in *R. v. R.D.S.*" (1995), 18 *Dal.L.J.* 408, at p. 417, "[t]he law will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea". Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (N.S. C.A.), at pp. 60-61.

[15] With respect to the five situations that may give rise to a reasonable apprehension of bias, only the fourth ground could be relevant in the present matter. There are no complaints with regards to my behaviour in this matter, only a complaint that I have dealt with a similar question earlier this year, and have issued a decision on that question which was not appealed and which Mr. M. Dale feels is an impediment to his position.

[16] As discussed in *Macy v. Macy* (1984), 3 O.A.C. 369, this situation does not give rise to a reasonable apprehension of bias:

> It must be conceded that her apprehension that she would be unsuccessful on her husband's second appeal in the event that the judge who heard the first appeal presided on the second appeal was a reasonable one. In my view, however, it was not a reasonable apprehension related to bias. I know of no authority which has gone so far as to say that the fact that a judge has previously applied or formulated in an action a principle of law which may be applicable to the factual situation in another action which he is scheduled to try, is sufficient to provide the basis for reasonable apprehension of bias on the part of one of the parties to the later action. I am satisfied that, standing alone, it cannot do so. To hold otherwise would mean that any litigant, who ascertained that a judge had previously relied on or formulated a principle of law which was adverse to the position of such litigant in a later case, would be entitled to insist upon such judge disqualifying himself on the grounds of a reasonable apprehension of bias. It would be an indirect way to assert a right to "pick one's judge." A litigant has the right to have a fair and impartial judge, not a favourable judge. There must not be raised

> in the mind of a litigant any reasonable apprehension of bias as distinct from any reasonable apprehension of lack of success.

[17] In *Marchand (Litigation guardian of) v. Public General Hospital of Chatham* (1999), 92 O.T.C. 8 (O.N. C.J. Gen. Div.), I held that counsel's allegations of bias were related to an apprehension of lack of success, rather than a true apprehension of bias. The same apprehension of lack of success may underlie the actions of counsel in this matter.

[18] No other behaviour on my behalf has been identified as giving rise to an apprehension of bias. Without more than the existence of a previous decision on a different set of facts, an informed person, viewing the matter realistically and practically, and having thought the matter through, would not have a reasonable apprehension of bias.

[19] Accordingly, Mr. M. Dale's apprehension is an apprehension of lack of success rather than an apprehension of bias and I will not recuse myself from hearing this motion.

[20] Section 105 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (*CJA*) governs medical examinations of parties in civil litigation:

> 105(1) In this section, "health practitioner" means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction.
>
> (2) 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.
>
> (3) Where the question of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.
>
> (4) The court may, on motion, order further physical or mental examinations.
>
> (5) Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence.

[21] Rule 33 of the *Rules of Civil Procedure*, O. Reg. 575/07, s. 6(1) also addresses medical examinations:

> 33.01 A motion by an adverse party for an order under section 105 of the *Courts of Justice Act* for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party.
>
> 33.02(1) An order under section 105 of the *Courts of Justice Act* may specify the time, place and purpose of the examination and shall name the health practitioner or practitioners by whom it is to be conducted.
>
> (2) The court may order a second examination or further examinations on such terms respecting costs and other matters as are just.
>
> 33.03 The court may on motion determine any dispute relating to the scope of an examination.

[22] Although a strict and literal interpretation of these principles excludes non-medical experts, courts have commonly allowed examinations by these professionals if required by the examining physician as a "diagnostic aid." (*Gotch v. Chittenden*, [1972] 2 O.R. 272 (O.N. H.C.))

[23] The jurisdiction to order non-medical expert assessments is an area of controversy in Ontario courts. The decisions on this topic divide into two streams at the Superior Court of Justice level, and there does not appear to be a Court of Appeal decision settling the matter. In the first set of cases, courts generally interpret s. 105 and R. 33 narrowly, allowing non-medical assessments only if required as diagnostic aids for medical practitioners. The divergent stream invokes the discretionary inherent jurisdiction of the court to ensure justice is done in any particular case. In these cases, a non-medical expert assessment is usually ordered in the interests of fairness and justice.

[24] Many recent Ontario court decisions assert that non-medical expert examinations may only be ordered if required as a "diagnostic aid" by an examining health practitioner. A determination of whether such an assessment is necessary is thus a factual inquiry into the nature and strength of the evidence on this point. Accordingly, many cases hinge on the evidence required to demonstrate that the non-medical expert examination is *necessary* for the examining health practitioner to address the issues raised by the litigation.

[25] In *Scissions v. Lajoie*, [2008] O.J. No. 24 (O.N. S.C.J.), Justice G. Roccamo accepted the analysis of Master Beaudoin (56 C.P.C. (6th) 56), which identified the relevant factors in determining whether a requested assessment was necessary:

> Both counsel agree that the test to be applied here is one of "fairness." When considering a request pursuant to Rule 33, having regard [to] the authorities cited by counsel, the Court concludes the following:
>
> - An assessment by persons who are not "health practitioners" may be ordered where such an assessment is *necessary to the diagnosis of a health practitioner* as defined by s. 105 of the Courts of Justice Act.
> - The court has to exercise its discretion depending on the facts of the particular case.
> - *There needs to be a proper evidentiary basis for such an assessment. While an affidavit from the qualified "health practitioner" is preferred; other credible evidence will satisfy the test.*
> - The word "diagnosis" referred to in the various authorities should be given a liberal interpretation.
> - Such as assessment needs to be directed to an important issue in the case.
> - The defendant must adduce evidence that such an assessment will ensure a fair trial or other just result.
> - The assessment must not be unnecessarily intrusive to the plaintiff. The onus is on the plaintiff to adduce such evidence.
> - The request must be made in a timely way. [Emphasis added]

[26] The importance of trial fairness alone in this line of cases is insufficient to ground an order compelling a plaintiff to participate in an examination.

[27] Most decisions under s. 105 and R. 33 focus on the evidentiary basis for the request. If a court is satisfied that the examining physician requires an adjunctive examination from a non-health practitioner, the plaintiff will be ordered to attend the testing. However, if the physician is able to comment on the plaintiff's situation at a sufficient level of detail, and only recommends or mentions the usefulness of an additional examination, a court will not order attendance by the plaintiff.

[28] In *Kozhani v. Gelbart, supra*, I ordered an additional assessment because the first examining physician specifically stated that she was not competent to conduct an examination on the relevant issue in the case: catastrophic impairment. In *Featherstone v. Essex (County)* (2009), 76 C.P.C. (6th) 195 at para. 17 (O.N. S.C.J.), Justice Leitch refused to order a further non-medical examination because the defendant did not tender sufficient evidence to demonstrate that the testing was necessary to the diagnosis of a health practitioner. However, Leitch J. noted that the decision was without prejudice to the defendant's right to renew the motion with a proper evidentiary record.

[29] It is important to distinguish the jurisdiction of a court to compel participation of a plaintiff in examinations from the ability of the Court to accept evidentiary records at trial where the rules of evidence apply to determine admissibility. In *Campbell v. Cotton* (2002), 17 C.P.C. (5th) 108 at para. 27, Master Dash refused to compel participation in a vocational assessment, but remarked:

> There is no evidence before me that an examination of the plaintiff is necessary in order for Ms. Vellone to prepare a vocational assessment or a future care cost analysis. There is nothing to prevent the defendant from commissioning and serving its own vocational assessment or future care cost analysis. What is prevented is compelling the plaintiff to undergo an examination for that purpose. Nothing would prevent Ms. Vellone from reviewing the extensive records and reports already generated, critiquing the reports of Mr. Katz and Ms. Straub, and preparing her own assessment.

[30] A divergent stream of cases adopts the view that s. 105 is not the only jurisdictional basis for ordering a vocational or non-medical assessment. In these cases, the court determines that its inherent jurisdiction to control its own procedure and to ensure justice is done creates an additional jurisdictional basis for ordering the assessments. In *Desbiens v. Mordini*, 2002 CarswellOnt 6037 at para. 2 (O.N. S.C.J.), Cameron J. determined that the Master below could have exercised the "inherent jurisdiction of this court to do what is necessary to do justice." This decision was upheld by Campbell J. in an application for leave to appeal to the Divisional Court ([2003] O.J. No. 368 at paras. 8-11 (O.N. Div. Ct.)):

> 8 I agree with Cameron J. that the suggestion that s. 105 is the only basis for future care cost or vocational assessments amounts to an error in law.

> 9 In *Yusuf v. MacLean*, [1999] O.J. No. 4348 (Ont. S.C.J.) O'Driscoll J. referred to a number of authorities that confirm the inherent jurisdiction in this Court to exercise discretion in permitting future care assessments where appropriate. These commence with *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (Ont. C.A.) at 282 down to *Beresford-Last (Litigation Guardian of) v. Dworak*, [1998] O.J. No. 872 (Ont. Gen. Div.).
>
> 10 I would have thought that there is sufficient common law recognition of this discretion to permit it to be exercised by the Master. I agree with Cameron J. that whether or not the Master has jurisdiction this Court does and it was appropriately exercised in this case by Cameron J.
>
> 11 To the extent that the decision of the Master was based on the premise that such an assessment could be ordered only under s. 105, it is in my view an error of law. I agree with the decision of Cameron J. for the reasons given by him.

[31] Justice Howden recently followed the above analysis in the case of *Moore v. Wakin*, 2010 ONSC 1991 at para. 4:

> I agree with the conclusion of C. Campbell J. and Cameron J. in *Desbiens v. Mordini*, [2003] O.J. No. 368 (Ont. Div. Ct.) and the handwritten endorsement by Cameron J. of December 11, 2002 that the 'diagnostic aid' ground related to s. 105 of the *Courts of Justice Act* is not the only jurisdictional base for ordering a future care assessment and that the Court has an inherent jurisdiction to exercise its discretion to order it in proper cases. Paraphrasing Cameron J. in *Desbiens*, on appeal from a Master's order, a credible report is vital to the final result in this case where future care and its costs are principal issues.

[32] In these cases, the suggestion that a non-medical assessment could *only* be ordered if it was required as a "diagnostic aid" was specifically rejected.

[33] Mr. Dale takes the position that pursuant to s. 105 of the *CJA* and R. 33 of the *Rules of Civil Procedure*, I can only order Vanessa Zita Vanderidder to participate in a life care plan assessment if such an assessment is required by an examining physician as a "diagnostic aid." I follow the path suggested by Mr. Dale, he will be able to call expert evidence concerning her future care and the cost of same through the evidence of Keith C. Hayes, Ph.D. and Mr. Jeffrey, notwithstanding that Keith C. Hayes, Ph.D. is not a "health practitioner." In this case, Vanessa Vanderidder is claiming in excess of $700,000.00 for her future care. It would seem to me that if Vanessa Vanderidder elects to place before the court evidence concerning her future care needs as determined by a non-health practitioner, she can hardly be heard to claim that it would be unfair to order her to submit to such an assessment by a person of the choosing of the defence.

[34] In my view, given the facts of this case and the claim being made by the plaintiff for future care costs, fairness can only be achieved by ordering Vanessa Vanderidder to participate in a life care assessment by a person other than a "health practitioner" notwithstanding that there is a lack of evidence before me from a health practitioner that such an assessment is needed by a health practitioner as a "diagnostic aid."

[35] In my view, courts should always strive to achieve fairness in the trial process in order a "level playing field" at trial which will ensure a fast result. To allow the plaintiff to adduce evidence of her future care needs through an export retained by the plaintiff while denying the defendant the ability to have an expert in life care needs of its choosing would not create a "level playing field."

[36] Accordingly, Vanessa Vanderidder shall participate in a life care plan assessment by Joanna Hommik, a certified life care planner and occupational therapist.

[37] The parties may make written submissions on costs within 10 days.

Justice B.T. Granger

Released: November 22, 2010

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COURT FILE NO.: 52326/06
DATE: 2010-11-22

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

VANESSA ZITA VANDERIDDER and PAULA ZITA VANDERIDDER and MATTHEW GERARDUS VANDERIDDER

Plaintiffs

-and –

AVIVA CANADA INC., LAFARGE PAVING & CONSTRUCTION LIMITED AND C.H. EXCAVATING (LONDON) LTD., H. PRANGER TRUCKING LTD., CURRAN CONTRACTORS LTD., DAVE LILLEY & SON EXCAVATING and PAUL HUNTER and 291 CONSTRUCTION LTD.

Defendants

REASONS FOR JUDGMENT

Granger J.

Released: November 22, 2010