# IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20111104
Docket: M100588
Registry: Vancouver

Between:

**Rostom Tchakedjian**

Plaintiff

And:

**Kyle David Rooney and Pickett's Nurseries Ltd.**

Defendants

Before: Master Baker

## Oral Reasons for Judgment

In Chambers
November 4, 2011

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| Counsel for Plaintiff | S.E. Gibson |
| Counsel for Defendant | K.E. Jamieson |
| Place of Trial/Hearing: | Vancouver, B.C. |

[1] **THE COURT:** This is an application on behalf of the defence for an IME to be conducted before Dr. Solomons, a psychiatrist, in a circumstance that, while not perhaps entirely unique, is unusual, and I will agree with Mr. Gibson to that extent.

[2] Mr. Tchakedjian, the plaintiff, I gather was involved in a motor vehicle accident in which he was struck as a pedestrian. What is different in this case from many others is that he has had, I gather, a lengthy history of mental illness, psychiatric issues, including schizophrenia. He has been psychotic or delusional on occasion, and there is no understating, I think, the extent of his medical problems in the past. That is the case to the extent that he now lives in assisted housing arranged and provided through the offices of the Richmond Mental Health people. His progress and his day-to-day affairs are regularly audited in the sense of him being accompanied, I gather, every two or three weeks by someone to make sure he is doing all right, plus there is extensive medical history, taken with medical professionals of course. He has had ample occupational therapy or the assistance of occupational therapists, who have also generated records.

[3] The concern here is not that Dr. Solomons should or should not do the IME. That in itself is not opposed by the plaintiff. The position of the plaintiff is that it should be a condition of the IME that Mr. Tchakedjian's IME either be a) recorded, or b) attended by a chaperone. The reasons for this were not immediately clear, but they have certainly emerged during the submissions. As I understand the objection, it is not the usual reasons one might have inferred from Mr. Tchakedjian's circumstances, for example, to assist him in recollections or things like that.

[4] It is true that his sister accompanied him in his examination and assessment by one plaintiff's professional, Dr. Travlos, who is a physical medicine specialist, and it is clear to me that, despite discussion today in court, that she attended with Mr. Tchakedjian on the assessment and that she had some input, assisting with some recollection and chronology, I think. In any event, that is the only plaintiff's expert that she or anyone else attended with.

[5] He attended with Dr. Woolfenden, who is a neurologist; with Dr. Bishop, a neuropsychologist; and Dr. O'Shaughnessy, a psychiatrist well known to the court, all of whom did not seem to require the assistance of a chaperone, and two at least, Drs. Woolfenden and O'Shaughnessy, I take from their reports that Mr. Tchakedjian was able to give them adequate and sufficiently detailed or specific information and responses to the questions that they were able to carry on with their assessments.

[6] So it does not seem to be the possibility of poor or incomplete responses. No, the position of the plaintiff is that, in keeping with appellate standards, and I refer to *Wong v. Wong*, that recording or the presence of a chaperone is justified when there is an apprehension, a reasonable apprehension, I would say, of bias or impartiality on the part of the expert.

[7] As we said during submissions in response to a comment made by me, it seems an awfully difficult circumstance to try and establish bias at this early stage, namely, even before someone like Dr. Solomons has seen the party in question, yet that seems to be the view of the Court of Appeal, and I do not disagree with Mr. Gibson's assessment that the case means that if there is to be bias, subject

obviously to positions and evidence taken at trial, the issue is to be addressed at this stage.

[8] It puts counsel in a very difficult position, in my respectful view, how to prove that. Well, certainly there has been a Herculean effort made to establish that today. Mr. Gibson has placed before the court several cases in which Dr. Solomons' evidence has been seriously challenged, obviously, by plaintiffs in each case, but seriously questioned and analyzed by the bench, and in several cases conclusions have followed very seriously reducing the value of Dr. Solomons' evidence, reducing its weight, and in one case in particular, *Drodge v. Kozak*, 2011 BCSC 1316, Judge Dardi, in the final analysis concluded at para. 53 that Dr. Solomons was not impartial and not balanced and as a consequence, as I say, significantly reduced the weight of his opinions.

[9] Anticipating this argument, the defence has presented several cases in which other physicians have accepted and relied upon Dr. Solomons' views or the evidence of Dr. Solomons has been upheld. One of those in particular is interesting. Without referring to the actual case, it is interesting that in one case Mr. Gibson offered, Dr. O'Shaughnessy had serious misgivings and took serious issue with the methodology of Dr. Solomons, and yet in other cases, one case presented by Ms. Jamieson, it was the opposite view: Dr. O'Shaughnessy had accepted Dr. Solomons' views and, as I understood the case, incorporated those into his analysis.

[10] Without seeming cavalier or superficial (I have no intentions of being that, obviously) it seems to me that experts have good days and bad days. There is just no doubt that Dr. Solomons has had bad days. It is my view, though, that the relatively high threshold of bias has not been established here.

[11] What has been established is that on occasion Dr. Solomons has been held by the courts to not have done a thorough job, to have drawn conclusions inconsistent with other demonstrated or proven facts, and as a consequence has had his value as a witness to a party seriously, seriously reduced. That, with respect, is not what in my view *Wong v. Wong* and the recording of independent medical examination processes is about. That is about advocacy, trial work, cross-examination, the usual hard slugging that trial counsel do.

[12] So I am not persuaded today that there is sufficient bias, or any bias, in fact, on the part of Dr. Solomons that would justify, in the words of the Court of Appeal, the very rare application of chaperones or recording of IMEs.

[13] I have some sympathy for Mr. Gibson's views and his submissions in respect of some of the other factors discussed in *Wong*. At paragraphs 32 and 33, the court considers factors where an audiotape was allowed or factors when the audiotape recording was prohibited, and I agree that in some sense Dr. Solomons has looked at these factors, I infer, and simply said, for example, "the use of an audiotape recorder would inhibit my examination". I mean, he has taken a very simple approach and simply contradicted some of the concerns of the Court of Appeal by putting it under oath. So be it.

[14] One of the factors that has been in my mind throughout this entire application is that cases I think up to Madam Justice Dardi's decision in *Drodge* at least, the other cases I think by and large predate the new Rules. The new Rules as of July 1st, 2010, require that experts, such as Dr. Solomons, in writing acknowledge their independent duty to the court as an expert witness, and it specifically eschews advocacy.

[15] In *Drodge* when Dr. Solomons gave his opinion, I do not know whether the expert rule, if I may call it that, applied at that time, but it sure does now, and if Dr. Solomons thinks it is a simple ritual, putting in an affidavit as he has done where he says in his affidavit sworn October 25th:

> I am aware of my duty in providing such reports to assist the court and not to be an advocate for any party.

I sincerely hope that Dr. Solomons understands that that is not window dressing; that is not a ritualistic or formulaic incantation. I take him at his word under oath, and I assume he understands the power of that and what he is saying there.

[16] The consequence is I am directing that the IME is to proceed as requested; that there is not to be a recording or the presence of a chaperone.

[17] Is there anything else?

[18] MS. JAMIESON: No. Costs in the cause, Your Honour? Liability is in issue.

[19] THE COURT: Mr. Gibson? Not a bad result in that respect.

[20] MR. GIBSON: That's the most I could ask for. Thank you.

[21] THE COURT: I agree with that. Thank you. Costs in the cause, Madam Registrar. Yes.

[22] THE REGISTRAR: Master Baker, point 2 about the taxi, is that granted? I didn't know if that was part of the order.

[23] MS. JAMIESON: I incorporated the points that my friend and I were in agreement upon into the order, and I'm content for the order to go as it's presented in the application.

[24] THE REGISTRAR: Did I get a copy?

[25] THE COURT: Just so we understand, para. 1 goes ahead. Paragraph 2, you will pay for travel?

[26] MS. JAMIESON: Yes.

[27] THE COURT: Paragraph 3, to and from, that is okay, the chaperone?

[28] MS. JAMIESON: Yes.

[29] THE COURT: Yes.

[30] THE REGISTRAR: Oh, to and from. I was thinking it was to do with attending.

[31] THE COURT: Yes, that is somebody to go along with him to the office.

[32] MS. JAMIESON: Yes.

[33] THE COURT: Paragraph 3. paragraph 4 and paragraph 5 is costs in the cause instead of costs to you in the cause.

[34] THE REGISTRAR Thank you I understand now

[35] MS JAMIESON: Yes.

[36] THE COURT: Yes. Thank you.

Master Baker