

CITATION: McLeish v. Daines, 2017 ONSC 869
COURT FILE NO.: 14-61793
DATE: 2017/02/07

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Krystal McLeish)
)
Plaintiff) Alan J. Clausi and Ian Mair, for the Plaintiff
)
– and –)
)
Erin Daines and Paul Penney)
) Kevin P. Nearing and Michelle Doody, for
) the Defendant
Defendants)
)
) **HEARD:** January 19, 2017

2017 ONSC 869 (CanLII)

**REASONS ON LEAVE TO CALL A VOCATIONAL EXPERT WITNESS IN THE
MIDDLE OF TRIAL**

R. SMITH J.

[1] The defendants have brought a motion for leave of the Court to file an expert report less than 90 days before the pretrial was held. The motion was brought on Thursday January 19, 2017 after the plaintiff and all of her experts had testified over the past eight days of trial.

[2] The defendants seek to file a report by a vocational rehabilitation expert, who has not met with the plaintiff, but proposes alternative career opportunities that she might be able to pursue.

[3] The defendants submit that they wish to file this expert report at this late date because the plaintiff was allowed to file a report by Dr. Holland, a chiropractor who performed two functional abilities evaluations and determined that the plaintiff was not able to meet the physical tests to become a police officer or to be hired by the Armed Forces. Dr. Holland's report was served on December 11, 2016 approximately one month before this trial commenced.

[4] The defendants' report does not respond to Dr. Holland's functional abilities tests, but rather introduces a new area of other vocational possibilities for the plaintiff.

[5] The plaintiff objects to the defendants serving a new expert report in the middle of the trial after the plaintiff and her expert witnesses have testified and she has closed her case.

[6] The plaintiff argues that it would be unfair and highly prejudicial to the plaintiff to allow a new expert witness to file a report and testify on a new subject matter at this late date.

Analysis

[7] Rule 53.03(3) states that leave to file an expert report may be obtained by counsel on terms that are just and with an adjournment if necessary, unless to do so will cause prejudice or undue delay in the conduct of the trial.

[8] In *Gilmour v. Miller Estate*, [1993] O.J. No 2784 (Div Ct), leave to call expert witnesses towards the end of the plaintiff's case was refused as an adjournment would be required to allow the plaintiff to obtain a proper report to respond and this would have caused prejudice to the plaintiff. The Court of Appeal upheld the trial judge's decision.

[9] A similar decision was reached by D. Wilson J. who refused to allow a new expert report to be filed in the middle of the trial in *Khelifa v. Ontario Corp No 1358584*, 2014 ONSC 3218 (SCJ).

[10] I am not prepared to allow the defendants to file a further expert report at this late date for the following reasons:

- (a) It would be very unfair and prejudicial to the plaintiff to allow new expert evidence to be introduced without any prior notice to her, after she and her expert witnesses have testified;
- (b) It is not possible to adjourn the trial as it is being tried by a jury;
- (c) The plaintiff and her experts were not cross-examined on most of the topics that it is anticipated that the new expert report would address;

- (d) The defendants have known for an extended period of time that the plaintiff was calculating her damages for loss of future income based on her evidence that she was unable to become a police officer or a military police officer due to the injuries suffered in the accident. As a result, the defendants have not been taken by surprise by any of the evidence called by the plaintiff.
- (e) In my reasons for allowing the plaintiff to call more than three experts, provided they address different issues, I stated that I would consider allowing an addendum to the defendants' existing expert reports if necessary to respond to new information contained in Dr. Holland's report. However, the defendants do not wish to file their new report to respond to Dr. Holland's two functional abilities tests that he administered. As such a further expert report is not necessary to respond to Dr. Holland's report in these circumstances.

Justice Robert Smith

Released: February 7, 2017

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