

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Saccary v. Vonhammerstein*, 2018 NSSC 135

**Date:** 20180413

**Docket:** Hfx. No. 409978

**Registry:** Halifax

Between:

Lillian Marie Saccary

Plaintiff

and

Hans Vonhammerstein

Defendant

and

Lillian Marie Saccary, Brittany Saccary and Selena Saccary by her Litigation  
Guardian Lillian Marie Saccary

Plaintiffs

and

Glenn Laffin

Defendant

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Robert W. Wright

**Heard:** April 13, 2018 in Halifax, Nova Scotia

**Oral Decision:** April 13, 2018

**Written Decision:** June 6, 2018

**Subject:** Civil Procedure Rules 21.02(2) and 55.04 – retention of medical expert to perform IME of the plaintiff in personal injury claims – whether selection of medical expert by the defendant unreasonable in all the circumstances.

**Summary:** The plaintiff was involved in two separate motor vehicle accidents in 2009 and 2011 respectively. Shortly before the occurrence of the second accident, an IME was performed on

the plaintiff by Dr. Edvin Koshi, a physiatrist, at the behest of her Section B insurer (those benefits no longer being an issue). The plaintiff subsequently obtained three medical expert reports in support of her personal injury claims in this litigation (in which two actions have been consolidated). A key issue in this litigation is the extent to which the plaintiff's current condition can be attributed to the occurrence of the second accident.

To address that question, counsel for the defendant has recently retained Dr. Koshi to perform another IME of the plaintiff to address her current medical condition and the cause and effect thereof. The plaintiff has refused to attend that IME on the basis that Dr. Koshi's ability to provide an objective opinion and to apply independent judgment for the assistance of the Court has been compromised by reason of the IME he performed on behalf of a peripheral party back in 2011. The defendant now brings this motion for an Order compelling the plaintiff to attend a medical examination by Dr. Koshi for purposes of this litigation.

**Issue:** (1) Given the prior IME performed by Dr. Koshi at the behest of the Section B insurer, should he now be disqualified from performing a further IME at the behest of the Section A insurer in the second accident because of the plaintiff's concerns over his objectivity and application of independent judgment?

**Held:** Given the defendant's *prima facie* right to have the plaintiff examined by an independent medical expert (duly qualified) of its own choosing, it falls to the plaintiff to demonstrate that the defendant's choice of expert is unreasonable.

In the absence of any specific evidence to the contrary, the Court was not persuaded that Dr. Koshi's ability to provide an objective opinion and to apply independent judgment for the assistance of the Court was thereby compromised. Without more, the Court was not satisfied that the plaintiff was able to establish a sufficient legal basis for the Court to interfere with the selection of Dr. Koshi to perform a further IME. The motion

was therefore granted with costs to the defendant in the amount of \$300.

**THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.  
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Lillian Marie Saccary, Brittany Saccary and Selena Saccary  
by her Litigation Guardian Lillian Marie Saccary

Plaintiffs

and

Glenn Laffin

Defendant

<b>Decision</b>
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**Judge:** The Honourable Justice Robert W. Wright

**Heard:** April 13, 2018 in Halifax, Nova Scotia

**Oral Decision:** April 13, 2018

**Written Decision:** June 6, 2018

**Counsel:** Lyndsay Jardine for the Plaintiffs  
Christopher W. Madill and Ibrahim Badawi  
for the moving party, Glenn Laffin

Wright, J. (orally)

[1] This is a motion on behalf of the defendant Glenn Laffin for an order pursuant to Civil Procedure Rule 21, compelling the plaintiff Lillian Saccary to attend a medical examination with Dr. Edwin Koshi in his Halifax office on April 27, 2018.

[2] The facts underlying this motion are not in dispute. The plaintiff was involved in two motor vehicle accidents, the first of which occurred in 2009 and the second in 2011. The plaintiff subsequently commenced two separate legal actions which were eventually consolidated by consent order dated January 18, 2017. In her pleadings, the plaintiff alleges that she sustained various soft tissue injuries that have left her with an ongoing partial disability. The plaintiff also alleges that her injuries from the first motor vehicle accident were exacerbated by the second one which occurred almost two years later.

[3] In pursuing her claims, the plaintiff has obtained expert medical reports from two physiatrists and a chronic pain specialist. The case is currently set down for trial in the fall of 2019.

[4] Shortly before the occurrence of the second motor vehicle accident in 2011, the plaintiff's Section B insurer obtained an independent medical report from Dr. Koshi (a physiatrist) pertaining to her Section B claims arising from the first accident.

[5] A key issue in this consolidated proceeding is causation of the plaintiff's injuries as between the first accident and the second accident.

[6] To address that question, counsel for the defendant Laffin (involved in the second accident) has now retained Dr. Koshi, on behalf of the Section A insurer, to perform another independent medical examination (“IME”) of the plaintiff. It has been scheduled for April 27, 2018 (two weeks hence). The purpose of that IME is to address the plaintiff’s current medical condition and the cause and effect of her injuries and/or disabilities, particularly as between the first and second accidents. Dr. Koshi is not the plaintiff’s treating physician.

[7] The plaintiff, through her counsel, has refused to attend that IME. The reason for that refusal is articulated in her counsel’s brief as follows:

The crux of our objection to the choice of Dr. Koshi lies in the fact that he has already seen Ms. Saccary in relation to injuries sustained in one of the consolidated matters and rendered his opinion on the causation, diagnosis, and prognosis of those injuries for another party peripherally involved in this litigation. He is therefore no longer an independent medical examiner in these factual circumstances. It is a straightforward position and one which, on review of the relevant case law, our courts have thus far not addressed in any decision that is factually analogous to this situation.

[8] Counsel for the plaintiff makes it clear that there is no denial of the defendant’s right to obtain an IME where she has put her medical condition in issue, nor is any objection taken to Dr. Koshi’s professional qualifications. The only objection stated here is the concern over the independence, objectivity and bias of the selected medical practitioner, given that Dr. Koshi has already rendered an opinion on Ms. Saccary’s condition to her Section B insurer. It is submitted that Dr. Koshi does not meet those requirements in these circumstances and that accordingly, a different medical practitioner should be selected to perform the IME.

[9] Defence counsel also points out that the Section B insurer is not a party to this litigation and indeed has confirmed in writing that it has no objection to the retention of Dr. Koshi to conduct a further IME of the plaintiff. The Court is informed, incidentally, that there is no ongoing dispute over the Section B claim made.

[10] This motion is governed by the principles contained in Civil Procedure Rule 21.02(2) and Civil Procedure Rule 55.04. I need not recite those principles at length for purposes of this decision other than to highlight that Rule 55.04 requires that an expert give an objective opinion for the assistance of the Court and that the expert apply independent judgment in so doing. That requirement is at the forefront of this motion.

[11] Generally, the case law makes it clear that a defendant contesting a personal injury claim has a *prima facie* right to have the plaintiff examined by a medical expert of the defendant's own choosing assuming, of course, that the chosen expert has the proper qualifications (see, for example, the Nova Scotia Court of Appeal decision in **Grant v. Foster** (1992) NSJ No. 102 which cites with approval the following passage from an English case called **Starr v. National Coal Board** [1977] 1 All.E.R. 243:

The Court held that the defendant had the right to choose an examiner of his choice; however, the defendant's request for a specific examiner must be reasonable. The Court added that the defendant's request for a specific examiner would only be considered unreasonable if it was in the interest of justice to consider an alternate.

[12] More recently, this Court held in **Howatt v. Chandler**, 2016 NSSC 216 (at para. 12) that “Presumptively, if the defendant has chosen a qualified expert (s) to conduct an IME/testing, then their choice should be respected, unless the circumstances make the choice an unreasonable one”.

[13] Given the defendant’s *prima facie* right to have the plaintiff examined by an independent medical expert (duly qualified) of its own choosing, it falls to the plaintiff to demonstrate that the defendant’s choice of expert is unreasonable. That is the question upon which this motion turns.

[14] As earlier recited, it is argued by the plaintiff that the choice of Dr. Koshi is not a reasonable one because of the concern over his objectivity, independence and bias in performing a further IME of the plaintiff, having done one earlier in 2011 at the behest of the plaintiff’s Section B insurer in between the occurrence of the two accidents.

[15] I am not persuaded by that argument that Dr. Koshi’s ability to provide an objective opinion and to apply independent judgment for the assistance of the Court is thereby compromised. Without more, I am not satisfied that the plaintiff has established a sufficient legal basis for the Court to interfere with the selection of Dr. Koshi to perform a further IME in the aftermath of the second accident. Sufficient evidence must be provided to show that the defendant’s expert of choice is unreasonable. To draw the conclusion sought by the plaintiff is in my view too far a leap in reasoning, in the absence of any specific evidence to the contrary, to displace the presumption that works in the defendant’s favour as above recited.

[16] It should also be noted that this situation where Dr. Koshi examined the plaintiff after the first accident, but shortly before the second accident, better positions him to assess and offer an opinion on the extent to which each accident has caused or contributed to the plaintiff's condition.

[17] Accordingly, the defendant's motion for an Order compelling the plaintiff to attend an IME with Dr. Koshi on April 27, 2018 is granted. The granting of this motion does not preclude the plaintiff's counsel, however, from making submissions to the Court at trial about the weight to be given to Dr. Koshi's opinion in all the circumstances.

[18] Costs of this motion are awarded to the defendant in the amount of \$300 in any event of the cause, but payable only at the conclusion of the proceeding.

J.