

CANADA / JUDGMENT

Ghane v. Bhullar

2022 BCSC 929

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 929 Ghane v. Bhullar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ghane v. Bhullar,

2022 BCSC 929

Date: 20220503

Docket: M192410

Registry: Vancouver

Between:

Javad Ghane

Plaintiff

And

Gurkirat Bhullar

Defendant

Before: Master Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff (by video):

J. Fisher

Counsel for the Defendant (by video):

R. Kinghorn

Place and Date of Hearing:

Vancouver, B.C.

April 26, 2022

Place and Date of Ruling:

Vancouver, B.C.

May 3, 2022

- [1] THE COURT: The plaintiff claims for injuries arising from a motor vehicle accident. This is currently a fast-track action. By application filed April 4, 2022, the plaintiff seeks an order that:
- a) The proceeding be removed from the fast track, Rule 15-1;
 - b) Alternatively, leave for the plaintiff to tender a second expert opinion at the upcoming trial of this action.
- [2] The defendant opposes all of the relief sought.

Background

- [3] The plaintiff alleges he was injured in an accident which occurred on February 7, 2018, in Surrey. His vehicle was rear-ended by a second vehicle owned and operated by the defendant. Injuries alleged include to the neck, back, hands and headaches. He seeks non-pecuniary damages, loss of past and future earning capacity, loss of housekeeping capacity, future care costs and special damages.
- [4] On March 7, 2019, plaintiff's counsel filed a notice of civil claim and notice of fast-track action. The defendant was not consulted regarding the decision to put the action on the fast track. Plaintiff's counsel now says they did so without the benefit of expert evidence regarding the extent of the plaintiff's injuries.
- [5] In September 2019, the plaintiff's family physician, Dr. Vasquez, referred him to a psychiatrist, Dr. Helper, regarding his oncoming symptoms.
- [6] On December 19, 2019, Dr. Helper recommended an MRI of the plaintiff's cervical and thoracic spine and electrodiagnostics with a neurologist Dr. Sudol.
- [7] On February 6, 2020, the defendant filed a response to civil claim. Initially liability was denied.
- [8] On May 22, 2020, after an MRI, the following findings were noted:

- a) Multilevel cervical spondylitic disease and multiple neural foraminal stenosis, including C6-7 with potential for C7 root impingement;
 - b) Possible foraminal disc herniation on the left at C5-6; and
 - c) Multilevel spondylitic changes in the thoracic spine but no significant focal thoracic disc herniation.
- [9] On July 8, 2020, s. 12.1 of the Evidence Act R.S.B.C. 1996 c. 124 received royal assent. This imposed limits on the number of expert reports that can be tendered in vehicle injury litigation. For a fast-track action, the default is one report regarding damages only unless the other party consents or the court grants leave to tender additional reports.
- [10] On July 21, 2020, plaintiff's counsel contacted defendant's counsel about scheduling a trial date based on a three-day trial estimate. Defendant's counsel took the position that three days was insufficient and asked that it be set for five days. Plaintiff's counsel agreed, provided that the action remain on the fast track.
- [11] Initial efforts to secure a five-day trial were unsuccessful. With the consent of defendant's counsel, plaintiff's counsel decided to try to secure a six-day trial date, on the basis that this could always be shortened.
- [12] On August 26, 2020, the defendant failed to appear for his examination for discovery. A certificate of non-attendance was issued. A discovery of the plaintiff did go ahead the same day and lasted about one and a half hours.
- [13] On September 8, 2020, defendant's counsel advised that the defendant would admit liability. This admission was later formalized through a notice to admit.
- [14] On March 1, 2021, the plaintiff filed a notice of trial returnable August 2, 2022, for six days.
- [15] On March 8, 2021, the plaintiff received a medical report from Dr. Vasquez. It states on page 15 regarding future treatment recommendations:

He may also benefit from seeing a neurosurgeon regarding possible corticosteroid injection and less likely surgical management of his left-sided C7 nerve impingement. Although this was discussed in previous visits, referral has not formally been made at this time as we observe his progress.

- [16] Dr. Vasquez also mentioned the possible attendance to another chronic pain management clinic to help the plaintiff manage his symptoms better and provide education. He also suggests the pain management team should include a clinical psychologist to help alleviate anxiety regarding the injuries. He suggests the plaintiff would benefit from continued active physiotherapy and other manual modalities, such as therapeutic massage, IMS and acupuncture as needed. He mentions the plaintiff was intending to try a chiropractor for the first time, which may help.

- [17] At page 16, Dr. Vasquez states the plaintiff was experiencing symptoms almost three years post-accident, which in his experience was not unusual. He predicts the plaintiff's symptoms would settle within a further one to two years, depending on the availability of treatments outlined in his report.
- [18] On April 20, 2021, Dr. Vasquez's report was served on the defendant.
- [19] On July 12, 2021, the plaintiff was assessed by a neurosurgeon, Dr. Heran. He issued a report dated July 13, 2021. Dr. Heran notes that the assessment was for the purpose of providing a medicolegal report. He was not becoming a care-giving physician. The report outlined possible treatment options, including diagnostic C7 nerve block plus/minus facet joint blocks for possible surgery consisting of anterior cervical discectomy infusion or disc replacement from C4 to C7. He describes anticipated time to recover and risks associated with surgery.
- [20] In mid December 2021, defence counsel arranged an examination of the plaintiff by a neurosurgeon, Dr. Chaudhary, on January 15, 2022. This was later changed to January 28, 2022.
- [21] On January 10, 2022, Dr. Heran's report was served on the defendant. On January 18, 2022, plaintiff's counsel asked defendant's counsel to consent to removing the action from the fast track, based on the trial not completing within three days and anticipated damages exceeding \$100,000 based on the conclusions reached in Dr. Heran's report.
- [22] On January 28, 2022, the plaintiff attended the IME with Dr. Chaudhary. Defendant's counsel has not served a report arising from this exam.
- [23] On February 22, 2022, defendant's counsel wrote to advise she would not consent to the action being removed from the fast track.
- [24] On April 4, 2022, the plaintiff filed this application, returnable April 19, 2022. It was not heard until April 26, 2022.
- [25] The 84-day deadline for serving expert reports is May 9, 2022. As noted, the trial is scheduled for August 2, 2022 for six days.

Applicable Law - Removal From Fast Track

- [26] Rule 15-1(1) provides that the rule applies to an action if:
- The claim is for \$100,000 or less exclusive of interests and costs;
 - The trial of the action can be completed within three days;
 - The parties to the action consent; or
 - The court so orders on its own motion or on the application of any party.

- [27] Subrule (2) provides that if the rule applies to any action, any party may file a notice of fast-track action. In this case, the plaintiff did so.
- [28] Subrule (3) provides that nothing in the rule prevents a court from awarding damages to a plaintiff in a fast-track action for an amount in excess of \$100,000.
- [29] Similarly, nothing in the rule prevents the trial of the action from being more than three days. See subrule (14), as well as *Burt v. Tamesis*, 2021 BCSC 2522 ["Burt"] at para. 18; and *Hemani v. Hillard*, 2011 BCSC 1381, at paras. 13 to 15.
- [30] Placing an action on the fast track has a variety of procedural consequences. Justice Gomery summarized these in *Burt* at paras. 4 to 5 as follows:
- [4] Fast-track litigation is addressed in Supreme Court Civil Rule 15-1 and s. 12.1(2) of the Evidence Act, R.S.B.C. 1996, c. 124. Placing an action on the fast track has procedural consequences, including the following:
- a) Most interlocutory applications cannot be brought unless a case planning conference or trial management conference has been held, subrules (7), (8) and (9);
 - b) The trial must be held without a jury, subrule (10);
 - c) Examinations for discovery are limited in duration and must be completed at least 14 days before the scheduled trial date, subrules (11) and (12);
 - d) Early trial dates are available, subrule (13); and
 - e) Costs are presumptively awarded on a fixed scale, which is limited by comparison to the usual tariff, subrule (15).
- [5] An important additional procedural consequence of the fast-track procedure is evidentiary. The presumptive limit on the number of expert reports addressing damages that may be tendered at the trial of a vehicle injury proceeding on the fast track is reduced by comparison to the ordinary presumptive limit in a vehicle injury proceeding, Evidence Act, s. 12.1(2). The presumptive limit in an ordinary action is three expert reports. In a fast-track action, it is a single expert report. The presumptive limit is not absolute. It may be avoided with the consent of all other parties or by leave of the court.
- [31] Subrule (6) provides that the rule ceases to apply to a fast-track action if the court, on its own motion or on the application of a party, so orders.
- [32] In *Bagri v. Bagri*, 2015 BCSC 2132, at para. 19, Master Scarth identified the following factors when assessing whether to make an order under subrule (6) as follows:
- [19] Even if an action qualifies as a fast track action, pursuant to Rule 15-1(6), a court may order that the action is to proceed as a regular action. When determining whether or not an action should proceed as a fast track action, the court has considered numerous factors, including:

- (i) the time required for trial: Shaker, at para. 21;
 - (ii) whether all parties have consented or acquiesced to use fast track procedures: Musgrove at paras. 19-21;
 - (iii) the risk of prejudice to a party, including prejudice with respect to costs: Shaker at paras. 33-34;
 - (iv) whether a party is using the application of fast track for an improper purpose, for example as a back door method to strike a jury notice: See Tong v. Lanser, [2012] B.C.J. No. 2956 at paras. 45-46, 51 (S.C.); and Beckett v. Tong, [2013] B.C.J. No. 1434 at para. 15 (S.C.); and
 - (v) the interests of justice and the purpose of Rule 15-1, which was designed to provide a more efficient and economical procedure for more straightforward or less valuable cases: Shaker at paras. 24-26; and Tong at paras. 32-33.
- [33] In *Bean v. Emco Corporation*, 2021 BCSC 2047, at para. 28, Master Elwood, as he then was, identified the following considerations relevant to determining whether to grant an order under subrule (6) as follows:
- [28] However, an application under Rule 15-1(6), for an order that the Rule ceases to apply, requires a more holistic analysis, including consideration of the potential prejudice to other parties. Under Rule 15-1(6), the court must consider whether the procedures and limitations of Rule 15-1 are fair to both parties in light of the purpose of the Rule and the principle of proportionality. In my view, the considerations on this second stage of the analysis include:
- a) The number of documents in the case and the ability of the parties to obtain meaningful early discovery;
 - b) The length of examinations for discovery the parties reasonably require;
 - c) Whether it is realistic the case can be ready for trial within four months after a trial date is set (or within eight months after the notice of fast track litigation was first issued);
 - d) Whether there is doubt the trial can realistically be completed within three days (as this may prejudice the successful party's entitlement to costs); and
 - e) Any other prejudice the party seeking the order removing the case may suffer if the order is not made and any prejudice the party resisting its removal may suffer if it is not made.

See Shaker, at paras. 23-25.

Analysis - Removal From Fast Track

- [34] Plaintiff's counsel argues that in order for an action to be a fast-track action, it is not sufficient to simply file a notice of fast-track action. At least one of the four factors in Rule 15-1(1) must be present. In this case she argues that:
- a) The plaintiff has never conceded that his damages are \$100,000 or less;

- b) Both parties acknowledge the trial cannot be completed within three days;
- c) The plaintiff no longer consents to the action being on the fast track; and
- d) There is no court order placing the action on the fast track.

- [35] As none of the four criteria in subsection (1) are now present, counsel says the action no longer qualifies as a fast-track action and ought to fall off more or less automatically, without the plaintiff having to make an application under subrule (6).
- [36] I note that it is the plaintiff who elected to place the action on the fast track back on March 7, 2019, when filing the notice to civil claim. Plaintiff's counsel did so without consulting the defendant. Presumably they had some basis for doing so at the time. A similar argument was addressed in *Burt* at paras. 18 and 19:
- [18] The plaintiff filed the notice of fast-track action before the defendant had filed his response to civil claim and without consulting with the defendant. He was not filing the notice with the defendant's consent. He must have done so on the basis of a preliminary assessment of the size of the claim and likely length of the trial. Presumably, the plaintiff believed at the time that the advantages of the fast track outweigh the disadvantages. I note that putting the case on the fast track would not prevent the trial from taking more than three days, *Hemani v. Hillard*, 2011 BCSC 1381, at paras. 13-15. It would not prevent the court from awarding more than \$100,000, if necessary, Rule 15-1(3).
- [19] This action was properly placed upon the fast track. The plaintiff's argument is that circumstances changed, and the law required that it be removed once it was clear that none of the four conditions for a fast-track action was in existence. He says that this was clearly the case by the time of the application before the Master. The plaintiff's claim for the cost of future care alone exceeds \$100,000. The action has been set for trial for five days, and the parties' trial briefs anticipate that it will take four days to complete. The plaintiff no longer consents to proceeding on the fast track, and it has not been ordered by the court.
- [37] The decision to book a trial of more than the three days contemplated in Rule 15-1(1) was one that the plaintiff's counsel agreed to and actively participated in. When defendant's counsel advised they thought the trial would require five days, plaintiff's counsel agreed to book that, saying she still believed three days would be adequate, so booking it for five was acceptable so long as the action remained on the fast track. Plaintiff's counsel later suggested booking six days due to lack of available five-day trial dates. Both counsel consented to this, and plaintiff's counsel filed a notice of trial.
- [38] An action is not automatically ejected from the fast track when underlying circumstances change. A party also cannot unilaterally remove an action from the fast track at will by purporting to withdraw their consent. This is addressed in *Burt* at paras. 20 to 23:

[20] As I interpret Rule 15-1, the relevant time to consider the four criteria in subrule (1) as conditions to its application is when the action is placed on the fast track. Once an action is placed on the fast track, it remains on the fast track unless it is removed pursuant to subrule (6), which provides:

This rule ceases to apply to a fast-track action if the court, on its own motion or on the application of any party, so orders.

[21] Removal of an action from the fast track is not automatic. It requires an exercise of judicial discretion, *Bagri v. Bagri*, 2015 BCSC 2132, at para.19.

[22] If it were otherwise, then it would sometimes be possible for a plaintiff to remove an action from the fast track at will, simply by withdrawing their consent, even just a few days before a trial that was scheduled to last more than three days. It could be unfair to a defendant who prepared for the trial of an action under one set of procedures to be placed under a different procedural regimen without notice.

[23] The cases reject the proposition that a plaintiff can remove an action from the fast track at will by withdrawing consent, in circumstances where the removal of the action from the fast track would be unfair and prejudicial to the defence, *Connatty v. Bone*, 2018 BCSC 2336, at paras. 27-31; *Rakic v. Stolz*, 2019 BCSC 2300, at paras. 5-12.

[39] Next the plaintiff argues that the action should be removed from the fast track because both parties agree the trial will require six days. Counsel complains the defendant is now attempting to gain a tactical cross advantage by insisting on keeping the action on the fast track. Further, in fast-track proceedings, s. 12.1(2)(b)(i) of the Evidence Act limits the plaintiff to just one report from one expert regarding vehicle injury damages at trial unless all parties consent to more or the court grants leave to tender more. The plaintiff says he will suffer prejudice if he cannot tender both Dr. Vasquez and Dr. Heron's reports at trial, as this will prevent him from proving the full scope of damages he suffered in the accident.

[40] Regarding length of trial, I have previously noted that having the length of trial exceed three days does not disqualify it from remaining on the fast track. The plaintiff also consented to the trial length being set for six days while insisting that it remain on the fast track. The plaintiff cannot purport to resile from that decision three months prior to trial.

[41] In assessing the argument based on the plaintiff's need to tender a second expert report, it is important to keep in mind the timing of the plaintiff's receipt and disclosure of the relevant reports. Dr. Vasquez's report is dated March 8, 2021. I presume it was received by plaintiff's counsel at that time. It was served on the defendant on April 20, 2021. Dr. Heran's report was dated July 13, 2021. Presumably it was received by the plaintiff's counsel at that time. It was not served on the defendant until January 10, 2022. The initial request to remove the action from the fast track was made January 18, 2022. Defendant's counsel rejected this on February 22, 2022. The plaintiff waited until April 4, 2022 to file this application. It was not heard until April 26, 2022. The 84-day deadline for delivering expert reports is May 9, 2022.

This timing effectively leaves the defendant no realistic opportunity to adjust its overall expert evidence strategy prior to trial.

- [42] Defendant's counsel argues he has conducted the defence of this claim based on procedural and evidentiary limitations applicable to fast track actions for the past three years. This includes limiting examination for discovery to under two hours and limiting both the type of expert evidence and obtained and the number of experts retained to one. He has proceeded based on the assumption that in admitting the liability, costs of the action would be fixed in accordance with fast-track limits. Allowing the plaintiff to change over to ordinary rules this close to trial would be unduly prejudicial to the defendant.
- [43] The timing of the generation and disclosure of Dr. Heran's report was largely in the plaintiff's control, as was the timing for applying to remove the action from the fast track. There is a substantial unexplained delay between when the plaintiff became aware of Dr. Heran's opinion and when the counsel began to seriously pursue removal from the fast track. While there may be some prejudice to the plaintiff in terms of costs and possibly the number of expert reports [this is addressed in the alternative application below]. The prejudice to the defendant if the action were to be removed from the fast track just three months prior to trial far outweighs this.
- [44] The timing of the plaintiff's application raises a concern that there may have been an aspect of strategic delay in an effort to gain an advantage over the defendant in the litigation. Whether that was the intent or not, the practical effect on the defendant would be the same. Had the plaintiff initiated the removal application within a reasonable time after receiving Dr. Heran's report, this would have afforded the defendant some opportunity to adjust his approach to defending the claim.
- [45] I exercise my discretion to dismiss the plaintiff's application to remove the action from the fast track.

Applicable Law - Additional Expert Report

- [46] Alternatively, the plaintiff applies for leave to file a second expert report within the fast-track action regime.
- [47] Section 12.1(2)(b)(i) of the Evidence Act R.S.B.C. 1996 c. 124 imposes a limit of one expert and one report on the issue of vehicle injury damages and reads as follows:

Limitation on expert evidence in vehicle injury proceedings

12.1 (1) In this section and section 12.2:

- (2) Except as provided under this section or the regulations ...
- (b) a party to a fast track vehicle injury proceeding must not tender the following at trial:
- (i) expert evidence on the issue of vehicle injury damages, of more than one expert.

- [48] Subsection (5) provides that a party can apply for leave to tender one or more additional experts or one or more additional reports from the first expert. Subsection (6) sets out the conditions which the applicant must satisfy. Subsection (7) sets out the information the applicant must include:
- (5) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (6) are met, grant leave to
 - (a) allow expert evidence of one or more additional experts to be tendered, despite the limit set out in subsection (2) (a) (i) or (b) (i), or
 - (b) allow the party to tender as evidence one or more additional reports from an expert referred to in subsection (2) (a) (i) or (b) (i), (4) (a) or paragraph (a) of this subsection, despite the limit set out in subsection (2) (a) (ii) or (b) (ii), as applicable.
 - (6) The following are the conditions for the purposes of subsection (5):
 - (a) the subject matter of the additional evidence to be tendered is not already addressed by expert evidence of the party making the application as permitted under subsection (2) or (4);
 - (b) without the additional expert evidence, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding.
 - (7) In an application under subsection (5), a party must include the following:
 - (a) the name of each expert whose evidence the party intends to tender at trial;
 - (b) the scope of expertise of each expert whose evidence the party intends to tender at trial;
 - (c) records that support the need for the additional evidence.
- [49] In *Vespaziani v. Lau*, 2021 BCSC 1224 ["Vespaziani"] at para. 22, Justice Kirchner found that the conditions in subsection (6) are conjunctive, such that both conditions must be met. He also found it is not necessary that the case be of an extraordinary or unusual nature. At para. 29-30 of his reasons:
- [29] Returning, then, to Mr. Black's primary argument. I do not read the conditions set out in s. 12.1(6) to require that a case be of an extraordinary or unusual nature before a court can make an order under s. 12.1(5). Rather, the conditions focus on (1) whether the subject matter of the additional reports is already addressed by other expert evidence led by the party; and (2) whether the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding.
- [30] The first condition seeks to root out duplication, or as it had been described in other cases, "piling on" of expert evidence. See, for example, *Smith v. Obuck*, 2018 ABQB 849, at para. 21. The second condition of s. 12.1(6) is a weighing exercise to balance the prejudice to the

party of not having the benefit of the expert report against the impact of the expert report on the cost and complexity of the case. With respect to the argument advanced on behalf of Mr. Black, while extraordinary aspects of a particular case might be a consideration under the framework for analysis, grounding this application solely or primarily on the basis that this is not an extraordinary motor vehicle accident case does not address the precisely worded conditions of s. 12.1(6).

Analysis - Additional Expert Report

Duplication

- [50] Dr. Vasquez does mention a possible corticosteroid injection and surgical management of the plaintiff's C-spine issues, but says the plaintiff would benefit from consulting a neurosurgeon about this. Dr. Heron's report has some overlap with Dr. Vasquez's report, but it primarily focuses on treatment options, specifically targeting the plaintiff's C-spine issues, including diagnostic nerve block plus/minus facet joint blocks and possible surgery, including interior cervical discectomy and fusion or disc replacement. Dr. Heran is the type of specialist that Dr. Vasquez suggested, and his opinion falls outside of Dr. Vasquez's area of expertise.
- [51] I conclude that the subject matter of Dr. Heran's report is not unduly duplicative of what is already addressed in Dr. Vasquez's report.

Prejudice

- [52] With regard to whether the plaintiff would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding if a second report is disallowed, the plaintiff simply says he would be prejudiced if he is not allowed to prove the full extent of the injury he suffered in the accident and asserts there would be no increase in the complexity and cost of the proceeding.
- [53] The plaintiff argues that in allowing the additional report, there would be disproportionate prejudice suffered, based on a subset of the same argument he made in the opposition to the application to remove the action from the fast track. Namely, that the defendant has conducted his case based on the expert report limitations applicable to fast-track actions. This includes limiting both the type of expert evidence obtained and the number of experts retained. He argues it would be unduly prejudicial to change the rules at this late date.
- [54] The defendant also argues that Vespaziani is distinguishable because it is not a fast-track action. In that case the parties knew they would be able to tender at least three expert reports addressing vehicle-injury issues. I note that the plaintiff in that case had served six expert reports, which prompted the defendant to apply for an order limiting the plaintiff to only three at trial. The number of reports issue was raised by defence counsel on March 8, 2021. The issue was joined the following day with the plaintiff's response. It was raised at a TMC held April 8, 2021. The defendant's application was heard April 23, 2021. Trial of the

action was set for May 10, 2021, for 11 days. Justice Kirchner ultimately granted the plaintiff leave to tender all six reports at trial.

- [55] I was not able to locate any decisions which consider an application for leave to tender additional expert reports in the context of a fast-track action. While the underlying facts in *Vespaziani* and the present case are clearly different, I note the same condition set out in s. 12.1(6) of the Evidence Act applies to both fast track and non-fast-track actions. There is no basis to suggest a different test applies to fast-track actions.
- [56] The prejudice to the plaintiff if he is not allowed to tender Dr. Heran's report is an inability to prove all of the components relevant to the injuries involving his C-spine. Dr. Vasquez only addresses the options in passing in his report, and the surgical options clearly fall outside his area of expertise.
- [57] I was not provided with much in the way of evidence that assists in quantifying the additional benefit of not increasing the complexity and cost of the proceeding if Dr. Heran's report is disallowed. I presume that would include possibly avoiding the cost of having Dr. Heran attend for cross-examination on his report and the cost of the defendant having to arrange and present expert evidence of their own on this issue.
- [58] I note that back on January 28, 2022, the defendant arranged to have the plaintiff examined by a neurosurgeon, Dr. Chaudhary. It is not clear whether he prepared a report. A copy of Dr. Heran's report had been provided to the defence prior to then, so it seems likely a copy of that report would have been provided to Dr. Chaudhary. If the defendant wishes to tender a neurosurgeon's report, presumably that can be arranged in short order at a relatively modest additional cost. There is no suggestion that adding Dr. Heran is possibly Dr. Chaudhary for cross-examination would put the length of trial over the six days currently reserved.
- [59] The final argument made by the defendant was that the plaintiff's application materials did not satisfy s. 12.1(7)(c) of the Evidence Act, which requires that the applicant tender records which support the need for additional evidence. He says that while it was within the plaintiff's right to consult a neurosurgeon for treatment purposes, the recommendation in Dr. Vasquez's report is not adequate to support the need for the plaintiff to retain a neurosurgeon to provide an additional expert report for litigation purposes without the defendant's consult. In my view, Dr. Vasquez's recommendation that the plaintiff consult a neurosurgeon or would benefit from such consultation about surgical and other treatment options is sufficient reason for why the second report was needed. This issue fell outside of Dr. Vasquez's area of expertise. I note this also appears to have prompted the defendant to arrange an examination by a neurosurgeon for litigation purposes.
- [60] I conclude that the plaintiff would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding if Dr. Heran's report is disallowed. The plaintiff is granted leave to tender Dr. Heran's report as a second expert report at trial.

Conclusion

[61] The plaintiff's application to remove the action from the fast track is dismissed.

[62] The plaintiff is granted leave to tender Dr. Heran's report as a second expert report at trial.

[63] As success has been divided, the parties will each bear their own costs of this application.

"Master Bilawich"

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