

CANADA / JUDGMENT

Tong v. Biggar

2021 BCSC 1013

COURT

Supreme Court of British Columbia

DECIDED

13 April 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 1013 Tong v. Biggar IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Tong v. Biggar, 2021 BCSC 1013 Date: 20210413 Docket: M184729 Registry: Vancouver Between: Longyu Tong Plaintiff And Matthew Biggar and Matt Gordon Roofing and Custom Sheet Metal Ltd. Defendants Before: Master Vos Oral Reasons for Judgment In Chambers (Hearing proceeded via teleconference) Counsel for the Plaintiff: M.C. Canofari Counsel for the Defendant: M.R.S. Hufton Place and Date of Hearing: Vancouver, B.C. April 13, 2021 Place and Date of Judgment: Vancouver, B.C. April 13, 2021

- [1] THE COURT: The defendants apply for an order that would compel the plaintiff to attend for an independent medical examination by Dr. John Esdaile, a rheumatologist, on April 15, 2021. The application is pursuant to Rule 7-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"). The plaintiff opposes the order sought by the defendants.
- [2] This decision is being delivered as oral reasons on the day the application was heard, as the application concerns an examination scheduled for the day after tomorrow. If the oral reasons are transcribed, I may edit them to include references to background information and to clarify the judgment in written form. The result and the core analysis will not change.

Background

- [3] The plaintiff claims damages for personal injuries and consequent losses she sustained as a result of an accident that occurred on April 1, 2016, whereby the defendants' vehicle struck the plaintiff while she was a pedestrian.
- [4] The trial of this action is scheduled for a 12-day hearing starting on June 7, 2021.
- [5] The 84-day deadline for service of expert reports pursuant to Rule 11-6(3) was March 12, 2021.
- [6] The plaintiff has served three expert reports: a medical/legal report prepared by Dr. Kathryn Fung, a psychiatrist, dated December 3, 2018; a medical/legal report prepared by Dr. John Armstrong, a general practitioner who describes himself as a "Complex Chronic Pain Physician", dated July 11, 2018; and a report prepared by an economist, dated March 7, 2019.

- [7] The defendants have served two expert reports: a cognitive functional capacity evaluation report prepared by Rob Corcoran, an occupational therapist, dated October 19, 2020; and a medical/legal report prepared by Dr. Robert Froh, an orthopedic surgeon, dated March 10, 2021.

Analysis

- [8] If the plaintiff's physical or mental condition is in issue in the action, a defendant can apply under Rule 7-6 for an order to compel the plaintiff to submit to an examination by a medical practitioner or other qualified person.
- [9] Rule 7-6 is designed to balance the plaintiff's advantage in obtaining expert reports by providing defendants with access to the plaintiff in order to obtain the expert assistance they require: *Tran v. Abbott*, 2018 BCCA 365, at para. 17. The primary purpose of Rule 7-6 is to put the parties on an equal footing with respect to medical evidence: *Tran* at para. 40. Multiple medical examinations may be appropriate and necessary where a variety of injuries are alleged, or the etiology of illness is not straightforward: *Tran* at paras. 32-33.
- [10] The plaintiff's counsel advised the court that the plaintiff contends she is permanently disabled as a result of the accident and suffers from post traumatic stress disorder, anxiety, depression, chronic pain, fibromyalgia and other symptoms.
- [11] The defendants submit that the proposed examination is required to put them on an equal footing with the plaintiff with respect to medical evidence that bears on the plaintiff's claims. The defendants refer to the first affidavit of Jo Bulmer, made March 24, 2021. Exhibit "J" to that affidavit is a passage from the July 11, 2018 medical/legal report Dr. John Armstrong prepared for this case, which the plaintiff has served on the defendants. It states: Nociplastic pain is likely involved in such disorders as fibromyalgia syndrome (FMS). FMS is characterized by chronic widespread pain in all four quadrants of the body and in the spinal axis with generalized superficial tenderness (pressure allodynia). In my opinion, Ms. Tong does have FMS.
- [12] The defendants submit that a rheumatologist is an appropriate expert to provide opinion evidence regarding the plaintiff's diagnosis of fibromyalgia syndrome. They rely on advice Dr. Froh provided in his medical/legal report dated March 10, 2021 (found at exhibit "I" of Jo Bulmer's first affidavit): I would suggest assessment by either rheumatology or rehabilitation medicine as they specialize in diagnosing and treating fibromyalgia.
- [13] The defendants have established that an examination by a rheumatologist is appropriate in order to put them on equal footing with the plaintiff with respect to the medical evidence for this case. The plaintiff is relying on expert medical evidence diagnosing her as having fibromyalgia syndrome. The doctor the defendants rely on, Dr. Froh, defers to a specialist in rheumatology or rehabilitation medicine for expertise regarding fibromyalgia. It is not disputed that Dr. Esdaile is an expert in the field of rheumatology. His expert evidence could potentially assist counsel for the defendants in preparing for trial and assist the court on a

matter in issue: whether the fibromyalgia syndrome diagnosed by Dr. Armstrong was caused or contributed to by injuries the plaintiff sustained in the subject accident.

- [14] The plaintiff's main objection to the proposed examination is that it would take place too late in the litigation. She points out that Dr. Armstrong's July 11, 2018 medical/legal report was served on the defendants on November 22, 2018, more than two years ago. The plaintiff submits that the proposed examination should have been arranged long ago, and should not be allowed at this time as the report would be served less than 84 days before the trial date.
- [15] The particular circumstances of this case must be considered. Counsel for the defendants indicated there were difficulties in arranging their orthopedic examination of the plaintiff, at least in part due to concerns relating to COVID-19. This is unfortunate, but is understandable in the considerable disruptions we have all experienced and witnessed during the last year, because of the global pandemic.
- [16] More importantly, it appears that the need for an examination by a rheumatologist was only fully realized recently, when defence counsel obtained Dr. Froh's March 10, 2021 medical/legal report. It suggested an assessment by a rheumatologist or a rehabilitation medicine specialist. Dr. Froh's examination took place on February 22, 2021. Defence counsel's materials indicate his office received Dr. Froh's report on March 12, 2021.
- [17] Another important factor is that the plaintiff would not be left without an opportunity to consider and have expert assistance with respect to any report Dr. Esdaile may prepare pursuant to the proposed examination. She and her counsel could consult with Dr. Armstrong. It is Dr. Armstrong's diagnosis that the plaintiff suffers from fibromyalgia syndrome. He obviously would be in a position to consider other medical evidence relating to that diagnosis. It is worth noting that the plaintiff's trial brief indicates that she will call Dr. Armstrong as a witness at trial.
- [18] The plaintiff's counsel argues that the plaintiff may be prejudiced if a report is prepared by Dr. Esdaile, as she may want to obtain a responding report and she might not be able to retain a rheumatologist who could prepare a report prior to the trial. The court cannot adopt this submission as a basis to deny the proposed examination. The main reason this application is before the court is because Dr. Armstrong diagnosed the plaintiff as having fibromyalgia syndrome. Counsel for the defendants argues it is absurd to suggest that Dr. Armstrong's expert opinion with respect to fibromyalgia would be properly before the court, but Dr. Armstrong would not be able to respond to another expert's comments about the diagnosis he originally made. I agree.
- [19] The plaintiff's counsel also argues that the plaintiff should not be required to attend at the proposed examination because she is anxious. The plaintiff must be able to deal with that anxiety as the application materials indicate she has attended at a number of medical appointments since the accident. This is not surprising as attending appointments with various medical specialists (sometimes for a single consultation) is a relatively common occurrence in our health system. The defendants have established that the proposed

examination is warranted, even if the plaintiff may be anxious about being examined by yet another doctor. The plaintiff should be informed that although the proposed examination is tied to this litigation, safeguards apply with respect to how the examination would proceed. Dr. Esdaile will be bound by his professional obligations as a licenced physician. He also faces the potential of being criticised by the court in a published decision if there is inappropriate conduct in relation to the examination or if he makes improper comments in his report, which could impact his standing within his profession.

- [20] In all the circumstances, the independent medical examination sought by the defendants is justified. Result
- [21] The application presented in Part 1 of the defendants' notice of application filed March 25, 2021, seeking an order that would compel the plaintiff to attend for a an independent medical examination by Dr. John Esdaile, a rheumatologist, on April 15, 2021, is granted.
- [22] Are there submissions on costs? [Discussion re: Costs]
- [23] The default order on a chambers application is that costs be determined as costs in the cause. That would be the appropriate order on this application. The defendants were successful on their application. They are entitled to costs of the application as costs in the cause, pursuant to Rule 14-1(12). "Master Vos"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/10/2021BCSC1013.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/tong-v-biggar-2021>

Prepared on 28 October 2026 · Esheria