

CANADA / JUDGMENT

## Zhao v. Yip

2023 BCSC 1290

COURT

Supreme Court of British Columbia

DECIDED

22 June 2023

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

2023 BCSC 1290 Zhao v. Yip

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhao v. Yip,

2023 BCSC 1290

Date: 20230622

Docket: M204958

Registry: Vancouver

Between:

Wanning Zhao

Plaintiff

And

Henry Yip, Helen Wai Yip,

Taylor Dean Kneider, and Thomas Lefkovits

Defendants

Before: Master Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

E. Orr-Ewing

Counsel for the Defendants:

E. Tahanha

M. Naimi

Place and Date of Hearing:

Vancouver, B.C.

June 22, 2023

Place and Date of Judgment:

Vancouver, B.C.

### June 22, 2023

- [1] THE COURT: This is an application by the defendants for an order that the plaintiff attend and submit to a functional capacity evaluation ("FCE") assessment with Mr. Robert Gander for a three-day examination from June 26, 2023 to June 28, 2023.
- [2] Today is June 22, 2023, so I accordingly have been left with little time to ponder the decision I am being asked to make today. My reasons are going to be substantially abbreviated from what I would normally give. I appreciate the significance of the application and I recognize the amount of work that both counsel have been put into preparing very thorough, thoughtful materials. The brevity of my decision and lack of detailed analysis is not intended to reflect on that. It is merely a reflection of the very limited time that I have been given to consider and come up with a decision.
- [3] The background to this is that the action arises out of a motor vehicle accident that occurred June 9, 2018. The injuries alleged include traumatic brain injury, concussion, sensitivity to light and sound, difficulty concentrating, memory loss, cognitive difficulties, fatigue, moodiness, nausea, dizziness, numbness to body, blurry vision, tinnitus, urinary incontinence, injuries to neck, arms, legs, hands, shoulders, ears, chest, back, and TMJ.
- [4] Examinations for discovery were completed on the plaintiff in December 14, 2022. Trial of the action is set for 15 days starting on October 16, 2023. The 84-day deadline for delivery of expert reports is July 24, 2023.
- [5] Prior to the accident, the plaintiff says she was employed full-time with Rogers in a variety of roles, having earnings in 2015 to 2016 time period of about \$64,000. She began pursuing a real estate licence and passed an exam for that in May 2018, shortly before the accident. She also indicated on her discovery that she was in the process of joining New Stream Realty but was unable to do that because of the accident. She ultimately did not become a realtor and has been completely unemployed since 2018. She is currently 43 years of age and on long-term disability.

- [6] The defendants have had four IMEs already. These include:
- a) January 18, 2022, exam by Dr. Muhlstock, a physiatrist;
  - b) February 4, 2022, exam by Dr. Laban, a psychiatrist;
  - c) July 14, 2022, exam by Dr. Cheung, a neurologist; and
  - d) September 9, 2022, exam by Dr. Vrabec, a urologist.
- [7] Reports have been obtained and produced from Dr. Muhlstock and Dr. Laban and copies were provided on this application. The plaintiff has not yet delivered any expert reports, at this point it is unknown what combination of experts are going to be forthcoming for the plaintiff's side.
- [8] The core issue before me is whether there is something new and unique that the proposed author of the functional capacity evaluation brings to the table that could not have been provided by and does not overlap with the expertise of physicians, who have already provided or conducted independent medical examinations: in particular, Dr. Muhlstock, the physiatrist, Dr. Laban, the psychiatrist, and some emphasis was also placed on Dr. Cheung, the neurologist, in argument. I did not receive any submissions about urology. That particular expertise is not relevant for present purposes.
- [9] The application is brought pursuant to Supreme Court Civil Rules, B.C. Reg. 168/2009 Rule 7-6. Subsections (1) and (2) allow the court to order an examination by experts in order to level the playing field between the plaintiff and the defendant. The leading authority in this is *Tran v. Abbott*, 2018 BCCA 365. Those authorities are not really in dispute today. Both parties agree on what the general parameters are.
- [10] The real issue today is whether the applicant has established that the occupational therapist who would be doing the proposed three-day functional capacity evaluation has some expertise or brings something to the analysis that could not have been done by one of the prior experts.
- [11] One of the reports produced, was that of Dr. Muhlstock. His opinion concludes that, given the length of time that has elapsed since the subject motor vehicle accident occurred, any soft tissue injuries sustained have long since healed or resolved from a physiological perspective. He also says on the prognosis:

Given that any soft tissue injuries have since healed/resolved, and given the absence of any objective clinical findings of ongoing accident-related physical impairment, it is my opinion that, as it pertains to the subject MVA from an objective neuromuscular perspective, Ms. Zhao's prognosis is considered to be good.

- [12] For Dr. Laban's opinion, she says:

This opinion is confined to Ms. Zhao's psychiatric morbidity. I [defer] to medical colleagues with respect to Ms. Zhao's medical morbidity and physical symptoms after the subject accident. It should be noted that post-concussion syndrome is not included in the DSM-5 as a diagnosis due to overlap of symptoms with depression, anxiety. DSM-5 criteria for a neurocognitive disorder are not met in this case.

Going on to prognosis, she says:

The prognosis is less than satisfactory. There has been a persistent course, a limited response to treatment, ongoing impairment in social and occupational functioning, and there is a medical comorbidity. Good prognostic factors include a stable pre-morbid personality, no past or family history of psychiatric morbidity, and no substance use.

Under what the effect of the plaintiff's injuries had on her life recreationally, socially, and vocationally, she says:

Ms. Zhao's psychiatric comorbidity has been contributorily, together with her medical morbidity, an impairment in the social and occupational functioning, she has not returned to work since 2018, is socially isolated, and has not returned to her pre-accident recreational activities.

[13] The defendants have also tendered affidavits from Dr. Muhlstock and Dr. Laban. These are in very similar format.

[14] Dr. Muhlstock says, that during his examination he did not perform a functional capacity evaluation of the plaintiff. His assessment of the plaintiff included a thorough history, physical examination, and review of the documentation. The physical tests conducted during his examination were designed to assess the plaintiff's reported injuries and provide a diagnosis and prognosis. She says:

My overall conclusion was that on the date of assessment, there was no objective clinical finding of any accident-related physical impairment and therefore I did not place any restrictions or limitations on the plaintiff's return to pre-accident activities.

He goes on to say at paragraph 5:

My assessment did not include a comprehensive functional examination designed to yield an objective measure of the plaintiff's functional capabilities and limitations in the context of occupational demands. While I am able to interpret the results of a functional capacity evaluation, I do not perform this evaluation. My sole practice is confined to the objective diagnosis and prognosis of the plaintiff's reported injuries.

He goes on to confirm he did not assess nor did he answer the question -- I don't think there was one posed specifically -- about functional capacities as compared to her occupational requirements.

[15] I note that his opinion is ultimately that there were no physical impairments that arose from the motor vehicle accident. He has essentially said that there is nothing wrong with her that is attributable to the accident and there is no reason for him to have done an analysis of her functional capacity based on that opinion.

[16] For Dr. Laban, she provides a very similar form of affidavit. She says, at paragraph 4:

I confirm that during my examination I did not undertake functional capacity evaluation of the plaintiff. My assessment of the plaintiff included a background review of the plaintiff's history, virtual, and review with the plaintiff during which I gathered clinical information from the plaintiff, conducted a mental state examination, and administered rating scales for the purposes of establishing a psychiatric diagnosis. My examination of the plaintiff did not include any site physical tests designed to measure the plaintiff's functionality. My overall conclusion was that on the date of assessment, she suffered from persistent depressive disorder and generalized anxiety disorder, moderate severity.

In paragraph 5, she says:

I advised in my report that as a result of the plaintiff's comorbidity, the plaintiff had socially isolated herself and not returned to her pre-accident occupation or recreational activities. My assessment of the effect of the plaintiff's injuries on her life, recreationally, socially, and vocationally, did not include that what the plaintiff's functional capacities or limitations are. The assessments of plaintiff's functional capacity and limitations is outside the scope of expertise and I would defer that finding to an occupational therapist.

At paragraph 6, she says:

I confirm I did not assess nor did I answer nor could I have answered the question of whether the plaintiff's functional capacities compare to the occupational requirements of either a call centre operator or a realtor. This assessment is beyond the scope of my expertise.

[17] The parties have taken me through a detailed legal argument and do not have the time to go through a detailed analysis of all the cases.

[18] Amongst those were *Tran v. Abbott*, (supra); *Anderson v. Steffen*, 2021 BCSC 252; *Bowden v. Lund*, 2023 BCSC 869; *Ferguson v. Guthrie*, 2022 BCSC 1111; *Gray-Verboonen v. Mandurah*, 2019 BCSC 1697; and *Luining v. Luining*, 2015 BCSC 2304.

[19] The conclusion I have come to is that I have not been persuaded that the defendant has established that the occupational therapist, Mr. Gander, brings to his proposed assessment something that is markedly different or unique from what would be provided through an assessment by one or more of the physicians who have previously provided IMEs: Dr. Muhlstock, physiatrist; Dr. Laban, psychiatrist; or Dr. Cheung, neurologist.

- [20] There are injuries here with physical components and there are injuries with psychiatric or psychological components. The defendants' experts who have already conducted assessments and provided opinions are the categories of specialists that are frequently chosen to opine on physical and psychiatric aspects of claims.
- [21] Now, a claim or an issue that came up in *Ferguson v. Guthrie* was really an argument over whether the functional capacity evaluation was a different expertise that was being brought into the analysis or whether it was simply a different approach and modality to analyzing the mechanics of the injuries. I concluded in that case, following decisions like *Anderson v. Steffen*, that merely having a different approach does not meet the requirements for satisfying the court that an additional examination is necessary.
- [22] I accept that defendants have vigorously argued today that the functional capacity is warranted in this case because of the psychiatric component. They somewhat concede that -- I will not say formally concede, but they did not press as hard on the physical side. Given the conclusion Dr. Muhlstock reached, it is understandable why he would not have gone into a more detailed physical assessment. In my view, a physiatrist is well capable and it is a frequent aspect of their day-to-day work to assess physical functionality. His conclusion is simply that there are no limitations that are attributable to the accident, so it is understandable that he did not go into a more detailed examination. Had he thought it was appropriate, he certainly was competent to do so.
- [23] Dr. Laban suggests she does not normally do a functional capacity evaluation. She did not find there was a neurocognitive disorder that met DSM-5 criteria in this case, but she did conclude there was a depression issue that was causing the plaintiff not to engage socially and not to be pursuing employment and other normal activities of daily life. That does not describe a physical disability; that describes a psychological or psychiatric issue. That is not something that, in my view, would be measurable through a functional capacity evaluation. If there is impairment associated with what Dr. Laban has suggested, it is a mental impairment or a depression-related impairment, not a physical functional limitation. I am not persuaded that the FCE evaluation that is being proposed is a meaningful component to understanding the conditions that Dr. Laban has found to be present.
- [24] In those circumstances, I am going to dismiss the defendants' application, having concluded that they have not satisfied me that a three-day functional capacity evaluation is necessary.

[Submissions regarding costs]

- [25] THE COURT: I am going to say costs to the plaintiff in any event of the cause but not payable forthwith.

[I have made minor edits to these reasons to enhance readability and clarity. The substance and outcome have not changed.]

"Master Bilawich"

---

## 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/23/12/2023BCSC1290.htm>

**CASE PAGE**              <https://chat.esheria.ai/case-law/canada/zhao-v-yip-2023>

Prepared on 29 October 2026 · Esheria