

 **Brar v. Ismail, [2018] B.C.J. No. 3092**

British Columbia and Yukon Judgments

British Columbia Supreme Court
New Westminster, British Columbia

E.M. Myers J.

Heard: June 7, 2018.

Oral judgment: June 8, 2018.

Docket: M178297

Registry: New Westminster

[2018] B.C.J. No. 3092 | 2018 BCSC 1487

Between Jaspal Kaur Brar, Plaintiff, and Joseph Ismail and Carter Dodge Chrysler Ltd., Defendants

(12 paras.)

Counsel

Counsel for the Plaintiff: Brij Mohan, Brian J. Yu.

Counsel for the Defendants: Travis W. Brine.

Oral Ruling re Application to Instruct Jury to Draw Adverse Inference with respect to failure to call Dr. Gandhi

E.M. MYERS J. (orally)

- 1 The defendants ask me to instruct the jury that they may draw an adverse inference from the plaintiff's failure to have her treating psychiatrist, Dr. Gandhi, provide an opinion.
- 2 The factors with respect to whether an adverse inference instruction for failure to call a medical witness should be given was canvassed in in *Buksh v. Miles*, [2008 BCCA 318](#). The court said:

[35] In this environment, and bearing in mind the position of a lawyer bound to be truthful to the court, it seems to me there is a threshold question that must be addressed before the instruction on adverse inferences is given to the jury: whether, given the evidence before the court, given the explanations proffered for not calling the witness, given the nature of the evidence that could be

provided by the witness, given the extent of disclosure of that physician's clinical notes, and given the circumstances of the trial (e.g., an initial agreement to introduce clinical records that work contrary to the inference, or incorporation of that witness's views or observations in the report of a witness called by the other side) a juror could reasonably draw the inference that the witness not called would have given evidence detrimental to the party's case. Where, as here, the trial started on the basis that all records should be before the jury, and ended with a request for an instruction on adverse inferences, and when both counsel have explained the failure to call the witness or witnesses by referring to their own assessment of the utility or need for the evidence, the answer to the threshold question I have stated is not self-evidently affirmative. In this case, in my view, the judge herself should have heard the explanations, considered the degree of disclosure of that witness's files and the extent of contact between the party and the physician, received submissions and determined whether a reasonable juror could draw the inference sought before giving the instruction to the jury for its consideration in its fact finding role. If not, the instruction had no place in her charge to the jury

3 The plaintiff's depression is a central factor in this lawsuit. She claims the accident significantly aggravated her pre-existing depression and that aggravation caused chronic pain and non-chronic pain to become more severe.

4 The evidence with respect to the state of the plaintiff's pre-existing depression is opaque. She testified that her depression was "situational", brought on by family matters. Her husband said the same thing.

5 Dr. Gandhi has been treating the plaintiff for depression and prescribing medication since March 2011. The accident in issue occurred in January 2015.

6 The plaintiff's general practitioner, Dr. Hair, dealt with her depression, but minimally. He acknowledged that there were few references to Ms. Brar's depression in his file because Dr. Gandhi was treating her.

7 Dr. Tarzwell was the psychiatrist who did provide an opinion for the plaintiff. Although Dr. Gandhi's records were reviewed by him, he said they were nearly indecipherable.

8 Dr. Tarzwell only saw the plaintiff once for the purposes of preparing his report. In cross-examination, he was referred to a September 6, 2017 consultation report of Dr. Gandhi in which Dr. Gandhi noted that the plaintiff was making steady progress. Dr. Tarzwell noted that Dr. Gandhi would have had a longer-term perspective enabling him to opine on that point. It is precisely that longer-term perspective that is crucial evidence in this case.

9 Unlike *Beggs v. Stone*, [2014 BCSC 2120](#), at para. 23, this is not a case in which the plaintiff's pre-accident condition and post-accident progress regarding her psychological state are well documented.

10 It might be - as argued by the plaintiff - that the defendants could have subpoenaed Dr. Gandhi. However, as said by Mr. Justice Armstrong in *Chavez-Salinas v. Tower*, [2017 BCSC 2068](#), at para. 213, they could not have required him to provide an opinion. Any helpful evidence Dr. Gandhi would have been able to give would be opinion: his mere observations would have been of only minimal assistance here, given there were no physical symptoms to observe.

11 The argument here is not - as it was in *Buksh* - that all physicians who dealt with the plaintiff should have testified. In my view, Dr. Gandhi's opinion would have filled a significant gap in the evidence. In

fact, the case virtually called out for his evidence. Plaintiff's counsel provided no reason why it was not able to be adduced.

12 Therefore, the jury should be instructed on their ability to draw an adverse inference. As I have said, counsel will have the opportunity to comment on my draft charge in its totality before it is delivered.

E.M. MYERS J.

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