

Case Name:

Paerhati (Litigation guardian of) v. Wang

Between

**Ayiditi Paerhati, by his Litigation Guardian, Aziguli
Adudureheman, Yuseyin Paerhati and Aziguli
Abudureheman, Plaintiffs, and
Ruhu Wang, Defendant**

[2008] O.J. No. 3176

Court File No. 04-CV-261756 CM3

Ontario Superior Court of Justice

E.M. Stewart J.

Heard: August 13, 2008.
Judgment: August 14, 2008.

(10 paras.)

Counsel:

Robert **Betts**, for the moving party Defendant.

Tania Astorino, for the responding party Plaintiffs.

ENDORSEMENT

1 E.M. STEWART J.:-- The Plaintiff in this motor vehicle action secured a report from a neuropsychologist dated April 25, 2008 shortly before a mediation in May, 2008. Following the failure of the mediation, the Defendant requested that the Plaintiff attend for examination by a neuropsychologist of the Defendant's choosing. This request was refused and as a result, the Defendant has brought this motion.

2 As a preliminary matter, I do not consider that leave is required for the bringing of this motion pursuant to Rule 48.04 as the Plaintiff set the action down for trial without the consent of the Defendant and the Certification Form reflects the intention of the Defendant to request an independent medical examination of the Plaintiff prior to trial.

3 If I am incorrect in that view, I would amend the moving party's Notice of Motion to request such leave and, in these circumstances, would grant it on the basis that Dr. Long's report changes the landscape and scope of this action significantly.

4 Although the Plaintiff appears to have sustained a concussion and closed head injury as a result of the 2002 accident, no neuropsychological evaluation was carried out until recently despite the recommendation for the performance of same by several medical professionals who saw and treated the Plaintiff. It was reasonable, based upon the material provided, for the Defendant to have assumed that no serious symptoms upon which a claim for damages for brain injury were present and thus it is understandable to me why they did not arrange a neuropsychological assessment to be performed earlier.

5 Dr. Long's report now raises the suggestion that a brain injury of some magnitude has been sustained by the Plaintiff, and the interests of fairness and justice require that the Defendant be permitted to have an independent examination performed in order to assess that conclusion and, if necessary, respond to it by way of evidence at trial.

6 It is unfortunate that the availability of persons able to conduct such assessments is so limited, but that is not the fault of any of the parties. Similarly, and especially because this is a jury trial, a "paper review" would be inadequate and it would be unfair to limit the Defendant to that kind of assessment in this case.

7 Accordingly, scheduling problems mean that any assessment of the Plaintiff by the Defendant's proposed expert cannot take place before January, 2009. Aside from a strong desire to have the trial of this action take place on September 15, 2008 as scheduled and the fact that certain witnesses have been summoned, the Plaintiff cannot point to any particular prejudice it would suffer as a result of a postponement of the trial date. I note that the Plaintiff is now 18 years old, and that any impairment of witness recall is more likely to cause problems for the Defendant than the Plaintiff in light of the fact that the Plaintiff was a pedestrian when struck by the Defendant's vehicle.

8 I am of the view that the interests of justice favour the granting of the Order sought. This will necessarily mean that the trial date of September 15, 2008 will be vacated, but I am advised that D. Wilson, J. had declined to confirm the trial date at the recent pre-trial conference in view of this outstanding issue.

9 The plaintiff therefore will be required to attend upon Dr. Snow for neuropsychological assessment on January 27 and 28, 2009 and the trial date will be adjourned to permit this to occur. It is expected that a new trial date will be scheduled for the earliest mutually convenient date thereafter as can be obtained. The parties shall be at liberty to schedule another pre-trial conference, should they consider that such a step would be useful, following delivery of Dr. Snow's report.

10 Although the Defendant has been successful on this motion, I am of the view that the sequence of events, the timing of the motion, the approaching trial date and the at least arguable point that this issue might have been anticipated sooner and steps taken to deal with it so that the trial date might not have been jeopardized lead me to conclude that there should be no costs of this motion. However, if counsel for either of the parties wish to make written submissions that costs should be disposed of in some other fashion, they may do so by providing them to me in writing by August 31, 2008.

E.M. STEWART J.

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