

---

CANADA / JUDGMENT

## Amini v. Khania

2014 BCSC 697

---

COURT

Supreme Court of British Columbia

DECIDED

29 April 2014

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

---

2014 BCSC 697 Amini v. Khania

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Amini v. Khania,

2014 BCSC 697

Date: 20140429

Docket: M114991

Registry: Vancouver

Between:

Abdullah Amini

Plaintiff

And

Pouran Khania and Atlas STE Tech Ltd.

Defendants

Before: The Honourable Mr. Justice Burnyeat

Ruling on the Admissibility

of a Supplementary Expert Opinion

Counsel for Plaintiff:

E.A. Orr-Ewing

Counsel for Defendants:

J. Fearon

Place and Date of Hearing:

Vancouver, B.C.

March 21, 2014

Written Submissions:

April 3, 2014

Place and Date of Judgment:

Vancouver, B.C.

**April 29, 2014**

- [1] This Ruling deals with the admissibility of the March 4, 2014 expert opinion received from Dr. Iain G. Dommissie, an orthopaedic surgeon retained by the Defendants.
- [2] Dr. Dommissie provided an expert opinion on November 15, 2013. In that opinion, Dr. Dommissie stated that he had reviewed 16 "appendices" and then outlined in detail what he had reviewed. That expert opinion was tendered in accordance with the applicable Rules.
- [3] Subsequently, a letter was sent by counsel for the Plaintiff to counsel for the Defendants enclosing the expert opinion of Dr. Javidan. As a result, counsel for the Defendants wrote Dr. Dommissie enclosing "the recent letter we received from Dr. Javidan ... for your review ...".
- [4] In his March 3, 2014 response and opinion letter, Dr. Dommissie stated that he had "received and reviewed the report of Dr. M. Javidan". Dr. Dommissie provided his certification and set out his qualifications and experiences in accordance with Rule 11-2, and then provided the following opinion: "In view of Dr. M. Javidan's new letter, it is likely that the onset of Mr. Amini's symptoms was as a result of the Accident."
- [5] At trial, it became apparent that Dr. Dommissie had been provided with a number of documents after he provided his November 15, 2013 expert opinion and before he provided his March 4, 2014 opinion. In particular, Dr. Dommissie was provided with copies of a medical-legal report of Dr. Beheshti, a medical-legal report of Dr. Fuller, an addendum medical-legal report of Dr. Fuller, an MSP printout, a PharmaNet printout, the clinical records of Dr. Beheshti, the clinical records from Mount Seymour Medical Clinic, and digital copies of x-rays of the right shoulder of the Plaintiff. None of those additional documents were listed in the March 3, 2014 expert opinion from Dr. Dommissie.
- [6] Counsel for the Defendants was not prepared to provide counsel for the Plaintiff with the correspondence that had been forwarded to Dr. Dommissie. Accordingly, counsel for the Plaintiff required the attendance of Dr. Dommissie for the purpose of cross-examination.

APPLICABLE RULES

[7] Expert reports are governed by Rule 11-6(1), which provides:

- (1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2(2) and must set out the following:
  - (a) the expert's name, address and area of expertise;
  - (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
  - (c) the instructions provided to the expert in relation to the proceeding;
  - (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
  - (e) the expert's opinion respecting those issues;
  - (f) the expert's reasons for his or her opinion, including
    - (i) a description of the factual assumptions on which the opinion is based,
    - (ii) a description of any research conducted by the expert that led him or her to form the opinion, and
    - (iii) a list of every document, if any, relied on by the expert in forming the opinion.

[8] Rules 11-6(5), (6) and (7) govern the provision of "supplementary" reports:

- (5) If, after an expert's report is served under subrule (3) (b), the expert's opinion changes in a material way,
  - (a) the expert must, as soon as practicable, prepare a supplementary report and ensure that that supplementary report is provided to the party who served the report under subrule (3), and
  - (b) the party to whom the supplementary report is provided under paragraph (a) of this subrule must promptly serve that supplementary report on every other party of record.
- (6) If, after an expert's report is served under subrule (3) (a) or (4), the expert's opinion changes in a material way and the party who served the report intends to tender that expert's report at trial despite the change,
  - (a) the expert must, as soon as practicable, prepare a supplementary report and ensure that that supplementary report is provided to the party, and
  - (b) the party must promptly serve that supplementary report on every other party of record.
- (7) A supplementary report under Rule 11-5(11) or under subrule (5)(a) or (6) (a) of this rule must

- (a) be identified as a supplementary report,
  - (b) be signed by the expert,
  - (c) include the certification required under Rule 11-2(2), and
  - (d) set out the change in the expert's opinion and the reason for it.
- [9] The jurisdiction of the Court to allow an expert opinion that has not been prepared and served in accordance with the Rules is set out in Rule 11-7(1):
- (1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court under Rule 11-5, must not be tendered at trial unless
    - (a) that evidence is included in a report of that expert that has been prepared and served in accordance with Rule 11-6, and
    - (b) any supplementary reports required under Rule 11-5 (11) or 11-6 (5) or (6) have been prepared and served in accordance with Rule 11-6 (5) to (7).

## DISCUSSION AND CASE AUTHORITIES

- [10] The Court in *Mazur v. Lucas* (2011), 10 B.C.L.R. (5th) 253 (C.A.), stated the reasoning behind Rule 11-6(1) and what was required under Rule 11-6(1)(f):

New Rule 11-6 expands on what an expert was required to state under old Rule 40A, but does not alter the general principle that it is essential for the trier of fact to know the basis of an expert opinion so that the opinion can be evaluated. The Rule has a dual purpose. The second purpose is to allow the opposing party to know the basis of the expert's opinion so that they or their counsel can properly prepare for, and conduct, cross-examination of the expert, and if appropriate, secure a responsive expert opinion. ...

(at para. 42)

- [11] On behalf of the Court, Goldie J.A. in *Goerzen v. Sjolie*, [1997] B.C.J. No. 44 (C.A.), made this statement regarding what was previously Rule 40A(5) which also required the statement of an expert to include the "facts and assumptions on which the opinion is based":

One of the purposes of a report or statement under this rule is to obviate the necessity of calling the author. That purpose would be defeated in large measure if facts and assumptions could be held back under some general practice relating to "working papers".

That subrule (5) is mandatory is obvious not only from its terms but also from the express consequence of inadmissibility for non-compliance in subrule (7). While it would be undesirable to encourage the profession to insist upon compliance with the literal meaning of every rule, I am of the view that when Mr. Lester gave notice under subrule (13) of the respondent's position (always assuming the basis for the objection was that taken at trial) he discharged the burden of reasonableness so necessary for the smooth working of an adversarial system. The burden was then on the appellants.

(at paras. 18-19)

[12] At the time, Rule 40A(7) provided that, if the expert opinion did not comply with Rule 40A(5), it was inadmissible and the testimony of any witness was inadmissible "unless the court otherwise orders".

[13] An expert opinion which fails to set out the qualifications of an expert or the facts or assumptions on which the expert opinion is based should not be admitted into evidence if a party later objects to its admissibility. In *Fame v. Daoust* (1995), 3 B.C.L.R. (3d) 128 (C.A.), Hutcheon J.A. on behalf of the Court allowed an appeal and ordered a new trial where the medical-legal report contained clinical records which had not been submitted as an expert report and did not contain the qualifications of the doctor that provided the report.

[14] *Jones v. Ma*, 2010 BCSC 867, dealt with an expert opinion that incorporated the observations and opinions of several individuals without clearly distinguishing who made the various observations upon which the opinion was based. The purpose of Rule 40A was described by Ehrcke J. as follows:

This is not simply a matter of form. The purpose of the rule is to ensure fairness to both parties by providing the party on whom the report is served with adequate notice to enable them to effectively cross-examine the expert and to properly instruct their own expert if they choose to retain one.

(at para. 11)

[15] This statement was made in *Dhaliwal v. Bassi* (2007), 73 B.C.L.R. (4th) 170 (S.C.):

The purposes of Rule 40A are clear: (a) neither side should be taken by surprise by expert evidence (*Sterritt v. McLeod* (2000), 74 B.C.L.R. (3d) 371 (B.C.C.A.) at para. 33) and neither side should be ambushed or surprised at trial; (b) to ensure fairness to the parties and to promote the orderly progression of the trial (*C.A. v. Critchley* (1996), 4 C.P.C. (4th) 269 (B.C.S.C.) at para. 15). The burden on Mr. Bassi to show that I should exercise my discretion to allow the report to be introduced has been described as a: "... relatively heavy burden . ... ": *McKay v. Passmore*, [2005] B.C.J. No. 1232 (B.C.S.C.), at para. 26. The question which arises is whether there is "... substantial and irremediable prejudice ..." so as to justify the exclusion of the report on the basis that the statement does not comply with Rule 40A(5)(c) of the Rules of Court: *C.A. v. Critchley*, supra, at para. 12.

(at para. 4)

Unless the authors of all parts of an opinion are known, unless the qualifications of each person contributing to the opinion are known, and unless the facts upon which each of the persons contributing to an opinion are set out, the cross-examination of an expert witness regarding the opinion that had been provided would be impossible.

(at para. 10)

- [16] Because the documents upon which the opinion was based were not set out in the supplementary opinion of Dr. Dommissé, counsel for the Plaintiff was put to a considerable disadvantage. First, counsel was not in a position to make an educated decision regarding whether to require the attendance of Dr. Dommissé. Second, counsel for the Plaintiff was not in position to decide whether a further opinion should be requested from Dr. Javidan. Third, counsel for the Plaintiff was not in a position to fully prepare for any cross-examination of Dr. Dommissé. Fourth, the cost of having Dr. Dommissé attend for cross-examination might lead to a substantial disbursement which would have to be borne by the Plaintiff if the Plaintiff was unsuccessful at Trial.
- [17] As well, any cost and inconvenience to Dr. Dommissé could have been avoided if his March 3, 2014 opinion had listed "every document" relied upon by him in forming his opinion.
- [18] The submission of counsel for the Defendants is that it is not necessary in a supplementary report to include a list of every document relied upon by the expert providing a supplementary opinion. I am satisfied that the failure of Dr. Dommissé to list the documents that he relied upon is not "cured" by the provisions of Rule 11-6(7). While it is clear that supplementary reports have a narrow scope and purpose and are only intended to set out where and how a previous opinion has changed in a material way, there is nothing in Rule 11-6(7) which would allow me to conclude that the filing of a supplementary report can circumvent the clear and mandatory requirements of Rule 11-6(1).
- [19] The submission made on behalf of the Defendants is that, if Rule 11-6(7) was intended to be read together with Rule 11-6(1), then Rule 11-6(7) would not have duplicated the requirements that the supplementary opinion be signed and include the usual certification but not include the requirement that all documents relied on be listed.
- [20] It could not have been the intention of the Legislature that a supplementary opinion could be based on facts and assumptions that would not be known to the Court or the parties. I cannot conclude that it would have been the intention of the Legislature that an expert report had to comply with the provisions of Rule 11-6 in all of its aspects but that a supplementary report did not.
- [21] The very purpose of Rule 11-6 is that all expert reports should be tendered in a way that neither side can be ambushed or surprised at trial.
- [22] Rule 11-5(11) deals with an expert appointed by the Court and requires that the report and any supplementary report must comply with Rule 11-6. If the report of an expert appointed by the Court and the initial opinion prepared by an expert must comply with Rule 11-6, there is no good reason why a supplementary report should not also comply with Rule 11-6. While the Legislature might consider an amendment to Rule 11-6(7) to make it clear that supplementary reports must fully comply with Rule 11-6(1), I reject the submission made on behalf of the Defendants.

- [23] A supplementary expert report remains an expert report. It must comply with the rules set out in Rule 11-6(1). Otherwise, the supplementary opinion would be based on unknown facts and assumptions. It would be impossible to give the necessary weight to a supplementary expert opinion as it would be impossible to compare the facts upon which that opinion was based with the findings of fact ultimately made by the Court. The provision of a supplementary report which does not comply with Rule 11-6(1) should not be used to circumvent the requirement that no party will be caught by surprise by an expert report.
- [24] In the alternative, the Defendants submit that the supplementary opinion of Dr. Dommissé should be admitted into evidence at Trial and that an order should be made pursuant to Rule 11-7(1).
- [25] The burden is on the Defendants to establish that the supplementary opinion should be admitted into evidence. The burden in this regard is a relatively heavy burden: McKay, supra. The question which arises is whether a substantial and irreparable prejudice will accrue to the Defendants if the supplementary opinion is not admitted into evidence.
- [26] The Defendants submit that the supplementary opinion does not cause the Plaintiff prejudice because "it is beneficial to his case, noting that the accident caused the onset of the symptoms". This submission ignores the fact that the onus is on the Defendants to show why the supplementary opinion should be admitted into evidence. I am satisfied that the test should be described this way: "Has the party that seeks the Court to exercise the discretion to allow a report to be introduced met the heavy burden of showing that the failure to make such an order will produce a substantial and irreparable prejudice to the party applying?"
- [27] It is not the case that an opinion or a supplemental opinion which does not comply should be admitted into evidence merely because no prejudice will accrue to the opposing party.

## DECISION

- [28] The March 3, 2014 opinion of Dr. Iain G. Dommissé will not be admitted into evidence. Any disbursements relating to the attendance of Dr. Dommissé at trial will be borne by the Defendants in any event of the cause as the attendance of Dr. Dommissé for the purpose of cross-examining him as to what documents he had referred to and providing his supplementary opinion could have been avoided.

\_\_\_ "Burnyeat J." \_\_\_

Burnyeat J.

## 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/14/06/2014BCSC0697.htm>

**CASE PAGE**              <https://chat.esheria.ai/case-law/canada/amini-v-khanian-2014>

Prepared on 28 October 2026 · Esheria