

CANADA / JUDGMENT

Aulakh v. Singh

2023 BCSC 863

COURT

Supreme Court of British Columbia

DECIDED

25 April 2023

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2023 BCSC 863 Aulakh v. Singh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aulakh v. Singh,

2023 BCSC 863

Date: 20230425

Docket: M197800

Registry: Vancouver

Between:

Harjinder Kaur Aulakh

Plaintiff

And

Gurjot Singh and Paramvir Singh

Defendants

Before: The Honourable Mr. Justice Thomas

Oral Reasons for Judgment

re admissibility of expert reports

Counsel for the Plaintiff:

M.S. Randhawa

Counsel for the Defendants:

A. Refuse

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 25, 2023

Place and Date of Judgment:

Vancouver, B.C.

April 25, 2023

- [1] THE COURT: I am ready to give my reasons with respect to the initial issue. This is an objection to the admissibility of one of the two psychiatry expert opinion reports the plaintiff intends to tender at her trial.
- [2] The defendant objects on the basis that:
- 1) two reports from the same specialist violate Rule 12.1 of the Evidence Act, R.S.B.C. 1996, c. 124 [Evidence Act]; or alternatively,
 - 2) the second report should not be admitted pursuant to the second or gatekeeping function of the common law as set out in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [White Burgess].

Rule 12.1 - Number of reports

- [3] Rule 12.1 limits each party to three expert opinion reports. The party who wishes to enter more than three expert opinion reports must seek leave to do so.
- [4] The plaintiff says that she is only relying on three expert reports, as her two economic reports do not contain any opinion evidence and are therefore not subject to s. 12.1 of the Evidence Act. The economic reports constitute calculations and multipliers. The multipliers in question rely on two pieces of evidence. The first is the discount rate, which both parties agree is not opinion evidence. The second is the B.C. survival rates. The plaintiff says this is factual evidence obtained from Statistics Canada. The defendant says this is opinion evidence in the context of the economist's reports.
- [5] Neither party has provided any authority nor has the economist testified with respect to why the particular survival rate was included and other information that would be helpful to consider the nature of the evidence provided, specifically whether it falls within the field of factual or opinion evidence.

- [6] Therefore, at this point in time, I am not comfortable making a determination as to whether the multipliers constitute expert opinion evidence with respect to Rule 12.1. However, given my subsequent findings on this application, it is unnecessary for me to make this determination to resolve this issue.

Which reports are objectionable?

- [7] I will proceed on the basis or at least on the assumption that there are five reports: two reports from two different psychiatrists, one from a functional capacity evaluator, and two economists' reports from the same economist, one providing future care multipliers and calculations and one providing loss of future earning capacity multipliers and calculations.
- [8] The parties agree that the economist's reports should be treated as one report. I agree in these circumstances this is appropriate, as it is both economical and expeditious to proceed with two reports, rather than undergoing the time and expense to combine them into one report.
- [9] The court may grant leave for additional expert opinion reports, provided that both conditions in 12.1(6) are met: see *Vespaziani v. Lau*, 2021 BCSC 1224 at para. 22. The first condition, 12.1(6)(a), is that additional evidence has not already been addressed by an expert report. The second condition, 12.1(6)(b), is that without the expert evidence, the party would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding.
- [10] The plaintiff says his core reports are the two psychiatry reports and his functional capacity evaluation. He seeks leave from the court for his economist reports to be admitted into evidence.
- [11] The defendant concedes that if the plaintiff's interpretation of Rule 12.1; that the plaintiff may determine which are the three primary reports and which reports are additional reports whose admissibility is governed by the discretion governed by Rule 12.1(5) and (6), is correct; the economist's reports would be admissible.
- [12] This is because both Rule 12.1(6)(a) and (b) are satisfied:
- 1) The economist's additional evidence has not already been addressed by admitting reports. Thus, Rule 12.1(6)(a) is satisfied.
 - 2) The economist's reports do not make the proceedings more complex. They reduce the complexity due to the assistance provided by the economist's calculations. The cost of obtaining the reports was minimal, the time required to review their evidence is minimal, the issues addressed by the reports are essentially computational. Thus, Rule 12.1(6)(b) is more than satisfied.

- [13] I agree that if the plaintiff's interpretation of Rule 12.1 is correct it would be appropriate to exercise my discretion to allow the economist's reports pursuant to Rule 12.1(5). The plaintiff would suffer prejudice disproportionate to the minimal cost of the economist's reports if leave was not granted to admit them.
- [14] The defendant says Rule 12.1 requires the plaintiff to first declare what reports he intends to admit into evidence at the trial and then it is the defendant, not the plaintiff, who is entitled to determine which reports are subject to the exercise of judicial discretion pursuant to Rule 12.1(5) and (6) to determine admissibility.
- [15] I cannot accept the defendant's interpretation of Rule 12.1. I say this for three reasons:
- 1) The defendant's position runs contrary to the procedure used by this court in *Raniga v. Kang*, 2021 BCSC 2340. In that case, the plaintiff served six reports from healthcare practitioners and an economist's report. The defendant conceded to leave being granted to the economic report. The plaintiff advised that three of his healthcare practitioners' reports were his core reports and sought leave for the remaining reports. The application proceeded on the basis of determining the admissibility of the additional non-core reports as stipulated by the plaintiff.
 - 2) As a fundamental principle, the plaintiff has the right to determine what expert evidence to submit as part of her case, subject to common law admissibility issues. Had the legislature wished to infringe on this fundamental right, in my view, clear language would be required.
 - 3) It is the plaintiff that must apply for leave to admit additional reports. She could simply proceed by calling the healthcare practitioners and admitting their reports at the start of her case. She would then require leave pursuant to Rule 12.1 and 12.1(5) if she elects to call the economic evidence after the medical evidence has already been admitted, yet both parties agree the economic evidence is admissible pursuant to Rule 12. In my view, this illustrates the artificiality of the defendant's position.

Conclusions on Rule 12.1

- [16] In my view, the plaintiff is entitled to determine which of her reports are core reports and which are additional reports for 12.1 purposes. Therefore, there is no need to determine whether the economist's reports constitutes opinion evidence as, in my view, if the reports are opinion evidence, it would be appropriate to exercise my discretion to allow the admission of the economic reports pursuant to Rule 12.1(5).

Common law

- [17] This does not end the issue. The next step is to determine whether the two psychiatry reports are admissible at common law.

- [18] The legal framework for assessing the admissibility of expert evidence is set out in *White Burgess*, and it requires a two-step analysis. The first step is to ensure that the evidence meets all the threshold preconditions of admissibility. The second step, which is referred to as the gatekeeper stage, requires an assessment of whether the benefits of admitting the evidence outweigh its potential risk, considering such factors as the degree of relevance, necessity, etc.: see *Gutfriend v. Case*, 2022 BCSC 2055 at paras. 7-8.
- [19] In this case, the defendant urges me to reject the admissibility of one of the physiatrist's reports at the gatekeeping stage on the basis that the benefits of admitting the second report are outweighed by a lack of relevance, necessity, and unnecessary time and expense of allowing the evidence to be admitted.
- [20] I agree that my gatekeeping function requires me to weigh the benefits of admitting the evidence against the counterweights of consumption of time, prejudice, and confusion: see *White Burgess* at para. 24.
- [21] I am also of the view that it is appropriate to include the issues of expense and proportionality to these considerations.

Nature of reports

- [22] A physiatry report was obtained from Dr. Hershler in March 2020 following an independent medical examination. There was a delay in the trial and an adjournment. The plaintiff attempted to obtain a follow-up report from Dr. Hershler in the fall of 2022, but he had retired and was unable to do a follow-up report. Had Dr. Hershler performed a follow-up examination and provided an updated opinion, the plaintiff could have combined the reports into one report.
- [23] The plaintiff obtained a follow-up report from Dr. Adrian on September 14, 2022, following a further independent medical examination. Dr. Adrian's report and Dr. Hershler's report have one difference in their physical examinations, which the defendant says is irrelevant. To the extent that the physical examination is relevant for establishing a plateau or change in symptoms, the examination section of the two reports could be admitted into evidence with one of the opinion sections being redacted.
- [24] Dr. Hershler determined that the motor vehicle accident caused the plaintiff soft tissue injuries, in addition to a structural issue to a disc in her back. His prognosis is poor, based on these issues or diagnoses.
- [25] Dr. Adrian determines that the plaintiff suffers from soft tissue issues due to the motor vehicle accident, but that her structural issues are unrelated to the motor vehicle accident. His prognosis is poor for the soft tissue injuries.

- [26] The defendant has also obtained a report from a psychiatrist. The plaintiff served this report back on the defendant as a report that she intended to rely on at trial. The plaintiff concedes that this report is unnecessary, given her reliance on Dr. Hershler's and Dr. Adrian's report, and would likely be prohibited at common law at the gatekeeping stage.

Considerations

- [27] This is not a case where there is a risk of confusion arising from the admission of both psychiatrists' reports. The issues appear to be straightforward. It may well be beneficial to hear from different views with respect to the nature of the plaintiff's injuries and the differences that may arise with respect to the prognosis.
- [28] This is not a situation where the plaintiff is attempting to pile on experts and obtain duplicative opinions on a single issue, as was discussed in *Cooper v. Clements*, 2022 BCSC 1775 at paras. 15-16.
- [29] There is little chance of prejudice of the sort contemplated in *White Burgess* arising in this situation. This was an update report that, in different circumstances, would have been conducted by the same expert and then amalgamated into one report. There will not be a significant impact on the length of the trial. In considering expense and proportionality, in my view, obtaining the report was appropriate given the apparent need of an update. Therefore, this is not a case where two experts were retained when one would do. This is the case where circumstances required retaining a second expert to provide an updated assessment of the plaintiff.
- [30] In weighing these considerations, I am of the view that the benefits of admitting the two psychiatry reports outweigh the counterweights of time, prejudice, confusion, expense, and proportionality.
- [31] Therefore, I grant leave for the defendant to proceed in admitting both of the psychiatry reports into evidence as satisfying the gatekeeping stage of the *White Burgess* criteria. Of course, the defendant is free to make challenges or to challenge the strength of the expert opinion reports pursuant to the first stage of that analysis.

"Thomas J."

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