

CANADA / JUDGMENT

Birkich v. Cantafio

2015 BCSC 2293

COURT

Supreme Court of British Columbia

DECIDED

30 October 2015

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2015 BCSC 2293 Birkich v. Cantafio IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Birkich v. Cantafio, 2015 BCSC 2293 Date: 20151030 Docket: M49928 Registry: Vernon Between: Wednesday Birkich, an Infant by her Litigation Guardian Dodi Sutton Plaintiff And Ralph Cantafio Defendant Before: The Honourable Mr. Justice Betton Oral Ruling on Voir Dire Re Admissibility of Dr. Maryana Apel's Report Counsel for the Plaintiff: W.S. Dick K.T. Grenier Counsel for the Defendant: E.C. Hughes J.M. Spruyt Place and Date of Trial/Hearing: Kelowna, B.C. October 30, 2015 Place and Date of Judgment: Kelowna, B.C. October 30, 2015

- [1] THE COURT: I will say at the outset that I am giving this decision now because there is an urgency, given where we are at in the trial and the fact that Dr. Apel is here. We are already behind in this trial and a decision is needed so that the matter can proceed in a timely way.
- [2] I want to preface my comments by making the observation that it would appear to me that counsel, in bringing this application and defending the application, made an assumption that I would urge counsel not to do in the future. I think counsel thought that this was a relatively straight-forward issue, it would only take a matter of minutes to resolve and that not a great deal turned on it. I say that in part because of the manner in which the voir dire proceeded, that is, simply submissions. It left the court with a void, I think, of relevant information to make the determination and when there is obvious time pressure on counsel and the court to move forward. It is my view that in these sort of applications, which can have significance not only in respect to this case but generally in terms of any precedent that is set by it, there should be a fulsome voir dire with appropriate evidence and an opportunity for the court to consider and reflect on what the outcome should be. Counsel should, before a trial commences, indicate to trial schedulers, where appropriate, that there are some pre-trial issues that need to be dealt with and, where possible, the trial judge is identified, have those dealt with in advance of the commencement of the trial proper or, failing that, make some specific arrangements and allowances for time during the course of the trial so that those time pressures can be alleviated with some meaningful consideration as to what evidence is appropriate and necessary for the issue to be properly dealt with.

- [3] This is an application for an exclusion of one of the plaintiff's expert reports, specifically that of Dr. Apel; a report that was prepared back in February of 2013 and, I presume, served long in advance of the commencement of this trial such that the issue would have been known and counsel could have identified either in a trial management conference or through trial scheduling or otherwise.
- [4] I also want to preface my comments by saying that it is clear, and I do not think the plaintiff is suggesting otherwise, that Dr. Apel has not complied with her obligations under the Rules. We are in a digital age and, although, to some extent at least, one might say that the Rules appear to deal with documents more than they might digital recordings, the intention of them is very clear; experts should retain all notes and file contents. They should all be available for production at a trial and no expert should have any misunderstanding or misapprehension, either based on their own knowledge or specifically after the form of instruction letters that counsel provide to the expert, about what their obligations are for retention of information.
- [5] This is the sort of issue that should not arise. To the extent that there is any practice in existence where counsel do not make it abundantly clear to the experts that they are retaining what those expert's obligations are regarding retention of records, it must be modified. That obligation should be set out as part of an instruction letter. Here, I have not been referred to the nature of the instruction letter. I do not know nor was Dr. Apel asked whether she was told that she should retain such information; whether there was any possibility for misapprehension or confusion on her part. Had she been specifically advised that she should retain such documents and gone ahead and destroyed them in any event, other issues may arise; there may be other results than what I am inclined to do in this particular case. I would expect that in future applications, if in fact my comments here gain any traction in terms of consideration in future practice, those instruction letters would be front and centre in terms of resolving the issue and, to the extent counsel having retained an expert did not ensure that that expert understood what their obligations were and the extent and import of retaining all of their foundational data, that would also serve as an important consideration in these sort of applications.
- [6] The purpose of the Rules, generally, is to have notice of expert opinions, to have a full and complete understanding of the foundation of those expert opinions, to be able to scrutinize and review the information provided to the expert in preparation of their opinion, and all of the data and information and records that they create as part of any examination or preparation of their report. That would allow the opposing party a full opportunity to scrutinize the opinion of the expert or to engage other experts for the purpose of doing the same. It allows everyone, including the party that seeks to cross-examine, to make a decision as to whether they want or need to cross-examine the expert, the scope of that cross-examination, and potentially to provide them with information upon which to conduct that cross-examination.

- [7] Any time information is lost, there is a potential for prejudice. It is very difficult for a court, in the position that I am put in today, to assess the extent of that prejudice other than to say it is a potential. There is no ability to scrutinize or review cross-examination on any inconsistencies, any differences in the self-report from a plaintiff, in this example, or party as to how that report might be different from one expert than another. There are all manner of issues that might arise, but it is all speculative. There is always the temptation to react to these type of issues and potentially apply flawed reasoning in making a reactionary determination as to the admissibility of a report and lose sight of one of the key considerations, that is, what the interests of justice are.
- [8] My colleague, Madam Justice Griffin, in *Paur v. Providence Health Care*, 2015 BCSC 1008, makes some relevant and appropriate observations about the purpose of the Rules in paragraphs 76 to 80 of that decision, and there is a balance to be struck, and it is ultimately not my role in making this decision to do so as a mechanism of scolding or criticizing Dr. Apel, although criticism is justified for not retaining the foundational data upon which she prepared her report. The purpose ultimately is to endeavour to ensure that justice is done.
- [9] On the evidence that I have before me, Dr. Apel says that her dictation was contemporaneous with her physical examination and is verbatim, save only editing for grammar, punctuation, and things of that nature, in the "physical examination" portion of her report. It is my understanding from counsel's submission that Dr. Apel is the only medical expert who diagnosed fibromyalgia and myofascial pain syndrome in the plaintiff. A subsequent examination by another physiatrist, Dr. Travlos, who has already given evidence, did not result in similar findings. Whether the ultimate conclusion, a conclusion that I cannot reach until I have heard all of the evidence, is that the plaintiff had fibromyalgia at one point in time, whether it may or may not still exist, or whether it may exist at some future point in time is a determination, I understand from counsel, I will be asked to make in the context of my ultimate decision.
- [10] Given the evidence that I do have on this voir dire, specifically from Dr. Apel, that this is a verbatim transcription (with only the editing that I have described) of what was on the now destroyed digital recording, I am not inclined to grant the defence application to not allow the report. Whether, and to what extent, the examination of Dr. Apel will affect my ultimate conclusion about the weight of her opinions is yet to be determined, but I do not want there to be any illusion that this in any way endorses the practice that Dr. Apel undertook in this case or, from her evidence, what has gone on for some 20 years. It is wrong, it is not in compliance with the Rules, it is not to be endorsed, and this decision should not in any way be seen as endorsing that.
- [11] I am going to direct as part of my order here that, at the plaintiff's expense, a transcript of my decision on this voir dire be prepared and a copy of it be provided to Dr. Apel. To the extent issues of this nature might arise in the future, in respect of Dr. Apel at least, this decision may be brought to the attention of a court dealing with issues on those occasions such that it would be considered in any decision that might be made about future reports. If

there is, not that I think that there should be, but if there is any misapprehension or confusion among the bar about the nature of instruction letters and what experts should be informed of, I would hope that this decision might, in some measure, resolve that because it is simply unacceptable. It is an easy process in this digital age for that information to be retained, it is abundantly clear from the Rules what the intention is, and to be faced with these sort of issues, in my view, is something that simply should not be occurring. "D.A. Betton J."

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