

CANADA / JUDGMENT

C.L.H. v. K.A.G.

2021 BCSC 2756

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2756 C.L.H. v. K.A.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.L.H. v. K.A.G.,

2021 BCSC 2756

Date: 20210510

Docket: S17849

Registry: Duncan

Between:

C.L.H.

Plaintiff

And

K.A.G.

Defendant

Restriction on publication: A publication ban has been imposed by an order of this Court restricting the publication, broadcast or transmission in any way of information or evidence that could identify the parties to this proceeding.

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Corrected Judgment: A citation number, a restriction on publication and a sealed file notice have been included on the cover page for publication purposes

and the text of the judgment was corrected at paragraph 1 on October 20, 2025.

SEALED FILE (IN PART)

Before: The Honourable Mr. Justice Veenstra

(via videoconference)

Oral Ruling on Admissibility of Evidence

Counsel for the Plaintiff:

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Place and Date of Hearing:

Duncan, B.C.

May 7, 2021

Place and Date of Judgment:

Victoria, B.C.

May 10, 2021

- [1] THE COURT: This is a civil action in which the plaintiff claims against the defendant for historical sexual assaults dating back to when the parties were children several decades ago. The trial is being heard by judge alone.
- [2] The plaintiff tendered evidence from a psychiatrist, Dr. Musgrave, whose evidence is alleged to constitute an admission against interest by the defendant. The evidence included Dr. Musgrave's notes of a patient history taken when he treated the defendant while the on-duty psychiatrist at a hospital emergency room in 2011. That one meeting was the only interaction Dr. Musgrave had with the defendant.
- [3] The defendant challenges the admissibility of the clinical records and of the related evidence of Dr. Musgrave.
- [4] Dr. Musgrave gave evidence that his notes were recorded by him in the ordinary course of his duties as a psychiatrist working in a hospital emergency room. The records that were placed before the court were certified copies from the hospital's files and Dr. Musgrave identified the handwriting as his own.

[5] The plaintiff in support of the admissibility of the clinical records relies primarily on s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124. The plaintiff also made reference to s. 51 of the Hospital Act, R.S.B.C. 1996, c. 200, and to *Ares v. Venner*, [1970] S.C.R. 608. Since the case was primarily argued on the basis of the Evidence Act, I will focus on those provisions.

[6] Section 42(2) provides that:

42(2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if

- (a) the document was made or kept in the usual and ordinary course of business, and
- (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

[7] Section 42(1) defines the key terms used in s. 42(2) as follows:

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

"document" includes any device by means of which information is recorded or stored;

"statement" includes any representation of fact, whether made in words or otherwise.

[8] Other relevant portions of s. 42 include:

- (3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.
- (4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.

[9] Although s. 42 operates independently from the common law rule as to admissibility of hospital records, as confirmed in *Ares*, their origins are similar. In *Ares*, Hall J. referenced the following quotation from Wigmore, 3rd ed., vol. 6, para. 1707, "Hospital Records":

The medical records of patients at a hospital, organized on the usual modern plan, deserve to be placed under the present principle. They should be admissible, either on identification of the original by the keeper, or on offer of a certified or sworn copy. There is a Necessity (ante, 1421); the calling of all the individual attendant physicians and nurses who have cooperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a Circumstantial Guarantee of Trustworthiness (ante, 1422); for the records are made and relied upon in affairs of life and death. Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence, to call them to the stand would ordinarily add little or nothing to the

information furnished by the record alone. The occasional errors and omissions, occurring in the routine work of a large staff, are no more an obstacle to the general trustworthiness of such records than are the errors of witnesses on the stand. And the power of the Court to summon for examination the members of the recording staff is a sufficient corrective, where it seems to be needed and a bona fide dispute exists.

[10] Justice Hall summarized the common law rule at page 626:

Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as prima facie proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and available to be called as witnesses if the respondent had so wished.

[11] In the present case, the author of the notes in question was not only available, he was called to the stand, gave evidence, and was cross-examined by defendant's counsel.

[12] Section 42(2) mandates that the fact to be established from the business record must be one for which "direct oral evidence would be admissible." Thus, before admitting a business record into evidence pursuant to this section, the court must consider:

- (a) the purpose for which the underlying fact is to be admitted;
- (b) whether that fact is relevant and probative to an issue in the action; and
- (c) whether any exclusionary rule applies.

[13] As noted by Southin J.A. in *Olynyk v. Yeo* (1988), 33 B.C.L.R. (2d) 247 (C.A.) at para. 33:

[33] Section 48 [which is now s. 42] does obviate one application of the hearsay rule. But it does not make everything in a document admissible just because the document is one which for some purposes falls within the section.

[14] The principles governing the admissibility and use of clinical records and business records generally were summarized by Burnyeat J. in *McTavish v. MacGillivray* (1997), 38 B.C.L.R. (3d) 306 at 311-12 (S.C.):

1. The notes taken must be made contemporaneously.
2. The notes must be made by someone having a personal knowledge of the matters being recorded.
3. The notes must be made by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business.

4. The matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business.
 5. A statement in the records of the fact that a certain diagnosis was made will be admissible.
 6. Recorded observations, diagnosis and opinions will be admissible providing they are recorded in accordance with points 1 through 4.
 7. The fact that the referring doctor relied upon another doctor's opinion to assist in coming to his or her own diagnosis and opinion is only evidence of that fact so that the other opinion does not become evidence unless it is otherwise admissible. Accordingly, it is only evidence of the fact that the referring doctor wished or required that opinion to be received before forming his or her own opinion.
 8. Statements made by parties or by experts which are recorded in the usual and ordinary course of business but which lie outside the exception to the hearsay rule are hearsay and will not be admitted into evidence unless they can be brought within Section 14 of the Evidence Act which allows for the admissibility of such statements if it can be shown that they are proof of a prior inconsistent statement.
- [15] The first four of these points were established through the initial questions asked of Dr. Musgrave. The primary issue on this application is whether the underlying fact sought to be established through Dr. Musgrave is itself admissible.
- [16] In this case, it is alleged that the records include an admission against interest by the defendant. The admissibility of such a statement was confirmed in *Cunningham v. Slubowski*, 2003 BCSC 1854 at para. 14:
- [14] The statement is not admissible for its truth unless it constitutes an admission against the plaintiff's interests. If it is an admission against interest, it is admissible for the truth of its content, depending on the jury's assessment of it.
- [17] As noted by Smith J. in *Edmondson v. Payer*, 2011 BCSC 118, at para 30:
- [30] Unlike prior inconsistent statements of an ordinary witness, which may only be used to impeach credibility, prior inconsistent statements of a party may also be treated as admissions and accepted for the truth of their content. However, there are important qualifications that apply to such statements in clinical records, whichever purpose they are being used for.
- [18] Justice Smith went on in that case to discuss the potential frailties in clinical records. To similar effect are the comments of Johnston J. in *Nelson v. British Columbia (Provincial Health Services Authority)*, 2015 BCSC 1941:

Hospital records are admissible generally on the authority of *Ares v. Venner*, [1970] S.C.R. 608, and s. 42 of the Evidence Act, R.S.B.C. 1996 c. 124. Here, the statutory conditions for admissibility under the Act have been admitted, as has the authenticity of the records. The hospital records in

this case are admissible in proof of what their author or authors did or observed directly, and recorded, or were instructed by such person to record, if the person making the record had a duty to record it. That means that notations of the results of physical examinations, such as blood pressure, heart rate, temperature, or the various positions adopted during labour, are all admissible for their truth. That does not mean that the notes must be accepted as complete, accurate, or irrebuttable. They are subject to contradiction by other evidence, and must be weighed in the same way as any other evidence.

- [19] The defendant argues that the plaintiff, by relying on medical records, is embarking on "trial by Xerox" as that term was framed by Justice Bouck in *Bottrell v. Bottrell* (1994), 91 B.C.L.R. (2d) 300 (S.C.). In my view, the brief set of notes from Dr. Musgrave that has been tendered is a limited and focused record.
- [20] The defendant also raised concern that there may be some vagueness in the words used by Dr. Musgrave in his notes and argued, based on *R. v. Ferris*, 1994 ABCA 20, aff'd [1994] 3 S.C.R. 756, that the "record" of the interview was thus not complete. That case involved a "fragment of an utterance" which, in the case of a criminal trial, led the court to conclude that it was not capable of meaning and should not have been left with the jury. As noted by Conrad J.A. at para. 25, the problem in that case was that "the gist of the statement is unknown and, moreover, unascertainable".
- [21] In this case, I see the statement testified to by Dr. Musgrave to be sufficient that it can be admitted into evidence and at the end of the trial weighed along with the other evidence.
- [22] In my view, the record that has been tendered has been properly verified as a business record by its author, Dr. Musgrave. While it remains to weigh the reliability and impact of the statement attributed by Dr. Musgrave to the defendant, it appears on its face to reflect an admission against interest as to a matter of relevance. I conclude that the document contained at tab 3 of Exhibit A for Identification can thus be admitted as an exhibit.
- [23] The defendant argued that the plaintiff should have sought and obtained confirmation from Dr. Musgrave that the record was true when made. That is not a requirement of s. 42. It is a requirement for the tendering of a document other than a business record by way of what is often referred to a "past recollection recorded", as I will discuss below.
- [24] During the course of argument with respect to this objection, I raised concerns about the manner in which Dr. Musgrave gave his evidence. In essence, counsel took Dr. Musgrave through a series of questions that established that his clinical notes were a business record, then invited him to read the relevant portions into the record. No objection was made at the time to any of the questions that were posed to him.
- [25] In my view, the manner in which a witness such as Dr. Musgrave is asked to give his evidence-in-chief must still follow the usual practices of this court.
- [26] As noted in *Bracken and Dull*, *British Columbia Courtroom Procedure* at page 958:

The general rule is that witnesses give their testimony relying on their memory and without reference to any document. A witness may not give testimony by reading prepared notes.

[27] The authors continue at page 962 to discuss the use of documents to refresh memory:

The most frequent use of a document by a witness is to "revive" or "refresh" a present memory.

Often, witnesses cannot recall facts about which they testified or reported on an earlier occasion, such as in a written statement, at an examination for discovery or at a preliminary hearing.

If this occurs, counsel should first ask questions to demonstrate that the witness truly cannot remember. Once it has been proven that the witness cannot remember, it is proper for counsel to ask a trial judge for permission to show the witness a transcript or other document recording the witness' prior statement or testimony. The witness is allowed to read the document silently and then is asked, "Does that assist you in remembering what happened?"

[28] If the recollection of the witness is thereby refreshed, then the witness can continue to give evidence based on that witness' recollection. If reviewing such document does not refresh the witness' recollection, then the process as summarized by Arbour J. in a concurring opinion in *R. v. Fliss*, 2002 SCC 16 at para. 8 is:

A witness may refresh his or her memory prior to testifying, as long as he or she testifies from present memory revived by the instrument that refreshed it, whatever that instrument may be. In some cases, the witness whose memory at trial cannot be revived can testify as to the accuracy of a past recording of a then existing memory, under certain conditions that are meant to alleviate the concerns arising from the hearsay rule. The past recording, or verification of a recording, must have been made contemporaneously to the event recorded, when the memory of the witness was still fresh, and the witness must swear that the recording represented then his or her accurate recollection.

[29] In the majority opinion in *Fliss* at para. 63, Binnie J. adopted the criteria for past recollection recorded as:

1. The past recollection, must have been recorded in some reliable way.
2. At the time, it must have been sufficiently fresh and vivid to be probably accurate.
3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time".
4. The original record itself must be used, if it is procurable.

[30] While there is some similarity between these requirements and those that govern the admissibility of business records under s. 42 of the Evidence Act, it will be seen that the "circumstantial guarantee of trustworthiness," using the words of Wigmore as quoted in *Ares*, is different. For business records, the trustworthiness comes from the fact that they are made in the ordinary course of business while, for past recollection recorded, the

trustworthiness comes from the confirmation of the witness that the statement accurately reflects the knowledge of the witness at the time.

- [31] However, the fact that the witness' notes are admissible through a means other than the rules governing past recollection recorded does not alter the expected approach to the introduction of that witness' evidence; that is, each witness should testify first from their own recollection, then be given an opportunity to refresh their recollection and give evidence on the basis of their refreshed recollection, and only thereafter to make reference to a business record or past recollection recorded in which their recollection at a past time was recorded.
- [32] As noted above, in this case, no objection was taken to the manner in which Dr. Musgrave gave his evidence. In the trial of a civil matter, I generally expect counsel to indicate when the evidence is in an area of controversy such that leading questions are not appropriate. Counsel for the defendant had and made full use of their opportunity to explore potential issues as to reliability of Dr. Musgrave's evidence and his notes through cross-examination. On that basis, I will admit the evidence of Dr. Musgrave as it was presented.

"Veenstra J."

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